

Mortgage Bankers Association Files Amici Brief in CFPB Constitutionality Case

May 30, 2023

On May 15, the Mortgage Bankers Association, the National Association of Home Builders, and the National Association of Realtors filed a joint *amici curiae* (friend of the court) brief in connection with the case challenging the constitutionality of the funding structure of the Consumer Financial Protection Bureau (CFPB) as set forth in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd Frank Act), [Consumer Financial Protection Bureau v. Community Financial Services Assn.](#) (Brief). The case, which is an appeal of a 5th Circuit decision finding the CFPB's funding to be in violation of the Constitution's Appropriations clause, was accepted by the Supreme Court on February 27, 2023, but was deferred for hearing until the Court's 2023–2024 term.¹

Concerns Raised

While not raising arguments with respect to the constitutionality of the CFPB's funding structure (whereby its annual funding is determined as a maximum percentage of the Board of Governors of the Federal Reserve System's budget), the Brief raises concerns about the impact to the filers' businesses and the US economy writ large if the CFPB's funding structure is found to be unconstitutional, and the agency's existing regulations, opinions and guidance are deemed no longer operative. In particular, the Brief notes that there could be "potentially catastrophic consequences" if the CFPB's existing rules related to the mortgage and real-estate markets are placed in doubt.

In presenting its arguments, the Brief highlights practical considerations, noting that "virtually all financial transactions for residential real estate in the United States depend upon compliance with the CFPB's rules, and consumers rely on the rights and protections provided by those rules. Importantly, the industry has invested billions of dollars into structuring its operations for compliance with the CFPB's regulations and other guidance. . . . Lenders, servicers, and consumers have operated by the CFPB's guideposts for more than ten years, and without those rules substantial uncertainty would arise as to how to undertake mortgage transactions in accordance with federal law."

The Brief also speculates about what will happen if the Court issues a determination that finds that all CFPB regulations, not just those issued in connection with the case in issue, are invalid, stating that such an expansive finding "could set off a wave of challenges and the *housing market could descend into chaos*, to the detriment of all mortgage borrowers" (emphasis added). Were all actions taken by the CFPB deemed to be unconstitutional because of a defect in its funding, the Brief asserts that there would be "challenges—brought by consumers, governmental agencies, or other industry participants—against real estate professionals, mortgage lenders, and mortgage servicers, with potentially crippling liability."

¹ Note that, in recent briefing filed by the CFPB in another case where it is a party, the CFPB noted that the *CFS* case is scheduled for the Supreme Court's 2023–2024 term and that any decision was "unlikely until the first half of 2024, and potentially not until June of that year."

Amici further argued in the Brief that any determination that the CFPB’s funding structure is unconstitutional should impose the least harm by “further[ing] Congress’s intent to promote financial stability by granting de facto validity to past actions that the CFPB took under its current funding scheme.”

What This Means

As of the date of this advisory, there have been approximately a dozen amici briefs filed. Filers include the State of New York, the State of West Virginia, the AARP, military and veterans organizations, and a group of current and former members of the US Congress. While most filers focus on the constitutionality question, the Brief is unique given its foundations in policy-based arguments. Given the size of the US residential mortgage loan market (approximately \$11.92 trillion dollars pursuant to one source), it is likely important for the Court to understand the economic impact of a potential ruling that finds all previous regulations issued by the CFPB to be defective (and therefore no longer operative). Of course, there is still time for Congress to act to address the CFPB’s funding structure before the case is heard (or even decided), but the impending election cycle makes such a resolution highly unlikely.

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