

Cabinet News and Views

Informed analysis for the financial services industry



A Continuing Saga

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Table of Contents:

- [In This Issue ...](#)
- [The Supreme Court Grants Petition to Decide Constitutionality of CFPB Funding](#)
- [FRB Releases LISCC Supervision Manual](#)
- [Expanding Regulatory Reach over Intermediaries That May Constitute Regulated Exchanges](#)
- [Yellen Calls on World Bank to Take Decisive Action on Climate Change](#)

In This Issue ...

President Biden's widely anticipated selection of Fed vice chair Lael Brainard to lead the White House economic team makes perfect sense from just about every angle and was largely praised in economic circles. It was kind of a no-brainer, really, considering Brainard's resume and reputation. But the move leaves a big gap at the Fed at a time when inflation is the top economic concern and the Fed is best positioned to provide leadership and guidance at exactly this inflection point.

In this week's *Cabinet News and Views*, I take a closer look at the Brainard departure from the Fed, along with the 2023 Dodd-Frank Act Stress Test scenarios. We also examine an important Advisory Opinion from the CFPB on mortgage comparison-shopping web sites, a warning from the FCA on cryptoassets, and the European Central Bank's continued focus on climate.

Lots to talk about and debate, so, as always, I welcome your comments and questions. Just drop me a line [here](#) if you'd like to discuss.

Daniel Meade

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The Supreme Court Grants Petition to Decide Constitutionality of CFPB Funding



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On February 27, 2023, the U.S. Supreme Court granted the Consumer Financial Protection Bureau's Petition for a Writ of Certiorari in the closely watched case of *CFPB v. Community Financial Services Association of America*,^[1] and denied the cross-petition filed by Community Financial Services Association of America ("CFSAA").^[2] The CFPB's petition asked the Court to overturn the October 19, 2022 ruling by the United States Court of Appeals for the Fifth Circuit that the CFPB's funding structure is unconstitutional and, therefore, that the CFPB's Payday Lending Rule is invalid.^[3] CFSAA's cross-petition asked the Court to consider two alternative grounds for invalidating the Payday Lending Rule.^[4] This case marks the second time in three years that the Supreme Court will consider the constitutionality of structural features of the CFPB.

In this latest judicial opinion holding that the CFPB's structure is unconstitutional, the Fifth Circuit held that the CFPB's funding structure violated the Appropriations Clause of Article I of the Constitution.^[5] The Appropriations Clause states, in part, that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law."^[6] The CFPB does not receive funds through annual appropriations from the Treasury, but is authorized to request a capped amount of funds from the Federal Reserve System.^[7] The Fifth Circuit held that this arrangement violates the Appropriations Clause because it uniquely insulates the CFPB from the appropriations process.^[8] According to the Fifth Circuit, funding the CFPB outside of the annual appropriations process means that the CFPB has powers of the "purse" and the enforcement "sword" in violation of the Constitution's separation-of-powers doctrine.^[9] As a remedy, the Fifth Circuit vacated the CFPB's Payday Lending Rule because it was finalized while the CFPB was unlawfully funded.^[10] The Fifth Circuit recognized that its ruling contradicted the decision of "every court to consider" the CFPB's funding structure.^[11]

The CFPB's petition challenged the Fifth Circuit's constitutional and remedial rulings. The CFPB argued that Congress "appropriated" funds to the agency as the Appropriations Clause requires when it authorized the CFPB to request and receive funds from the Federal Reserve System.^[12] The CFPB contended that the Fifth Circuit should not have invalidated the Payday Lending Rule because it did not ask whether the funding provision was severable from other CFPB statutes, and misapplied precedent when considering the causal connection between the constitutional defect and the Payday Lending Rule.^[13] The CFPB sought oral argument for the Court's April 2023 sitting,^[14] but the timing of the grant means

that a hearing is unlikely to occur before the Court's October 2023 term. A decision, therefore, could come as late as May or June 2024.

CFSA's cross-petition urged the Court to deny the CFPB's petition, but asked the Court to consider two alternative grounds for vacating the Payday Lending Rule if it were to grant the CFPB's petition: (1) it was promulgated by the CFPB's director while he was unconstitutionally "shielded from removal by President Trump"; and (2) it exceeds the CFPB's authority.^[15] The Supreme Court declined to consider the Fifth Circuit's ruling on those issues.

