No. 22-____

IN THE

Supreme Court of the United States

LAW OFFICES OF CRYSTAL MORONEY, P.C.,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

Argued: January 18, 2022
Decided: March 23, 2023

No. 20-3471

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner-Appellee,

v.

LAW OFFICES OF CRYSTAL MORONEY, P.C.,
Respondent-Appellant.*

Appeal from the United States District Court for the Southern District of New York
No. 20-cv-3240, Kenneth M. Karas, Judge

Before: KEARSE, WALKER, AND SULLIVAN, *Circuit Judges*

* The Clerk of Court is respectfully directed to amend the official case caption as set forth above.

Respondent-Appellant the Law Offices of Crystal Moroney ("Moroney") is a law firm that principally provides legal advice and services to clients seeking to collect debt. As the agency charged with regulating this industry, the Consumer Financial Protection Bureau ("CFPB") served Moroney with a civil investigative demand ("CID") for documents, which it subsequently petitioned to enforce in the district court. While that petition was pending, the Supreme Court issued its opinion in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), holding that the provision that protected the Director of the CFPB from removal other than for cause was an unconstitutional limitation on the President's removal power. Concerned about the validity of its enforcement action following *Seila Law*, the CFPB filed a notice to ratify the CID and the enforcement action against Moroney. The district court (Karas, *J.*) ultimately granted the CFPB's petition to enforce the CID.

On appeal, Moroney argues that the CID cannot be enforced because (1) the CID was void *ab initio* under *Seila Law*, as the CFPB Director was shielded from presidential oversight by an unconstitutional removal provision at the time the CID was issued; (2) the funding structure of the CFPB violates the Appropriations Clause of Article I of the Constitution; (3) Congress violated the nondelegation doctrine when it created the CFPB's funding structure; and (4) the CID is an unduly burdensome administrative subpoena. We hold that the CID was not void *ab initio* because the CFPB Director was validly appointed, that the CFPB's funding structure is not constitutionally infirm under either the Appropriations Clause or the nondelegation doctrine, and that the CID served on Moroney is not an unduly burdensome administrative

subpoena. Accordingly, we **AFFIRM** the order of the district court enforcing the CID.

AFFIRMED.

RICHARD A. SAMP (Michael P. DeGrandis, Jared McClain, *on the brief*), New Civil Liberties Alliance, Washington, DC, *for Respondent-Appellant*.

KEVIN E. FRIEDL, Senior Counsel (Stephen Van Meter, Acting General Counsel; John R. Coleman, Deputy General Counsel; Steven Y. Bressler, Assistant General Counsel, *on the brief*), Consumer Financial Protection Bureau, Washington, DC, *for Petitioner-Appellee*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Respondent-Appellant the Law Offices of Crystal Moroney ("Moroney") is a law firm that principally provides legal advice and services to clients seeking to collect debt. As the agency charged with regulating this industry, the Consumer Financial Protection Bureau ("CFPB") served on Moroney a civil investigative demand ("CID") for documents, which it subsequently petitioned to enforce in the district court. While that petition was pending, the Supreme Court issued its opinion in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), holding that the provision that protected the Director of the CFPB from removal other than for cause was an unconstitutional limitation on the President's removal power. Concerned about the validity of its enforcement action following *Seila Law*, the CFPB filed a notice to ratify the CID and the enforcement action against Moroney. The district court

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I. BACKGROUND

In 2010, in response to the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010). Title X of that statute, the Consumer Financial Protection Act ("CFPA"), created the CFPB to consolidate the regulation of consumer financial products and services in a single agency. *See* CFPA, 124 Stat. at 1955–2113; S. Rep. No. 111-176, at 10–11 (2010). Among other responsibilities, the CFPB is charged with enforcing federal laws involving debt-collection practices.

The CFPB is funded through its enabling statute

rather than Congress's annual appropriations. Congress authorized the CFPB to draw funds from the combined earnings of the Federal Reserve System – of which the CFPB is formally a part – up to a specified cap. *See* 12 U.S.C. § 5497(a). Since 2013, that cap has been set at twelve percent of the Federal Reserve System's 2009 operating expenses, adjusted annually to account for increases in labor costs. *Id.* § 5497(a)(2)(A)–(B). Congress also authorized the CFPB to seek additional funding through the annual appropriations process. *See id*. § 5497(e).

The CFPB is headed by a single director who is appointed by the President, with the advice and consent of the Senate, for a five-year term. *See id.* § 5491. Originally, the President could only remove the CFPB Director for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). But in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court held that this removal restriction impeded the President's Article II executive authority and therefore violated the separation of powers. *See id.* at 2197. Because the Supreme Court determined that the removal provision was severable from the rest of the CFPA, the Supreme Court held that the CFPB could continue to operate with a Director who is removable by the President at will. *See id.* at 2211.

Like many law-enforcement agencies, the CFPB is authorized to issue administrative subpoenas known as civil investigative demands, or CIDs, in aid of its investigations. *See* 12 U.S.C. § 5562(c). The CFPB's regulations permit individuals and entities that receive CIDs to negotiate appropriate modifications to CIDs through a meet-and-confer process with CFPB staff. *See* 12 C.F.R. § 1080.6(c). The CFPB's rules further set out a procedure, similar to that used in ordinary civil

discovery, by which CID recipients can assert claims of attorney-client privilege by providing the CFPB with a schedule of the withheld documents. *See* 12 C.F.R. § 1080.8. The CFPB may file a petition in district court to enforce compliance with a CID. 12 U.S.C. § 5562(e); 12 C.F.R. § 1080.10.

In June 2017, the CFPB issued a CID to Moroney. In compliance with the 2017 CID, Moroney produced thousands of pages of documents and other data but withheld a subset of documents, claiming that producing those documents would compromise its ethical obligations to its clients. In November 2019, after the meet-and-confer process proved futile, the CFPB sought to enforce the 2017 CID in district court. Just four days before the scheduled hearing, however, the CFPB withdrew the CID, and the district court denied the petition to enforce as moot. Shortly thereafter, the CFPB issued a second CID, demanding substantially similar documents and information as the 2017 CID. In April 2020, the CFPB moved to enforce the 2019 CID in district court. While the petition was pending, the Supreme Court issued its opinion in *Seila Law*. Apparently concerned about the validity of its enforcement actions in the wake of *Seila Law*, the CFPB filed a Notice of Ratification purporting to ratify the 2019 CID and the enforcement action. In August 2020, the district court granted the CFPB's petition to enforce the 2019 CID. Moroney filed a timely notice of appeal.

On appeal, Moroney argues that the CID cannot be enforced because (1) the CID was void *ab initio* under *Seila Law*, as the CFPB Director was shielded from presidential oversight by an unconstitutional removal protection at the time the CID was issued; (2) the funding structure of the CFPB violates the

Appropriations Clause of Article I of the Constitution; (3) Congress violated the nondelegation doctrine when it created the CFPB's funding structure; and (4) the CID is an unduly burdensome administrative subpoena. We address each argument in turn.

II. DISCUSSION

A. The CID Was Not Void *Ab Initio*.

Moroney argues that the CID was void *ab initio* because, when the CID was issued, the CFPB Director was shielded by an unconstitutional removal provision. This argument is foreclosed by the Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

Collins, like *Seila Law*, concerned an independent agency that was headed by a single director who was protected from at-will presidential removal. *See id.* at 1771. In *Collins*, the Supreme Court held that under "[a] straightforward application of [its] reasoning in *Seila Law*," the removal restriction violated the separation-of-powers doctrine. *Id.* at 1784. The Supreme Court then excluded certain relief as inappropriate for an invalid removal restriction. It held that the relevant inquiry for determining whether an officer "lacked constitutional authority and that [her] actions were therefore void *ab initio*" is whether the officer "in question [was] properly *appointed*," not whether she was properly *removable*. *Id.* at 1787. Because "there was no constitutional defect in the statutorily prescribed method of appointment to that office," the Supreme Court held that "there is no reason to regard any of the actions taken by [the properly-appointed officer] as void." *Id.*; *see also Calcutt v. FDIC*, 37 F.4th 293, 311–17 (6th Cir. 2022), *mandate*

stayed pending petition for writ of certiorari, —— S. Ct. ——, 2022 WL 4546340, at *1 (Sept. 29, 2022); *CFPB v. CashCall, Inc.*, 35 F.4th 734, 742 (9th Cir. 2022). Nevertheless, the Supreme Court left open the possibility that a party could be entitled to relief if it could show that "an unconstitutional provision . . . inflict[ed] compensable harm" on the petitioner. *Collins*, 141 S. Ct. at 1789.

