

November 17, 2022

As widely reported, on October 19, 2022, the [US Court of Appeals for the Fifth Circuit struck down a Consumer Financial Protection Bureau rulemaking](#) on the grounds that the mechanism for funding the CFPB's operations is an unconstitutional violation of the appropriations clause of the US Constitution. On November 14, the CFPB decided to skip review by the full panel of the Fifth Circuit and take this critical question right to the US Supreme Court, asking it to set the case for argument **this term**, given the significant legal and practical consequences of the outcome for the entire financial services industry.

## **Fifth Circuit struck down rulemaking on constitutional, rather than procedural, grounds**

In *Community Financial Services Association of America v. Consumer Financial Protection Bureau*, a trade association asked the Fifth Circuit to strike down the bureau's 2017 payday lending rule because, it argued, the CFPB acted arbitrarily and capriciously, and therefore exceeded its statutory authority when it promulgated the rule, and the CFPB's funding mechanism – drawing funds from the Federal Reserve's operating expenses rather than directly through the appropriations process – was unconstitutional. As to the first question, the Fifth Circuit found that the CFPB had appropriately exercised its authority to declare certain practices "unfair," finding that the bureau properly studied the issue in question, considered comments made during the rulemaking process, and had a reasonable basis to conclude that a particular act was "unfair." However, the Fifth Circuit's determination that the CFPB's rulemaking process was appropriate was rendered moot by its determination that the CFPB's funding mechanism was unconstitutional.

## **CFPB argues to Supreme Court that funding mechanism is constitutional – and warns of collateral damage in ruling to the contrary**

In [its petition to the Supreme Court](#), the CFPB claims the Fifth Circuit's ruling is based on an unprecedented and erroneous understanding of the Constitution's appropriations clause and warns that a ruling to the contrary will call into question almost every CFPB action taken since it was created. The CFPB's brief then marches through the history of the congressional appropriations process, and notes that a host of federal entities are funded through permanent appropriations, rather than an annual congressional authorization process. The CFPB also notes that other financial services regulators derive funding from sources outside of congressional appropriations, such as the Office of the Comptroller of the Currency and the Federal Reserve Board. Finally, the bureau notes that, even if the funding mechanism is constitutional, the Fifth Circuit failed to conduct an appropriate severability analysis, which would have more appropriately preserved the CFPB's ability to continue its functions despite the constitutional issues with the funding mechanism.

## **What's next?**

Only time will tell if the Supreme Court decides to pick up the case this term and how it will resolve this critical issue. In the absence of legal clarity, the CFPB has nevertheless shown no signs of withdrawing from regulatory, supervisory or enforcement activity in the aftermath of the Fifth Circuit's decision. Indeed, the bureau has since the Fifth Circuit's ruling promulgated new rules, continued conducting examinations and even settled a pending lawsuit.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or

entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

---

## Key Contacts

Michelle L. Rogers Washington, DC	mrogers@cooley.com +1 202 776 2227
--------------------------------------	---------------------------------------

---

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.