

# CFPB Structure to Be Tested by the Supreme Court

Wednesday, December 4, 2019

## Andrew Arculin

Partner | 202.344.4588 | [raarculin@Venable.com](mailto:raarculin@Venable.com)

## Meredith Boylan

Partner | 202.344.8062 | [mboylan@Venable.com](mailto:mboylan@Venable.com)

## Jonathan Pompan

Partner and Co-Chair | 202.344.4383 | [jipompan@Venable.com](mailto:jipompan@Venable.com)

## Gerald (Gerry) Sachs

Partner | 202.344.4269 | [gsachs@Venable.com](mailto:gsachs@Venable.com)

## Peter Frechette

Associate | 202.344.4616 | [psfrechette@Venable.com](mailto:psfrechette@Venable.com)

**VENABLE** LLP

## Welcome

**This presentation is being recorded and will be available at [www.Venable.com](http://www.Venable.com) next week.**

*Please follow the onscreen prompts for submitting questions. Contacting us does not create an attorney-client relationship. While Venable would like to hear from you, we cannot represent you, or receive any confidential information from you, until we know that any proposed representation would be appropriate and acceptable, and would not create any conflict of interest. Accordingly, do not send Venable (or any of its attorneys) any confidential information.*

*This presentation is for general informational purposes only and does not represent and is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can be provided only in response to specific fact situations.*

*This presentation does not represent any undertaking to keep recipients advised as to all or any relevant legal developments.*

*ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.*

**VENABLE** LLP

© 2019 / Slide 2

## CLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1.25 hours, of which 1.25 hours applies to the general credit requirement, and by the State Bar of New York in the amount of 1.25 credit hours, of which 1.25 credit hours can be applied toward the Areas of Professional Practice requirement. Venable certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California and State Bar of New York, which govern minimum continuing legal education. Venable is a State Bar of California and State Bar of New York approved MCLE provider.

**A code will be distributed through the Q&A chat section at the end of the program, and a CLE submission form will be sent to participants next week via email.**

**VENABLE** LLP

© 2019 / Slide 3

## Presenters



**Andrew Arculin**  
Partner, Consumer Financial Services  
202.344.4588  
raarculin@Venable.com



**Meredith Boylan**  
Partner, Consumer Financial Services  
202.344.8062  
mlboylan@Venable.com



**Jonathan Pompan**  
Partner and Co-Chair, Consumer Financial Services  
202.344.4383  
jlpompan@Venable.com



**Gerry Sachs**  
Partner, Consumer Financial Services  
202.344.4269  
gsachs@Venable.com



**Peter Frechette**  
Associate, Consumer Financial Services  
202.344.4616  
psfrenchette@Venable.com

**VENABLE** LLP

© 2019 / Slide 4

## Today's Topics

- Consumer Finance Protection Bureau (CFPB) Introduction and Overview
- Challenges to the Constitutionality of the CFPB
- *Seila Law LLC v. CFPB*
- Effects of an Unconstitutional CFPB and Arguments About the Bureau's Structure
  - CFPB Enforcement Actions
  - State Enforcement and Litigation
  - Supervisory Activity
  - Rulemaking Activity

VENABLE<sub>LLP</sub>

© 2019 / Slide 5

---

## Introduction & Overview

---

VENABLE<sub>LLP</sub>

© 2019 / Slide 6

## Background of the CFPB

- Independent Agency created by Congress in 2010 through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Title X: Consumer Financial Protection Act).
- The CFPB was created to regulate the offering and provision of consumer financial products and services under federal consumer financial laws.
- The CFPB is designed to ensure that the federal consumer financial laws are enforced consistently so that consumers may access markets for financial products, and so that these markets are fair, transparent, and competitive.
- The CFPB has exclusive authority to enforce federal consumer financial laws against non-depository covered persons (“non-banks”) and has exclusive federal consumer law supervisory authority and primary enforcement authority over insured depository institutions with over \$10 billion in assets.

VENABLE<sub>LLP</sub>

© 2019 / Slide 7

## Structure of the CFPB

- **CFPB Established:** “There is established in the Federal Reserve System, an independent bureau to be known as the ‘Bureau of Consumer Financial Protection’, which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of Title 5.”
- **Officer of the United States:** A single Director serves as the “head of the Bureau.”
- **Appointment:** The Director is appointed by the President, by and with the advice and consent of the Senate and serves a 5 year term. The Director may continue to serve the expiration of the term of appointment, until a successor has been appointed and qualified.
- **Removal:** “The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.” (the “For-Cause Removal” Provision).

