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Seila Law Decision Likely Has Major Implications for CFPB Actions

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On June 29, 2020, the Supreme Court issued its much-awaited decision in *Seila Law v. Consumer Financial Protection Bureau*,¹ holding that the single-Director, independent-agency structure of the Consumer Financial Protection Bureau ("CFPB") violates the Constitution's separation of powers doctrine. The decision has major implications for the CFPB, other independent agencies, and federally regulated parties, including in regulatory challenges and enforcement actions.

Overview of the CFPB

As part of the congressional response to the 2008 Financial Crisis, the CFPB was created pursuant to Dodd-Frank as an independent financial regulator with oversight over consumer debt products. The CFPB was uniquely structured as an administrative agency. Instead of a multi-person board or commission, the CFPB reported to a single Director, largely protected from removal by the President except for cause (inefficiency, neglect, or malfeasance). Unlike other single-administrator agencies like the Office of the Comptroller of the Currency, the CFPB was vested with rulemaking, enforcement, and extensive adjudicatory powers over firms that it did not charter or license on a broad range of consumer protection issues. It could implement binding regulations, conduct investigations, issue subpoenas, issue civil investigative demands ("CID"), initiate administrative adjudications, bring civil actions in federal court, and could conduct its own administrative proceedings against private entities to ensure compliance with its regulations.

Case Background

In 2017, the CFPB issued a CID to Seila Law LLC, a California law firm, as part of an inquiry into whether the law firm violated consumer protection law. The CID directed Seila Law to produce information and documents related to its business practices. Seila Law objected to the CID on grounds that CFPB's leadership structure was a violation of the Constitution's separation of powers doctrine. Ultimately, the CFPB filed a petition to enforce the CID in federal District Court, which ordered Seila Law to comply with the demand. The Ninth Circuit affirmed the District Court's decision. The Supreme Court granted certiorari to address the constitutionality of CFPB's structure and whether it violates separation of powers and appointed *amicus curiae* to defend the CFPB's constitutionality. The Supreme Court also requested oral argument on whether, if the CFPB structure does violate separation of powers, the CFPB Director's removal protection can be severed from the rest of the Dodd-Frank Act, which would allow the CFPB to remain operational despite the violation.

Seila Law Decision

The Supreme Court held that the CFPB structure—specifically the Director’s removal protection—violates the Constitution’s separation of powers doctrine. The Court explained that “such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”² The Supreme Court expressed concern with the extent of vested executive power and lack of external accountability inherent in the CFPB structure. The Supreme Court explained that “the CFPB’s single-Director configuration is [] incompatible with the structure of the Constitution. . . [because it vests] significant governmental power in the hands of a single individual who is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”³

The Court also highlighted the employment protection afforded to the CFPB Director and held that in order for a subordinate executive to hold the power of the CFPB Director, the person holding the position must be subject to “at-will employment.”

Notwithstanding the conclusion that the CFPB’s structure violated Article II of the Constitution, the Supreme Court did not grant *Seila Law* the relief it sought. While the employment protection afforded to the CFPB Director was struck down as an unconstitutional aspect of the CFPB’s structure, as previewed by its oral argument request, the Supreme Court severed the employment provision from its assessment of the general constitutionality of the CFPB. As a result, the CFPB itself can remain in place and have the same enforcement and rulemaking powers, but the Director is now removable at-will.

The issue of whether *Seila Law* must respond to the CID now returns to the Ninth Circuit. As the Court explained in its decision, the CID that *Seila Law* had challenged was subsequently ratified by an *Acting* Director, whom the President could remove at his discretion.⁴ As a result, because the Supreme Court found the issue of the Director’s removal protection to be severable, it remanded the case to the Ninth Circuit Court of Appeals to consider whether the CID issued to *Seila Law* can still be enforced since it was ratified by a CFPB Director accountable to the President.

Potential Implications

The *Seila Law* decision has potential implications for ongoing CFPB enforcement actions and with forward-looking conduct provisions that the CFPB has included in past settlements. On July 7, 2020, the CFPB ratified most regulatory actions that it took from January 4, 2012 through June 30, 2020 in an attempt to proactively respond to the *Seila Law* decision.⁵ However, despite these ratifications, prior and potentially ongoing CFPB requests for information and enforcement actions—originating when the agency was unconstitutionally structured—are placed into question, pending the lower court’s resolution of whether the CFPB effectively ratified actions taken by an unconstitutional Director. Accordingly, any past and pending actions undertaken by the CFPB may potentially be deemed invalid absent a court-recognized ratification or waiver of the separation of powers objection.

There is also an open question regarding whether and how the *Seila Law* decision will impact the status of other independent agencies like the Securities and Exchange Commission, Federal Trade Commission, Commodities Futures Trading Commission, and Federal Deposit Insurance Corporation. Arguably, under the Court’s reasoning in *Seila Law*, these agencies may likewise be subject to similar separation of powers challenges, and such challenges may implicate and call into question the agencies’ rulemaking, information requests, and enforcement activity.

Although it may take years for any such challenges to reach the Supreme Court (if they do at all), it is important that companies and individuals involved in pending CFPB or similar agency matters secure their objection to any *Seila Law*-type separation of powers objection in order to protect against potential waiver. Parties can and should preserve this issue, particularly in agency adjudications, to avoid losing an opportunity if and when other independent agencies are successfully challenged.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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¹ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. ____ (2020) (June 26, 2020).

² *Id.*, Slip Op. at 8-9.

³ *Id.*, Slip Op. at 4.

⁴ Such reasoning is consistent with the Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which held that a separation of powers violation deprived an officer—an SEC Administrative Law Judge in that instance—of authority to act and thereby rendered invalid that officer's actions taken prior to the defects being cured. The *Seila Law* decision therefore continues the trend of leaving it to the lower courts to decide whether any subsequent ratification cures an otherwise invalid agency action due to a separation of powers violation.

⁵ CFPB Ratification of Bureau Actions, 12 C.F.R. Chapter X (2020), available at https://files.consumerfinance.gov/f/documents/cfpb_ratification_bureau-actions_2020-07.pdf.

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