

CFPB Funding Structure Found Constitutional, Rulemaking and Litigation to Advance

May 16, 2024

On May 16, 2024, the [US Supreme Court handed down its long-awaited decision](#) in *Consumer Financial Protection Bureau v. Community Financial Services Association of America*, with a 7 – 2 majority holding that the funding mechanism of the Consumer Financial Protection Bureau (CFPB) is constitutional pursuant to the appropriations clause. Writing for the majority, Justice Clarence Thomas wrote, “Under the Appropriations Clause, an appropriation is simply a law that authorizes expenditures from a specified source of public money for designated purposes. The statute that provides the Bureau’s funding meets these requirements. We therefore conclude that the Bureau’s funding mechanism does not violate the Appropriations Clause.”

Decision clears the way for CFPB’s litigation and enforcement agenda

Although the CFPB reached a number of settlements with financial institutions while the Supreme Court case was pending, numerous courts across the US had stayed active litigation pending the Supreme Court decision. Some institutions also had successfully challenged – at least temporarily – the CFPB’s ability to issue and enforce civil investigative demands, hampering the CFPB’s enforcement mechanism.

With the constitutionality question cleared up, the CFPB’s litigation docket will again begin moving, with many cases springing to life. In late 2023, the CFPB announced a significant hiring initiative in its enforcement division and has continued to reorganize staff and internal mechanisms to speed up processes, mindful of continuing to advance a broad agenda in an election year.

Rules in litigation may still not take immediate effect and will have to be challenged on the merits

The cloud over the CFPB’s constitutionality also slowed its rulemaking authority. For example, the Texas federal district court hearing the lawsuit challenging the CFPB’s [final credit card late fee rule](#) issued a preliminary injunction on May 10, 2024, just four days before the rule was set to take effect, putting the rule on hold at least until the Supreme Court decision. With the issue of constitutionality no longer in question, what the court will do with the existing preliminary injunction is uncertain – including its consideration of other merits issues and a seemingly continued disagreement, or lack of clarity, on the issue of venue transfer.

The [CFPB’s small business data collection and reporting rule](#) is in a similar situation, and there are still pending challenges to that rule that could further delay implementation. Furthermore, the nationwide preliminary injunction obligates the CFPB to extend deadlines for compliance to compensate for the period during which the rule was stayed. This same requirement was not set in the credit card late fees injunction, however.

The US Court of Appeals for the Fifth Circuit also will now resume consideration of the [lower court decision](#) vacating the CFPB’s examination manual update that would deem certain discriminatory acts and practices as “unfair.”

What to expect

Immediately after the Supreme Court released the opinion, the CFPB issued its own press release declaring that the decision means the “CFPB is here to stay.” The CFPB’s enforcement, supervisory and rulemaking functions remained active while the case was pending, but every action had the potential to be challenged on the grounds that no action could be constitutional if the CFPB’s funding was unconstitutional. With the constitutionality cloud hanging over the CFPB having lifted, a major obstacle to the CFPB’s rulemaking and enforcement agenda has been removed. However, it will still be faced with merits-based challenges, an extremely active litigation docket and the many considerations tied to implementation with various rulemakings.

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