In the wake of *Seila Law* and *Collins*, courts have disagreed as to how one could make such a showing. One view is that *Collins* requires a party to "show that the agency action would not have been taken *but for* the President's inability to remove the agency head." *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 575 F. Supp. 3d 505, 508 (D. Del. 2021) (emphasis added); *see also Calcutt*, 37 F.4th at 316 ("To invalidate an agency action due to a removal violation, that constitutional infirmity must *cause harm* to the challenging party" (emphasis added) (internal quotation marks omitted)); *CashCall*, 35 F.4th at 742 ("[T]he party challenging an agency's past actions must . . . show how the unconstitutional removal provision *actually harmed* the party." (internal quotation marks omitted)). A less demanding view is that *Collins* merely requires a party to show that "the President's inability to fire an agency head *affected* the complained-of decision." *CFPB v. RD Legal Funding, LLC*, 592 F. Supp. 3d 258, 266 (S.D.N.Y. 2022) (emphasis added) (internal quotation marks omitted). According to this view, *Collins* requires only *some* nexus between the existence of the unlawful removal provision and the complained-of enforcement action. Unfortunately, the *Collins* majority opinion did not pronounce a definitive holding on this point. *See Collins*, 141 S. Ct. at 1788–89. But Justice Kagan,

writing for herself, Justice Breyer, and Justice Sotomayor, did provide some helpful guidance.

Specifically, Justice Kagan "join[ed] in full the majority's discussion of the proper remedy" in *Collins* and, in so doing, suggested that a party seeking to void an agency action must first show but-for causation linking an unconstitutional removal protection to the complained-of agency action. *Id.* at 1801 (Kagan, J., concurring). According to Justice Kagan, an agency action should be undone only when voiding the agency's action is "needed to restore the [complaining party] to the position [it] 'would have occupied in the absence' of the removal problem." *Id.* (Kagan, J., concurring) (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 (1977)). Justice Kagan explained that "[g]ranting relief in any other case would, contrary to usual remedial principles, put the [complaining party] 'in a better position' than if no constitutional violation had occurred." *Id.* (Kagan, J., concurring) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285 (1977)).

We find Justice Kagan's logic to be persuasive. Requiring but-for causation in these cases properly matches the constitutional injury to the requested remedy. *See id*. at 1789 (Thomas, J., concurring) ("[T]o the extent a [g]overnment action violates the Constitution, the remedy should fit the injury."). Such a requirement is also consistent with long-established remedial principles articulated by the Supreme Court and our own precedents, *see Mt. Healthy*, 429 U.S. at 285–87; *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("[T]he nature of the [constitutional] violation determines the scope of the remedy."); *United States v. City of Yonkers*, 197 F.3d 41, 55 (2d Cir. 1999) ("[T]he nature of the . . . remedy

is to be determined by the nature and scope of the constitutional violation." (quoting *Milliken*, 433 U.S. at 280)). We therefore hold that to void an agency action due to an unconstitutional removal protection, a party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head.

In this case, there is no dispute that the CFPB Director who issued the CID was properly appointed. And Moroney does not even argue that the Director would not have issued the CID but for the unconstitutional removal provision. Nor could it. The investigation into Moroney has spanned the tenures of five CFPB Directors appointed by three different Presidents, and all but the first were at some point subject to at-will removal. Since the CID was issued, there have been three different CFPB Directors appointed by two different presidents, each of whom has been subject to at-will removal at some point in their tenure. There is nothing to suggest that the Director's removal protection affected the issuance of the CID or the investigation into Moroney.

Moroney contends that *Collins* is distinguishable because it concerned retrospective relief (disgorgement of funds), whereas this case involves prospective relief (production of withheld documents). We decline to read *Collins* so narrowly. The petitioners' only "live claim" before the Supreme Court in *Collins* was for retrospective relief, and so that is all the Supreme Court addressed. *Collins*, 141 S. Ct. at 1787. But the Supreme Court's reasoning that an officer's actions are valid so long as she was validly appointed applies with equal force regardless of the relief sought by the party challenging the officer's actions. *See Calcutt*, 37 F.4th at 316 ("[W]hether an unconstitutional removal

protection inflicted harm remains the same whether the petitioner seeks retrospective or prospective relief." (internal quotation marks omitted)). Moroney's distinction between this case and *Collins* therefore does not make a difference.

B. The CFPB's Funding Structure Is Proper Under the Appropriations Clause.

Moroney next contends that the CID is not enforceable because the CFPB's funding structure violates the Appropriations Clause of the Constitution. The Appropriations Clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Clause "was intended as a restriction upon the disbursing authority of the Executive department" and "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). "[I]n other words, the payment of money from the Treasury must be authorized by a statute." *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990). There can be no dispute that the CFPB's funding structure was authorized by the CFPA – a statute passed by Congress and signed into law by the President. *See* 124 Stat. at 1955–2113.

Nevertheless, Moroney argues that the CFPB's funding structure violates the Appropriations Clause because the Executive Branch "decides how much funding is 'reasonably necessary' to carry out the agency's mission, without any meaningful guidance, limitation, or control by the Legislative Branch." Moroney Br. at 21. As a threshold matter, Moroney cites no support for a "meaningful guidance" test under

the Appropriations Clause. *Cf. Cincinnati Soap*, 301 U.S. at 321 ("The contention . . . that any attempted appropriation is bad, because the particular uses to which the appropriated money are to be put have not been specified, is without merit."). But, in any event, Moroney's statement is simply an inaccurate description of how the CFPB is funded.

In enacting the CFPA, Congress provided that "[f]unds obtained by, transferred to, or credited to the [CFPB] . . . shall remain available until expended[] to pay the expenses of the [CFPB] in carrying out its duties and responsibilities." 12 U.S.C. § 5497(c)(1). Congress also limited the amount of funding the CFPB can draw from the Federal Reserve System to – at most – twelve percent of the Federal Reserve System's 2009 Operating Expenses with adjustments for increases in labor costs. *Id.* § 5497(a)(2)(A)–(B). To receive funding in addition to the twelve-percent limit, the CFPB must seek Congressional appropriations through the annual appropriations process. *Id.* § 5497(e). Because the CFPB's funding structure was authorized by Congress and bound by specific statutory provisions, we find that the CFPB's funding structure does not offend the Appropriations Clause.

C. We Decline to Follow the Fifth Circuit's Decision in *Community Financial Services Association of America, Ltd. v. CFPB.*

Our colleagues on the Fifth Circuit recently held that the CFPB's "funding apparatus cannot be reconciled with the Appropriations Clause and the [C]lause's underpinning, the constitutional separation of powers." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (CFSA)*, 51 F.4th 616, 642 (5th Cir. 2022), *cert.*

granted sub nom. CFPB v. Com. Fin. Services Ass'n., ___ S. Ct. ___, 2023 WL 2227658, No. 22-448 (Feb. 27, 2023). Specifically, the Fifth Circuit concluded that Congress "cede[d] *direct* control over the [CFPB]'s budget by insulating it from annual or other time limited appropriations" and "ceded *indirect control* by providing that [the CFPB]'s self-determined funding be drawn from a source that is itself outside the appropriations process," namely, the Federal Reserve System. *Id.* at 638–39. This structure, according to the Fifth Circuit, constitutes "a double insulation from Congress's purse strings," *id.* at 639, which runs "afoul of the separation of powers embodied in the Appropriations Clause," *id.* at 640. We respectfully disagree.

As a threshold matter, we cannot find any support for the Fifth Circuit's conclusion in Supreme Court precedent. To the contrary, the Court has consistently interpreted the Appropriations Clause to mean simply that "the payment of money from the Treasury must be *authorized by a statute.*" *Richmond*, 496 U.S. at 424 (emphasis added); *see also Cincinnati Soap*, 301 U.S. at 321 ("[The Appropriations Clause] means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."); *Knote v. United States*, 95 U.S. 149, 154 (1877); *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 94–95 (1992); *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1319–20 (2020). We are not aware of any Supreme Court decision holding (or even suggesting) that the Appropriations Clause requires more than this "straightforward and explicit command." *Richmond*, 496 U.S. at 424. Here, Congress expressly appropriated the CFPB's funding by enacting the CFPA, *see* 124 Stat. at 1955–2113, and we are "not

at liberty to depart from binding Supreme Court precedent, 'unless and until the [Supreme] Court reinterprets' [such] precedent" itself. *OneSimpleLoan v. U.S. Sec'y of Educ.*, 496 F.3d 197, 208 (2d Cir. 2007) (quoting *Agostini v. Felton*, 521 U.S. 203, 238 (1997)) (alterations omitted).

We likewise find no support for the Fifth Circuit's reasoning in the Constitution's text. The Appropriations Clause states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Nothing in the Constitution, however, requires that agency appropriations be "time limited" or that appropriated funds be drawn from a particular "source." *CFSA*, 51 F.4th at 639. Certainly, "if the Framers of the Constitution had thought it necessary to" impose these limits, "they would have" done so. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Indeed, in the section preceding the Appropriations Clause, the Constitution expressly provides that "no Appropriation of Money" to raise and support an army "shall be for *a longer Term than two Years*." U.S. Const. art. I, § 8, cl. 12 (emphasis added). By "negative implication," the absence of any restrictions in the Appropriations Clause other than that Congress must authorize government funding in a prior statute "precludes the sort of implicit . . . limit[s]" that the Fifth Circuit chose to impose in *CFSA*. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018); *see also* 1 Joseph Story, Commentaries on the Constitution of the United States § 625 (Edmund H. Bennett ed. 3d ed. 1858) ("It would seem but fair reasoning upon the plainest principles of interpretation, that when the [C]onstitution established certain qualifications, . . . it meant to exclude all others.").

