The Heritage Foundation

LEGAL MEMORANDUM

No. 172 | FEBRUARY 8, 2016

Time to Eliminate the Consumer Financial Protection Bureau

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Abstract

The Consumer Financial Protection Bureau (CFPB) imposes enormous costs on consumers and financial service providers through costly and unwarranted command-and-control regulation. A key component of 2010's Dodd–Frank legislation, the CFPB also reduced the choice of products and services—and thus competition and innovation—within the consumer financial marketplace. Even more alarming than its economic impact is the degree to which the CFPB is exempt from congressional or executive oversight. In fact, the bureau was designed to evade the checks and balances that apply to most other regulatory agencies. A new decision handed down by the U.S. Court of Appeals for the District of Columbia, however, has raised new questions about the constitutionality of this rogue agency.

On July 24, 2015, in *State National Bank of Big Springs v. Lew,*[1] the U.S. Court of Appeals for the District of Columbia ruled that an Oklahoma bank had standing to challenge the constitutionality of the Consumer Financial Protection Bureau (CFPB) created by the Dodd–Frank Act.[2] In so holding, the appeals court noted that the CFPB "has already exercised…broad regulatory authority to impose new obligations on banks, including State National Bank." It thus remanded the case to the United States District Court for the District of Columbia for consideration of the merits of the bank's constitutional challenge.

The appeals court's ruling casts a spotlight on the activities of a relatively new but highly important federal agency. The CFPB imposes enormous costs on consumers and financial service providers through costly and unwarranted command-and-control

Key Points

- The Consumer Financial Protection Bureau inflicts serious harm on the U.S. economy.
- The CFPB's exemption from the oversight constraints that apply to other agencies is particularly egregious and raises serious constitutional problems.
- In order to promote a sounder economy, good government, and fidelity to the American constitutional structure, Congress should repeal all CFPB-related statutory provisions and restore the authority of more constitutionally accountable federal agencies over consumer protection with respect to financial services.
- Congress should review existing federal financial services regulatory statutes with an eye to eliminating programs that are excessively burdensome and consider ways to harmonize the application of financial institution regulatory standards.
- Responsibilities formerly allocated to the CFPB that merit being retained on substantive policy grounds should be reassigned by Congress to existing federal agencies that are subject to greater political oversight.

This paper, in its entirety, can be found at **http://report.heritage.org/lm172**

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regulation.[3] Furthermore, an analysis of the legal foundations of the CFPB sheds substantial doubt on its constitutionality. Thus, both economic and constitutional concerns indicate that it is time for Congress to abolish the CFPB and reallocate those of its functions that merit being retained to other existing federal regulatory agencies.

The Dodd–Frank Act and the CFPB

Reacting to the financial crisis of 2008, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) in 2010. Yet this new regulation did not address the causes of the 2008 crisis and is not likely to reduce the risk of a future crisis. In reality:

> [M]any of the act's components did virtually nothing to address the root causes of the financial crisis and simply expanded the federal safety net for financial firms. This approach has only further socialized the cost of financial risk-taking and, therefore, has increased the likelihood of future financial crises and bailouts.[4]

Establishment of the CFPB was a key feature of Dodd–Frank. The CFPB is given broad authority, through rulemaking and enforcement actions, "to implement and, where applicable, enforce 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."[5] Despite these lofty goals, the CFPB has imposed high costs on the finance sector and consumers while reducing the choice of products and services—and thus competition and innovation within the consumer financial marketplace.

Heritage Foundation Senior Research Fellow Diane Katz has described the CFPB's broad reach and documented its shortcomings, making a strong case for the bureau's abolition:

> [The CFPB] is living up to its billing as one of the most powerful—and unaccountable—federal agencies ever created.... [W]ith a staff exceeding [1,690][6] and funding of [more than] $600 million[,] the bureau is restructuring the mortgage market; devising restrictions on credit bureaus, education loans, overdraft policies, payday lenders, credit card plans and prepaid cards; and amassing unverified complaints with which to assail creditors and bankers. This inordinate control over consumer finance is constraining credit and harming the economy.
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> Prior to passage of Dodd–Frank, authority for some 50 rules and orders stemming from 18 consumer protection laws was divided among seven agencies. Title X of the act consolidated this authority within the CFPB, while granting the agency unparalleled, radical powers over virtually every consumer financial product and service.
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> The bureau was designed to evade the checks and balances that apply to most other regulatory agencies. Its very structure invites expansive rulemaking, as does its misappropriation of the emergent theory of behavioral economics that drives bureau decision making. It deems consumers prone to financial irrationality and thus ill-equipped to act in their self-interest. Consequently, the CFPB is compelled to intervene in consumers' personal financial transactions.
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> Government interference in the financial market does not come without consequences. In the case of the CFPB, the rule of law is being supplanted by regulatory whim, producing deep uncertainty in the consumer financial market. And, the new regulatory strictures will increase consumers' costs and reduce consumers' choices of financial products and services.
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> Lawmakers must curtail the bureau's unconstrained powers. Outright elimination of the CFPB is the best option. Consumer protection can be advanced instead through better coordination among financial regulators. Proceeding toward bureau dissolution, bureau funding should be controlled by Congress, and the vague language of the CFPB's statutory mandate must be tightened to stop bureaucrats from defining—and expanding—their own powers.[7]

