Harvard Law School Forum on Corporate Governance

Supreme Court Holds That CFPB's Structure Is Unconstitutional

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On June 29, the Supreme Court issued its long-awaited opinion in *Seila Law LLC v. Consumer Financial Protection Bureau*, finally resolving the question that has dogged the new agency since its inception: Is the leadership structure of the Consumer Financial Protection Bureau (CFPB) constitutional? Writing for a 5-4 majority, Chief Justice John Roberts ruled that the CFPB structure—"an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met"—violates the Constitution's separation of powers.

For financial services companies regulated by the CFPB, the most important aspect of *Seila Law* is not the headline constitutional defect, but the remedy. Choosing "a scalpel rather than a bulldozer," the Court did not invalidate the CFPB. The Court held 7-2 that the Director's constitutionally offensive removal protection could be severed from the CFPB's other authorities, thus bringing the Director (and with her, the CFPB) under Presidential control, while leaving the CFPB's other powers in place.

While *Seila Law* is an important case in the evolving doctrine of separation of powers as applied to independent agencies, the case has three immediate consequences for financial services companies. First, the CFPB is here to stay, and its broad authorities and other controversial aspects (such as its insulation from Congressional appropriations) remain intact. Second, the CFPB's Director is now directly accountable to the President, significantly raising the stakes in the 2020 election for the agency's regulatory and enforcement agenda. Third, the Court left one important question unanswered: it declined to address the effect of its ruling on prior CFPB rules and enforcement actions. While we believe the agency will attempt to cure the constitutional defect, we expect continued litigation—and uncertainty—on this issue.

Background

In response to the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), creating the CFPB as an independent financial regulator within the Federal Reserve System. The CFPB has expansive authority to "implement and, where applicable, enforce Federal consumer financial law," which includes 19 enumerated federal consumer-protection statutes and the Dodd-Frank Act's broad prohibition on unfair, deceptive, and abusive acts and practices. The CFPB's authority over consumer financial

products and services includes rulemaking authority with respect to the enumerated statutes, the ability to issue orders, including orders prohibiting products and services which it concludes are "abusive" or substantively unfair, as well as the power to impose significant financial penalties on financial services companies. The CFPB is funded through the Federal Reserve System, and thus is not subject to Congressional constraint through the appropriations process. Although technically housed within the Federal Reserve System, the CFPB also is not subject to oversight or control by the Board of Governors of the Federal Reserve System. As a result, the CFPB was created to be an independent agency, largely unconstrained by Congress or the Federal Reserve System. The CFPB is headed by a single Director appointed by the President, by and with the advice and consent of the Senate, for a five-year term. The Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office."

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a California-based law firm that provides debt-related legal services to consumers. Seila Law refused to comply, objecting that concentrating the CFPB's authority in a single Director with for-cause removal protection violated the separation of powers doctrine. The CFPB filed a petition to enforce its demand in federal district court. The district court rejected Seila Law's constitutional objection and ordered the law firm to comply with the demand. The Court of Appeals for the Ninth Circuit affirmed.

Case Analysis: *Seila Law*

The Supreme Court granted certiorari to address the constitutionality of the CFPB's single-Director structure. That decision was telling in and of itself, given that the Ninth Circuit's ruling was in accord with *PHH Corporation v. CFPB*, the D.C. Circuit's *en banc* opinion upholding the Director's removal protection. As many had expected, the Supreme Court reversed the Ninth Circuit and held that Congress's restriction on the President's power to remove the CFPB's Director violated the separation of powers doctrine.

The Court began its analysis from the premise that Article II of the Constitution gives the entire executive power to the President alone, "who must 'take care that the Laws be faithfully executed.'" Lesser officers who aid the President in his or her duties "must remain accountable to the President, whose authority they wield." The President's power to remove these lesser officers at will is foundational to the President's executive function and "has long been confirmed by history and precedent." The Court held that "[w]hile we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power." The Court found that the CFPB's Director fit that bill. In creating the CFPB, Congress "vest[ed] significant governmental power in the hands of a single individual accountable to no one." Such an agency "has no basis in history and no place in our constitutional structure."

Next, the Court turned to the remedy. Seila Law argued that the Director's unconstitutional removal protection rendered the "entire agency … unconstitutional and powerless to act." The Court disagreed. Relying on the Dodd-Frank Act's severability clause, the Court's severability precedent, and the proposition that "Congress would have preferred a dependent CFPB to *no agency at all*," the Court ruled that the Director's removal protection is severable from the CFPB's other statutory authorities. "The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will."

Finally, the Court expressly declined to address how its holding affects prior CFPB regulatory and enforcement actions. The government had argued that the Court need not reach the constitutional question because the CFPB's demand to Seila Law had since been ratified by an Acting Director accountable to the President. The Court remanded the question of ratification to the lower courts, noting that it "turns on case-specific factual and legal questions not addressed below and not briefed here."

Implications

Seila Law is an important case for the canons of administrative law and the separation of powers doctrine. But for financial services companies regulated by the CFPB, it has meaningful (and immediate) practical consequences.

First, the CFPB has escaped Supreme Court review with its authorities basically untouched. Absent Congressional action, the CFPB will (i) continue to be run by a single Director, (ii) continue to wield expansive rulemaking, supervisory, and enforcement authority over the multi-trillion dollar market for consumer financial products and services, and (iii) continue to be insulated from Congressional control via the appropriations process.

Second, the CFPB's Director is now directly accountable to the President—whoever that person may be. Typically, financial regulators have a measure of insulation from the political process to provide consistency and certainty to financial markets. With this decision, the election of the next President—and the prospect of a Democratic administration—could result in significant and immediate changes to the CFPB's regulatory and enforcement agenda.

Third, while *Seila Law* secured the CFPB's future, the Court left in place significant uncertainty as to its past. This past includes major enforcement actions and rulemakings that have reshaped the market for consumer financial products and services over the last nine years. Of course, it remains to be seen what appetite financial services companies have to challenge the CFPB's prior rules and enforcement orders. And, we expect the CFPB will attempt to remedy the constitutional defect by ratifying the agency's past actions or perhaps invoking the *de facto* officer doctrine. Yet, the availability of either remedy is an open question. Ratification in particular is a live dispute in both *Seila Law* and a pending *en banc* appeal before the Fifth Circuit, *Consumer Financial Protection Bureau v. All American Check Cashing*. Ratification of prior agency actions was also left unresolved in another thread of the Supreme Court's recent separation of powers jurisprudence. In *Lucia v. SEC*, the Court found that the SEC hired administrative law judges (ALJs) in violation of the Appointments Clause, but offered limited remedial guidance aside from instructions that Lucia was entitled to a "new hearing before a properly appointed" ALJ. While litigating Lucia's challenge, the SEC issued an order purporting to ratify its past ALJ appointments by approval of the Commission itself. The Court acknowledged that order, but declined to address its validity.

The complete publication, including footnotes, is available here.