Nor do we find support for the Fifth Circuit's reasoning in the history of the Appropriations Clause. "The concept of appropriations as developed through the centuries in England and as adopted by the colonies encompassed dual limitations on both *amount* and *object*." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1353 (1988) (emphasis added) (footnotes, internal quotation marks omitted). Consistent with this concept, "[t]he design of the Constitution in [the Appropriations Clause] was . . . to secure . . . that the *purpose*, the *limit*, and the *fund* of every expenditure should be ascertained by a previous law." 7 Alexander Hamilton, The Works of Alexander Hamilton 532 (John C. Hamilton ed. 1851) (hereinafter "Hamilton") (third emphasis added); *see also id.* ("[N]o money can be expended, but for an *object*, to an extent, and *out of a fund*, which the laws have prescribed").

Here, Congress prescribed the "*purpose*" (or "*object*"), "*limit*," and "*fund*" of its appropriation for the CFPB in the CFPA. Hamilton, at 532. As to the *purpose*, Congress specified five "objectives" for the CFPB, including that "(1) consumers are provided with timely and understandable information . . . about financial transactions; (2) consumers are protected from unfair, deceptive, or abusive acts . . . and from discrimination; (3) outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed . . . ; (4) Federal consumer financial law is enforced consistently . . . ; and (5) markets for consumer financial products and services operate transparently and efficiently." 12 U.S.C. § 5511(b)(1)–(5). With respect to the *fund* and *limit* of the appropriation, Congress directed the Board of Governors to "transfer to the [CFPB] *from the combined earnings of the Federal Reserve System* [an]

amount determined by the [CFPB's] Director to be reasonably necessary to carry out [its] authorities," 12 U.S.C. § 5497(a)(1) (emphasis added), but which amount "*shall not exceed [twelve percent] of the total operating expenses of the Federal Reserve System*, as reported in the Annual Report, 2009, of the Board of Governors," *id.* § 5497(a)(2)(A) (emphasis added). Although such funding does not fall under the annual appropriations process typical of most Congressional spending, we cannot conclude that Congress "abdicate[d] [its appropriation] obligation entirely" in establishing the CFPB's funding structure. *CFSA*, 51 F.4th at 642 (quoting *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 241 (5th Cir. 2022) (Jones, J., concurring)). Consistent with the historical practices of English, colonial, and state governments that formed the basis of the Founders' understanding of the appropriations process at the time of the Constitution's enactment, Congress specified "the *purpose*, the *limit*, and the *fund*" of its appropriation for the CFPB in "a previous law," Hamilton, at 532 (emphasis added).

For all these reasons, we respectfully decline to follow the Fifth Circuit's decision in *CFSA*.

D. The CFPB's Funding Structure Is Proper Under the Nondelegation Doctrine.

Moroney next argues that, even if the CFPB's funding structure is proper under the Appropriations Clause, Congress violated the nondelegation doctrine in enacting the CFPA because it did not articulate an "intelligible principle" circumscribing the President's discretion in appropriating funds. Moroney Br. at 22. Article I of the Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a

Congress of the United States." U.S. Const. art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation," and Congress "may not transfer to another branch powers which are strictly and exclusively legislative." *Gundy v. United States*,139 S. Ct. 2116, 2123 (2019) (internal quotation marks omitted). Nevertheless, Congress can "obtain[] the assistance of its coordinate Branches," including by empowering executive agencies. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The difference between an improper delegation of Congress's legislative powers and a proper delegation is whether Congress has "la[id] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S.394, 409 (1928).[1]

The CFPA states that the CFPB's budget is to be used to "pay the expenses of the [CFPB] in carrying out its duties and responsibilities." 12 U.S.C. § 5497(c)(1). The CFPA further explains that the purpose of the CFPB is to "seek to implement and, where applicable, enforce Federal consumer financial law consistently for

[1] In its history, the Supreme Court has found an improper delegation only twice—in *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). Although a lively scholarly debate regarding the scope of the nondelegation doctrine has developed in recent years, *compare* Julian Davis Mortensen & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021), *with* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021), "since 1935 the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards," *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., concurring).

the purpose of ensuring that all 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." *Id.* § 5511(a). The CFPA goes on to list five "objectives" and six "primary functions" for the CFPB. *Id.* § 5511(b)–(c). Under the nondelegation doctrine's lenient standard, Congress has plainly provided an intelligible principle to guide the CFPB in setting and spending its budget. *See Mistretta*, 488 U.S. at 372–73 ("[I]t [is] constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." (internal quotation marks omitted)). We therefore conclude that the CFPB's funding structure is proper under the nondelegation doctrine.[2]

[2] Adopting the Fifth Circuit's reasoning in *CFSA* with respect to the Appropriations Clause would also require us to circumvent the Supreme Court's nondelegation doctrine cases. As discussed *supra*, the CFPA's specification of five "objectives," six "primary functions," and the twelve-percent limit on the amount of funding it may draw from the Federal Reserve System, 12 U.S.C. §§ 5497(a)(2), 5511(b)–(c), "clearly delineates the general policy" and "boundaries of this delegated [budgetary] authority." *Mistretta v. United States*, 488 U.S. 361, 372–73 (1989) (citation omitted). Under the Fifth Circuit's view, however, Congress must not only "lay down . . . an intelligible principle" in delegating its budgetary authority, *J.W. Hampton*, 276 U.S. at 409, but it must also assert "direct control" over the CFPB's budget "on the front end" and review of the CFPB's expenditures "on the back end," *CFSA*, 51 F.4th at 638–39. Clearly, these additional requirements are at odds with the Supreme Court's guidance that Congress' articulation of an "intelligible principle" directing the agency's exercise of legislative authority is all that is required to satisfy separation of powers concerns under the Constitution, *J.W.*

E. The CID Was an Enforceable Administrative Subpoena.

Finally, Moroney argues that the CID is unenforceable because it is unduly burdensome. "The courts' role in a proceeding to enforce an administrative subpoena is extremely limited." *In re McVane*, 44 F.3d 1127, 1135 (2d Cir. 1995) (internal quotation marks omitted). "To win judicial enforcement of an administrative subpoena, [an agency] must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the [agency's] possession, and [4] that the administrative steps required have been followed." *RNR Enters., Inc. v. SEC*, 122 F.3d 93, 96 (2d Cir. 1997) (internal quotation marks omitted). It is the respondent's burden to show that an agency subpoena is unreasonable – a burden that "is not easily met." *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973).

Moroney first argues that the CID was not issued for a proper purpose because it seeks information implicating the practice of law. To be sure, Congress specifically prohibited the CFPB from exercising enforcement authority over attorneys engaged in the practice of law. *See* 12 U.S.C. § 5517(e)(1). The CFPB nonetheless has enforcement authority over attorneys engaged in "the offering or provision of a consumer financial product or service . . . that is not offered or provided as part of, or incidental to, the practice of law, occurring exclusively within the

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Hampton, 276 U.S. at 409.

scope of the attorney-client relationship." *Id.* § 5517(e)(2). Here, Moroney is engaged in both debt collection and the practice of law, but the CID is addressed only to its debt-collection practices and possible violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, and the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* The CID was therefore issued pursuant to a legitimate purpose under the statute. *See* 12 U.S.C. § 5517(e)(2).

Next, Moroney argues that the CID seeks information protected by attorney-client privilege and Moroney's duty of confidentiality to its clients. But, as the district court correctly noted, Moroney has not identified specific documents that it claims are privileged. Instead, Moroney makes broad declarations of privilege in the apparent hope that those blanket assertions will defeat the CID *in toto*. As this Court has long recognized, the proper way to address claims of privilege in response to a CID is for the objecting party to submit a privilege log. *See United States v. Constr. Prods. Rsch., Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). And, of course, the burden is on "the party invoking the privilege" to "provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege," absent which the "claim will be rejected." *Id.* (internal quotation marks omitted). Because Moroney has not met its burden of showing that the documents sought by the CID are privileged, the district court was correct to reject its privilege claims.

Finally, Moroney argues that it has already responded to the CFPB's 2017 CID and that much of the material requested by the 2019 CID is duplicative of what it has already produced. But here again, Moroney has failed to meet its burden. While Moroney

claims that the requests are duplicative, it never explains how the 2019 CID is duplicative of the 2017 CID or which documents have already been produced. Because the burden is on Moroney to show that the 2019 CID is unreasonable and Moroney has not met this burden, *see Brigadoon Scotch*, 480 F.2d at 1056, the district court was correct to enforce the CID.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the order of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL PROTECTION,	)	
Petitioner,	)	
v.	)	Case No. 20-cv-3240 (KMK)
LAW OFFICES OF CRYSTAL MORONEY, P.C.,	)	**ORDER**
Respondent.	)	

KENNETH M. KARAS,
United States District Judge:

For the reasons stated on the record at the Oral Argument held on August 18, 2020, the Court grants Petitioner's Petition to Enforce the Civil Investigative Demand, (Dkt. No. 6).