Among the various problems associated with the CFPB, its exemption from the oversight constraints that apply to other agencies is particularly egregious and raises serious constitutional problems.

The CFPB's Constitutional Infirmities

In enacting Dodd–Frank, Congress went out of its way to shield the CFPB from the normal forms of congressional oversight that hold government agencies accountable to the people's elected representatives. From an accountability standpoint, each individual Dodd–Frank limitation on oversight of the CFPB is troublesome. Moreover, taken as a whole, these provisions leave the CFPB unconstrained to such a degree that its actions are a serious affront to the Constitution's separation of powers.[8]

Dodd–Frank provides that the CFPB is an "independent bureau" in the Federal Reserve System "which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."[9] The bureau is overseen by a single director, who serves for a five-year term and can be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office."[10]

Dodd–Frank further reinforces the CFPB's independence from the President by specifying that the bureau has no "obligation" to consult with the Office of Management and Budget (OMB),[11] the White House office that oversees management of the executive branch on the President's behalf.[12] In addition, although the CFPB is within the Federal Reserve System, it is largely insulated from Federal Reserve System management control.[13]

The CFPB is similarly independent from congressional oversight. First, Congress has no ability to approve or disapprove the CFPB's budget.[14] That budget must be paid from a designated fund generated by the Federal Reserve System,[15] which is likewise independent of the congressional appropriations process. Second, Dodd–Frank prohibits the Appropriations Committees of the House of Representatives and the Senate from reviewing the budget set by the director.[16] In short, Congress cannot use the power of the purse to rein in or control either the CFPB's expenditures or its actions.

These statutory provisions that grant the CFPB a substantial degree of autonomy should be evaluated in light of U.S. Supreme Court jurisprudence concerning agency independence. While the Supreme Court has upheld the constitutionality of "independent" agencies that exercise executive powers but are not subject to full presidential control,[17] the Court limited the degree of independence that could pass constitutional muster in its 2010 *Free Enterprise Fund* decision.[18] In that case, the Court held that Congress may not place more than one layer of independence between the President and an agency. Accordingly, the Court invalidated the Sarbanes–Oxley Act's insertion of a second layer of independence between the Public Company Accounting Oversight Board (PCAOB) and the President.[19]

The Court emphasized that "[t]his novel structure does not merely add to the Board's independence, but transforms it.... Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?"[20] The Court honed in on the constitutional significance of bureaucratic accountability, explaining that we "can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders."[21]

The *Free Enterprise Fund* case strongly indicates that the CFPB's degree of independence goes beyond constitutionally acceptable norms.

First, the CFPB is more than one level removed from presidential oversight. Its director is independent from management supervision by the institution within which the bureau sits—the Federal Reserve System—and the Federal Reserve System is independent from presidential control.[22]

Second, the bureau's independence from congressional appropriations or budgetary review prevents Congress from exercising its key means of oversight: the power of the purse.

Taken as a whole, these features grant the bureau greater autonomy than is allowed to any regulatory institution whose structure has been reviewed by the Court. Moreover, a finding that the CFPB is unconstitutional would comport with the emphasis placed by the Framers of the Constitution on bureaucratic accountability to the elected branches as a key means by which the Constitution protects the interests of the American people.

Lack of Accountability to Congress. In *Federalist* 58, James Madison explained that the congressional "power of the purse may...be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every

grievance, and for carrying into effect every just and salutary measure."[23] Congress, however, cannot employ this "effectual weapon" with respect to the CFPB, since it does not appropriate the CFPB's funds and may not even review the bureau's budget. The CFPB has praised this freedom from accountability to Congress, stating that its "funding outside the congressional appropriations process" ensures its "full independence" from Congress.[24]

Lack of Accountability to the Executive. In *Federalist* 72, Alexander Hamilton explained that with respect to the execution of the laws, the people look to the President to guide the "assistants or deputies...subject to his superintendence."[25] Hamilton added in *Federalist* 70 that absent a clear chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall."[26] For that reason, as James Madison explained to the First Congress, the Constitution sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[27] The CFPB's insulation from presidential control means that there is no "chain of dependence" linking the bureau to presidential oversight and no presidential "superintendence" of CFPB activities.

