

KEVIN E. FRIEDL
MAUREEN MCOWEN
JONATHAN REISCHL
TRACY L. HILMER
(202) 435-9268
kevin.friedl@cfpb.gov
maureen.mcowen@cfpb.gov
jonathan.reischl@cfpb.gov
tracy.hilmer@cfpb.gov
1700 G Street, NW
Washington, DC 20552

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

BUREAU OF CONSUMER
FINANCIAL PROTECTION,

Plaintiff,

v.

PROGREXION MARKETING, INC., *et al.*,

Defendants.

Civil Action No. 2:19-CV-298-BSJ

NOTICE

Plaintiff Consumer Financial Protection Bureau submits this notice to inform the Court of a change in the Bureau's position regarding an issue in the case: the constitutionality of the for-cause removal provision in the Consumer Financial Protection Act (CFPA). *See* 12 U.S.C. § 5491(c)(3).

In the Bureau's Opposition to Defendants' Motion to Dismiss, ECF No. 36, it argued that the for-cause removal provision is constitutional because it does not impede the President's

ability to perform his constitutional duties, Opp’n at 30–33. Yesterday, the Office of the Solicitor General filed a brief on behalf of the Bureau in support of a petition for certiorari in *Seila Law LLC v. CFPB*, No. 19-7 (S. Ct.) (filed Sept. 17, 2019) (OSG Br.). That brief urges the Supreme Court to grant certiorari to address the constitutionality of the CFPA’s for-cause removal provision and argues that the provision is unconstitutional but that the constitutional problem does not affect the validity of the other provisions of the CFPA. (A copy of that brief is attached.) The Bureau’s Director has determined that she agrees with the Solicitor General’s position and has accordingly directed that Bureau attorneys no longer defend the constitutionality of the removal provision in this Court or in any other.¹

Although the Bureau now agrees that the for-cause removal provision in the CFPA is unconstitutional, the Bureau does not agree with Defendants that the Complaint should be dismissed.

As the Bureau’s Opposition explained, Opp’n at 33–34, the unconstitutionality of the for-cause removal provision does not affect the validity of the remainder of the CFPA because that provision is severable and, indeed, Congress expressly directed that “[i]f any provision of this Act ... is held to be unconstitutional, the remainder of this Act ... shall not be affected thereby,” 12 U.S.C. § 5302; *see also* OSG Br. at 16–17. The Fifth Circuit, sitting en banc, recently reached the same conclusion with respect to the for-cause removal protection that applies to the head of the Federal Housing Finance Agency. In *Collins v. Mnuchin*, the Fifth Circuit held that such “removal protection, in combination with other FHFA features, is inconsistent with Article II and the separation of powers.” --- F.3d ---, 2019 WL 4233612, at *22 (5th Cir. Sept. 6, 2019) (en banc). The court went on to hold that “the appropriate remedy for that finding is to declare the

¹ The Bureau stands by the other arguments in its Opposition, including its position that the Bureau’s statutory method of funding is constitutional.

‘for cause’ provision severed.” *Id.* at *25–28. Such declaration remedied any “ongoing injury” to the challengers. *Id.* at *28.

Thus, were this Court to agree that the for-cause removal provision in the CFPA is unconstitutional, dismissal of the Complaint would not be the proper remedy because the removal provision can instead be severed from the rest of the statute. Opp’n at 34. Severing that provision would remedy any “ongoing injury” to Defendants caused by the provision. *Collins*, 2019 WL 4233612, at *28; *see also* Opp’n at 33–34 (citing similar outcomes in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) and then-Judge Kavanaugh’s vacated panel decision in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016)); *cf. CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *18–19 (M.D. Pa. Aug. 4, 2017) (unpublished) (“[I]n the event that the Bureau’s structure is found to be unconstitutional and the problematic provisions are severed ... , the severance would not affect the CFPB’s ability to maintain the present suit.”). This case could then proceed in the ordinary course toward a resolution on the merits of the claims in the Complaint.

So while the Bureau submits this notice to inform the Court of its change in position regarding the constitutionality of the for-cause removal provision in the CFPA, the Bureau’s position remains that this litigation should proceed.

Dated: September 18, 2019

Respectfully submitted,

CARA PETERSEN
Acting Enforcement Director

DAVID RUBENSTEIN
Deputy Enforcement Director

CYNTHIA GOOEN LESSER
Assistant Deputy Enforcement Director

/s/ Kevin E. Friedl
KEVIN E. FRIEDL
MAUREEN MCOWEN
JONATHAN REISCHL
TRACY L. HILMER
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552
Telephone: (202) 435-9268
kevin.friedl@cfpb.gov
maureen.mcowen@cfpb.gov
jonathan.reischl@cfpb.gov
tracy.hilmer@cfpb.gov

Attorneys for Plaintiff