THORN RUN PARTNERS
GOVERNMENT RELATIONS

Hearing Summary

April 17, 2024

House Financial Services Panel Scrutinizes the CFPB's Funding

Executive Summary

On April 16, the House Financial Services Subcommittee (HFSC) on Financial Institutions and Monetary Policy held a hearing on the Consumer Financial Protection Bureau's (CFPB) financial reporting and transparency. During the hearing, lawmakers took familiar, party-line positions on the CFPB and its funding structure. Subcommittee Republicans continued to both criticize what they cast as the Bureau's politicization and litigate the constitutionality of the agency's "dual-insulated" funding structure — whereby it is funded through direct transfers from the Federal Reserve (Fed), which is itself also an independent entity. They argued that that funding mechanism: (1) is unlike that of any other independent financial regulator; (2) renders the CFPB unaccountable to Congress; and (3) is ultimately unconstitutional, thereby necessitating that the agency's funding be subject to congressional appropriations.

Meanwhile, Democrats on the panel and their invited witness came to the defense of the CFPB's funding structure, as well as the agency itself — touting its actions on predatory lending and "junk fees," among other matters. Democratic lawmakers also highlighted findings from Government Accountability Office (GAO) and independent audits of the CFPB's financial reporting as indicating that the agency is functioning in a responsible manner, and they likened its funding arrangement to that of other financial regulators — including the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), and Fed, among others — that are also funded independently of the congressional appropriations process.

Opening Statements

Chair Andy Barr (R-KY) (statement) spoke of what he described as a lack of transparency and accountability by the CFPB, criticizing the agency for acting in a "politically motivated way" and acting outside of the traditional notice and comment rulemaking process. While acknowledging that the GAO conducts audits of the CFPB, he noted that those audits do not address policy or budgetary decisions, and he additionally criticized the lack of findings or recommendations in the Bureau's most recent independent audit. He indicated a need to "rein in" the Bureau's activities by subjecting its funding to congressional oversight, whether through the Supreme Court finding that the agency's funding structure is unconstitutional or through congressional action.

Ranking Member Bill Foster (D-IL) cited polling that indicates broad, bipartisan support for the CFPB and touted its efforts on a variety of matters — including "junk fees" and discriminatory lending. He argued that, similar to other independent agencies, the Bureau's budget is subject to "intense" scrutiny by the GAO and independent auditors, which he said have affirmed the "soundness" of the CFPB's budget. The Ranking Member also highlighted the CFPB's publication of financial and performance reports and how the agency's director must testify semiannually before Congress, suggesting that the agency is already subject to oversight. A Supreme Court ruling that the CFPB's funding mechanism is unconstitutional would be "massively disruptive and destructive" to its efforts to enforce consumer protection laws, he concluded.

Full Committee Ranking Member Maxine Waters (D-CA) (statement) criticized Republicans for pursuing a "crusade" against the CFPB. She reiterated congressional Democrats' ongoing support for the agency and echoed the claim that it enjoys bipartisan support from the public.

WITNESS TESTIMONY

Mr. Brian Johnson (testimony), of Patomak Global Partners LLC, explained how the Dodd-Frank Act made the CFPB independent from Congress and the president through its funding structure and the "for cause" removal protection it granted to the agency's director — a protection that, he noted, the Supreme Court has since struck down. Mr. Johnson offered an accounting of how the CFPB obtains and expends its funding, which he indicated involves processes that are ultimately subject to "minimal" oversight. While the GAO conducts audits of the CFPB's financial reporting controls, it does not look at its spending decisions, and the Bureau's most recent independent audit report is "far from comprehensive," he concluded.

Mr. Adam White (testimony), of the American Enterprise Institute and George Mason University's Antonin Scalia Law School, spoke of the growing importance of Congress exercising its "power of the purse" through the appropriations process as a means of conducting oversight. He noted that the CFPB's funding is unique in the way that it draws from the Fed's funds, asserting that it "makes no sense" for the agency to be exempt from the congressional appropriations process and oversight. Mr. White further warned that, if the Supreme Court does not find the CFPB's funding structure to be unconstitutional, there will be calls to grant other agencies "special access" to Fed funds. He concluded by recounting the Bureau's own history of asserting its "non-appropriated" status.