These constitutional infirmities do not necessarily mean, however, that the federal courts will invalidate CFPB decisions on constitutional grounds—let alone strike down the statutory provisions that establish the CFPB. The federal courts have been reluctant to invoke constitutional "first principles" to second-guess congressional decisions regarding agency structure and broad delegations of authority. Thus, congressionally created entities with some degree of independence and immense regulatory powers (such as the Federal Reserve Board, the Federal Communications Commission, and the Securities and Exchange Commission) have survived judicial scrutiny.

The Supreme Court has consistently approved extremely broad congressional delegations of authority to formulate rules of conduct as long as the statutes providing for such delegations contain an "intelligible principle"[28]—an extremely permissive standard. In addition, even if a reviewing court found the lack of CFPB oversight to be constitutionally problematic, it could well impose only a superficial and substantively insignificant structural remedy (such as the requirement that the bureau's director be subject to presidential dismissal on any grounds) instead of actually declaring the bureau's authorities and actions invalid.[29]

In sum, despite the principled case for the bureau's unconstitutionality, constitutional challenges to the CFPB are time-consuming, uncertain, and of questionable utility in reining in the bureau. Accordingly, congressional action is needed.

The Need for Remedial Legislation

The degree of independence enjoyed by the Consumer Financial Protection Bureau is an affront to the Constitution. Congress has a responsibility to act in a constitutional manner, and it can demonstrate that it takes that duty seriously by repealing Title X of the Dodd–Frank Act, which created and empowered the CFPB.

Congressional action regarding the CFPB should proceed as follows.

1. Congress should identify the consumer protections currently assigned to the bureau. Given the broad sweep of the CFPB's authority and the harm it has imposed through its regulatory actions,[30] some of those responsibilities merit being eliminated or, if not, substantially curtailed.

2. Congress should repeal all CFPB-related statutory provisions and restore the authority of more constitutionally accountable federal agencies—the Federal Trade Commission and the traditional federal financial institution regulators—over consumer protection with respect to financial services.[31]

3. Congress should review existing federal financial services regulatory statutes with an eye to eliminating programs that are excessively burdensome and harmful to the American economy and consider ways to harmonize the application of financial institution regulatory standards.[32]

4. As Heritage Foundation scholars have recommended,[33] Congress should consider enacting additional regulatory reform legislation, such as requiring congressional approval of new major

regulations issued by agencies (including financial services regulators) and subjecting "independent" agencies (including financial services agencies) to executive branch regulatory review.

Carried out appropriately, this legislative reform agenda would inure to the benefit of the American economy and further the cause of sound, constitutionally accountable government.

Conclusion

The Consumer Financial Protection Bureau inflicts serious harm on the U.S. economy. Beyond that, the CFPB's structure eliminates political accountability to such an extent that the bureau runs afoul of the Constitution.

In order to promote a sounder economy, good government, and fidelity to the American constitutional structure, Congress should repeal the statutory provisions that provide for the CFPB. Those responsibilities formerly allocated to the CFPB that merit being retained on substantive policy grounds should be reassigned by Congress to existing federal agencies that are subject to greater political oversight. Congress should also consider additional statutory changes to reduce the excess burden of financial services regulation. Such statutory reforms would strengthen the American economy and vindicate core American constitutional principles.

