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The Honorable Rohit Chopra  
Director  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552

Dear Director Chopra:

As the Attorney General of the State of West Virginia, I am writing to you about the constitutionality of your agency's continuing operation.

Along with other States, West Virginia has long argued that various aspects of the Consumer Financial Protection Bureau's structure present serious constitutional concern. *See Amicus Curiae Br. Of Texas, West Virginia, et al., Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7), 2019 WL 6894816; *Amicus Curiae Br. Of Texas, West Virginia, et al., All Am. Check Cashing, Inc. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 646 (2019) (No. 19-432), 2019 WL 5722251; *see also State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 52 (D.C. Cir. 2015) (describing claims brought by West Virginia and other states alleging that the CFPB is unconstitutional). Among other things, the Dodd-Frank Act endowed the CFPB with an "unprecedented combination of structural characteristics" that "renders it incompatible with a constitutional separation of powers." William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 345 (2016). So throughout much of its existence, the Bureau has acted without meaningful oversight from either the President or Congress.

Now, a recent decision from the U.S. Court of Appeals for the Fifth Circuit has confirmed our belief that the Bureau does not operate in line with basic constitutional limits. Earlier this week, that court ruled that CFPB's independent funding mechanism—which provides the agency with operating funds through the Federal Reserve—is unconstitutional. The specific case before it involved a challenge to the validity of CFPB's 2017 Payday Lending Rule. *See generally Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, No. 21-50826, 2022 WL 11054082, at \*1 (5th Cir. Oct. 19, 2022). But the decision's rationale extends far beyond that rule. In particular, although

“Congress plainly (and properly) authorized the Bureau to promulgate the Payday Lending Rule,” the court concluded that Congress has “deprived the Bureau of the lawful money necessary to fulfill those responsibilities.” *Id.* at 38. Accordingly, the court struck down the Payday Lending Rule because the “Bureau’s unconstitutional funding structure not only ‘affected the complained-of decision,’ it literally *effected* the promulgation of the rule.” *Id.* (internal citation omitted).

Your agency responded by effectively rejecting the decision’s obvious effect. The Bureau insisted that it would “continue to carry out its vital work enforcing the laws of the nation and protecting American consumers.” Katy O’Donnell, *Appeals Court Finds CFPB Funding Unconstitutional*, POLITICO (Oct. 19, 2022 7:44 PM), <https://politi.co/3EZh4RK>. The agency still contends that there is “nothing novel or unusual” in its funding mechanism. Stacy Cowley, *Appeals Court Finds Bureau’s Funding Unconstitutional*, N.Y. TIMES (Oct. 20, 2022 4:43 PM), <https://nyti.ms/3SieJo7>. But the Fifth Circuit has now explained exactly why the Bureau’s backdoor funding is, in fact, “unique” “[e]ven among self-funded agencies.” *Cnty. Fin. Servs. Ass’n*, 2022 WL 11054082, at \*17; *see also, e.g.*, Thomas Arning, *The Consumer Financial Protection Bureau: A Novel Agency Design with Familiar Issues*, 24 FORDHAM J. CORP. & FIN. L. 153 (2018) (explaining why the Bureau’s structure and design is different).

We cannot see how the Bureau intends to move on with its “business as usual” attitude given that most of its operating funds derive from an unconstitutional funding scheme. Although some agency money does come from offsetting collections and miscellaneous revenue, that sum represents only an insignificant part of your annual budget. *See* CFPB, ANNUAL PERFORMANCE PLAN AND REPORT, AND BUDGET OVERVIEW (Feb. 2022), <https://bit.ly/3DgtlQC>. So the Bureau apparently intends to continue relying on monies from a funding structure that a federal appellate court has now declared “violates the Constitution’s structural separation of powers.” *Cnty. Fin. Servs. Ass’n*, 2022 WL 11054082, at \*1; *see also* C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 GEO. MASON L. REV. 1213, 1229 (2017) (“Title X of Dodd-Frank is designed to give the CFPB an overruling influence over governmental policy in matters of consumer credit, by eliminating all meaningful constitutional checks on the Agency.”).

CFPB may have responsibilities, but it still must discharge them in a constitutionally permissible way. CFPB plainly cannot do that with a funding scheme that “sever[s] any line of accountability between [Congress] and the CFPB.” *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 223 (5th Cir. 2022) (Jones, J., concurring). Congressional appropriations might seem inconvenient to an agency that is obviously eager to impose its ideological mission without limits. *See, e.g.*, Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 973 (2013) (former CFPB Senior Counsel for Litigation arguing that the agency should march on with aggressive regulation so that the agency will become “untouchable” despite constitutional concerns). But the Founders consciously required this method to ensure “transparency and accountability between the people and their government.” *Cnty. Fin. Servs. Ass’n*, 2022 WL 11054082, at \*13.

In addition to reassessing its future plans, CFPB must reevaluate whether its present regulations have any effect, too. After all, “without its unconstitutional funding, the Bureau lacked any other means to promulgate [those] rule[s].” *Cnty. Fin. Servs. Ass’n*, 2022 WL 11054082, at \*18. The same could be said for the Bureau’s enforcement actions as well; those proceedings only operate thanks to unconstitutionally acquired funds.

West Virginia expects the Bureau to respect its constitutional responsibilities, particularly in light of the new guidance from the Fifth Circuit. Therefore, we request that you answer the following no later than November 1, 2022:

1. Does the agency believe that *any* of the regulations that it promulgated under the unconstitutional funding scheme remain in effect? If so, which ones—and why? Similarly, how does the decision affect past enforcement actions?
2. What plans does the Bureau plan to undertake to comply with the ruling? How will its ongoing enforcement efforts be effected? How will this change affect any promulgation of regulations? How will bank supervision continue, if at all?

Unless Congress crafts a constitutional appropriations scheme, we see no other alternative but a substantial revision to the scope of the agency’s work. Only that reevaluation would spare everyone needless litigation about the validity (or lack thereof) of the agency’s efforts to constrain consumer financial markets.

In the meantime, this office wants to ensure that your actions are transparent and accountable. We will continue to use all appropriate means to do so.

Sincerely,



Patrick Morrisey  
West Virginia Attorney General

cc: Maxine Waters, Chairwoman, U.S. House Committee on Financial Services  
Patrick McHenry, Ranking Member, U.S. House Committee on Financial Services  
Carolyn Maloney, Chairwoman, U.S. House Committee on Oversight and Reform  
James Comer, Ranking Member, U.S. House Committee on Oversight and Reform  
Frank Pallone, Chairman, U.S. House Committee on Energy and Commerce  
Cathy McMorris Rodgers, Ranking Member, U.S. House Committee on Energy and  
Commerce  
Rosa L. DeLauro, Chair, U.S. House Committee on Appropriations  
Kay Granger, Ranking Member, U.S. House Committee on Appropriations

Sherrod Brown, Chairman, U.S. Senate Committee on Banking, Housing, and Urban Affairs

Patrick J. Toomey, Ranking Member, U.S. Senate Committee on Banking, Housing, and Urban Affairs

Gary C. Peters, Chairman, U.S. Senate Committee on Homeland Security and Governmental Affairs

Rob Portman, Ranking Member, U.S. Senate Committee on Homeland Security and Governmental Affairs

Patrick Leahy, Chairman, U.S. Senate Committee on Appropriations

Richard Shelby, Vice Chairman, U.S. Senate Committee on Appropriations