



Testimony before the House Oversight and Government Reform Committee

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**Prepared for the hearing:
Legislative Proposals for Fostering Transparency**

**U.S. House of Representatives
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Chairman Chaffetz, Ranking Member Cummings, and honorable members of the Committee, thank you for this opportunity to present testimony on behalf of my organization, the Competitive Enterprise Institute (CEI). CEI is a Washington-based free-market think tank that studies the effects of all types of regulation on job growth and economic well-being. We propose ideas to “regulate the regulators” and hold them accountable so that innovation and job growth can flourish in all sectors.

A first step toward such accountability is for government agencies that exercise power over American entrepreneurs, investors, and consumers to be as transparent as possible. How can citizens hold these agencies accountable if we cannot see what they are doing? That is why my colleagues at CEI and I have long sought to bring sunshine to regulatory agencies through Freedom of Information Act (FOIA) requests and insistence on public meetings.¹

I am pleased that the bills and legislative proposals being discussed at the hearing today—including the bipartisan Open Government Data Act and Federal Reserve Transparency Act as well as the chairman’s own Fannie Mae and Freddie Mac Transparency Act—take significant steps to move transparency laws into the 21st century by ensuring that new technologies are used to enhance government transparency rather than to evade it. These bills should begin to correct

¹ Christopher C. Horner, “FOIA Productions: An Incomplete Story,” Competitive Enterprise Institute, March 2, 2017, <https://cei.org/blog/foia-productions-incomplete-story>

the major problem of the excessive secrecy we have seen at federal financial regulatory and housing agencies over the last decade.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 promised to bring accountability to the financial sector. However, it created new bureaucracies that are unaccountable to the President and Congress²—and have been able to skirt some of Congress’ basic laws for openness.

The powerful Consumer Financial Protection Bureau (CFPB), which was created by Dodd-Frank, claimed exemption from the Federal Advisory Committee Act (FACA), which mandates that task forces convened by the government with participants from the private sector must open their meetings to the public and produce thorough public records of those meetings. The CFPB has held meetings in various cities throughout the country, but has closed them to the public, casting doubt on its stated mission to produce a more transparent marketplace for consumers.³ Fortunately, in late 2015, President Obama signed a bill formally subjecting the CFPB to the Federal Advisory Committee Act.⁴ We will continue to monitor to ensure the CFPB complies with this law and has open meetings with diligent records kept.

Unfortunately, other affronts to transparency in Dodd-Frank still stand uncorrected. Dodd-Frank still exempts the Financial Stability Oversight Council, which it also created, from FACA and gives the Council vast leeway to hold meetings closed to the public and shield details of those meetings from the public. The Council is tasked with designating firms as “systemically important”—essentially “too big to fail.” It keeps only minimal records of its meetings and provides virtually no information as to how it designates financial firms as “systemically important,” even though such decisions can dramatically affect financial markets and the wider economy.⁵

Legislation requiring openness in policy deliberations about the government-sponsored enterprises (GSEs) Fannie Mae and Freddie Mac, such as that proposed by Chairman Chaffetz, is especially important. These are corporations chartered by Congress that are now under the conservatorship of the federal government. Taxpayers have propped them up after the housing collapse to the tune of \$185 billion. As long as they remain under a government conservatorship or receivership, taxpayers deserve some sunshine in return for the money they have spent on these two entities.

² Hester Peirce and Robert Greene, “A New Year for Unaccountable Financial Regulators,” RealClear Markets, January 17, 2013, http://www.realclearmarkets.com/articles/2013/01/17/a_new_year_for_unaccountable_financial_regulators_100094.html

³ Matthew Orso and Joshua Davey, “Chipping Away At the CFPB’s Clandestine Activities, Law360, May 4, 2015 <https://www.law360.com/articles/648299/chipping-away-at-the-cfpb-s-clandestine-activities>

⁴ The Consolidated Appropriations Act of 2016 (H.R. 2029, Pub.L. 114–113), Section 704

⁵ Aaron Klein and Justin Schardin, “UK Regulator’s Transparency Should Be a Model for U.S. FSOC,” Bipartisan Policy Center, July 10, 2015, <https://bipartisanpolicy.org/blog/uk-regulators-transparency-should-be-a-model-for-u-s-fsoc/>

Government officials' deliberations on the fate of the GSEs must also be made public. The Obama administration claimed executive privilege when private sector shareholders of Fannie and Freddie asked for information regarding the Treasury Department's Third Amendment of 2012, in which the government began to confiscate all the GSE profits even after the GSEs paid the government back for bailing them out.⁶

We have urged the Trump administration to reverse its predecessor's unprecedented use of executive privilege, which should be reserved only for rare information requests that compromise national security. We also urge the committee to investigate the Obama administration's secretive practices in this regard. Finally, we urge passage of transparency legislation.

Thank you again for inviting me to testify. I look forward to your questions.