SO ORDERED.

DATED: August 19, 2020
White Plains, New York

/s/ Kenneth M. Karas
KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE

APPENDIX C
(Excerpts from Transcript of August 18, 2020 Hearing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BUREAU OF CONSUMER FINANCIAL PROTECTION, Petitioner, v. LAW OFFICES OF CRYSTAL MORONEY, P.C., Respondent.	Case No. 20-cv-3240 (KMK)

United States Courthouse
White Plains, New York

August 18, 2020

HONORABLE KENNETH M. KARAS,
District Court Judge

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BY: MICHAEL P. DeGRANDIS
JARED McCLAIN

* * * * *

THE COURT: All right. Anything else from anybody? Okay. Well, what the bands say, a long strange trip it's been. So here we are.

Seila Law comes down which provides some illumination, but what I want to do is give you a ruling now, because if you wait for me to write an opinion, I think this will not be in anybody's interest. So I'm going to go through some factual background. Obviously what I relate to you here is taken from submissions from both respondent and the Bureau.

Now, according to the Bureau, respondent is a law firm that collects on delinquent or defaulted consumer debt on behalf of various creditors. Respondent also provides information to credit reporting agencies about consumers from whom it is seeking to collect debt, but respondent does clarify and consistent themes throughout its position here in this case is that it is a law firm that provides legal advice and services to clients. Indeed, there's no disputing

that, nor is there any disputing the fact that Ms. Moroney is licensed to practice law in this state and in New Jersey, and that her firm is regulated by the State of New York and New Jersey Rules of Professional Conduct, and of course her continued ability to practice as a licensed attorney is conditioned upon strict adherence to those rules.

We all know the first CID was issued to respondent back in June of 2017. According to the Bureau, this CID sought "substantially similar" information to the 2019 CID but it's not identical. What's more, the Bureau claims that respondent produced a partial response to the 2017 CID but it withheld and "clawed back a significant amount of material." And there's also a claim that some of the documents were not produced in compliance with the Bureau's standards regarding electronically stored information, that there was no certification, that their responses to the 2017 CID were true and complete.

Now respondent counters by noting that it did provide written responses to the interrogatories, produced thousands of pages of documents and other data, and to the extent that there was a decision to not produce certain documents, that was based on the attorney-client privilege and other nondisclosure principles, or because the material, the responsive materials might have been inextricably intertwined with privileged material. But in particular what the Bureau contends is that respondent originally identified about 1793 pages of responsive material, along with 1150 pages of which was comprised of data dictionary tables that were duplicative of Excel spreadsheets that the respondent also produced, and that the respondent also withheld responses to at least 15 of the Bureau's requests, including 144 letters of dispute that it deemed to be responsive to the Bureau's request for legal

actions and administrative proceedings filed against respondent or its principals relating to the company's debt or information furnishing activities.

Now respondent does claim that, well, first of all, respondent has made the point that it retained ethics counsel for independent advice, and relied on that advice in evaluating its duty under Rule 1.6 of the New Jersey and New York Codes of Professional Conduct to protect the information it deemed to be covered by attorney-client privilege. There was a request for waiver from clients, which was declined. And so from respondent's perspective, the Bureau was putting respondent in a position to violate ethical obligations regarding asserted confidences.

There was correspondence that explained some of these points and then ultimately what happened was that in November of 2019 the Bureau withdrew the 2017 CID. That was on November 4.

On November 14, the Bureau had issued the 2019 CID, and all of what was requested is spelled out in the petition at paragraph 1. It's also Exhibit A to Ms. Assae-Bille's declaration. The respondent takes the view that the two CIDs are not initiated due to any consumer complaints regarding any of the purposes listed in the Notice of Purpose because otherwise the Bureau would have indicated as such.

The CID was issued by a deputy assistant director of the Office of Enforcement and was served on respondent by way of certified U.S. Mail, return receipt requested. The materials were due by December 16 of 2019. On December 2, respondent and counsel for the Bureau met and conferred in accordance with 12 C.F.R. 1080.6(c).

There was some discussion about modification, but that was never forthcoming. Instead, respondent filed a petition requesting that the director set aside or modify the CID which stated that line for respondent to actually

answer the CID. And this request is made both on constitutional and statutory grounds and sought a modification to excuse respondent from producing any material that had previously been submitted in connection with the 2017 CID.

The petition was denied. There was a request to have respondent fully comply with the 2019 CID within ten days. Also, the director determined that the respondent's petition was untimely.

The bottom line here is that by March 19 of 2020, counsel for respondent indicated that respondent did not intend to comply with the 2019—not comply, respond to the 2019 CID.

So there's been no production of materials in response to the CID, and as has been acknowledged, there's been no privilege log with respect to the 2019 CID, but respondent does aver that the only documents that have been withheld from its response to the 2017 CID were those related to the practice of law, not documents exclusively related to third-party debt collection, and that respondent has produced all policies and procedures that the Bureau had requested in the 2017 CID.

There's also, I mean I'll note this because respondent makes this point in its papers, there is a pending petition to enforce a CID against FedChex Recovery, which I'll just call Fedchex today, which is another one of respondent's clients, which is out in the Central District of California. From respondent's perspective, that CID seeks the same information sought and the CID at issue here regarding respondent's contacts with that client.

So the 2019 CID does contain notification of purpose. According to the Bureau, the CID sought from respondent materials that may be relevant to the Bureau's investigation that were not already in its possession,

including certain interrogatories, written reports, documents, et cetera.

The requests in the CID include, among other things, respondent's organizational structure, its employees, business activities, debt-collection activity, identities of creditors or third parties for whom respondent performed debt-collection activities, information on consumer complaints and disputes, policies and procedures, handbooks, guidance, and training materials, and recordings and calls between respondent and consumers or third parties related to debt-collection attempts.

All right, so just for the record, in terms of some background of CFPB, it was created in 2010 by Congress as a "independent financial regulator within the Federal Reserve System." The statute that enables the Bureau is the CFPA, or Title X, of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act.

The Bureau is tasked with implementing and enforcing financial consumer protection laws. This is all laid out, of course, in *Seila Law*.

Now, upon its creation, Congress transferred the administration of 18 federal statutes to the Bureau and enacted a new prohibition on any unfair, deceptive, or abusive act or practice by certain participants in a consumer finance sector. Also, the Bureau is able to implement this standard and the statutes under its purview through binding regulations.

Also, along with its rule-making authority, the Bureau also has adjudicatory authority, as it's allowed to conduct certain administrative proceedings.

Congress vested the Bureau with certain enforcement powers which allows it to conduct investigations, issue subpoenas, and CIDs, initiate administrative adjudications, and prosecute civil actions in

federal court.

The Bureau is authorized to seek restitution, disgorgement, injunction, and civil penalties up to $1 million for each day that a violation occurs.

As part of its enforcement authority, the Bureau can issue CIDs, which are a type of investigative administrative subpoena. In fact, the CFPA provides the Bureau with its authority to issue the CIDs and enforce them in federal court. For that, I'm citing 12 U.S.C., Section 5562(c)(1) and (e)(1).

So under the CFPA the Bureau can issue a CID when "it has reason to believe that any person ... may have information relevant to violation of federal consumer financial law." That's from 5562(c)(1).

The Bureau can initiate a proceeding to enforce the CID in federal court by filing a petition, which is what we're dealing with here.

The director has a five-year term. The director is appointed by the President and does require Senate approval.

Until the Supreme Court's decision in *Seila Law*, the President was able to remove the director only for "inefficiency, neglect of duty, or malfeasance in office." But in *Seila Law*, the Supreme Court determined that the Bureau's leadership by a single independent director violated separation of powers, as it vested "significant governmental power in the hand of a single individual accountable to no one," and that the director's "insulation from removal by an accountable President ... rendered the agency's structure unconstitutional." That's from 140 Supreme Court at pages 2203-4. But the Supreme Court did determine the removal restriction was severable from the other provision of the law that established the Bureau. So the Court ruled that the agency may continue to operate, but its director must be removable by the

President at will. Page 2192.

In terms of funding, the Bureau does not receive direct appropriations from Congress. Instead, each quarter the Bureau receives funding directly from the Federal Reserve, which transfers funds to finance the Bureau from "combined earnings from the Federal Reserve System." That's from Section 5497(a). The Federal Reserve itself is funded outside the appropriations process through bank assessment, as noted in *Seila Law* at page 2194.

Each year the Bureau's director determines the amount of funding "reasonably necessary to carry out" the duties of the Bureau up to a cap of 12 percent of the combined earnings adjusted annually for inflation. In recent years, that budget has exceeded a half a billion dollars.

To exceed the cap, the Bureau has to obtain additional funding in the ordinary appropriations process.