VENABLE<sub>LLP</sub>

© 2019 / Slide 8

## Challenges to the Constitutionality of the CFPB

VENABLE LLP

© 2019 / Slide 9

## Challenges to the Constitutionality of the CFPB

### A non-exhaustive list:

- *CFPB v. Navient Corp.*, No. 3:17-CV-101 (M.D.Pa. Aug. 04, 2017)
- *CFPB v. Future Income Payments, LLC*, 252 F. Supp.3d 961 (C.D. Cal 2017)
- *John Doe Company v. CFPB*, 235 F. Supp. 3d 194 (D.D.C. 2017)
- *CFPB v. Think Finance*, No. CV-17-127-GF-BMM (D. Mont. Aug. 03, 2017)
- *CFPB v. All American Check Cashing, Inc.*, NO. 3:16-cv-356-WHB-JCG (S.D. Miss. Mar. 21, 2018)
- *CFPB v. RD Legal Funding, LLC*, 332 F.Supp.3d 729 (S.D.N.Y. 2018)
- *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019)
- *PHH Corporation v. CFPB*, 881 F.3d 75 (D.C. Cir. Jan. 2018)
- *CFPB v. Borders & Borders, PLC*, No. 3:13-CV-01047-CRS-DW (W.D. Ky. Jul. 12, 2017)
- *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015)
- *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684 (D.C. Cir. 2015)
- *CFPB v. TCF Nat'l Bank*, 2017 U.S. Dist. LEXIS 221325 (D. Minn. Sep. 08, 2017)
- *CFPB v. Ocwen Fin. Corp.*, 2019 U.S. Dist. LEXIS 152336 (S.D. Fla. Sep. 05, 2019)
- *Doe Co. v. Cordray*, 849 F.3d 1129 (D.C. Cir. 2017)
- *CFPB v. D & D Mktg.*, 2016 U.S. Dist. LEXIS 194709 (C.D. Cal. 2016)
- *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015)
- *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177 (D.D.C. 2016)
- *CFPB v. NDG Fin. Corp.*, 2016 U.S. Dist. LEXIS 177756 (S.D.N.Y. Dec. 02, 2016)
- *CFPB v. Nationwide Biweekly Admin., Inc.*, 2017 U.S. Dist. LEXIS 145923 (N.D. Cal. Sep. 08, 2017)

VENABLE LLP

© 2019 / Slide 10

## Background: *PHH Corp. v. CFPB*

- A 2014 CFPB enforcement action involving alleged violations of the anti-kickback provisions of RESPA.
- On administrative appeal, Director Richard Cordray increased the disgorgement amount from \$6.9 million to \$119 million.
- PHH then appealed to the Court of Appeals for the D.C. Circuit.
- Among other holdings, the three-judge panel held that the CFPB's structure was unconstitutional, a defect it sought to cure by striking the for-cause removal provision.
- The opinion by then-Judge (now Justice) Kavanaugh would have allowed the enforcement action to proceed on remand to the agency after the court severed the removal provision from the statute.
- The CFPB appealed to the full D.C. Circuit sitting en banc.



VENABLE<sub>LLP</sub>

© 2019 / Slide 11

## *PHH Corp. v. CFPB*

- D.C. Circuit (en banc)
  - Disagreed with the opinion of the panel, and affirmed the constitutionality of the CFPB.
  - Argued that the Supreme Court had previously upheld for-cause removal protections for the heads of another independent agency, the FTC (*Humphrey's Executor*) and concluded that the CFPB's "single-member structure" did not cast doubt on the constitutionality of the provision protecting the CFPB Director from removal.
- Judge (now Justice) Kavanaugh's Dissent:
  - "... a case about executive power and individual liberty."
  - Concluded that the exception in *Humphrey's Executor* for independent agencies is limited to agencies headed by multimember bodies.

VENABLE<sub>LLP</sub>

© 2019 / Slide 12

## Unitary Executive Theory

### Federalist

- The Constitution lodges all “executive” power in the hands of the president.
- The president has plenary or unlimited power over the execution of administrative functions.
- “Strong” Unitary Executive Theory.