By granting the CFPB's petition, the Supreme Court will have the opportunity to address significant questions about the meaning of the Appropriations Clause, the appropriate remedy for the purported constitutional violation, and the viability of the CFPB and other federal financial regulators that are funded outside of annual appropriations. As the CFPB explained, the Fifth Circuit's decision has "enormous legal and practical consequences" for the CFPB, regulated entities, and consumers.^[16] Indeed, the logic of the Fifth Circuit's decision threatens to unwind every action the CFPB ever has taken.^[17] Attorneys General of twenty-one Democratic states and the District of Columbia submitted an amicus brief echoing this concern.^[18] They argue that the potential loss of the "CFPB's critical enforcement, regulatory, and informational functions" threatens "substantial harm to the states."^[19] In another amicus brief, sixteen Republican Attorneys General emphasized federalism concerns underlying this case.^[20] They urged the Court to uphold the Fifth Circuit's decision in order to "provide the states certainty over their role in regulating our financial system" and "restore the CFPB's accountability to the states."^[21] And despite the Fifth Circuit's effort to limit its opinion to the CFPB, its analysis could implicate other federal agencies that are not funded through a "normal" appropriations bill, such as the Federal Reserve System and the Federal Deposit Insurance Corporation. Thus, the Court's decision may have far-reaching consequences across the Federal Government.

[1] *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (Feb. 27, 2023), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-448.html>.

[2] *Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, No. 22-663 (Feb. 27, 2023), available at <https://www.supremecourt.gov/docket/docketfiles/html/public/22-663.html>.

[3] Petition for a Writ of Certiorari, *CFPB v. Community Financial Services Association of America*, No. 22-448 (Nov. 14, 2022) ("CFPB Petition" hereinafter).

[4] Cross-Petition for a Writ of Certiorari, *Community Financial Services Association of America v. CFPB*, No. 22-663 (Jan. 13, 2023) ("CFSA Petition" hereinafter).

[5] *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 644 (5th Cir. 2022) (subsequent history omitted); see also Rachel Rodman et al., *Fifth Circuit Ruling Chills Consumer Financial Protections*, Bloomberg Law (Oct. 25, 2022), <https://news.bloomberglaw.com/business-and-practice/fifth-circuit-ruling-chills-consumer-financial-protections?context=search&index=0> (discussing Fifth Circuit's opinion).

[6] U.S. Const. art. I, § 7, cl. 7.

[7] *See Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 638 (discussing 12 U.S.C. § 5497(a)).

[8] *Id.* at 638–39.

[9] *Id.* at 640.

[10] *Id.* at 642–43.

[11] *Id.* at 641.

[12] CFPB Petition at 10 (“Congress enacted a statute explicitly authorizing the CFPB to use a specified amount of funds from a specified source for specified purposes. The Appropriations Clause requires nothing more.”).

[13] *Id.* at 23–27.

[14] *Id.* at 31.

[15] CFSAA Petition at i, 13, 22.

[16] CFPB Petition at 28–30.

[17] *See Cmty. Fin. Servs. Ass'n of Am.*, 51 F.4th at 643 (“Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency’s unconstitutional funding scheme, there is a linear nexus between the infirm provision (the Bureau’s funding mechanism) and the challenged action (promulgation of the rule).”).

[18] Brief for New York et al. as Amici Curiae in Support of Petitioners, *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448, at 17 (Dec. 14, 2022), available at https://www.supremecourt.gov/DocketPDF/22/22-448/249998/20221214182326873_22-448_Amicus%20Brief.pdf.

[19] *Id.* at 17.

[20] Brief for West Virginia et al. as Amici Curiae in Support of Granting the Petition, *CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448 (Dec. 14, 2022), available at https://www.supremecourt.gov/DocketPDF/22/22-448/249963/20221214151852678_CFPB%20Amicus%20ISO%20Petition.pdf.

[21] *Id.* at at 4, 8–9.

FRB Releases LISCC Supervision Manual



By **Daniel Meade**
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The Federal Reserve Board (“FRB”) released its Large Institution Supervision Coordinating Committee (“LISCC”) Program [Manual](#) last week. Governor Michelle Bowman had hinted that the manual would be coming soon in recent [remarks](#) to the American Bankers Association Community Banking Conference, and which we discussed [last week](#).

The LISCC Program is the FRB’s supervisory program for the eight global systemically important banking institutions (“G-SIBs”) headquartered in the United States. The LISCC Manual provided an overview of the LISCC program, including information on structure of the program in the FRB, a discussion of the LISCC supervisory cycle, and how the LISCC program coordinates with other supervisors.

As noted in the LISCC Manual and in previous [SR Letters](#), the LISCC Program was created in the aftermath of the global financial crisis “to fulfill three primary objectives.” The three objectives are:

1. enhance the resiliency of LISCC firms to lower the probability of their failure or inability to serve as a financial intermediary;
2. reduce the impact on the financial system and the broader economy in the event of a LISCC firm’s failure or material weakness; and
3. provide information to Federal Reserve decision-makers about issues and vulnerabilities at LISCC firms that could have an adverse impact on the broader financial system and economy

While the LISCC Program Manual does move the needle a bit on FRB transparency, it may not move the needle as much as some may have been expecting. As noted above, the LISCC Manual gives a very broad description of the LISCC program that is mainly a reiteration of previous FRB announcements. It does not go into the level of detail that the FRB’s [Bank Holding Company Supervision Manual](#) does. This may be by design, and also unnecessary, as the eight LISCC banks continue to be subject to the provisions in the BHC Supervision Manual. However, there may be some who thought the LISCC Manual would be like getting the teacher’s edition of the school workbook and providing the correct answers to the workbook’s questions. Anyone looking for that type of publication may be disappointed.