The funding is not reviewable by Congress, including the committees on appropriations in both the House and the Senate, but the director does report annually to the House and Senate appropriations Committee about the Bureau's "financial operating plans and use of funds." And that's spelled out in 5497(e)(4).

All right, so we got here because of the petition, but also it's worth noting that the respondent brought an action against the Bureau and against the director in her official capacity seeking declaratory judgment and injunctive relief against the bureau.

On January 22nd of this year, the Court did issue an order to show cause. Oral argument was held on February 27 where the Court from the bench denied the motion. And then an amended complaint was filed on April 30th.

The instant petition was filed April 24, which was accepted by this Court as related, and then we've had

really very thorough and comprehensive briefing through the early part of the summer and here we are.

In terms of legal standard, it is well established "that any agency can conduct an investigation even though it has no probable cause to believe that any particular statute is being violated." That's what the Second Circuit said in *U.S. versus Construction Products Research Inc.*, 73 F.3d 464, 470. For example, administrative agencies can investigate merely on suspicion that the law is being violated.

The Court's role in a proceeding to enforce an administrative subpoena, which is basically what we're dealing with here, is very limited, what the Second Circuit noted in *NLRB versus American Medical Response, Inc.*, but of course the agency's efforts have to be reasonable. Whatever information they're seeking by way of the compulsory process has to be reasonable, which is satisfied if an agency demonstrates that the investigation is being conducted for a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already in the administrative agency's possession, and that the administrative steps required have been followed. That's all from *American Medical Response* at page 192.

If a subpoena satisfies these requirements it's typically enforced unless the party opposing it demonstrates that the subpoena is unreasonable or issued in bad faith or for some other improper purpose, or that compliance would be unnecessarily burdensome.

In terms of the respondent's attacks on the subpoena, I'll start with the funding structure, and respondent argued that the Bureau itself is unconstitutional because it doesn't receive appropriations from Congress, instead ceding Congress's funding authority to the Bureau itself and to the President, which violates, in respondent's view, the appropriations clause

and the vesting clause. And this is all spelled out in pages 14 through 19 of respondent's memorandum of law. And what respondent specifically argues is that in the wake of *Seila Law*, that *Seila Law* ostensibly rendered the Bureau's funding structure "inconsistent with the congressional statutory design and purpose," and also is inconsistent with the constitutional design and purpose given that it permits the President to determine and direct the Bureau's funding and budget. Of course, the Bureau disagrees, and even goes so far as to say that *Seila Law* resolved the issue of the CFPB's constitutionality.

Article I, sections 1 and 9, provides that "no money shall be drawn from the treasury, but in consequence of appropriations made by law," and that "all legislative powers herein granted shall be vested in a Congress of the United States."

So with respect to the Appropriations Clause, the Supreme Court has underscored its straightforward and explicit command, "it simply means that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." That's from *Office of Personnel Management versus Richmond*, 496 U.S. 414, 424.

Here, the Bureau is funded from the earnings of the Federal Reserve which Congress has, in fact, authorized by statute. I've already discussed 5497. And that's important here because the Appropriations Clause "does not in any way circumscribe Congress from creating self-financing programs without first appropriating the funds as it does in typical appropriation and supplement appropriation acts," which is, in the Court's view, what exactly what Congress has done here. That's a quote from *AINS Inc. versus United States*, 56 Federal Court of Claims 522, 539, I'll note a case that was affirmed by the Federal Circuit but abrogated on other grounds by the Federal Circuit. Other cases that have addressed this

issue is *CFPB v. Think Finance, LLC*, 2018 WL 3707919 at *2, the District of Montana there determined that the CFPB's funding does not violate the Appropriations Clause; ditto the Central District of California in two cases, *CFPB versus D&D Marketing*, 2016 WL 8849698, and *CFPB versus Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089. Indeed, although the Supreme Court referenced the Bureau's funding structure in *Seila Law*, it did so to point to the level of power vested in a director removable only for cause, not to independently suggest that the funding mechanisms were somehow unconstitutional. For example, on page 2203, the Supreme Court noted "the CFPB's single-director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The director does not even depend on Congress for annual appropriations." So I think it's fair to say that although the Bureau's funding structure was not directly at issue in *Seila Law*, in deciding to sever the for-cause removal provision of the CFPA, the Supreme Court did note "the only constitutional defect we have identified in the CFPB structure is the director's insulation from removal," and that that constitutional defect "disappear[ed]" with a director removable at will by the President.

It's also important to note that the courts have held that Congress may "choose to loosen its own reins on public expenditure. Congress may also decide not to finance a federal entity with appropriations." This was noted in the *Morgan Drexen* case at 1089. Indeed, as the Bureau points out, Congress has provided similar independence to other financial regulators, like the Federal Reserve, the FDIC, the OCC, the National Credit Union Administration, and the Federal Housing Finance Agency. And this was all discussed in *PHH Corp. versus*

CFPB, 881 F.3d 75, 81. Also, *CFPB versus Navient Corp.*, 2017 WL 3380530 at *16, which lists these and some other agencies as independent agencies that operate completely outside the normal appropriations process. Indeed, these other agencies have been deemed to have complete, uncapped budgetary autonomy, as noted in *PHH II*, 881 at page 81. Indeed, the Federal Reserve has been around for over 100 years, and like the CFPB, has broad investigative and enforcement authority, including the power to conduct on-site examinations of banks under its purview to impose certainly monetary penalties.

Also, I just find it unconvincing, although it's certainly stridently argued that the narrow exception limited to agencies that receive funding from fees and the like. There's really no authority to support this narrow exception theory of the self-funded governmental entities. I think *PHH II*, the case, in fact, respondent cites for the proposition, the DC Circuit found "the way the CFPB is funded fits within the tradition of independent financial regulators" and does not violate the Constitution. In fact, the DC Circuit totally *en banc* found that "the requirement that the CFPB seek congressional approval for funding beyond the statutory cap makes it more constrained in this regard than other financial regulators."

Plus, Congress hasn't relinquished control over all the agency's funding, so although the CFPA restricts the House and Senate Appropriations Committees from reviewing the Bureau's primary funding source, it doesn't strip Congress as a whole of its power to modify appropriations as it sees fit. That's from *CFPB versus ITT Educational Services, Inc.*, 219 F.Supp. 3d 878, 896, that's a Southern District of Indiana decision from 2015. In fact, the CFPB has a formula-based spending cap on the amount that the Bureau's director can derive from the Fed, and the CFPA further "imposes a number of other

conditions on the director's use of the funds so derived." And that's from the *ITT* case page 896 n.12.

What's more, Congress "might not have exempted the CFPB from congressional oversight via the appropriations process if it had known the CFPB would come under executive control." But it "remains free to change how the CFPB is funded at any time." That's noted by *Navient Corp.*, 2017 WL 3380530 at *16. And in fact, the *PHH I* case, which is *PHH Corp. versus CFPB*, reported at 839 F.3d 1, at page 36 n.16, "Congress can always alter the CFPB's funding in any appropriations cycle or at any other time. Section 5497 is not an entrenched statute shielded from future congressional alteration, nor could it be."

And to the extent that the argument is that the nondelegation doctrine applies because Congress has transferred its authority to another branch of government, which in fact is the argument that's made at page 15, the Supreme Court has indicated that "in our increasingly complex society replete with ever changing and more technical problems ... Congress simply cannot do its job absent an ability to delegate power under broad general directives." That's from *Gundy versus United States*, 139 Supreme Court at 2123. Thus, "a statutory delegation is constitutional as long as Congress lays down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." And that's from the same page. As such, "the constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion," and there's really been no explanation of what aspect of the funding structure lacks that intelligible principle. In fact, by limiting the funding that the director may request from the Fed, with a formula-based spending cap on the amount, it seems clear that the CFPB does not

lack for a principle or have some sort of unguided or unchecked authority granted to the CFPB. So the Court finds that Title X does not violate appropriations and vesting clauses in the Constitution.

Turning to the ratification issue, on July 2nd, the Bureau filed a notice of ratification issued by the director. She noted that "in her capacity as the director, she considered the basis for the CFPB's decision to issue the CID to respondent, to deny respondent's request to modify or set aside the CID, and to file a petition requesting that the District Court enforce the CID." She also noted that she ratified this decision on behalf of the Bureau and that she understood that the President may now remove her with or without cause." And that's from paragraph three, four and five of her declaration.

The argument is that the 2019 CID is invalid because it's the product of an unconstitutionally structured federal agency, and when Director Kraninger acted prior to *Seila Law*, she was an invalid agent acting without any authority, thus, any actions taken by her were basically null and void and can't be saved by ratification. The second point is that even if Director Kraninger was able to ratify her previous actions as an unconstitutionally insulated director, the 2019 CID would still be unenforceable because the ratification does not cure the structural constitutional defect identified by the Supreme Court, only the President himself can ratify the Director's prior acts. The third argument is that even if the director had validated her prior acts, she did not purport to ratify the regs until the week after she ratified the enforcement action. And finally, that the director failed to perform a detached and considered judgment of the act that she ratified.

