Down But Not Out: The CFPB’s Future After Seila Law LLC v. Consumer Financial Protection Bureau

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In the wake of the 2008 financial crisis, Congress created the Consumer Financial Protection Bureau, an independent agency dedicated to consumer protection in the financial sector. The CFPB's jurisdiction includes banks,[1] credit unions, securities firms, debt collectors, foreclosure relief services, and many other financial industry players.

Since its founding, the CFPB has been the subject of court challenges, particularly regarding its status as an "independent agency." Independent agencies are government agencies that exist outside of federal executive departments — they are not overseen by a member of the President's Cabinet — and, while managed by the executive branch, are largely independent of presidential control because the President's power to dismiss the agency's leader is limited. As to the CFPB, the President appoints the CFPB's Director for a five-year term, by and with the advice and consent of the Senate. 12 U.S.C. § 5491(b)(2). Until recently, under the Dodd-Frank Act, which created the CFPB, the President could not remove the CFPB's Director at-will; rather, the President could only remove the Director for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

The President's power to remove the CFPB Director changed as a result of a recent Supreme Court decision. On June 29, 2020, in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183 (U.S. 2020), the Court held that the Dodd-Frank Act's restriction on the President's ability to remove the CFPB's single-director[2] violated the constitutional separation of powers. The Court emphasized that the President's power to remove agency heads flows from Article II, § 1, cl. 1 of the Constitution, which states that the executive power is vested in the President, who must take care that the laws are faithfully executed. *Seila*, 140 S.Ct. at 2191. The Court, however, rejected the argument that, if the leadership structure is unconstitutional, then the entire CFPB must be eliminated.

Instead, the Court held that although the removal restrictions are unconstitutional, those restrictions can be severed from the rest of the CFPB and the Dodd-Frank Act. The Court noted that the Dodd-Frank Act explicitly includes a provision stating that all of its sections are severable. *Seila*, 140 S.Ct. at 2192. Moreover, the Court stated that "there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President." *Seila* 140 S.Ct. at 2209.

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Accordingly, the CFPB remains alive. It has a formidable set of law enforcement tools and jurisdiction over "federal consumer law,"[3] including jurisdiction over 18 consumer protection statutes — such as the Fair Credit Reporting Act and the Fair Debt Collection Practices Act.[4] The CFPB has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court.[5] To remedy violations, the CFPB may seek restitution, disgorgement, and injunctive relief, and can impose civil penalties of up to $1,000,000 for each day that a violation occurs.[6]

The CFPB has collected over $11 billion in fines and penalties in its short existence. This includes, for example, ordering Citibank subsidiaries to pay $28.8 million in penalties for wrongful conduct in connection with advising consumers on options to avoid foreclosures, and ordering the Bank of America to pay over $700 million in relief to consumers harmed by practices related to credit card add-on products.

Where does the CFPB go from here? Enforcement levels often depend on who is President. During the Trump administration, there has been a significant decline in enforcement activity by the CFPB. Since a peak in productivity under the Obama administration in 2015, the CFPB's overall enforcement activity has fallen 80 percent. Additionally, the average monetary relief to victims has fallen 96 percent.[7] This has led some to wonder whether, if the democrats gain control of the White House in January, CFPB enforcement actions will increase again. The Obama/Biden administration signed the Act that created the CFPB and supported aggressive enforcement by the agency; accordingly, it is likely the CFPB will increase its enforcement activities if Biden is elected. Thus — especially if Biden prevails in November — financial institutions and others regulated by the CFPB should ensure that their compliance programs are reviewed and updated as necessary, and that they are prepared to appropriately address any audits, investigations, and enforcement actions undertaken by the CFPB.

If you have questions about CFPB compliance audits, investigations, or enforcement actions, please contact Eric Yaffe, Jackson Hobbs, White-Collar Group Chair Susan Gaertner, or your regular Lathrop GPM contact. Our White-Collar Group also focuses on, among other things, False Claims Act litigation, responding to state and federal subpoenas, company internal investigations, trade secrets, and a variety of other white- collar civil and criminal matters.

[1] Once a financial institution acquires $10 Billion in Assets, it falls under the guidance, rules, and regulations under the CFPB.

[2] The opinion also mentioned another high-profile regulator with a single-director structure — the Federal Housing Finance Agency — as it charts a new future for Fannie Mae and Freddie Mac.

[3] 12 U.S.C. § 5511(a).

[4] 12 U.S.C. § 5481(a)(12) (transferring the implementation of these 18 enumerated consumer protection statutes away from the Federal Reserve and other agencies and to the CFPB). The 18 enumerated consumer laws include: The Alternative Mortgage Transaction Parity Act of 1982, Public L. No. 97-320, 96 Stat. 1545 (codified as amended at 12 U.S.C. ch. 39); The Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (codified as amended at 15 U.S.C. §§ 1667-1667f); The Electronic Fund Transfer Act, Pub. L. No. 90-321, 92 Stat. 3728 (codified as amended at 15 U.S.C. ch. 41, subch. 6); The Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (codified as amended at 15 U.S.C. ch. 41, subch. 4); The Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (codified as amended at 15 U.S.C. ch. 41, subch. 1, pt. D); The Fair Credit Reporting Act, Pub. L. No. 90-321, 84 Stat. 1128 (codified as amended at 15 U.S.C. ch. 41, subch. 3) (excluding §§ 615(e), 628, 15 U.S.C. §§ 1681m(e), 1681w); The Home Owners Protection Act of 1998, Pub. L. No. 105- 216, 112 Stat. 897 (codified as amended at 12 U.S.C. ch. 49); The Fair Debt Collection Practices Act, Pub. L. No. 90-321, 91 Stat. 874 (codified as amended at 15 U.S.C. ch. 41, subch. 5); Federal Deposit Insurance Act § 43(b)-(f), 64 Stat. 873 (codified as amended 12 U.S.C. §§ 1831t(c)-(f)); Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 502-09, 113 Stat. 1338 (codified as amended at 15 U.S.C. §§ 6802-6809) (excluding § 505 as it applies to § 501(b)); The Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified as amended at 12 U.S.C. ch. 29); The Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended at to various parts of Truth in Lending Act, particularly 15 U.S.C. §§ 1601-02, §§1639-41); The Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, 88 Stat. 1724 (codified as amended at 12 U.S.C. ch. 27); The S.A.F.E. Mortgage Licensing Act of 2008, Pub. L. No. 110-289, 122 Stat. 2810 (codified as amended at 12 U.S.C. ch. 51); The Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (codified as amended at 15 U.S.C. ch. 41, subch. 1); The Truth in Savings Act, Pub. L. No. 102-242, 105 Stat. 2334 (codified as amended at 12 U.S.C. ch. 44); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 626, 123 Stat. 524 (codified as amended at 15 U.S. C. § 1638); and The Interstate Land Sales Full Disclosure Act, Pub. L. No. 90-448, 82 Stat. 590 (codified as amended at 15 U.S.C. ch. 42).

[5] 12 U.S.C. §5561 et seq.

[6] 12 U.S.C. §5565.

[7] *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline*, Consumer Federation of America, https://consumerfed.org/reports/dormant-the-consumer-financial-protection-bureaus-law-enforcement-program-in-decline/ (*accessed* July 24, 2020).