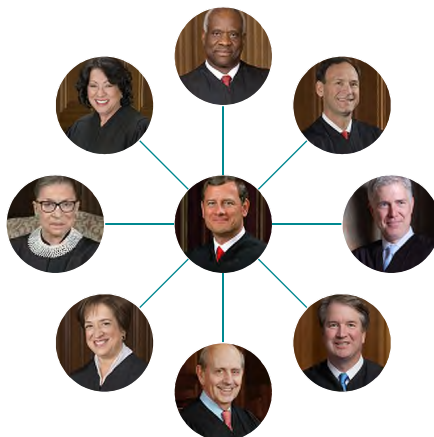
### Liberalism

- Congress has a wide degree of authority to structure government as it sees fit – including whether an officer is removable by the president.
- Acknowledges quasi-legislative and quasi-judicial power being exercised by the executive branch.
- “Weak” Unitary Executive Theory.

VENABLE<sub>LLP</sub>

© 2019 / Slide 13

## Unitary Executive Theory before the Supreme Court



VENABLE<sub>LLP</sub>

© 2019 / Slide 14

---

## **Seila Law LLC v. CFPB**

---

**VENABLE**<sub>LLP</sub>

© 2019 / Slide 15

## **Seila Law LLC v. CFPB**

- In 2017, Seila Law LLC refused a CFPB civil investigative demand (CID) and filed a petition for the CFPB to set aside the demand.
- Then Director Richard Cordray denied the request, and Seila Law submitted partial responses, reiterated its objections, and declined to provide further information or documents.
- The CFPB filed a petition to enforce the CID in federal district court and prevailed.
- Seila Law appealed to the Ninth Circuit, which affirmed based primarily on the majority opinion from the D.C. Circuit en banc decision *PHH Corp. v. CFPB*, and then Seila Law filed its petition for certiorari.
- The Supreme Court granted the petition on October 18, 2019.



**VENABLE**<sub>LLP</sub>

© 2019 / Slide 16



## ***Seila Law LLC v. CFPB***

- What's Next:
  - Petitioner's and Respondent's briefs on the merits are due December 9, 2019.
  - Amicus Curiae in Support of the Judgment's brief on the merits is due January 15, 2020.
  - Oral Argument is scheduled for March 3, 2020.
  - Opinions typically handed down at the end of the Court's term (late June/early July).

VENABLE<sub>LLP</sub>

© 2019 / Slide 17

## **Constitutional Argument**

- Article II, Section 1 – Vesting executive power with the President of the United States.
- Article II, Section 3 – Requiring the President to “take Care that the Laws be faithfully executed.”
- **The Argument:** The independence of the Director of the CFPB prevents the President from fulfilling the duty to “take Care that the Laws be faithfully executed.” The statutory restriction on the President's authority to remove the Director of the CFPB violates the constitutional separation of powers.
- **The Precedent:** The Supreme Court has upheld certain “for-cause removal” provisions in other agencies, but only in the context of an agency led by a multi-member panel or commission (as opposed to a single person).
- **Circuit Split:** The 9th Circuit and the D.C. Circuit have held the CFPA's appointment provision does not violate separation of powers doctrine, but the en banc 5th Circuit has held that the nearly identical structure of the Federal Housing Finance Agency is unconstitutional.

VENABLE<sub>LLP</sub>

© 2019 / Slide 18

## Issues before the Supreme Court

- Argument on March 3, 2020
- Whether the vesting of substantial executive authority in the CFPB, an independent agency led by a single director, violates the separation of powers; and
- Whether, if the CFPB is found unconstitutional on the basis of the separation of powers, 12 U.S.C. §5491(c)(3) can be severed from the Dodd-Frank Act.



VENABLE<sub>LLP</sub>

© 2019 / Slide 19

## Overview of Parties' Arguing Positions

- **Seila Law LLC:** The CFPB's structure violates the Constitution and cannot be remedied – the creation of the agency is void and the CFPB has no power to enforce its CID.
- **Justice Department (and CFPB):** The CFPB's structure violates the Constitution, but the appropriate remedy is to sever the "for-cause removal" provision. The CFPB's regulatory, supervisory, and enforcement powers are unaffected, but the CFPB becomes an executive branch agency.
  - The CFPA should remain "fully operative" and the CFPB would continue to function as before, just with a Director who "may be removed at will by the President." (Letters from Director Kathleen Kraninger to the Hon. Nancy Pelosi and the Hon. Mitch McConnell (September 17, 2019))
  - Seila Law and other respondents would still be required to respond to CFPB CIDs.
  - Regulatory, supervisory, and enforcement authorities would be unaffected.
- **Amicus Curiae in Support of the Judgment:** The CFPB's structure does not violate the Constitution, and the Ninth Circuit's opinion should be affirmed.

