



May 21, 2024

## SUPREME COURT UPHOLDS CONSTITUTIONALITY OF CFPB FUNDING

On May 16, 2024 the U.S. Supreme Court handed down a [7-2 decision](#) in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, holding the Consumer Financial Protection Bureau's ("CFPB") funding mechanism does not violate the Appropriations Clause and is therefore constitutional. The case, on appeal from the Fifth Circuit, comes from a challenge to the Payday Lending Rule wherein a Fifth Circuit panel ruled that the CFPB's funding structure constituted an unconstitutional appropriation, making the Rule unenforceable. See our [ALERT of Feb. 27, 2023](#).

The Supreme Court rejected the Fifth Circuit decision in a majority opinion authored by Justice Thomas. The majority lays out a two-prong test for determining that an appropriation satisfies the Appropriations Clause: the law must (i) identify a source of public funds and (ii) authorize the expenditure of those funds for designated purposes. This test is based on the Constitution's text, the history against which that text was enacted and congressional practices immediately following ratification. The Dodd-Frank Act (i) authorizes the CFPB to draw public funds from a particular source (the Federal Reserve system earnings) in an amount not exceeding 12% of the Federal Reserve system's total operating expenses as reported in the fiscal year 2009 (adjusted for inflation) and (ii) specifies the purposes for which the CFPB can use those funds (to "pay the expenses of the Bureau in carrying out its duties and responsibilities"). Therefore, the CFPB's funding statute contains the requisite features of a congressional appropriation, satisfying the requirements of the Appropriations Clause.

Justice Thomas dispenses with both the respondent's and the dissent's arguments for why the CFPB's funding mechanism violates the Appropriations Clause. The opinion states that the respondent's arguments unpersuasively attempt to build additional requirements (such as a limitation on "standing" appropriations) into the meaning of "Appropriation made by Law" under the Constitution. Meanwhile, the dissent argues that "Appropriations" is a term of art that should be defined using history rather than dictionaries, without actually offering a competing understanding of the meaning of the word "Appropriations." Remaining unconvinced that the Appropriations Clause requires more than an authorization of the disbursement of

specified funds for identified purposes, Justice Thomas and the majority hold that the CFPB's funding is constitutional.

The Supreme Court appeal was pending for over a year and in that time industry challenged several other CFPB rules and enforcement actions based on the Fifth Circuit constitutionality ruling. Lower courts granted several injunctions staying enforcement actions and rule enforcement including, but not limited to, the Section 1071 Small Business Lending Rule and the Credit Card Late Fee Rule. Following the decision by the Supreme Court, CFPB Director Chopra indicated that the agency will be "firing on all cylinders." This likely means that the litigation which was stayed by injunctions will begin again and rulemaking and enforcement action will increase.

While the industry lost the funding battle, the rules and enforcement actions can still be challenged on other grounds. For example, the Credit Card Late Fee rule is currently being challenged under the CARD Act, Truth in Lending Act and Administrative Procedure Act; however, the court decided not to address those arguments in light of the Fifth Circuit funding decision. The Supreme Court's decision on funding will require the lower courts to address the other grounds on which the rules were challenged. Consequently, litigation will likely continue in those cases.

Additionally, the pending Supreme Court decision in a pair of cases seeking to challenge the *Chevron* doctrine may implicate how administrative rules, including those promulgated by the CFPB are challenged. See our [ALERT of Jan. 26, 2024](#). The *Chevron* doctrine refers to the judicial deference given to administrative actions, setting forth a legal test detailing when the court should defer to an agency's interpretation. Currently the *Chevron* doctrine provides a great deal of deference to an agency's interpretation. However the conservative majority of the Court appeared inclined to overrule or limit *Chevron* deference, cutting back the regulatory power of federal agencies. If the Court limits *Chevron* deference, it will be easier for the industry to successfully challenge the CFPB's actions. A decision on the two cases challenging *Chevron* deference are expected before the end of the current term at the end of June.

We will continue to monitor the status of rule litigation as well as the actions of the Supreme Court and the CFPB.

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