

CFPB “Firing On All Cylinders” After Surviving Constitutional Challenge To Funding Structure

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The Supreme Court recently upheld the Consumer Financial Protection Bureau’s funding structure in a 7–2 decision that will likely pave the way for renewed regulatory activity by the agency in the near future.

Enacted as part of the Dodd-Frank Act, the CFPB’s unique funding structure permits the agency to annually request an unspecified portion of funds from the Federal Reserve System, subject to an inflation-adjusted cap. In rejecting a constitutional challenge to this funding structure by several trade associations, the Supreme Court held in *Consumer Financial Protection Bureau v. Community Financial Services Association of America* that the Appropriations Clause merely requires Congress to identify the source and purpose of federal funds, and that Congress’s one-time appropriation for the CFPB in the Dodd-Frank Act meets that minimal constitutional standard. The seven-member majority largely aligned in their reasoning that the Constitution’s text and history, as well as early congressional practice, endorsed funding mechanisms such as this one, and thus provided broad legal support for the fiscal independence of agencies that are delegated substantial powers. As a practical matter, this decision will likely jumpstart long-delayed regulatory and enforcement work at the CFPB, including the vacated payday lending rules that were the subject of this litigation.

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Background and the Fifth Circuit’s Decision Below

The Supreme Court’s decision in *CFPB v. Community Financial Services Association*¹ is the second constitutional challenge to the Consumer Financial Protection Bureau’s (CFPB) structure to reach the Supreme Court since the agency’s founding in 2011. Back in 2020, the Supreme Court held in a 5–4 decision that the CFPB’s combination of single-Director leadership and for-cause removal protection unconstitutionally circumscribed the President’s executive power and therefore was unconstitutional.² The most recent case addresses the CFPB’s unique funding structure, which permits the CFPB Director to request funds from the Federal Reserve Board of Governors, as long as the requested amount does not exceed 12% of the Federal Reserve System’s total operating expenses.³

This case arose out of a broad legal challenge by several trade organizations against the CFPB’s 2018 regulation on high-interest consumer loans (the “Payday Lending Rule”).⁴ The Payday Lending Rule restricts lenders from obtaining loan payments through preauthorized account access after two unsuccessful withdrawal attempts. The plaintiffs challenged the Payday Lending Rule under the Administrative Procedures Act and more broadly challenged the CFPB’s authority to issue the Payday Lending Rule based on the legality of the Director’s appointment, the nondelegation doctrine and the Appropriations Clause. The Fifth Circuit rejected all but the last of these grounds, concluding that the CFPB violated the Appropriations Clause.⁵ The Fifth Circuit accordingly vacated the Payday Lending Rule.

The Supreme Court Backs the CFPB

In a 7–2 decision written by Justice Thomas, the Supreme Court upheld the CFPB’s funding structure.

The Supreme Court held that the Appropriations Clause merely requires Congress to designate particular revenues for identified purposes, and it specifically rejected the argument that appropriations must be time-limited. Justice Thomas rooted this source-and-purpose rule in the text and history of the Appropriations Clause, as well as early Congressional practice. The majority also noted that early congresses employed both fee-based appropriations for customs and post offices as well as capped appropriations for unspecified amounts, and analogized those structures to Congress’s funding of the CFPB. Applying the source-and-purpose test, the Supreme Court held that the CFPB’s funding mechanism was consistent with the Appropriations Clause and historical practice.

In a concurrence joined by Justices Sotomayor, Kavanaugh and Barrett, Justice Kagan noted that modern practice also supported the majority’s flexible standard for satisfying the Appropriations Clause. It appears that these four concurring justices did not want to limit the source-and-purpose rule to originalist principles alone, and their concurrence echoes the reliance on practice and custom often seen in separation of power decisions.

“Firing on all cylinders”

The Supreme Court’s decision will likely pave the way for increased regulatory and enforcement activity at the CFPB. In the short term, the Supreme Court’s reversal of the Fifth Circuit’s decision will revive the Pay Lending Rule that the Fifth Circuit had previously vacated. Looking beyond that, the CFPB will likely embrace the legal certainty provided by the Supreme Court’s decision as it increases its workload. In prepared remarks following the decision,⁶ the Director said that the agency is now “firing on all cylinders” and highlighted three agency priorities:

¹ 601 U. S. ____ (2024).

² *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U. S. 197, 204–05 (2020).

³ *See* 12 U. S. C. §5497(a).

⁴ *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 CFR pt. 1041 (2018).

⁵ *Cnty. Fin. Servs. Ass’n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 642 (5th Cir. 2022).

⁶ Prepared Remarks of CFPB Director Rohit Chopra Regarding the Supreme Court’s Decision in *CFPB v. CFSA*, CONSUMER FIN. PROT. BUREAU (May 17, 2024), available [here](#).

- Forging ahead with enforcement work that was paused during the legal challenge
- Cracking down on so-called junk fees
- Greater attention to credit reporting and credit scores

In the coming months and years, we can expect to see a more active and assertive CFPB continuing to flex its regulatory muscle.

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