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The Supreme Court's CFPB Decision: Implications for Consumer Finance & Other Agencies

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Though it took different majorities to get there, this week's Supreme Court opinion on the CFPB, *Seila Law v. CFPB*, reached the two most widely anticipated results: (1) the Dodd-Frank Act's "for cause" limitation on the President's authority to remove the agency's single Director was an unconstitutional restriction on the President's Article II powers, *but* (2) the sole remedy for that defect is to strike just that limitation — so that President may terminate the Director at will — rather than to dismantle the agency or to weaken its substantial powers in any way.[1] Simple enough, the CFPB "may therefore continue to operate." But the opinion also creates other, important questions inside the consumer-finance world, and some of its reasoning arguably raises constitutional issues about other federal agencies whose leaders are insulated from removal by the President, including agencies that unlike the CFPB are led by commissions or boards.

This Alert focuses on those open questions and issues, the future implications of *Seila Law*, both for those within the CFPB's reach and for other federal agencies.

A. Implications for the Consumer Finance Industry

Seila Law clearly leaves intact what it described as the CFPB's "vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy."[2] It also permits any new President to remove the last President's Director upon inauguration, whereas — for example — even if the country elects a new President this Fall, President Trump's Director would otherwise have been at least entitled to serve out her term through 2023.

But the Court left open many other potential consequences of its decision, starting with the outcome of the dispute between the two parties before it. That dispute is whether the CFPB may enforce a Civil Investigative Demand issued

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1 The Court's five so-called "conservative" justices joined the opinion holding the removal restriction to be unconstitutional, with all four "liberal" justices dissenting. For the holding that severance of that restriction was the appropriate remedy, however, the opinion's author (Chief Justice Roberts) lost two of the conservatives (Justices Thomas and Gorsuch), but prevailed because all four liberals concurred in that portion of the judgment.

2 More colorfully, the Court elsewhere said the agency "acts as a mini-legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens."

originally by President Obama's CFPB Director, who the Court held was unconstitutionally insulated from removal by the President at that time, Donald Trump. Thus, these parties still must litigate the CFPB's argument that its *next* Director — *Acting* Director Mulvaney, who was not insulated from removal by President Trump due to his "Acting" status — cured that problem by somehow "ratifying" the enforcement. Other, similarly situated targets of pending investigations or enforcement proceedings brought or continued under a Director insulated from removal may now attempt to resist based on the case's holding that the removal restriction was, in fact, unconstitutional.

The various opinions in *Seila Law* indicate that outcome of such challenges could differ depending on the facts. For instance, in a proceeding initiated under current Director Kraninger, would it matter that she (unlike President Obama's Director) has always served the same President who appointed her? Would a target's position be weaker if the proceeding began — or at least continued — after she declared nine months ago that the CFPB, too, believed the removal restriction to be unconstitutional? And what about concluded CFPB proceedings?

After the Court heard oral argument in *Seila Law* in March, we discussed issues that might be raised by such challenges in this Alert. In general, we were skeptical, for reasons discussed there, that challenges would succeed (with the possible exception of those focused on the period when President Obama's Director served under President Trump), but we are continuing to study this week's opinions. In that regard, we note that one of the opinions, though joined only by Justices Thomas and Gorsuch, reasoned that the mere "continuance of [an] enforcement action by" Director Kraninger before Monday's decision formally striking her removal protection inflicted a distinct "constitutional injury" on the target, requiring dismissal. The majority opinion left that issue for the lower courts.

B. Other Federal Agencies

Perhaps the most important new points in *Seila Law* are the limitations it put on the principle that removal restrictions generally *are constitutional* for independent agencies led by a group of officers (usually "commissioners") with staggered terms. There are many such agencies, including the FTC, SEC, CFTC and FERC. This principle for multi-member commissions is based on a New Deal-era precedent, *Humphrey's Executor*, which upheld a statute with a "for-cause" limitation on the removal of FTC Commissioners.

While *Seila Law* declined to over-rule *Humphrey's*, it made clear that going forward, the old case will be strictly limited to its facts, which arguably do not align with some of today's modern independent agencies. *Seila Law*'s view is that *Humphrey's* depended in large measure not only on the multi-member, staggered composition of a commission common to many agencies, but also on the earlier Court's conclusion that that the FTC at the time did not exercise true "executive Power" as described in Article II of the Constitution.

According to *Seila Law*, that "conclusion" by the earlier Court "has not withstood the test of time," apparently due to the modern view of "executive Power" and the current understanding of the FTC's authorities. Indeed, the *Seila Law* majority even allowed for the possibility that the FTC at the time of *Humphrey's* itself "possessed broader … powers than the *Humphrey's* Court appreciated," thus clarifying that the precedent is limited only to "the set of powers [that] Court considered" within the four corners of its opinion. As the majority put it, those limitations mean that removal restrictions on commission members may be upheld only if the agency is performing duties merely "as a legislative or as a judicial aid," as opposed to exercising "substantial executive power." Two other justices, who would have over-ruled *Humphrey's* outright, observed in their concurrence that these limitations on the precedent are at least a "step in the right direction."

Seila Law had no trouble concluding that the CFPB wields "substantial executive power," given its vast authority to promulgate rules for "a major segment of the U.S. economy," to "unilaterally issue final decisions awarding legal and equitable relief," and to seek — via a "quintessentially executive power not considered in *Humphrey's*" — "daunting monetary penalties against private parties" in federal court. More significantly, though, the Court went on to list a vast array of factors that apparently should be weighed in a future challenge to removal restrictions on the tenure of agency leaders, making any challenge a case-specific and fact-intensive undertaking. The factors discussed by the Court included, but was not limited to:

- the scope of the agency's general powers to make rules, conduct administrative adjudications unilaterally, and prosecute enforcement actions in court, including how those powers measure up to what the Court found "substantial" in the case of the CFPB;
- the length of the leaders' statutory terms in office (given that longer terms diminish a President's ability to influence the agency when she chooses);

- whether, like the CFPB, the agency receives “funds outside the appropriations process,” which according to the Court “aggravates the agency’s threat to Presidential control”; and
- whether the agency can regulate, and / or bring enforcement actions against “purely private actors” (powers lacked, the Court noted, by the overseer of Fannie Mae and Freddie Mac for example (the FHFA), which otherwise seems especially vulnerable given its unusual, single-person (rather than Commission) leadership structure.

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If you have any questions about the topic of this Alert or other related issues, please contact the author, a McGuireWoods attorney with whom you have worked, or any McGuireWoods attorney in your practice area or industry.