MORTGAGE BANKERS ASSOCIATION

MBA Summary of Supreme Court Decision in
Consumer Financial Protection Bureau* v. *Community Financial Services Association
May 16, 2024

On May 16, 2024, the Supreme Court (the Court) released a 7-2 **decision** in *Consumer Financial Protection Bureau* (CFPB or Bureau) v. *Community Financial Services Association* (CFSA) holding that the CFPB's funding structure is constitutional. As a result, this case will have no impact on the CFPB's current enacted mortgage rules or enforcement powers. Justice Thomas delivered the opinion of the Court.

In this case, the Court decided the narrow question of whether the CFPB's funding structure complies with the Constitution's Appropriations Clause. The Court states that based on the Constitution's text, the history against which that text was enacted, and congressional practice immediately following ratification, 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.

Background – The Path to the Supreme Court

On October 19, 2022, the Fifth Circuit Court of Appeals held that the CFPB's funding structure was unconstitutional, concluding that the Appropriations Clause "does more than reinforce Congress's power over fiscal matters; it affirmatively obligates Congress to use that authority 'to maintain the boundaries between branches and preserve individual liberty from the encourages of executive power." The Fifth Circuit pointed out that the CFPB receives funding directly from the Federal Reserve, which itself is funded outside the appropriations process. The Fifth Circuit observed that Congress not only ceded direct control over the CFPB's budget by insulating it from annual appropriations, but also ceded indirect control by providing that the CFPB's funding could be drawn from a source that is itself outside the appropriations process. They believed this "double insulation" from Congress's purse strings is unprecedented across the government. That decision is available **here**, and MBA's summary of the decision is available **here**.

This decision was appealed by the CFPB. At the Supreme Court CFSA claimed that the CFPB's Payday Lending Rule was unconstitutional because the CFPB's funding structure is unconstitutional under the Appropriations Clause and general separation of powers principles. The case turned on whether the CFPB's funding mechanism is a valid appropriation. Many agencies are funded by an annual appropriations process. However, the CFPB does not receive funding through this process. Instead, the agency requests its funding from the Federal Reserve, up to 12% of the Federal Reserve's "total operating expenses." 12 U.S.C. § 5497(a)(1)–(2). The Federal Reserve is similarly insulated from the annual appropriations process and is instead funded through interest earned on the securities it owns and assessments the agency levies on banks within the Federal Reserve System.

The Supreme Court's Decision

The decision essentially debates the meaning of "appropriation" at the time of the enactment of the Constitution. The Court held that expenditures meet the requirements of the Appropriations Clause if a law authorizes expenditures from a specified source of public money for designated purposes. The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. The Court determined what is required for a valid appropriation based on the Constitution's text, the English Parliamentary appropriations process, and early congressional practice. In particular, early Congresses used a wide array of funding structures to fund executive agencies. Appropriations could be set for either a particular amount or up to a specified spending cap. Additionally, some appropriations were only for a set time period while others were not. The designated purpose of those appropriations could either be specific or incredibly broad. Agencies were also permitted to fund themselves through fees those agencies collected, such as the early Customs Service and Post Office.

Given the wide latitude the Appropriations Clause gives Congress to determine an agency's funding, the Court found that the CFPB's funding structure contains the requisite features of a congressional appropriation. The statute authorizes the CFPB to draw public funds from a particular source and it specifies the objects for which the CFPB can use those funds. The Court concludes that the Dodd-Frank provision that authorizes the CFPB to draw funds from the combined earnings of the Federal Reserve System is a constitutionally valid appropriation.

The Court rejected and found unpersuasive several arguments made by CFSA:

- CFSA argued that the CFPB's funding is not received through the appropriations process because the agency decides the amount of funding it draws from the Federal Reserve. However, the Court denied this argument because Congress placed a cap on the amount of funding the CFPB could draw.

- CFSA also argued that the CFPB's funding structure is not a valid appropriation because there is no specific end date to the funding. However, Congress has the power to make standing appropriations and that "the Constitution does not explicitly limit the duration of appropriations for other purposes."

- Lastly, CFSA argued that the CFPB's funding structure violates the separation of powers by allowing the executive to act without a fiscal check. However, the Appropriations Clause merely requires that Congress pass a law that authorizes the disbursement of specified funds for identified purposes.

The dissent (Justice Alito and Justice Gorsuch) accepts that the question in this case is ultimately about the meaning of "appropriations." The dissent argues that the majority decision "turns the Appropriations Clause into a minor vestige. The Court upholds a novel statutory scheme under which the powerful Consumer Financial Protection Bureau (CFPB) may bankroll its own agenda without any congressional control or oversight." It also focuses on how it was not enough though that Congress enacted the law authorizing the Bureau's funding because a "law alone does not suffice – an appropriation is required."

<u>What's Next?</u>

While MBA frequently disagrees with the CFPB on how they interpret or enforce particular rules, a decision that would have invalidated the CFPB's previous rules could have had severe consequences for the mortgage markets. The potential consequences were highlighted in an Amicus Brief that MBA filed with the Court, available **here**.

Many cases involving the CFPB were paused pending this decision. Now that this issue has been resolved, litigation against the CFPB will likely resume. Additionally, there are other cases pending before the Court that may limit the CFPB's powers. These administrative law cases revolve around the deference afforded to the agencies and how they interpret their statutory authority. While these cases do not pose an existential threat to the CFPB in particular, they may significantly impact how they can apply their rule writing powers or use their powers of statutory interpretation.

We welcome your thoughts and questions as we continue to unpack this landmark decision. Please contact Justin Wiseman (jwiseman@mba.org), Alisha Sears (asears@mba.org), or Gabriel Acosta (gacosta@mba.org).