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Endnotes

1. No. 13-5247, slip op. (D.C. Cir. July 24, 2015), http://www.cadc.uscourts.gov/internet/opinions.nsf/961BA5A070E7A5CF85257E8C0050F258/$file/13-5247.pdf. The Court of Appeals did not rule on the merits of the constitutional claim. The appeals court also dealt with three other claims by plaintiffs, which are not the subject of this paper. First, it held that the plaintiff had standing to challenge President Barack Obama's recess appointment of Richard Cordray as director of the Bureau, "leav[ing] it to the District Court to consider the significance of Director Cordray's later Senate confirmation and his subsequent ratification of the actions he had taken while serving under a recess appointment." Slip op. at 9. Second, the appeals court held that the plaintiff did not have standing to challenge the constitutionality of the Financial Stability Oversight Council established by Dodd–Frank. *Id*. at 9–11. Third, the appeals court held that the plaintiff did not have standing to challenge Dodd–Frank's grant of "orderly liquidation authority" to the government to liquidate failing financial institutions that pose a significant risk to the stability of the U.S. financial system. *Id.* at 12–14.
2. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
3. *See*, *e.g.*, Todd J. Zywicki, *The Consumer Financial Protection Bureau and the Return of Paternalistic Command-and-Control Regulation*, 16 ENGAGE (Issue 2), *available at* https://www.fed-soc.org/publications/detail/the-consumer-financial-protection-bureau-and-the-return-of-paternalistic-command-and-control-regulation.
4. Norbert J. Michel, *Repealing Dodd–Frank and Ending "Too Big to Fail"*, Heritage Foundation Backgrounder No. 2973 (Nov. 3, 2014), *available at* http://www.heritage.org/research/reports/2014/11/repealing-doddfrank-and-ending-too-big-to-fail.
5. 12 U.S.C. § 5511(a).
6. 2016 projected. CFPB, CFPB Strategic Plan, Budget, and Performance Plan and Report (Feb. 2015), *available at* http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.
7. Diane Katz, *The CFPB in Action: Consumer Bureau Harms Those It Claims to Protect*, Heritage Foundation Backgrounder No. 2760 (Jan. 22, 2013), *available at* http://www.heritage.org/research/reports/2013/01/the-cfpb-in-action-consumer-bureau-harms-those-it-claims-to-protect.
8. The following description of the CFPB's constitutional infirmities and independence from political accountability draws substantially *on The Administrative State v. the Constitution: Dodd–Frank at Five Years, Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 114th Cong. (prepared Statements of Neomi Rao, Associate Professor, George Mason Law School, and Ambassador C. Boyden Gray), *available at* http://www.judiciary.senate.gov/meetings/the-administrative-state-v-the-constitution-dodd-frank-at-five-years (last visited January 8, 2016).
9. 12 U.S.C. § 5491(a).
10. 12 U.S.C. § 5491(c)(3).
11. 12 U.S.C. § 5497(a)(4)(E) (stating that Dodd–Frank "may not be construed as implying any obligation on the part of the Director [of the CFPB] to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information…or any jurisdiction of oversight over the affairs or operations of the Bureau").
12. "The core mission of OMB is to serve the President of the United States in implementing his vision across the Executive Branch. OMB is the largest component of the Executive Office of the President. It reports directly to the President and helps a wide range of executive departments and agencies across the Federal Government to implement the commitments and priorities of the President." Office of Mgmt. & Budget, Mission and Structure of the Office of Management and Budget, *available at* https://www.whitehouse.gov/omb/organization_mission/ (last visited January 8, 2016).
13. The Board of Governors of the Federal Reserve System is barred from intervening in any matter or proceeding before the CFPB's directors, from appointing or removing CFPB officers and employees, and from altering the CFPB's institutional structure. 12 U.S.C. § 5492(c)(2). The Financial Stability Oversight Council, an interagency council established by Dodd–Frank, in theory is empowered to veto final CFPB regulations that threaten the safety and soundness of the U.S. financial system, but as explained by Professor Neomi Rao, this nominal veto power is structured in such a way that, as a practical matter, it will never actually be used. Prepared Statement of Neomi Rao, *supra* note 8, at 10–11.
14. 12 U.S.C. § 5497(a)(1) (providing that the Federal Reserve "shall transfer to the Bureau…the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law"). The amount transferred to the CFPB is, however, subject to a generous annual cap, based on a percentage of annual Federal Reserve System operating expenses. 12 U.S.C. § 5497(a)(s).
15. 12 U.S.C. § 5497(c) (providing that "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."). "[T]he Federal Reserve System was created by Congress to be self-financed and therefore is not subject to the congressional budgetary process. In this way, the Fed is considered to be 'independent within government.'… The Federal Reserve's income is derived primarily from the interest on U.S. government securities that it has acquired through open market operations." Fed. Reserve Bank of San Francisco, *Where Does the Federal Reserve Get the Money to Fund Its Operations?* (May 2006), http://www.frbsf.org/education/publications/doctor-econ/2006/may/federal-reserve-funding.
16. 12 U.S.C. § 5497 (c) ("the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.").
17. Humphrey's Executor v. United States, 295 U.S. 602 (1935).
18. Free Enterprise Fund v. Public Accounting Oversight Board, 561 U.S. 47 (2010).

