

## Cabinet News and Views

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### Second Circuit Rules CFPB Funding Mechanism Is Constitutional, Deepening Split with Fifth Circuit



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On March 23, the U.S. Court of Appeals for the Second Circuit ruled that the CFPB's funding mechanism is constitutional.<sup>[1]</sup> The case, *CFPB v. Law Offices of Crystal Moroney*, is significant for two reasons. First, the Second Circuit expressly declined to follow the Fifth Circuit's recent ruling in *CFPB v. Community Financial Services Association of America* that the CFPB's funding mechanism violates the Appropriations Clause of Article I of the Constitution.<sup>[2]</sup> Second, the Second Circuit issued its ruling *after* the Supreme Court granted certiorari in *Community Financial* – weighing in on a controversial issue that the Supreme Court has already agreed to address.

*Moroney* concerned a challenge by a law firm to a civil investigative demand issued by the CFPB. The law firm argued, among other things, that the CID was invalid because the CFPB's funding mechanism is unconstitutional. Under the Consumer Financial Protection Act, the CFPB does not receive funds through annual appropriations from the Treasury Department but is authorized to request a capped amount of funds from the Federal Reserve System. The law firm argued that this arrangement violates the Appropriations Clause because it uniquely insulates the CFPB from the appropriations process.

Importantly, the Fifth Circuit recently adopted this same argument in *Community Financial*. There, the Fifth Circuit held that funding the CFPB outside of the annual appropriations process means that the CFPB has powers of the “purse” and the enforcement “sword” in violation of the Constitution's separation-of-powers doctrine. As a remedy, the Fifth Circuit vacated the CFPB's Payday Lending Rule because it was finalized while the CFPB was unlawfully funded. The Fifth Circuit recognized that its ruling contradicted the decision of “every court to consider” the CFPB's funding structure. In February, the Supreme Court granted the CFPB's petition for certiorari in *Community Financial*. The case is expected to be argued this fall.

In *Moroney*, however, the Second Circuit rejected the argument that the CFPB's funding mechanism is unconstitutional. The Second Circuit held that the Appropriations Clause simply requires that "the payment of money from the Treasury must be *authorized by a statute*."<sup>[3]</sup> The Court ruled that "[h]ere, Congress expressly appropriated the CFPB's funding by enacting the CFPA."<sup>[4]</sup> Next, the Second Circuit addressed the Fifth Circuit's ruling, holding that it could not find "any support" for the Fifth Circuit's conclusion in Supreme Court precedent, the Constitution's text, or the history of the Appropriations Clause.<sup>[5]</sup>

The Second Circuit's ruling in *Moroney* deepens the divide between the Fifth Circuit and every other court to address the constitutionality of the CFPB's funding mechanism. *Moroney* is also likely to be a factor as federal courts across the country weigh whether to allow cases involving the CFPB to proceed while *Community Financial* is pending with the Supreme Court. We expect *Community Financial* and *Moroney* to continue to reverberate across cases involving both the CFPB and other federal financial agencies that are funded outside the annual appropriations process.

<sup>[1]</sup> See *CFPB v. Law Offices of Crystal Moroney*, Slip Op. (Dkt. No. 151-1), No. 20-3471 (2d Cir. March 23, 2023).

<sup>[2]</sup> *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (Feb. 27, 2023), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-448.html>.

<sup>[3]</sup> *Moroney*, Slip Op. at 13.

<sup>[4]</sup> *Id.*

<sup>[5]</sup> *Id.* at 14–19.

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