Mr. Christopher Peterson (testimony), of the University of Utah's S.J. Quinney College of Law, defended the constitutionality of the CFPB's funding structure, which he suggested is consistent with the way several other executive agencies are funded. He argued that the fact that the Dodd-Frank Act appropriated funds to the Bureau through an on-going mechanism does not mean that it is unconstitutional, and that the Constitution's Appropriations Clause does not require the use of an annual appropriations process. Mr. Peterson further contended that, based on the most recent CFPB financial report and GAO audit, the Bureau's funding mechanism is subject to "effective" internal controls. He concluded by touting the CFPB's efforts in a variety of areas.

Discussion and Questions

CFPB Funding & Constitutionality

- Chair Barr contested the argument that the CFPB's funding structure is similar to that of other agencies, asserting that there is no analogue to the way in which the Bureau receives funding independently from another entity that is itself also exempt from the appropriations process. **Rep. Scott Fitzgerald (R-WI)** made a similar argument. Mr. Johnson concurred and noted how the funding structures of other market conduct regulators, including the Commodity Futures Trading Commission (CFTC) and Securities and Exchange Commission (SEC), are subject to appropriations.
- Several Republicans on the panel — including **Reps. Roger Williams (R-TX), William Timmons (R-SC), Andy Ogles (R-TN)**, and Fitzgerald — argued that the CFPB's funding structure has meant a lack of accountability for the agency and therefore that the Bureau should be subject to congressional oversight through the appropriations process.
- Mr. White agreed with Chair Barr that, just as the Supreme Court made the Bureau more accountable to the executive branch when it struck down the CFPB director's "just cause" removal protection, it should also act to make the agency more accountable to Congress by finding its funding structure to be unconstitutional.
- Ranking Member Foster questioned whether there is a constitutional distinction between how other independent financial regulators are funded and the CFPB's "double insulated" funding structure. Mr. Peterson replied that there is not and that Congress could act to block Fed fund transfers to the Bureau through legislation if it wanted to.
- When asked by **Rep. Bill Posey (R-FL)** whether they were aware if the U.S. Comptroller General has ever been asked to opine on the constitutionality of the CFPB's funding, Messrs. Johnson and White were unable to cite any instance of this occurring.
- Rep. Posey proposed the idea that, because the CFPB receives funds from the Fed that might otherwise be remitted to the Treasury, this funding arrangement equates to drawing money from the Treasury without appropriations, implying a violation of the Appropriations Clause. Mr. Johnson concurred.
- **Rep. Barry Loudermilk (R-GA)** said he was "hopeful" the Supreme Court would find that the CFPB's current funding structure limits congressional oversight, and he expressed support for Chair Barr's Taking Account of Bureaucrats' Spending (TABS) Act (H.R.1382), which would bring the Bureau under the regular appropriations process.
- Reps. Williams and Loudermilk inquired whether the CFPB would still be able to fulfill its statutory mission even if it is subject to congressional appropriations. Mr. White agreed that it would and claimed that a ruling against the Bureau's funding structure would not pose a threat to the funding of any other agency, including the Fed.
- **Rep. Brad Sherman (D-CA)** likened the CFPB's funding structure to that of the Federal Reserve and accordingly warned that, if the Supreme Court rules that the Bureau's funding is unconstitutional, it will have ramifications for the central bank as well. **Rep. Ayanna Pressley (D-MA)** similarly compared the CFPB's funding structure to other independent federal financial agencies, including the Fed, FDIC, and OCC.

- **Rep. Young Kim (R-CA)** asked whether there is a legal definition or standard for determining what is "reasonably necessary" when it comes to CFPB funding requests, to which Mr. Johnson said that this is not defined in the Dodd-Frank Act.