Now *Seila Law* left open the question of validity of a ratification by the director, but of course, the

circumstances there were different, as the CID had been issued by a different director, Director Cordray, the first director, and was subsequently ratified by Acting Director Mulvaney, who the CFPB argued could be removed at will by the President because of his status as the acting director. The Supreme Court found that the question of whether the alleged ratification, in fact, occurred and whether it is legally sufficient to cure the constitutional defect, the original demand ... turned on case-specific factual and legal questions not addressed below and not briefed before the court. So the court remanded that question finding the appropriate course was for the lower court to consider those questions in the first instance. Of course, the Court recognizes that Justice Thomas had a different view, and it speaks for itself. I'm sure you all have read it.

All right, so addressing sort of the arguments in turn. The first argument is, as I mentioned, that the actions taken by the Bureau prior to *Seila Law* are nullities that cannot be ratified. And because the court's severance of the removal provision in Title X was prospective, respondent argues that when the director acted, she was an invalid agent, as such, her acts are void *ab initio*. And there's the other argument, the related argument, that the ratification would deprive the respondent of any remedy for the constitutional violation, the separation of power violation, and vindication for her claim that the Bureau was unconstitutionally ratified to begin with.

And as I said, the other argument is that even if the earlier actions could be ratified, only the President can do so, because the President was the Bureau's only lawfully acting principal prior to severing the for-cause removal provision.

Now, I think we all agree, and I think it was said so

during the argument, that the Supreme Court has made clear that on the question of authorization or ratification, that this is something that's typically governed by principles of agency law. And this is discussed in the *Political Victory Fund* case, 513 U.S. 88, 98, and lower cases precisely dealing with challenges to the CFPB structure have noted such, among others, the *Gordon* case, which is a Ninth Circuit case, reported 819 F.3d 1179, 1191, and then *RD Legal Funding*, 332 F.Supp. 3d 729, 785.

In *Political Victory Fund,* the Supreme Court has looked to the restatement of agency to determine whether an after-the-fact authorization by the Solicitor General related back to the date of the unauthorized filing by the FEC such that the authorization would make the filing timely. The court found that it didn't because under the restatement, "if an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such a time." That's at page 98. The Court stated that the rationale behind the rule was that it was "essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at time the ratification was made." The emphasis is on the but-also phrase, same page. Thus, because the filing deadline would have already passed at the time the Solicitor General authorized the act, the Authorization in that case was invalid.

Now, courts have interpreted this as really amounting to addressing a timing issue. So, for example, *Advance Disposal Services Eastern, Inc. versus NLRB.*, 820 F.3d 592, 603, and they utilized the principles of agency law to determine whether a later ratification authorizes an earlier action by an agent particularly with respect to

appropriation clause violations. So what the Third Circuit said in the *Advance Disposal* case is that the timing problem in *Political Victory Fund* has since been read to require that the ratifier had the power to reconsider the earlier decision at the time of the ratification. And so there the Third Circuit considered three general requirements for ratification in determining whether a properly constituted NLRB and its regional director could ratify an action taken by the regional director at a time where the board lacked a valid quorum given invalid recess appointments of several members. So the three requirements are: "First, the ratifier must, at the time of ratification, still have the authority to take the action to be ratified; second, the ratifier must have full knowledge of the decision to be ratified; third, the ratifier must make a detached and considered affirmation of the earlier decision." So there the Third Circuit ultimately found that the requirements were satisfied, and that's the bottom line.

Now in *Gordon*, which is the Ninth Circuit case, the parties agreed that although Director Cordray's initial recess appointment was invalid and did not satisfy the requirement of the appointments clause, later renomination and confirmation was valid. So based on that, the Ninth Circuit determined that a ratification issued by Director Cordray with respect to enforcement action at issue in that case, paired with a subsequent valid appointment, cured any initial Article II deficiencies. In reaching that conclusion, the Ninth Circuit reasoned that "under the second restatement, if the principal, [the] (CFPB), had authority to bring the action in question, then the subsequent ratification of the decision to bring the case is sufficient." That's from 1191. It bears noting that the Ninth Circuit did cite the "less stringent" third restatement of agency, Section 4.04 comment B., which

"advises that a ratification is valid even if principal did not have capacity to act at the time, so long as the person ratifying had capacity to act at the time of ratification." So the Ninth Circuit found that because Congress statutorily authorized the Bureau to bring the action in question through the CFPA, the Bureau had authority to bring the action at the time the enforcement action was initiated, and thus, the director's ratification, Director Cordray's ratification, after his proper appointment resolved any appointment clause deficiencies.

So, as in *Advance Disposal* here, the Court's view is that there appears to be no limitation that would prevent Director Kraninger from bringing an enforcement action against respondent at the time, given that she is now removable at will by the President. Indeed, I think that was conceded during the argument. Furthermore, if the director is considered to be both the agency and the principal, like the regional director in *Advance Disposal*, she better than anyone else had full knowledge of her earlier action. And, as in *Gordon*, here, if the CFPB, if the Bureau is to be considered the principal, and Congress authorized the Bureau to issue CIDs and bring the actions in federal court to enforce consumer protection statutes and regulations.

Now, it's true that some courts have distinguished between ratification and cases involving appointment clause violations and those involving structural defects. So this is, of course, discussed and argued in *RD Legal Funding* by Judge Preska where she thought the distinction was dispositive. But unlike in the *RD Legal Funding* case, here the for-cause removal provision has been severed and the structure of the Bureau is no longer in contravention of the Constitution. So the constitutional deficiency issue doesn't exist here anymore. Of course, Judge Preska didn't have the benefit of the *Seila Law*

decision, which we obviously have here. As such, the relevant question seems to be whether the constitutional violation has been remedied and whether the remedy was effective and adequately addressed the prejudice to respondent from the constitutional violation. And that's the framing that was set forth by the DC Circuit in the *Legi-Tech* decision, 75 F.3d 704, 708. If that's true, then dismissal of the enforcement action is neither necessary nor appropriate.

And I think *Legi-Tech* is instructive here as one of the few cases where a court examined whether ratification of a previously brought enforcement action, in light of a structural constitutional defect that had been cured, was sufficient to remedy respondent's claimed injury against whom the enforcement action was taken. In that case, what the DC Circuit did is it handled a challenge to litigation brought by the FEC after the circuit had determined that the agency's structure violated the Constitution in the case called *FEC versus NRA Political Victory Fund*, given the presence of two constitutional officers as non-voting *ex officio* members if the FEC. As in *Seila Law*, however, the DC Circuit determined that the provision was severable and the FEC thereafter voted to reconstitute itself, excluding those *ex officio* members from all proceedings and ratified former actions, including the agency's previous probable cause finding and civil enforcement action.

Just as has happened here, the respondent in that case argued that separation of powers is a structural constitutional defect that made the entire investigation void and that the FEC's later ratification of the PC finding couldn't cure the constitutional violation given that the vote at the end of the administrative process doesn't remove the taint, the structural taint, from the sequence of the decision.

And there the DC Circuit even acknowledged the respondent was, in fact, prejudiced given the structural defect in place at the time, but the court framed the question as "the degree of continuing prejudice after the FEC's reconstitution and ratification," at page 708.

The D.C. Circuit assumed that no matter what course was followed, other than a dismissal with prejudice, some effects of the unconstitutional structure of the FEC are to be presumed to have impacted the action. The court nonetheless determined there was no ideal solution to that problem because "even were the commission to return to square one, it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time." And that's what I think we have here, and that's what I mentioned during argument. But even if the Court were to dismiss this enforcement action, there's really no reason to believe that the Bureau's decision to issue the CID to bring an action would differ another time around. And I think that's been acknowledged here. So, as in *Legi-Tech*, where there is no significant change in the membership of the commission, there's been no significant change in the leadership here, forcing the Bureau to start at the beginning of the process, given what the DC Circuit described as human nature, "promises no more detached and pure consideration of the merits of the case than in this case the Bureau's ratification decision reflected." So the more efficient and sensible course seems to be to take the ratification of this prior decision at face value and treat that as the adequate remedy for the constitutional violation bearing in mind "the discretion the judiciary employs in the selection of remedies."

Indeed, ratification has similarly been found to be an effective cure in cases involving appointments clause violations that were later resolved, particularly when a

dismissal would likely result in a similar administrative procedure. So one case is the DC Circuit's decision in *Wilkes Barr Hospital Company LLC versus NLRB.* There's the *Doolin Security Savings Bank* case, 139 F.3d 214, *Intercollegiate Broadcast Systems*, 798 F.3d at 117.

Also, it bears noting that before *Seila Law*, at least two courts determined that even if the CFPA's for-cause removal provision was severable, the enforcement action would still be effective. And I'll note both a *PHH I* and *PHH II* cases where then Judge Kavanaugh determined that the for-cause removal provision was, in fact, unconstitutional but that it was severable from the rest of the CFPA. Judge Kavanaugh then considered the petitioner's statutory objections to the enforcement action and vacated the action on statutory grounds but not based on the structural constitutional violation, "because the constitutional ruling would not halt the CFPB's ongoing operations or the CFPB's ability to uphold the order against the petitioners."