Expanding Regulatory Reach over Intermediaries That May Constitute Regulated Exchanges



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In response to changes in business practices, regulations and laws eventually change, too. During the past few years derivatives markets are witnessing this change as it applies to trading facilities as well as to entities that provide services that may be ancillary to intermediated swap execution. Indeed, the lines are becoming blurred between a traditional derivatives exchange and a facility or an entity that only a few years ago no one would recognize as an organized exchange.

This Clients & Friends Memo formed the basis for a recent webinar for the Futures Industry Association's Law & Compliance Division.

You can read the Clients & Friends Memo [here](#).

Yellen Calls on World Bank to Take Decisive Action on Climate Change



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On February 9, Treasury Secretary Janet Yellen [spoke](#) at the Center for Strategic and International Studies, urging the World Bank to “evolve” and be “bolder and more imaginative” in its operational approach to tackling global challenges such as climate change. She proposed that the World Bank “expand its vision” to include addressing these global challenges. According to Secretary Yellen, the problem lies in multilateral development banks’ (MDBs’) “core model,” which involves countries borrowing to make specific investments aimed at addressing development constraints in their own countries. That model is insufficient to meet the moment. Such a model will always underinvest in addressing global challenges – since the benefits of investments in global challenges stretch far beyond the borders of the country where a given project takes place.” As a result, the Secretary contended that the World Bank and other MDBs urgently needed to change, given declining progress in their “core mission of poverty reduction and inclusive economic growth.”

Yellen referenced a [2022 G20 report](#) on development banks’ capital adequacy frameworks, explaining that it provided a “solid blueprint” for the World Bank to “boost its financial capacity by responsibly stretching its existing financial resources.” She highlighted several “promising ideas for exploration,” which included the increased securitization of private sector portfolios and piloting the issuance of subordinated debt instruments. She also requested that the World Bank identify “concessional resources available to countries to tackle global challenges,” explaining that these resources could “incentivize the decommissioning of coal plants and protect displaced workers during a clean energy transition.”

A spokesperson for the World Bank responded to Yellen's remarks, stating that the lender appreciates support from the U.S. and other shareholders “for finding ways to ramp up development finance to meet global challenges such as climate change, fragility, and pandemics. We see this support as a recognition by the global community of the World Bank’s longstanding responsiveness and effectiveness, and we always welcome new ideas.”

Notably, on February 23, President Biden nominated former Mastercard, Inc. CEO, Ajay Banga, to be the [next World Bank president](#). President Biden stated that Banga is “uniquely equipped to lead the World Bank at this critical moment in history” and highlighted Banga’s “critical experience mobilizing public-private resources to tackle the most urgent challenges of our time, including climate change.” Yellen also publicly offered her support of Banga.

Taking the Temperature: Secretary Yellen's speech clearly reflects a view that the World Bank should be more aggressive in addressing various global challenges, including climate change. Her public backing of Banga's nomination supports her view, which makes sense given the massive investment required to transition to a green economy. While inherently uncertain, The World Economic Forum has estimated that it will require approximately \$3.5 trillion more spending per year in order to achieve net zero by 2050 (and that does not take into account addressing harm already caused by climate change). Equally difficult is the question of which countries should pay. At the mitigation-focused COP27 in November in Egypt, the almost 200 countries in attendance reached an agreement to establish a dedicated fund to assist developing countries respond to loss and damage caused by climate change. "Loss and damage" refers to the concept that wealthier nations, which have been the largest emitters of greenhouse gas emissions, should [compensate developing nations](#) for harm caused by climate change. Likewise, at the [COP15 biodiversity conference in Montreal](#) in December, the main area of contention involved how to pay the costs that will be incurred to realize the Global Biodiversity Framework's (GBF) goals. The parties ultimately agreed to establish a global biodiversity fund with contributions of \$20 billion/year by 2025 and \$30 billion/year by 2030, from the existing United Nations Global Environmental Facility (GEF). The GBF also included pledges to cease at least \$500 billion a year of subsidies for activities deemed harmful to nature such as agriculture and fishing. And, it bears mention that the World Bank has not been absent in terms of support for climate-related efforts. The Bank, along with other MDBs, is among the largest sources of funding for developing countries. In a [statement](#) released at COP27, the MDBs stated that in 2021 they "delivered \$51 billion in Low and Middle Income Countries, of which \$33 billion (65%) was for mitigation and \$18 billion (35%) for adaptation; and \$31 billion in High Income Countries, of which 95% was for mitigation and 5% for adaptation. In addition \$41 billion of private finance was mobilised in parallel."

(This article originally appeared in [Cadwalader Climate](#), a twice-weekly newsletter on the ESG market.)