VENABLE<sub>LLP</sub>

© 2019 / Slide 20

---

## Effect of an Unconstitutional CFPB and Arguments About the Bureau's Structure

---

VENABLE<sub>LLP</sub>

© 2019 / Slide 21

### Outcomes and Remedies

- **Scenario 1:** The Supreme Court could uphold the Ninth Circuit's opinion and affirm the constitutionality of the CFPB. This would settle the issue with no change to the CFPB's structure and no impact on its authorities and activities.
  - Ninth Circuit: *Seila Law LLC v. CFPB*
  - D.C. Circuit (en banc): *PHH Corp. v. CFPB*
- **Scenario 2:** The Supreme Court could determine that the CFPB's structure violates the Constitution, and sever the "for-cause removal" provision of the CFPA.
  - The Court applied this solution in the 2010 case *Free Enterprise Fund v. Public Corporation Accounting Oversight Board*.
  - Fifth Circuit: *Collins v. Mnuchin*
- **Scenario 3:** The Supreme Court could determine that the CFPB's structure violates the Constitution, but hold that the "for-cause removal" provision is not severable and/or some other remedy is appropriate, up to possibly invalidating the CFPB and the agency as a whole.
  - Southern District of New York: *CFPB v. RD Legal Funding, LLC*

VENABLE<sub>LLP</sub>

© 2019 / Slide 22

## CFPB Enforcement Actions

- Past Enforcement Actions
- Ongoing Enforcement Actions
  - Current actions: Staying litigation
  - Investigations and CIDs: Challenging CIDs or investigations
- Future Enforcement Actions
  - Creating perceived limits around the Bureau's enforcement authority

VENABLE<sub>LLP</sub>

© 2019 / Slide 23

## State Enforcement and Litigation

- Past Enforcement Actions/Cases under the CFPA
- Ongoing Enforcement Actions
  - Using CFPA authority
  - Joint actions with the CFPB
  - States as gap-fillers in consumer financial protection
- Future Enforcement Actions/Cases: Potentially more aggressive state actions

VENABLE<sub>LLP</sub>

© 2019 / Slide 24

## Supervisory Activity

- Past Examinations
  - Exam findings and matters requiring attention
  - Exam ratings
- Current Examinations
- Future Examinations

VENABLE<sub>LLP</sub>

© 2019 / Slide 25

## Rulemaking Activity

- Final Rules
- Proposed Rules
  - Payday Rule
  - Regulation F: Debt Collection Practices Rulemaking
  - GSE “QM Patch” Advance Notice of Proposed Rulemaking
- Upcoming/Planned Rulemaking Activity
  - The CFPB’s Fall 2019 Regulatory Agenda announced additional rulemaking activities, reviews, and longer-term goals. The Bureau plans on addressing issues with Regulation C implementing the Home Mortgage Disclosure Act (HMDA), as well as PACE financing, business lending data, and remittances. Over the longer term, the CFPB indicated it plans to address feedback on the Loan Originator Compensation Rule under the Truth in Lending Act.

VENABLE<sub>LLP</sub>

© 2019 / Slide 26

---

## Questions?

---

VENABLE<sub>LLP</sub>

© 2019 / Slide 27

## Join Us

### Consumer Financial Services Outlook 2020

January 15, 2020, 2:00 pm – 3:15 pm est

A Complimentary Venable LLP Webinar. Eligible for 1.25 CLE credit hours. [Register here](#).

Members of Venable's Consumer Financial Services Practice will review the current state of federal and state consumer financial protection law and policy, and outline what you and your company need to know about what's ahead. The speakers will share their experiences from the front lines and offer strategies to help you navigate the evolving legal and regulatory landscape.

Topics will include:

- The CFPB's Future, Congress, and Election Year: What it all means
- CFPB Rulemaking Updates: Debt collection, small dollar loans, and more
- FTC, CFPB, and State Attorney General Enforcement and Litigation Trends, and What's Next
- Forging Ahead with Risk and Compliance Initiatives
- Future of Bank FinTech Partnerships and Chartering

This session focuses on providers of consumer financial products and services and their service providers, including nonbanks, banks, and advertisers, in such markets as student loans, mortgage lending and servicing, auto lending, small dollar lending, consumer reporting, consumer credit and related services, money transmission and check cashing, prepaid cards, debt collection, debt relief services, and debt buying.

VENABLE<sub>LLP</sub>

© 2019 / Slide 28



© 2019 Venable LLP.  
This document is published by the law firm Venable LLP. It is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations that Venable has accepted an engagement as counsel to address.

**VENABLE** LLP