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# U.S. Court of Appeals for the Fifth Circuit Finds Consumer Financial Protection Bureau’s Funding Unconstitutional. Now What?

John R. Coleman, Marshall T. Bell, and Jeffrey P. Naimon\*

*The authors review a recent federal circuit court decision holding the funding structure for the Consumer Financial Protection Bureau unconstitutional, and discuss the ruling’s ramifications.*

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The U.S. Court of Appeals for the Fifth Circuit has ruled, in *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*,<sup>1</sup> that the funding structure for the Consumer Financial Protection Bureau (“CFPB”) is unconstitutional, triggering a potential wave of implications discussed below.

## The Holdings

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A panel of three Fifth Circuit judges has unanimously held that the CFPB funding structure created by Congress violated the Appropriations Clause of the Constitution, which provides that “no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”

The panel ruled that, although the CFPB spends money pursuant to a validly enacted statute, the structure violates the Appropriations Clause because the CFPB obtains its funds from the Federal Reserve (not the Treasury), the CFPB maintains funds in a separate account, the Appropriations Committees do not have authority to review the agency’s expenditures, and the CFPB exercises broad authority over the economy. The court rejected the CFPB’s arguments that the funding structure was necessarily constitutional because it was created by and subject to Congress, and distinguished other agencies that are funded outside of the annual appropriations process.

The case involves a challenge to the CFPB's 2017 payday rule, which prohibits lenders from attempting to withdraw payments for covered loans from consumers' accounts after two consecutive withdrawal attempts have failed due to insufficient funds. The court rejected other challenges to the rule, including arguments that Congress violated the non-delegation doctrine by authorizing the CFPB to promulgate rules prohibiting unfair practices, that this particular rule exceeded that statutory authority, and that the rule was otherwise arbitrary or capricious. But the court reasoned that the CFPB could not have promulgated the payday rule without the unconstitutional funding, and, therefore, vacated it. As a result, lenders' obligation to comply with the rule (originally set for August 19, 2019, but repeatedly delayed) will be further delayed (if compliance is ever required) while the constitutional issue winds its way through the courts.

## **The Implications**

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If upheld, the Fifth Circuit's view regarding the constitutionality of the CFPB's funding, combined with its remedy, pose an existential threat to the agency. Under the court's logic, the CFPB cannot act consistent with the Constitution because its actions all depend on the expenditure of funds.

For example, CFPB examinations and investigations, like CFPB rulemakings, depend on the expenditure of funds. The receipt and processing of complaints requires the expenditure of funds. Indeed, the work of every CFPB official or employee relies on a funding mechanism that the court has found unconstitutional. Simply put, without funding the agency cannot act.

But the immediate implications are less dramatic. Challenges to the CFPB's funding structure have been pending for many years, and while it is likely that the panel's decision will encourage more challenges, particularly in the Fifth Circuit, the existential threat depends on whether the panel's decision remains the law. The CFPB is likely to seek further review, either in the Supreme Court or before the full Fifth Circuit, and either court could reverse the panel's decision.

Indeed, other courts, including the U.S. Court of Appeals for the District of Columbia Circuit, have reached the opposite conclusion after considering the relevant constitutional text and precedent.

And, assuming it decides the question, the Supreme Court may be reluctant to adopt an interpretation of the Appropriations Clause that limits Congress' authority to fund agencies or government programs outside of the annual appropriations process, especially given the many important agencies and programs that are currently funded outside that process.

If the Supreme Court ultimately upholds the CFPB's funding structure, the agency will have weathered its second significant constitutional challenge in its short history and eliminated another structural ground for challenging its actions.

However, the consequences for the agency should the Supreme Court agree with the panel's decision are more complex. For example, it may not have the option of simply severing the unconstitutional provisions. In *Seila Law*, it was relatively straightforward for the Court to sever the removal provision and simply fall back on the default presumption that the director of the CFPB is removable by the president at will. Here, there is no other funding mechanism to fall back on and the Supreme Court cannot create one, as that would likely present its own problems under the Appropriations Clause.

Instead, the Supreme Court might stay its mandate to give Congress an opportunity to pass legislation to "cure" the constitutional issue. There is some precedent for this. When the Supreme Court declared the Federal Election Commission unconstitutional in 1976 in *Buckley v. Valeo*, it afforded "de facto" validity to past agency actions, and stayed its mandate to allow Congress to repromulgate the statute in a manner that complied with the court's holding. Of course, Congress would not be limited to simply "fixing" any constitutional defect, but would have plenary authority to revisit the agency's structure, authorities, and very existence. Depending on the composition of the political branches, the CFPB that emerged from this process may be significantly different than the agency that exists now.

While this drama plays out, companies would be well served to not relax their focus on the day-to-day task of compliance. The litigation over the removal provision did not ultimately provide shelter to any company sued by the CFPB. In addition, the state attorneys general, the Federal Trade Commission, and other relevant regulators will continue to partner with the CFPB and independently enforce the laws against entities subject to their authority.

For the time being, companies also likely should presume the validity of other rules promulgated by the CFPB, including various

safe harbors contained in those rules, for compliance purposes. As noted, the Fifth Circuit's decision will almost certainly be subject to further review, no existing regulation has yet been challenged on this ground, and courts are unlikely to penalize companies that have relied in good faith on a CFPB rule, even if it is later struck down.<sup>2</sup>

In short, we do not expect the Fifth Circuit's decision to affect the CFPB's policy direction, and we anticipate that the CFPB will continue to advance its rulemaking agenda and its supervision and enforcement priorities. While the decision may result in some delays, it is not yet certain what other impact it will have.

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1. *Community Financial Services Association of America, Limited v. Consumer Financial Protection Bureau*, No. 21-50826 (5th Cir. Oct. 19, 2022).

2. See, e.g., 15 U.S.C. 1640(f), 1692k(e).