Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552

September 17, 2019

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington D.C. 20515

Dear Madame Speaker:

Pursuant to 28 U.S.C. 530D, I am writing to advise you that the Consumer Financial Protection Bureau has determined that the for-cause removal provision of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. 5491(c)(3), is unconstitutional. The Department of Justice has taken that position, on behalf of the Bureau, in response to a petition for certiorari filed in *CFPB v. Seila Law*, No. 19-7 (S. Ct.) (filed September 17, 2019) (attached).

The CFPA established the Bureau and charged it with "implement[ing] and, where applicable, enforc[ing] Federal consumer financial law consistently for the purpose of ensuring that consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a). In establishing the Bureau, Congress provided that the Bureau would be headed by a single Director who is appointed by the President, with the advice and consent of the Senate, for a term of five years. 12 U.S.C. 5491(b), (c)(1). Congress further provided that the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

CFPB v. Seila Law, LLC involves a petition to enforce a civil investigative demand (CID) that the Bureau filed in the United States District Court for the Central District of California in June 2017. Seila Law argued that the petition should be denied because the for-cause removal provision of the CFPA is unconstitutional. The Bureau defended the constitutionality of this provision before both the district court and the court of appeals, and prevailed in both courts.

See CFPB v. Seila Law, LLC, 923 F.3d 680 (9th Cir. 2019); No. 8:17-cv-01081-JLS-JEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017).

Seila Law petitioned the Supreme Court to review "[w]hether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers." This case therefore presents the question whether Congress unduly interfered with the President's executive authority by limiting the grounds upon which the President may remove the Director of the Bureau.

The President, through the Department of Justice, determined in March 2017 that the for-cause removal provision of the CFPA unduly interferes with the President's Executive authority under Article II of the Constitution. *See PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir.) (amicus brief of the United States filed March 17, 2017). Thus, there is a conflict between a statutory provision that Congress enacted and the President's understanding of his authority under Article II of the Constitution. Mindful of the Bureau's role as an Executive agency within the Executive Branch, *see, e.g.*, 12 U.S.C. 5491(a), I have decided that the Bureau should adopt the Department of Justice's view that the for-cause removal provision is unconstitutional. Accordingly, the Bureau, through its attorneys at the Department of Justice, has now advanced that position in *Seila Law*. In addition, I have directed the Bureau's attorneys to refrain from defending the for-cause removal provision in the lower courts.[1]

I believe it is in the Bureau's interests to obtain a final resolution of this issue as soon as possible. Accordingly, the Bureau has urged the Supreme Court to grant the pending petition for certiorari to resolve questions regarding the constitutionality of the for-cause removal provision. The Bureau expects that, if the Supreme Court grants the petition, it will appoint an experienced advocate to defend the for-cause provision as *amicus curiae*.

My determination that the for-cause removal provision is unconstitutional does not affect my commitment to fulfilling the Bureau's statutory responsibilities. I will continue to carry out the Bureau's duties under the CFPA and to defend the Bureau's actions. Further, a Supreme Court decision holding that the for-cause removal provision is unconstitutional should not affect the

[1] The cases currently pending in the lower courts where a similar argument has been made include: *CFPB v. Nationwide Biweekly Admin.*, No. 18-15431 (9th Cir.); *CFPB v. CashCall, Inc.*, No. 18-55479 (9th Cir.); *CFPB v. All Am. Check Cashing, Inc.*, No. 18-90015 (5th Cir.); *CFPB v. RD Legal Funding, LLC*, No. 18-2860 (2d Cir.); *Community Fin. Servs. Assoc. v. CFPB*, No. 1:18-cv-00295 (W.D. Tex.); *CFPB v. Ocwen Fin. Corp.*, No. 9:17-cv-80495 (S.D. Fla.); *BCFP v. Progrexion Mktg., Inc.*, 2:19-cv-00298 (D. Utah); *CFPB v. Navient Corp.*, 3:17-cv-101 (M.D. Pa.); and *CFPB v. Think Finance, LLC*, No. 4:17-cv-127 (D. Mont.).

Bureau's ability to carry out its important mission. As the brief in *Seila Law* explains, Congress directed that should any provision of the Bureau's statute be found unconstitutional, "the remainder of the Act . . . shall not be affected thereby." 12 U.S.C. 5302. Likewise, in similar situations, when the Supreme Court has "confront[ed] a constitutional flaw in a statute," it has "limit[ed] the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006)). Thus, if the Court holds the for-cause removal provision unconstitutional, the CFPA should remain "fully operative," and the Bureau would "continue to function as before," just with a Director who "may be removed at will by the [President]." *Id.* at 509.

Please let me know if I can be of any further assistance in this matter.

Sincerely,

Kathleen L. Kraninger
Director

Enclosure