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CFPB Reform: The Battle in the Courts

November 21, 2016 | Client Update | 2-minute read

Those who are not closely following ***PHH v. CFPB*** may not be aware that the panel decision is not final and effective. *PHH* is the D.C. Circuit decision holding that the current structure of the CFPB, an agency headed by a single director removable only for cause, is unconstitutional. The D.C. Circuit panel ordered that the mandate for its decision **not** be issued until seven days after disposition of a petition for rehearing en banc. On Friday, November 18, the CFPB filed a **petition** for rehearing en banc before the D.C. Circuit. This timing makes it highly likely that any decision by the D.C. Circuit whether to rehear the case will not occur before the inauguration of President-Elect Trump. If the petition is granted, and they rarely are, it is almost certain that the results of the rehearing will not be known for several months after Inauguration Day. The intersection of the litigation timing and the results of the election means that, for now, the CFPB is not an executive agency and Director Cordray is not removable by the President except for cause rather than at will.

In its petition, the CFPB argues that *PHH v. CFPB* "may be the most important separation of powers case in a generation" and cites *Humphreys Executor v. United States*, 292 U.S. 602 (1935) and Morrison v. Olson, 487 U.S. 654 (1988) to argue that its current structure is in line with those precedents and is therefore constitutional. The CFPB's petition does not contest the panel's holding that the CFPB's action against PHH was subject to RESPA's three-year statute of limitations. But it argues that the panel misinterpreted RESPA and as a result incorrectly refused to allow the CFPB to apply its interpretation of the statute retroactively to any conduct occurring within that limitations period.

As we noted in our **original memorandum** on the case, it is unclear whether the separation of powers issues with respect to the CFPB will be decided by the executive, legislative or judicial branches. Jeb Hensarling's Financial CHOICE Act would reform the CFPB's structure so that it is headed by a five-member bipartisan commission and subject the CFPB to the appropriations process. The views of the incoming Trump Administration are unknown.

Law clerk Ryan Johansen contributed to this post.

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.

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