And a similar decision was reached by Judge McMahon in *CFPB v. NDG Financial Corp.*, 2016 WL 7188792.

Now, to the extent that there's the argument that not only would this ruling deprive respondent of a remedy in this case but also in the related case, the Court does not agree. In the related case, the respondent seeks a declaratory judgment that CFPB's single-director structure violates the Constitution,, but that's precisely the remedy that the conclusion in *Seila Law* provides.

With respect to *Lucia versus SEC*, I think that case is just different. The Supreme Court there determined that the appointment of an ALJ who presided over an enforcement proceeding did not comport with the appointments clause. The court found that under its precedent, "one who makes a timely challenge to the

constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief." That's from page 2055. The court determined that the appropriate remedy for an adjudication tainted with appointments violations is a new hearing before a properly appointed official. But, here, as the Bureau points out, the adjudication of the CID is before this Court, as is the adjudication of the related case. So it's an apples-and-oranges comparison. What's more, in *Lucia*, the court found that another ALJ or the SEC itself would need to hold a new hearing because the previous ALJ already both heard the petitioner's case and issued an initial decision on the merits. But here, there's been no "adjudication," by the Bureau or the director, with respect to the enforcement action and also there's no substitute decision-maker to revisit the decision such as another ALJ.

To the extent that the respondent argues that the Supreme Court determined in *Seila Law* that the only lawfully acting principal is the President, I just don't think that's a fair reading of *Seila Law*. Although the court, the Supreme Court cited the well-established principle that the executive power belongs to the President, it didn't issue any sort of ruling on ratification in fact stating that "because it would be impossible for one man to perform all the great business of the state, the Constitution assumes that lesser executive officers will assist the supreme magistrate in discharging the duties of his trust." Quoting from the writing of George Washington. Can you get a better source than that. There really isn't any other authority to support this proposition, as clever as it is.

So the Court finds that where the for-cause removal provision has been severed, and thus, the constitutional violation has dissipated, the ratification of the prior action is valid.

Now there's the other argument, as I said, there's

the argument that the director has not validly ratified the Bureau's regulations and its related guidance documents that her ratification of this action is invalid. In fact, what the respondent argues is because Director Kraninger ratified the investigation and the enforcement on July 2 and regulations on July 10, that she could not have attained the regulatory authority to ratify this case until July 10 at the earliest. And the respondent further argues that the ratification was, in any event, ineffective, as "if anyone can ratify prior invalid Bureau regulations, guidance documents, and enforcement activities, only the President can."

The Court does not agree. The Bureau's authority to issue and enforce CIDs is derived not just from the CFPB but from the CFPA, and in deciding that the Bureau was unconstitutionally constituted, the Supreme Court determined that the removal provision was severable from any other statutory provision relating to the Bureau's powers and responsibilities. So the provisions related to the Bureau's authority to issue CIDs, they remain valid based on *Seila Law*.

To the extent that there's this argument that the director failed to perform a detached and considered judgment of the actions she ratified, this argument is based on the assumption that she couldn't have given the prior acts more than a passing glance because it would have had to have been done within a matter of days after *Seila Law*.

While it's certainly true a ratifier must make a detached and considered judgment and not simply rubber-stamp an earlier action, there's really no actual evidence to establish that the director failed to conduct an independent evaluation or make a detached considered judgment, it's merely speculation based on sort of timing, but that's just, at the end of the day, that's just not enough

authority that says that somehow that's enough. So, for example, in *Advanced Disposal Services*, the Court noted that mere lack of detail in the director's express ratification is not sufficient to overcome the presumption of regularity. In fact, elsewhere in that decision the Third Circuit noted that the presumption of regularity applied to the actions of an agency, and finding that those opposing ratification, in that case, had "not produced evidence that cast doubt on the agency's claim that the board of directors properly ratified the earlier actions." And the party argued only that ratification was a "rubber-stamp." And also *Legi-Tech*, the DC Circuit said that it couldn't examine the internal deliberations of the commission, at least absent the contention that one or more commissioners was actually biased.

Here, the ratification states that the director considered the basis for the Bureau's decisions to issue the CID, to deny respondent's request to modify or set aside the CID, and to file a petition requesting that the district court could enforce the CID, and she ratified those decisions on behalf of the Bureau. In the Court's view, that is sufficient under the circumstances.

All right, now in terms of the enforceability of the CID, as noted, the Court's role here is extremely limited, but of course the information being sought has to be reasonable. I've gone through all this. An agency does have to make only a *prime facie* showing that the four requirements I discussed earlier had been met.

In terms of the purpose of the investigation, the CID indicates the purpose. It's all laid out in the CID. In the Court's view, this reflects a legitimate, investigatory purpose, as the CFPA expressly authorizes the Bureau to investigate suspected violations of consumer protection laws, such as the FDCPA and the FCRA, which is what is the purpose here, among others. I'll just note a couple of

cases that have come to similar conclusions, *CFPB versus Heartland Campus Decisions, ESCI*, 2018 WL 1089806, as I said, among others.

Now the argument here is that respondent sort of states the purpose of the CID, arguing that it falls under the practice-of-law exception, acknowledging that although the respondent's services include debt-resolution activities that might be regulated by the Bureau as the third party, the Bureau is prohibited from regulating the practice of law and that the Bureau has "pressed its obstinate demand for information and documents, including those created in respondent's practice of law that respondent is duty-bound to protect from disclosure." The practice-of-law exclusion instructs the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of the state in which the attorney is licensed to practice law. So though while it's true the CID sought information that regulated the practice of law and that that would be impermissible on its face, that's not the purpose of the CID. In fact, the Bureau has made this quite clear that that is not the purpose of the CID.

The nature of the CID and the investigation falls under an exception to the practice-of-law exclusion. Section 5517(e)(2) states that the exclusion "shall not be construed as to limit the authority of the Bureau with respect to any attorney to the extent that such attorney is otherwise subject to any of the enumerated consumer laws or authorities transferred." So here the Bureau seeks information about possible violations, as I said, of the FDCPA and the FCRA, both of which respondent is subject to and the Bureau represents that the purpose of the CID is not to investigate in the actual practice of law but is instead meant to gather information about respondent's debt-collection activity, which the CID

specifically defines as activities, including attempts to collect a debt, either directly or indirectly, excluding the provision of legal services. I think respondent acknowledges that that's not an impermissible purpose. I think there's just a question of the extent to which the documents themselves that are being sought, for example, might implicate attorney-client privilege. And I will certainly talk about that in a minute. But on its face, the Court finds that the purpose is legitimate.

In terms of relevance, that could be broadly interpreted, and the courts are supposed to defer to an agency's appraisal of relevance. And so, unless it's obviously wrong, the Court's not going to question it. Again, this gets into the attorney-client confidences issue. And the Bureau obviously disagrees that it is trying to seek or retain information that is covered by the privilege because, for example, the communications being sought do not reflect communications by clients seeking an opinion of law, legal services, or assistance in some legal proceeding involving respondent. Instead, the CID seeks information related to respondent's debt-collection business and specifically defines debt-collection activities as excluding the provision of legal services and directs respondent that if any responsive materials were held on the basis of privilege that respondent should submit a schedule of the documents and information withheld that includes details, such as the subject matter, dates, names, address, et cetera.

And any party asserting attorney-client privilege has to demonstrate: The asserted holder of the privilege is or sought to become a client; that the person to whom the communication was made is the member of a bar or a court, or that person's subordinate; in connection with this communication is acting as lawyer; the communication relates to a fact the attorney was informed, A, by a client,

B, without the presence of strangers, C, for the purpose of securing primarily an opinion of law or legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort, and the privilege has been claimed and not waived by the client. That's all spelled out in *SEC versus Yorkville Advisors, LLC*, 300 F.R.D. 152, 161.

As I said, it's pretty clear that the material that the Bureau seeks is relevant in terms of how it relates to the investigation and the statutory violations that the Bureau is statutorily charged with investigating, and on the face the requests appear to be related to debt-collection services provided by respondent, and so they are relevant to the investigatory purpose.

To the extent that there are broad assertions of attorney-client privilege, that's really not going to get it done. So, for example, to the extent that there is a claim that the Bureau seeks attorney-client confidences and privileged documents and information, those are not really detailed at all, there's no specific examples given, there's nothing about relating to specific legal advice the respondent had given. So, for example, some of the documents that the Bureau seeks, information on consumer complaints in recordings of calls between respondent and consumers, that's not embodied by the attorney-client privilege. Just on its face it's just not.

And it also should be I think undisputed territory that to the extent an attorney acts as a collection agent, any communications between that attorney and the client are not protected by the attorney-client privilege. Among other cases that was noted in *Avoletta versus Danforth*, 2012 WL 3113151. Again, the Bureau is saying that all it wants is information related to respondent's activity and debt-collection activity.

To the extent that there is information that is

privileged, then respondent can submit a privilege log, which has not been done in connection with the CID.

