Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—D.D.C.: Former Fed officials support NTEU motion for clarification of CFPB injunction obligations, (Dec. 8, 2025)

Banking and Finance Law Daily Wrap Up

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By Justin Marcus Smith, J.D.

The former officials argued a technical and off-point "lack of profits" does not prevent the Federal Reserve from continuing to meet its public obligations, including the obligation to make requested transfers of operating funds to the CFPB.

Several former Federal Reserve officials have lent their support, as proposed *amici curiae,* to a pending National Treasury Employees Union motion for clarification of Consumer Financial Protection Bureau (CFPB) obligations under the court's preliminary injunction limiting the CFPB's purported wind-down. In a proposed brief, the *amici* argued that the CFPB defendants relied on a "mistaken" Office of Legal Counsel (OLC) analysis that the Federal Reserve Board does not have funds to pay for ongoing CFPB operations at CFPB request. The *amici* explained their general point that the Federal Reserve is not a private bank and is therefore not constrained by private banking accounting rules. They also expressed a more specific argument that the Federal Reserve is presently "profitable" under any disputed definition of the word. The Federal Reserve has the money it needs to pay for "necessary expenses," inclusive of whatever funds the CFPB might request for continued operation, as is always the case in carrying out public purposes. Moreover, the *amici* cautioned that the OLC opinion did not respect the expertise or independence of the Federal Reserve (*National Treasury Employees Union, et al. v. Vought, et al.*, No. 1:25-cv-00381-ABJ (D.D.C. Nov. 10, 2025)).

Background. In the ongoing National Treasury Employees Union (NTEU) case challenging the actions of Consumer Financial Protection Bureau (CFPB) Acting Director Russell Vought, on Nov. 10, 2025, the CFPB defendants notified the court that they anticipated exhausting available operating funds in early 2026 (see *Banking and Finance Law Daily*, Nov. 12, 2025).

More importantly, the CFPB defendants additionally notified the court that they refused to request more funding from the Federal Reserve to ensure the Bureau's continued operation in compliance with the court's preliminary injunction. The notice relied on a Nov. 7, 2025, opinion issued by the Department of Justice Office of Legal Counsel (OLC). The OLC concluded that the Federal Reserve currently has no combined earnings available, and that in the absence of such earnings, the CFPB purportedly lacks a lawful source from which to draw funds. OLC opinions are binding on executive branch agencies, including the CFPB. At the time, the Bureau said it expected to have sufficient funds to continue operations through at least Dec. 31, 2025.

On Nov. 23, 2025, the plaintiffs (*i.e.*, National Treasury Employees' Union; National Consumer Law Center; National Association for the Advancement of Colored People; Virginia Poverty Law Center; Ted Steege; and the CFPB Employee Association) filed a motion for clarification of the defendants' obligations under the court's Mar. 28, 2025, preliminary injunction restricting Vought's actions to close the CFPB.

On Dec. 5, 2025, former Federal Reserve officials, inclusive of Governor Donald Kohn, Thomas C. Baxter, Jr., Sandra Braunstein, William English, and Donald Hammond, filed a contemporaneous motion for leave to file their proposed brief as *amici curiae* in support of the plaintiffs' motion for clarification. The former Fed officials said they want to address the recent Office of Legal Counsel opinion about the "combined earnings of the Federal Reserve System" at issue in the plaintiffs' motion to clarify.

Clarification rationale. The plaintiffs said clarification was appropriate because the defendants had announced an intention to stop complying with the court's injunction. In seeking the court's clarification that the defendants

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could not justify a preliminary injunction by refusing to request funding, the plaintiffs countered the Federal Reserve has billions of dollars in "combined earnings."

***Amici* concur.** According to the *amici* curiae, their proposed brief further explains that (1) the Federal Reserve System currently has "combined earnings" even under the OLC definition; and (2) the OLC opinion analysis of "combined earnings" misunderstands Federal Reserve operations in several fundamental respects.

Combined earnings. The proposed *amici* briefed that the Federal Reserve Banks generate substantial income through fees for services to depository institutions. A chief source of income is the interest on securities held and acquired in the course of Fed open market operations. The Reserve Banks use part of that income to pay "necessary expenses," including not only the interest paid to depository institutions and dividends to member banks, but also the funds transferred to the CFPB under 12 U.S.C. § 5497(a). Any money left over goes to the Treasury general fund.

When Federal Reserve expenditures exceed income, it records a "deferred asset" on its balance sheet as though it is borrowing the shortfall from itself. For example, in recent years, higher interest rates intended to stamp out inflation meant the Federal Reserve had to pay more on deposits at its Reserve Banks than its earnings on securities. When the Federal Reserve has positive income again, it pays down the value of that "deferred asset" before resuming remainder remittances to the Treasury.

OLC opinion. The amici argued the OLC opinion was fundamentally mistaken in its approach because it interpreted Federal Reserve "combined earnings" to mean what it called "profits." Even if the Federal Reserve were "unprofitable," the *amici* contended it does not follow that there is no money available under § 5497(a) to fund CFPB continued operations. In any event, the Federal Reserve is currently "profitable" and has "combined earnings," even under the OLC understanding.

The amici continued that, as reflected in the Federal Reserve's most recent weekly balance sheets, the "deferred asset" is currently shrinking. That means Federal Reserve earnings on securities and income from other sources presently exceed expenses. It presently has "combined earnings" under any definition in dispute here.

The *amici* continued that the OLC opinion relied on an interpretation of "combined earnings" pertinent to private enterprise concepts that do not apply to the Federal Reserve as the nation's central bank. The central bank was never meant to be a profit-maximizing private enterprise. The Board of Governors is a federal agency under 12 U.S.C. 241 and integral to the federal government. Likewise, the Federal Reserve member banks are non-profit.

The 2008 financial crisis illustrated the distinction from commercial banking inasmuch as the Federal Reserve provided credit to American International Group (AIG) after private financing attempts failed for excessive risk. The Federal Reserve filled the breach in fulfillment of its financial stability mission.

The *amici* further explained how the Federal Reserve has specialized accounting principles and practices for its public function as a central bank. "Forgetting this context," the OLC opinion relied on private bank accounting principles. The *amici* said the Federal Reserve does not even track or report and is not audited on the "earnings" measure the OLC used, *i.e.*, "total interest" less "total interest expense" plus "the sum of non-interest income or losses." The OLC opinion is inconsistent with actual Federal Reserve operations and created the wrong impression that the Reserve Banks could be left with no money for necessary expenses.

Moreover, the OLC opinion purportedly also misunderstood that "deferred assets" cause no harm to the Federal Reserve. It can continue to perform all critical functions and financial obligations while recording deferred assets on its balance sheet without any impact on its operational independence. The opinion also overlooked that the maximum statutory transfer to CFPB is a "pittance" compared to the current size of the deferred asset, about $446 million compared to $243.2 billion.

The amici suggested it was the mistaken OLC opinion that tended to detract from the independence of the Federal Reserve rather than the Dodd-Frank obligation to pay out CFPB requests for funds.

***Amici* qualifications.** The proposed amici urged they met the standards as amici inasmuch as they have "highly relevant expertise" from decades of leadership experience at the Federal Reserve, including oversight

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of Board of Governor's financial management functions and advice on monetary policy. They continued they have unique information and perspective on Federal Reserve System functioning that will contribute to the court's understanding of how the OLC opinion interprets the System's "combined earnings." They also claimed a substantial interest in aiding the court in understanding the central bank.

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Companies: CFPB Employee Association; National Association for the Advancement of Colored People; National Consumer Law Center; National Treasury Employees Union; Virginia Poverty Law Center

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