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Between the Courts and Congress
Is the Future of the CFPB in Jeopardy?

Throughout the nearly six years of its existence, the Consumer Financial Protection Bureau (CFPB or the "Bureau") has been the target of attacks in various courtrooms and the halls of Congress. No doubt the previous administration and the then Democrat-controlled Congress designed the CFPB to withstand political winds (i.e., an independent agency not subject to congressional appropriations and headed by a single director appointed by the President, removable only for cause).

At this point, however, President Trump, the Republican-controlled House and Senate and the courts are about to test its durability. Specifically, in the DC Circuit, a pending case between PHH Corporation (PHH) and the CFPB threatens the governance structure of the Bureau, and while the PHH case could ultimately decide the future of the Director's position, several legislative proposals – should they become law – would challenge the very existence of the Bureau.

Republican lawmakers have long sought to reform or eliminate the consumer-focused agency, and have ramped up these efforts in recent months. With Republicans in control of Congress and the White House, those seeking to shutter the Bureau may finally get an opportunity to see where the votes are on that proposition. After briefly providing background on the *PHH* case, **Part One** of this article analyzes the legal implications of the case and discusses possible outcomes following the court's decision. **Part Two** turns to Capitol Hill and provides an overview of current legislation that seeks to limit – or even eliminate – the CFPB and discusses expected developments forthcoming this Congress.

Part One: The PHH Case

Background

On February 17, 2017, the Court of Appeals for the DC Circuit granted a motion by the CFPB to hold an *en banc* rehearing of the PHH appeal. The order vacates the panel's October 2016 judgment, arranges a briefing schedule and sets May 24, 2017, as the date for oral argument.

The underlying dispute first arose in 2015, which resulted in a CFPB administrative law judge's recommendation of a US$6.5 million fine against PHH for allegedly requiring unlawful kickbacks from mortgage insurers in violation of Section 8 of the Real Estate Settlement Procedures Act (RESPA). PHH appealed that decision to CFPB Director Richard Cordray, who rejected its arguments and then increased the fine to US$109 million.

On October 11, 2016, the DC Circuit vacated the US$109 million enforcement order by the CFPB, finding that not only was its interpretation of RESPA unreasonable, but that the CFPB's structure is too unaccountable to be constitutional and poses an opportunity for the Director to abuse his power. To remedy this potential for abuse of power, the Court ordered that the CFPB would no longer be an "independent" agency, but "now will operate as an executive agency" and that President Trump "now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time." This decision has been stayed pending the results of the rehearing.

What's Next?

Following the DC Circuit's decision to hold the rehearing, the process of exchanging briefs and filing amicus briefs has begun. Oral argument will take place before a panel of 10 DC Circuit judges on May 24, 2017. A decision will thereafter be made by the panel. Here are a few of the possible results:

- The panel could dismiss the appeal of PHH from the Director's decision, leaving in place the statutory and constitutional interpretations that served as the foundation for the CFPB's argument.
- The panel could accept the reasoning and re-impose the mandate of the three-judge panel, or highly unlikely, dismiss the appeal as improvidently granted and reinstate the mandate of the three-judge panel.
- The panel could conclude that the case should be dismissed because the administrative law judge was inappropriately appointed, or could decide he was inappropriately appointed but that the remedy should be something short of dismissal of the proceedings.
- The panel could decide the statutory interpretation questions and choose not to reach the constitutional questions.
- The panel could decide both the questions of interpretation and the constitutional questions, with a mixture of possible results on those reviews. The constitutional question could be decided on the grounds stated in the opinion of the three judge panel, or on the grounds that the collection of unlimited powers placed on the Director violates the non-delegation clause in Article I, Section 1 of the Constitution.

Regardless of the results of the rehearing, chances are good that the case will be appealed to the Supreme Court.

On March 17, 2017, the Department of Justice (DOJ) filed a brief with the DC Circuit arguing that President Trump should be allowed to remove Director Cordray (the "Director"). Note, however, that the brief stopped short of calling the agency unconstitutional. The DOJ wrote that "[w]hile we do not agree with all of the reasoning in the panel's opinion, the United States agrees with the panel's conclusion that single-headed agencies are meaningfully different" from independent commissions like the Federal Trade Commission (FTC). Regarding the President's removal powers, the DOJ wrote that "[t]he panel correctly concluded...that the proper remedy for the constitutional violation is to sever the provision limiting the president's authority to remove the CFPB's director, not to declare the entire agency and its operations unconstitutional." The DOJ brief is one indication that the White House intends to resolve the fate of the Director via the courts as opposed to removal by President Trump before the case is decided, as discussed below. The CFPB has until March 31, 2017 to file its own brief in the case.

Authority to Remove the Director

Most of the discussion of this case has revolved around the constitutional authority of the President to remove the Director without cause. At the present time, the October 2016 opinion of the three- judge panel is the most detailed discussion of that question, and that provides some judicial support for removing the Director without cause. The mandate implementing that opinion, however, has been stayed, pending the decision of the full panel.

That decision, however, does not bind President Trump in any significant way – if he chooses, he could remove the Director without cause at any time, and leave it to the Director to make the case that he should remain in office. There are various venues in which the Director could attempt to make the case (e.g., the Court of Claims for the pay he would not receive), and the Director might persuade a court to conclude that he was wrongfully removed. That whole procedure is far from clear, and where that litigation might go is difficult to determine.

