

SDNY Weighs In on the Constitutionality of the CFPB's Structure

June 22, 2018 | Client Update | 3-minute read

Arguments surrounding the constitutionality of the CFPB's structure, never fully put to rest despite the D.C. Circuit's *en banc* decision in [PHH v. CFPB](#), are back in the headlines this week. Yesterday, Senior United States District Judge Loretta A. Preska of the Southern District of New York issued a decision in *CFPB v. RD Legal Funding, LLC*, [finding](#) that the structure of the CFPB created by the Dodd-Frank Act—an agency headed by a single director, removable by the President only for “inefficiency, neglect of duty or malfeasance in office”—is unconstitutional.

In so holding, Judge Preska respectfully disagreed with the *PHH* majority and instead sided with Judge Kavanaugh's dissent in that case, with which we assume the reader's familiarity here. Judge Preska, however, broke with Judge Kavanaugh in one crucial respect. Unlike Judge Kavanaugh, Judge Preska, like Judge Henderson in *PHH*, does not view the portion of Dodd-Frank's Title X that protects the CFPB Director from at will removal as severable from the rest of Title X. Therefore, Judge Preska—quoting Judge Henderson—found that Title X (the portion of Dodd-Frank that created the CFPB and transferred to it the consumer financial protection functions previously the responsibility of the federal banking regulators) must be struck down “in its entirety.”

Acting CFPB Director Mulvaney's skepticism as to the scope of the CFPB Director's powers is well known. Given Judge Preska's adoption of Judge Henderson's severability reasoning, however, we expect the CFPB to file an appeal to the Second Circuit, at least on the severability issue.¹ We do not exclude the possibility, however, that the CFPB decides, tactically, that it prefers to argue its case in one of the pending appellate cases, described below, which are further along. As these decisions are being made, the White House must simultaneously attempt to secure Senate confirmation for Kathy Kraninger as permanent CFPB Director.

Looking ahead to the longer-term, we expect that Judge Preska will be far from the last member of the federal judiciary to formally express his or her view on the CFPB's constitutionality. As Judge Preska noted in her opinion, multiple appeals challenging the CFPB's current structure are pending before the Ninth Circuit. In addition, the Fifth Circuit also recently granted an interlocutory appeal to hear [a challenge](#) brought to the CFPB's structure by a firm represented by Ted Olson, a [well-known advocate](#) for the separation of powers and the same attorney who represented PHH before the D.C. Circuit. Oral argument has not yet been scheduled in any of these cases, but given the persistent questions surrounding the CFPB's structure and the increasing likelihood of a circuit split on the issue, the Supreme Court is likely to be compelled to weigh in. That is, unless Congress acts first to change the structure.

Our FinRegReform team will continue to provide updates on these challenges to the CFPB's structure, as well as the pending Kraninger nomination.

[View as a PDF](#)

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

James W. Haldin

+1 212 450 4059

james.haldin@davispolk.com

Margaret E. Tahyar

+1 212 450 4379

margaret.tahyar@davispolk.com

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's privacy notice for further details.

¹ This assumes that Judge Preska will, as permitted by the Federal Rules of Civil Procedure, direct entry of a final judgment against the CFPB despite the fact that claims brought by the New York Attorney General in *RD Legal Funding* were not dismissed and are still pending before the District Court.