And I think there's also, I think, force to the Bureau's argument that Rule 1.6 specifically exempts an attorney from any sort of responsibility to the extent the information is required by an order of the Court. Among other cases, *In re Alghanim*, 2018 WL 2356660.

Thus, because the Court's view is that the Bureau is not seeking privileged information, it's conducting an investigation, and the respondent hasn't shown that the Court should otherwise refuse to enforce the CID on the basis of relevance, the Court finds that the Bureau has demonstrated that the information it seeks is relevant.

Again, to the extent there are specific objections, because there are specific document or portions of documents that are privileged, then a privilege log can be submitted.

In terms of what's already in the Bureau's possession, the Bureau I think persuasively makes the point that the previously identified pages from the 2017 CID, there were some issues about formatting which that was provided, there was clawback. So there was a clawback and redaction of many of the pages that were responsive. And to the extent respondent generally has said, hey, I produced thousands of pages in response to the 2017 CID, that's not sufficient to rebut the Bureau's representation, it's showing as to what it has not been given. Plus the 2017 and 2019 CIDs are not identical. And so absent more specific detail, the Court finds this objection not to be persuasive.

In terms of the administrative steps taken, the only argument here has to do with the ratification, but the Court has already ruled on that.

With respect to FedChex issue, the Court agrees that Rule 19 is essentially not applicable here, not

applicable to enforcement proceedings, and I don't think respondent has made the showing that, even if it somehow did apply, that it should apply here. I'll note that the Court hasn't been able to find a case within the Second Circuit regarding the applicability of Rule 19 to enforcement proceedings, but there have been, certainly are decisions that in the context of the SEC and CFTC proceedings, that Rule 19 is not dispositive, among other cases *SEC versus Princeton Economic International Limited*, 2001 WL 10233, at *1.

Even if it did apply, it's far from clear that FedChex is a necessary party. To the extent that the respondent has information that is responsive to the CID that might tangentially relate to FedChex, then respondent should produce that material. To the extent that they are privileged, then respondent can submit a privilege log, as previously discussed.

So for these reasons the Court grants the petition to enforce the 2019 CID. To the extent, as I said, that there are objections, specific objections regarding privileged material, respondent should submit a schedule of that material as directed by the CID to the Bureau. To the extent that the respondent seeks modifications based on what it produced in response to the 2017 CID, it can discuss this with the Bureau and write specific details on the material if it feels satisfied the requests from the 2019 CID that are duplicative of the 2017 CID.

Sorry to keep you so long, is there anything else?

MS. ASSAE-BILLE: Not from the Bureau, your Honor.

MR. DeGRANDIS: For the respondent, we have nothing further. Thank you, your Honor.

THE COURT: All right. Have a pleasant afternoon.

Everybody stay healthy.

MR. DeGRANDIS: Thank you, you, too.

MS. ASSAE-BILLE: Thank you, your Honor.

(Proceedings concluded)

CERTIFICATE: I hereby certify that the foregoing is a true and accurate transcript, to the best of my skill and ability, from my stenographic notes of this proceeding.

Angela A. O'Donnell, RPR, Official Court Reporter, USDC, SDNY

APPENDIX D

Statutory Provisions

12 U.S.C. § 5497 provides:

Funding; penalties and fines

(a) Transfer of funds from Board Of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

(3) Transition period

Beginning on July 21, 2010, and until the designated transfer date, the Board of Governors shall transfer to the Bureau the amount estimated by the

Secretary needed to carry out the authorities granted to the Bureau under Federal consumer financial law, from July 21, 2010 until the designated transfer date.

(4) Budget and financial management

(A) Financial operating plans and forecasts

The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau.

(B) Financial statements

The Bureau shall prepare annually a statement of—

(i) assets and liabilities and surplus or deficit;

(ii) income and expenses; and

(iii) sources and application of funds.

(C) Financial management systems

The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and

applicable Federal accounting standards.

(D) Assertion of internal controls

The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of title 31.

(E) Rule of construction

This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.

(F) Financial statements

The financial statements of the Bureau shall not be consolidated with the financial statements of either the Board of Governors or the Federal Reserve System.

(5) Audit of the Bureau

(A) In general

The Comptroller General shall annually audit

the financial transactions of the Bureau in accordance with the United States generally accepted government auditing standards, as may be prescribed by the Comptroller General of the United States. The audit shall be conducted at the place or places where accounts of the Bureau are normally kept. The representatives of the Government Accountability Office shall have access to the personnel and to all books, accounts, documents, papers, records (including electronic records), reports, files, and all other papers, automated data, things, or property belonging to or under the control of or used or employed by the Bureau pertaining to its financial transactions and necessary to facilitate the audit, and such representatives shall be afforded full facilities for verifying transactions with the balances or securities held by depositories, fiscal agents, and custodians. All such books, accounts, documents, records, reports, files, papers, and property of the Bureau shall remain in possession and custody of the Bureau. The Comptroller General may obtain and duplicate any such books, accounts, documents, records, working papers, automated data and files, or other information relevant to such audit without cost to the Comptroller General, and the right of access of the Comptroller General to such information shall be enforceable pursuant to section 716(c) of title 31.

(B) Report

The Comptroller General shall submit to the

Congress a report of each annual audit conducted under this subsection. The report to the Congress shall set forth the scope of the audit and shall include the statement of assets and liabilities and surplus or deficit, the statement of income and expenses, the statement of sources and application of funds, and such comments and information as may be deemed necessary to inform Congress of the financial operations and condition of the Bureau, together with such recommendations with respect thereto as the Comptroller General may deem advisable. A copy of each report shall be furnished to the President and to the Bureau at the time submitted to the Congress.

(C) Assistance and costs

For the purpose of conducting an audit under this subsection, the Comptroller General may, in the discretion of the Comptroller General, employ by contract, without regard to section 6101 of title 41, professional services of firms and organizations of certified public accountants for temporary periods or for special purposes. Upon the request of the Comptroller General, the Director of the Bureau shall transfer to the Government Accountability Office from funds available, the amount requested by the Comptroller General to cover the full costs of any audit and report conducted by the Comptroller General. The Comptroller General shall credit funds transferred to the account established for salaries and expenses of the Government Accountability Office, and such

amount shall be available upon receipt and without fiscal year limitation to cover the full costs of the audit and report.

(b) Consumer Financial Protection Fund

(1) Separate fund in Federal Reserve established

There is established in the Federal Reserve a separate fund, to be known as the "Bureau of Consumer Financial Protection Fund" (referred to in this section as the "Bureau Fund"). The Bureau Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose.

(2) Fund receipts

All amounts transferred to the Bureau under subsection (a) shall be deposited into the Bureau Fund.

(3) Investment authority

(A) Amounts in Bureau Fund may be invested

The Bureau may request the Board of Governors to direct the investment of the portion of the Bureau Fund that is not, in the judgment of the Bureau, required to meet the current needs of the Bureau.

(B) Eligible investments

Investments authorized by this paragraph shall be made in obligations of the United States or obligations that are guaranteed as to principal and interest by the United States, with maturities suitable to the needs of the Bureau Fund, as determined by the Bureau.

(C) Interest and proceeds credited

The interest on, and the proceeds from the sale or redemption of, any obligations held in the Bureau Fund shall be credited to the Bureau Fund.

(c) Use of funds

(1) In general

Funds obtained by, transferred to, or credited to the Bureau Fund shall be immediately available to the Bureau and under the control of the Director, and shall remain available until expended, to pay the expenses of the Bureau in carrying out its duties and responsibilities. The compensation of the Director and other employees of the Bureau and all other expenses thereof may be paid from, obtained by, transferred to, or credited to the Bureau Fund under this section.

(2) Funds that are not Government funds

Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.

(3) Amounts not subject to apportionment

Notwithstanding any other provision of law, amounts in the Bureau Fund and in the Civil Penalty Fund established under subsection (d) shall not be subject to apportionment for purposes of chapter 15 of title 31 or under any other authority.

(d) Penalties and fines

(1) Establishment of victims relief fund

There is established in the Federal Reserve a separate fund, to be known as the "Consumer Financial Civil Penalty Fund" (referred to in this section as the "Civil Penalty Fund"). The Civil Penalty Fund shall be maintained and established at a Federal reserve bank, in accordance with such requirements as the Board of Governors may impose. If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.

(2) Payment to victims

Amounts in the Civil Penalty Fund shall be available to the Bureau, without fiscal year limitation, for payments to the victims of activities for which civil penalties have been imposed under the Federal consumer financial laws. To the extent that such victims cannot be located or such payments are otherwise not practicable, the Bureau may use such funds for the purpose of consumer education and financial literacy programs.

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the

authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

(3) Apportionment

Notwithstanding any other provision of law, the amounts in paragraph (2) shall be subject to apportionment under section 1517 of title 31 and restrictions that generally apply to the use of appropriated funds in title 31 and other laws.

(4) Annual report

The Director shall prepare and submit a report, on an annual basis, to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives regarding the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau, including any funds appropriated in accordance with this subsection.