19. The President appoints the members of the Securities and Exchange Commission (SEC) and can dismiss them only for "good cause," and under Sarbanes–Oxley, the SEC in turn appointed the members of the PCAOB, who also could be dismissed only for "good cause." The two "good cause" restrictions in effect placed double limitations on the President's normal ability to dismiss executive officers at will.
20. *Free Enterprise Fund*, 561 U.S. at 496–97.
21. *Id.* at 499.
22. *See* Fed. Reserve Bank of San Francisco, *How Is the Federal Reserve Structured?* (Feb. 6, 2004), http://www.frbsf.org/us-monetary-policy-introduction/federal-reserve-structured/ (explaining how "the appointment procedure for Governors, the appointment procedure for Reserve Bank Presidents, and funding" make the Federal Reserve System "independent within the government.")
23. The Federalist No. 58 (James Madison), *available at* http://thomas.loc.gov/home/histdox/fed_58.html (last visited January 8, 2016).
24. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 81 (Apr. 2013) (emphasis added), http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-andreport-FY2012-14.pdf.
25. The Federalist No. 72 (Alexander Hamilton), *available at* http://thomas.loc.gov/home/histdox/fed_72.html (last visited January 8, 2016).
26. The Federalist No. 70 (Alexander Hamilton), *available at* http://thomas.loc.gov/home/histdox/fed_70.html (last visited January 8, 2016).
27. 1 Annals of Cong., at 499 (James Madison).
28. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 395, 409 (1928). Subsequently, the Supreme Court has consistently declined to impose strict requirements on congressional delegations. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 581 U.S. 457 (2001); Dep't of Trans. v. Ass'n of Am. R.R., 135 S. Ct. 1225 (2015).
29. In its *Free Enterprise Fund* decision, 561 U.S. 47, the Supreme Court merely eliminated restrictions on the SEC's ability to remove PCAOB board members, without otherwise altering the administration of the PCAOB. There is no reason to believe that the PCAOB's actions have been affected by this minor change. This reflects a natural judicial tendency to avoid drastic changes in statutory schemes where they are not necessary when a narrowly tailored remedy for a finding of unconstitutionality is available.
30. *See* text preceding *supra* note 5.
31. Dodd–Frank currently authorizes the CFPB to enact regulations that identify and prohibit "unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(b). This authority covers both depository institutions (banks, savings and loan associations, and federal credit unions) and non-depository institutions (including offerors of mortgages and a variety of financing and debt relief services). Before the enactment of Dodd–Frank, the FTC had a long history of challenging "unfair or deceptive acts or practices in or affecting commerce" (Section 5 UDAP) in the non-bank financial services industries pursuant to its authority under Section 5(a)(1) of the FTC Act, 15 U.S.C. § 45(a)(1). Although this consumer protection authority did not extend to banks, savings and loan associations, and federal credit unions (see 15 U.S.C. § 5(b)(2)), the federal financial institution agencies, including the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve Board, the Comptroller of the Currency, and the National Credit Union Administration, had authority to enforce Section 5 UDAP under their statutes in a manner consistent with carefully crafted FTC limiting principles applicable to unfairness and deception. *See* 15 U.S.C. § 45(n) (defining "unfairness"); Federal Trade Commission, *FTC Policy Statement on Unfairness*, 104 F.T.C. 949, 1070 (1984), https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness; Fed. Trade Comm'n, *FTC Policy Statement on Deception*, 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception. *See also*, *e.g.*, FDIC Compliance Manual, Chapter 7 (Federal Trade Commission Act, Section 5 Unfair or Deceptive Acts or Practices), https://www.fdic.gov/regulations/compliance/manual/7/VII-1.1.pdf (last visited January 8, 2016). Repeal of the CFPB's authority should ensure that Section 5 UDAP enforcement in financial services is restored to the status quo ante, with the FTC responsible for non-depository institution financial services and the federal financial institution agencies responsible for depository institution financial services.
32. *See*, *e.g.*, David C. John, *How to Protect Consumers in the Financial Marketplace: An Alternate Approach*, Heritage Foundation Backgrounder No. 2314 (Sept. 8, 2009) (recommending the creation of a council of consumer financial regulators that would be charged with ensuring uniformity in regulatory standards that apply to all types of financial institutions and can meet the challenges posed by complex new financial products), *available at* http://www.heritage.org/research/reports/2009/09/how-to-protect-consumers-in-the-financial-marketplace-an-alternate-approach.
33. *See* James L. Gattuso & Diane Katz, *Red Tape Rising: Six Years of Escalating Regulation Under Obama*, Heritage Foundation Backgrounder No. 3015 (May 11, 2015), *available at* http://www.heritage.org/research/reports/2015/05/red-tape-rising-six-years-of-escalating-regulation-under-obama.