CFPB Regulatory Activity & Operations

- Ranking Member Waters applauded the CFPB's initiative on "junk fees" and credit card late fees final rule, asking Mr. Peterson to address the argument that the Bureau lacked the legal authority to promulgate that rule. Mr. Peterson contended that the agency is "well within" its legal authority to revisit and reevaluate the safe harbor fee amount under the Credit Card Accountability Responsibility and Disclosure (CARD) Act of 2009.
- Reps. Sherman, **Al Green (D-TX)**, and Pressley expressed general support for the CFPB, with the latter echoing the claim that the agency enjoys broad bipartisan support from the public and highlighting its rule on credit card late fees.
- Noting how other federal financial regulators have multi-member boards, Rep. Loudermilk questioned the argument that having a single director makes the CFPB more efficient or effective. Mr. White pointed out that the Bureau was originally proposed to have a multi-member commission and expressed his belief that the agency would "do well" with such a leadership arrangement assuming it is "funded appropriately."
- Rep. Williams accused the CFPB of a partisan regulatory agenda and criticized it for issuing policy statements or guidance in lieu of conventional rulemaking. He prompted Mr. Johnson to discuss the effects of issuing new regulations outside of the "proper process," to which Mr. Johnson said that this creates uncertainty in markets and thereby hinders economic activity.
- **Rep. Ralph Norman (R-SC)** accused the CFPB of "overstepping" its authority and voiced support for Chair Barr's Congressional Review Act (CRA) resolution (H.J.Res.122) to overturn the agency's credit card late fees rule. Mr. Johnson contended that limiting credit card fees will result in added costs for those who do not make late payments as well as potentially higher interest rates or reduced access to credit cards for those with marginal credit.
- When asked by Rep. Kim what Congress should do to "reclaim" power over the CFPB, Mr. White suggested that, other than making the agency subject to appropriations, lawmakers should continue to leverage CRA resolutions and revise the Dodd-Frank Act.
- Rep. Fitzgerald questioned whether there are any "reliable" metrics for gauging the effectiveness of CFPB's enforcement efforts. Mr. White claimed that there has been a "paucity" of such metrics or attempts to devise them at the agency.
- Rep. Kim wondered why the CFPB does not have something akin to the Fed's Compliance & Internal Control Office to ensure its Civil Penalty Fund is used for financial literacy programs. Mr. Johnson explained that the Bureau has controls to ensure the primary purpose of the Fund is to compensate victims, and that the agency also has a Civil Penalty Fund Governance Board responsible for judgments about whether to allocated unobligated funds to programs. Rep. Norman also proposed the idea of transferring unobligated civil penalty funds to the Fed to help pay off debts.

CFPB Reports & Audits

- Ranking Member Foster prompted Mr. Peterson to discuss the independent audits conducted of the CFPB. While acknowledging the veracity of Chair Barr's claim that those audits do not offer insight into the agency's priorities, Mr. Peterson contended that their key take away is that there is no evidence the CFPB is engaging in "inappropriate" activity.
- Rep. Posey wondered whether GAO's audits of the CFPB also seek to determine if the agency is spending money "efficiently," to which Mr. Johnson offered his understanding that the audits review controls on financial reporting, not underlying spending decisions.
- Rep. Green highlighted findings from the GAO's most recent annual audit of the CFPB's fiscal year (FY) 2023 and 2022 financial statements, which he said indicates that the Bureau is "sound" and "fiscally responsible."
- Rep. Timmons contended that GAO audits are insufficient to ensuring "appropriate checks and balances" for the CFPB and spoke of a lack of insight into the agency's balance sheet.
- Noting how the CFPB indicated in its most FY 2023 annual financial report that no funding from its Civil Penalty Fund was allocated to consumer education and financial literacy programs, Rep. Timmons questioned why this is the case and how the Fund's surplus might best be allocated. Mr. Johnson spoke of the need for Congress to ensure the funds are not diverted away from their purpose of victim compensation.