

Following *Seila Law* Decision, Fifth Circuit Considers en banc Whether Ratification is Sufficient to Protect CFPB Actions

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In the August 17th edition of the *ARM Compliance Digest*, Hinshaw partner David Schultz briefly reviewed the import of a couple of amicus briefs filed in a 5th Circuit *en banc* hearing. Here is an excerpt from that briefing:

The constitutionality of the CFPB has been the subject of debate and litigation since its inception. We know the Supreme Court in *Seila Law* held unconstitutional CFPB's structure, severing the director's for-cause removal protection but leaving the agency and authority otherwise intact. As a consequence of that ruling, the 5th Circuit en banc panel is considering another constitutional challenge to the agency in *CFPB v All American Check Cashing*.

Due to *Seila Law*, the agency's current Director has been submitting ratifications that declare any regulatory actions taken prior to the Supreme Court's ruling remain valid. Is that lawful? That is being litigated in *CFPB v All American Check Cashing*. This past week the Cato Institute and Pacific Legal Foundation filed amicus curiae briefs in support of the defendant. Cato Institute argues that the "attempt at retroactive constitutional justification is dangerous. An illegitimate exercise of power cannot become legitimate through post-hoc ratification. Allowing such an action would perpetuate the constitutional violation and undermine the separation of powers."

The case presents difficult constitutional issues that may either end up again in the Supreme Court or have a ripple effect on CFPB actions taken pursuant to a ratification.

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