Appendix:

John Berlau, "Mnuchin Must Bring Transparency to Fannie Mae and Freddie Mac," Competitive Enterprise Institute, February 20, 2017, <https://cei.org/blog/mnuchin-must-bring-transparency-fannie-mae-and-freddie-mac>

⁶ See Appendix.

Appendix

Mnuchin Must Bring Transparency to Fannie Mae and Freddie Mac

John Berlau • February 20, 2017

[fannie-mae-house.png](#)



Now that he [has been confirmed](#), Treasury Secretary Steven Mnuchin has a lot on his plate. He needs to do what he can administratively to reduce the crushing burden of [the Dodd-Frank Act](#) on small banks and credit unions. He also needs to work with Congress on major legislative fixes such as the forthcoming [Financial Choice Act](#) from House Financial Services Committee Chairman Jeb Hensarling (R-TX), a restructuring of the convoluted housing finance system, and comprehensive tax reform.

But first, Mnuchin must do everything he can to reverse the extreme secrecy practiced by the Obama Treasury Department. The Obama administration has been judged by a major news service as the least transparent of modern presidencies, and much of the source of this secrecy – for whatever reason – was in housing and finance policy.

A 2015 [analysis](#) by the Associated Press found that “the Obama administration set a record again for censoring government files or outright denying access to them last year under the U.S. Freedom of Information Act.” The AP added that the administration “also acknowledged in nearly 1 in 3 cases that its initial decisions to

withhold or censor records were improper under the law—but only when it was challenged.”

But Freedom of Information Act requests were just the tip of the iceberg for the Obama administration’s secrecy, much of which had nothing to do with the legitimate exception of national security. Under Dodd-Frank, the administration set up the Consumer Financial Protection Bureau (CFPB) and the Financial Stability Oversight Council (FSOC) to be exempt from many open meetings and (especially with FSOC) open records requests.

In 2015, thanks to constant pushing by CEI and Rep. Sean Duffy (R-WI), Congress finally [made the CFPB subject to the Federal Advisory Committee Act](#) that requires open meetings. Congress should now do the same for FSOC. And since Mnuchin is chairman of FSOC as Treasury Secretary, he should move immediately to open up its meetings and—with minor exceptions such as discussions of trade secrets of private firms—make its records available to the public.

But probably the most egregious example of Obama-era secrecy concerns the management of the government-sponsored housing enterprises (GSEs) Fannie Mae and Freddie Mac. As important as the role Fannie and Freddie play in the housing market, it is hard for anyone to argue that their actions somehow affect national security.

Yet when asked to produce documents in litigation by Fannie and Freddie’s shareholders, the Obama administration made the unbelievable claim of “executive privilege.” According to [New York Times](#) financial columnist Gretchen Morgenson, “the government has invoked presidential privilege on 45 documents created either by officials at the Treasury or the FHFA, the regulator charged with conserving Fannie and Freddie’s assets.”

Fannie and Freddie were chartered by Congress around forty-five years ago as companies with private shareholders but lines of credit with the government. In September 2008, the Bush administration found that Fannie and Freddie were on the brink of failing. Under new powers from the Housing and Economic Recovery Act (HERA) passed two months earlier, it took them into a “conservatorship” in

which the government took 79.9 percent of the entities' stock in exchange for bailing them out, a "conservatorship" that continued into the Obama administration and to this day.

The series of actions now being called "Fanniegate" began in August 2012, when then-Treasury Secretary Tim Geithner issued the "Third Amendment" to the GSE conservatorship. The Third Amendment, with no authorization from the HERA law, required all of the GSEs' profits to be siphoned off to the U.S. Treasury Department in perpetuity — even after the GSEs paid back what they owed to taxpayers.

This arbitrary action has spawned more than 20 lawsuits from Fannie and Freddie's private shareholders. The suits charge the government with everything from violating the Administrative Procedures Act to unconstitutionally taking property without just compensation.

The Third Amendment has also raised concerns that the profit sweep is leaving Fannie and Freddie with very little capital reserves, furthering the chance for more taxpayer bailouts should something go awry with the housing market again. See, on this point, [this excellent paper](#) coauthored by then- Cato Institute Director of Financial Regulation Studies Mark Calabria, who just became chief economist for Vice President Mike Pence.

But the really amazing thing is that we know very little about what prompted Obama and Geithner to pursue this highly controversial policy, because according to the *Times*' Morgenson, the Obama administration "fought every discovery request made by the Fannie and Freddie shareholders."

Recently, one of these shareholder lawsuits—*Fairholme v. United States*—prompted Judge Margaret Sweeney to compel the government to produce some of these documents in order to satisfy a discovery request from the mutual fund plaintiff. Last month, the U.S. Court of Appeal for the Federal Circuit panel [largely upheld](#) Sweeney's decision.

Mnuchin should immediately reverse the Obama administration's secrecy and release these papers not only to the plaintiffs, but to the American public. Then, the Justice Department and Congress must conduct a full investigation of Fanniegate.