



February 27, 2023

SUPREME COURT TO HEAR WHETHER CFPB'S FUNDING IS CONSTITUTIONAL

On February 27, 2023, the Supreme Court [granted certiorari](#) in *Consumer Financial Protection Bureau v. Community Financial Services Association of America* to determine the constitutionality of the CFPB's funding structure. The question before the Supreme Court has two parts; whether the court of appeals erred (i) in holding that the statute providing funding to the CFPB, 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and (ii) in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

The case comes out of a legal challenge to the Payday Lending Rule resulting in a panel of the Fifth Circuit Court of Appeals holding the CFPB's funding structure unconstitutional. When creating the CFPB in the Consumer Financial Protection Act, Congress funded the Bureau via the CFPB Director requesting amounts from the Federal Reserve System, up to a statutory limit. To the Fifth Circuit, this funding structure violates the appropriations clause and the separation of powers by insulating the CFPB from the congressional appropriations process and the inherent oversight that process brings. The Fifth Circuit panel determined that because the non-appropriated funds paid for the CFPB to promulgate the Payday Lending Rule, the rule was crafted illegally and could not be enforced. The case does not address the CFPB's statutory authority to issue rules and bring enforcement actions, only the agency's funding.

The consequences of the Fifth Circuit ruling could be broad for the CFPB. The Fifth Circuit did not distinguish the Payday Lending Rule from any other regulation issued in the CFPB's history. Arguably, any action by the CFPB would be unconstitutional because it was taken by the CFPB using unconstitutional funding. Plaintiffs could argue the TILA-RESPA integrated disclosure rules and the safe harbors from liability by sending corrected closing disclosures are unconstitutional. While the petition was pending, multiple defendants in other CFPB enforcement actions used the Fifth Circuit ruling to seek dismissal of their own cases or request overturning of other rules.

The CFPB's petition warns of the potential collateral impact on other administrative agencies. The Fifth Circuit ruling did not distinguish the CFPB's funding structure from other agencies that are

funded outside the congressional appropriations system. Beyond the CFPB, other federal financial regulators and agencies that are funded outside congressional appropriations include: the Federal Reserve Board (assessments on member Fed banks), Federal Deposit Insurance Corporation (insurance fund assessments), Office of the Comptroller of the Currency (national bank assessments), National Credit Union Administration (credit union assessments), U.S. Patent Office (patent application fees) and the U.S. Post Office (stamp and postal duties).

The CFPB's petition argues that by striking down the Payday Lending Rule, the Fifth Circuit panel went out of its way to invent an entirely new remedy to appropriations violations. The petition argues no act of Congress has ever been held a violation of the appropriations clause and that courts have historically avoided attempts to distinguish permissible and impermissible appropriations. Thus, there is no established historical remedy for appropriations violations and that unwinding a rule, like the Fifth Circuit panel did, has not been used in the similar context of violations of the appointments clause.

Federal district courts previously had upheld the CFPB's funding structure from challenge six times in five circuits. The Fifth Circuit panel ruling "respectfully disagreed" with those cases.

State attorneys general have also lined up in both support and opposition to the Fifth Circuit decision. Twenty-two state attorneys general have filed an amicus brief in support of the constitutionality of the CFPB while sixteen state attorneys general have filed an amicus brief in opposition.

The case will likely be argued in the fall of 2023 with decisions to follow sometime in 2024 as the justices agreed to review the CFPB's appeal but declined to fast-track the proceeding. We will continue to monitor this case and provide updates. ☐

✧ *Elizabeth Anstaett and Benjamin Hurford*

Darrell L. Dreher
ddreher@dtlaw.com

Elizabeth L. Anstaett
eanstaett@dtlaw.com

Mercedes C. Ramsey
mramsey@dtlaw.com

Susan L. Ostrander
sostrander@dtlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DTLAW.COM

To see previously sent ALERTS, visit our website at www.dtlaw.com

To decline future ALERTS, please contact us at ALERTS@DTLAW.COM.
This ALERT has been prepared for informational purposes only. It does not constitute legal advice and does not create an attorney-client relationship.

Michael C. Tomkies
mtomkies@dtlaw.com

Benjamin J. Hurford
bhurford@dtlaw.com

Judith M. Scheiderer
jscheiderer@dtlaw.com

Robin R. De Leo
robin@deher-la.com