US SUPREME COURT HOLDS THAT THE CFPB'S FUNDING STRUCTURE IS CONSTITUTIONAL

Date: 16 May 2024

US Policy and Regulatory Alert

By: Joshua L. Durham

On 16 May 2024, in a much-anticipated decision, the US Supreme Court held the funding mechanism for the Consumer Financial Protection Bureau (CFPB) is constitutional. The decision, *Consumer Financial Protection Bureau v. Community Financial Services Association of America, Ltd*., No. 22–448 (US), recognizes that Congress has broad discretion in structuring funding mechanisms for federal agencies. The Court's decision not only preserves the CFPB's existence but likely will undo the decisions of lower courts that had invalidated CFPB rulemaking based on the supposed unconstitutional manner in which Congress funded the CFPB. These rules include the CFPB payday lending rule at issue in the Court's decision as well as the CFPB rule regarding small business lending[1] and the new examination directive on discrimination against unspecified protected classes.[2] Business entities that are subject to CFPB authority will likely want to take a careful look at the status of these rules and other of the CFPB's proposed rules.

The Constitution's Appropriations Clause commands that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. In most instances, Congress funds federal agencies on an annual basis. In funding the CFPB, however, Congress decided that the CFPB did not have to petition for funds each year but, rather, authorizes the CFPB to draw from the Federal Reserve System the amount the CFPB director deems "reasonably necessary to carry out" the CFPB's duties, subject to an inflation-adjusted cap. *See* 12 U.S.C. §§ 5497(a)(1), (2). The Court granted certiorari to answer the question of whether that type of funding mechanism complies with the Appropriations Clause and held that it does. Slip op. at 1. Justice Thomas wrote for the Court in a 7-to-2 decision.

Specifically, the Court determined that under the Appropriations Clause, an appropriation is "simply a law that authorizes expenditures from a specified source of public money for designated purposes." Slip op. at 5. The Court held that Congress met that requirement in enacting the CFPB's funding mechanism. *Id*. The Court based its decision on "the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification," concluding that "appropriations need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause." *Id*. at 6.

In reaching its decision, the Court noted that Congress has fashioned open-ended appropriation mechanisms derived from fees from the beginning of the Republic, citing the mechanisms Congress chose to enact to fund the Customs Office and the Post Office. Slip op. at 13-15. The Court found that the CFPB's funding structure fits squarely within the framework employed by the First Congress when it established those agencies. *Id*.

The Court rejected the reasoning of the Fifth Circuit Court of Appeals[3] that the Appropriation Clause demands an actual appropriation rather than just describing the manner in which Congress intends to fund an agency. Slip op. at 4. The Court also rejected the reasoning of the dissent and in particular, disagreed with the dissent's view that

©2005-2026 K&L Gates LLP. All Rights Reserved.

the Appropriations Clause demands Congress deliberate every two years to appropriate funds for use by the executive branch. *Id*. at 17-20. Rather, the Court stated that the Constitution permits Congress to make standing appropriations and that both pre-ratification and post-ratification appropriations practice support this conclusion. *Id*. at 20.

"In short," the Court stated that:

> [T]he origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion. Some appropriations required expenditure of a particular amount, while others allowed the recipient of the appropriated money to spend up to a cap. Some appropriations were time limited, others were not.

Slip op. at 12. The Court also stated that the specificity with which appropriations designated the objects of the expenditures varied greatly. *Id*. Accordingly, the Court confirmed that Congress had the power to fund the CFPB in the manner prescribed.

Justice Kagan, who joined the majority decision, concurred separately to add that "continuing tradition" since the founding supports the ability of Congress to fund agencies such as the CFPB in a variety of ways, some of which give greater or lesser discretion to the executive branch. Justice Jackson also separately concurred to state that "[w]hen the Constitution's text does not provide a limit to a coordinate branch's power; we should not lightly assume that Article III implicitly directs the Judiciary to find one."

With the Court's decision, lower court decisions invalidating or staying challenges to CFPB rulemaking are likely now to be reversed. As noted, these rules include the CFPB payday lending rule at issue in the Court's decision as well as the CFPB rule regarding small business lending and the new examination directive on discrimination against unspecified protected classes. Additionally, lower courts are likely to lift stays on litigation involving the CFPB which had been paused pending the Supreme Court's decision. The resolution of these cases may also have an effect on certain businesses in the financial services and other industries. Business entities that are subject to CFPB authority will likely want to take a careful look at how the Court's decision may impact the status of various rulemaking efforts governing business practices. We will continue to monitor how lower courts react and adjust to the Supreme Court's directive.

FOOTNOTES

[1] *Texas Bankers Ass'n v. CFPB*, 685 F. Supp. 3d 445 (S.D. Tex. 2023); *Monticello Banking Co. v. CFPB*, 6:23-CV-00148-KKC, 2023 WL 5983829 (E.D. Ky. Sept. 14, 2023).

[2] *Chamber of Commerce of United States of Am. v. CFPB*, 6:22-CV-00381, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023).

[3] 51 F. 4th 616 (5th Cir. 2022).

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



JOSHUA L. DURHAM
ASSOCIATE

SAN FRANCISCO
+1.415.882.8028
JOSH.DURHAM@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.