

Fifth Circuit Court of Appeals Invalidates Small-Dollar Rule, Throws the Future of the CFPB Into Question

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On October 19, 2022, the Fifth Circuit Court of Appeals [issued its opinion](#) in *Community Financial Services Association of America, et al. v. CFPB (CFSA v. CFPB)* invalidating the [CFPB's Payday, Vehicle-Title, and Certain High-Cost Installment Loans rule](#) (Small-Dollar Rule). The three-member panel decision calls into question the future viability of the CFPB by declaring unconstitutional the regulator's funding mechanism.

In 2017, the CFSA and the Consumer Service Alliance of Texas sued the CFPB challenging the agency's Small-Dollar Rule. In particular, the plaintiffs contended that by promulgating the rule, the Bureau acted arbitrarily and capriciously and exceeded its statutory authority. Moreover, the plaintiffs alleged that the CFPB was unconstitutionally structured because the CFPB director's insulation from removal and the CFPB's independent funding mechanism violates separation-of-powers principles.

While the panel found that “for the most part, Plaintiff’s claims miss their mark . . . one arrow . . . found its target: Congress’s decision to abdicate its appropriations power under the Constitution, i.e. to cede its power of the purse to the Bureau, violates the Constitution’s structural separation of powers.” Consequently, the court reversed a district court’s decision [granting summary judgment in favor of the CFPB](#), and vacated the Small-Dollar rule.

What Comes Next? The CFPB has the option of either requesting an *en banc* rehearing before the entire Fifth Circuit Court of Appeals, or filing a certiorari petition before the United States Supreme Court. Of course, the immediate effect is that the Small-Dollar rule will continue to be held in abeyance for the foreseeable future. Moreover, the decision itself is only binding on federal courts within the Fifth Circuit, and does not immediately affect the Bureau's broader activities. As such, we can expect that the CFPB may continue to operate normally, despite the injection of uncertainty regarding the validity of future actions it may take.

Nevertheless, the substance of the panel decision calls into question all CFPB rulemaking, supervisory, and enforcement activities. Indeed, the panel states that “[b]ecause the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency’s unconstitutional funding scheme, there is a linear nexus between the infirm provision (the Bureau’s funding mechanism) and the challenged action (promulgation of the rule). In other words, without its unconstitutional funding, the Bureau lacked any other means to promulgate the rule.” This reasoning is arguably applicable to all CFPB activities, and could pose a substantial challenge to the future viability of the CFPB absent Congressional action. We will continue to closely monitor this litigation.

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