Assuming that the *en banc* panel concludes that the Director may be removed only for cause, Director Cordray would stay in office at least until the Supreme Court reached a contrary conclusion, until his term expires in July 2018, or until the President removes him while citing reasons that purport to satisfy the cause requirements of inefficiency, neglect of duty, or malfeasance.

President Trump's Options

As for the options of the President at this point, or after the decision of the panel, he could inform the Director that he had been replaced by another official as Acting Director and let the Director litigate that question if he wished. Note that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) establishes the Deputy Director as the Acting Director if the Director is absent or unavailable. A decision by a court other than the Supreme Court does not prohibit the President from interpreting Article II in this case as he wishes. Of course, the courts could find his interpretation wrong at the end of the litigation (and might even place a stay on the termination pending final judicial review).

If the President leaves the Director in place, the Director faces a potentially difficult environment in which to conduct the Bureau's business. Enforcement at the Supreme Court level will be constrained by the statutory requirement to get prior approval of the Solicitor General for the Bureau to represent itself before the Court on any matter. At the level on which judicial or administrative proceedings are initiated, the Bureau must first touch base with the other agencies before proceeding. Any memoranda of understanding on how this will be done can be terminated by the agencies and new ones can be negotiated. Therefore, the Director would be required to work with Trump appointees at agencies disinclined to work with the CFPB. As if the interagency cooperation would not be difficult enough, Director Cordray would also face difficulties in Congress. For any CFPB rulemaking, lawmakers could use the Congressional Review Act to stop rules Director Cordray might promulgate, thus presenting another roadblock for the CFPB to carry out its duties.

While next steps following the rehearing are difficult to determine, this case may ultimately find itself in the Supreme Court.

Part Two: Legislative Developments

While the *PHH* case continues to progress toward the May rehearing, Congressional Republicans continue to introduce legislation seeking to curb the CFPB's regulatory authority or eliminate the Bureau entirely. Though the agency was created to protect consumers, there is a growing argument by many conservatives that the Bureau is an "unaccountable Leviathan" that often takes action that exceeds the scope of its authority. Although the CFPB faces obstacles in the PHH case on the structure of its governance, it is important to note the obstacles in Congress could affect its very existence, at least in its present form.

Reform Legislation Pending in Congress

Several measures to reform the Bureau are pending in the Senate and House of Representatives. These bills can generally be broken down into two categories: (1) those that would eliminate the CFPB entirely, either through defunding or repealing certain provisions of Dodd-Frank that gave life to the Bureau; and (2) the more modest reforms that would maintain the existence of the CFPB, but dramatically alter or restrict its authority.

- **Eliminating the CFPB Entirely**

  In February 2017, Senator Ted Cruz (R-TX), along with seven Republican co-sponsors including Senate Majority Whip John Cornyn (R-TX), introduced the "Repeal CFPB Act" (S. 370). The entire legislative text is comprised of the following sentence: "The Consumer Financial Protection Act of 2010 (12 U.S.C. 5481 et seq.) is repealed, and the provisions of law amended or repealed by that Act are restored or revived as if the Act had not been enacted." Representative John Ratcliffe (R-TX) introduced an identical companion bill (H.R. 1031) in the House, along with 27 Republican co-sponsors. While these bills may signal an ideal scenario for many Republicans, they omit essential details on what a post-CFPB world would look like. Among other concerns, the bills do not address how to handle CFPB regulations and rules promulgated over the years or how enforcement actions would be treated. Given this uncertainty and makeup of the Senate (discussed further below), such an extreme legislative measure is not likely to progress any further.

- **Restricting the CFPB's Authority**

  Other legislative proposals aim to reduce the CFPB's role in the financial regulatory scheme by altering the leadership structure or changing how the Bureau is funded. The CFPB receives its primary funding via the Federal Reserve – outside of the Congressional appropriations process that determines funding for most other federal agencies. In February 2017, Senator David Perdue (R-GA) introduced a bill (S. 387), along with 18 Republican co-sponsors, that shifts the Bureau's funding source from the Federal Reserve to the Congressional appropriations process. Similarly, Senator Mike Rounds (R-SD) introduced legislation (S. 365) that would remove the mechanism for the Federal Reserve to fund the CFPB. Moreover, Senator Rounds' bill would establish a "Consumer Financial Civil Penalty Fund" that would require all civil penalties obtained by the CFPB in judicial or administrative actions be deposited in that fund, and any such amounts would, in turn, be deposited into the Treasury's general fund. There are currently no co-sponsors to this bill.

  As to the CFPB's single director structure, Senator Deb Fischer (R-NE) introduced a bill (S. 105), along with four Republican co-sponsors, that would replace the existing directorship with a five-member "Board of Directors" appointed by the President and subject to Senate confirmation. Representative Scott DesJarlais (R-TN) introduced a similar bill (H.R. 1018), with Representative John Duncan Jr. (R-TN), that would establish a five-person commission to lead the Bureau.

  Separately, note that on March 21, 2017, the House Financial Services Subcommittee on Oversight and Investigations held a hearing titled "The Bureau of Consumer Financial Protection's Unconstitutional Design." Republicans on the Subcommittee called the Bureau "unaccountable" and agreed that two major steps are needed to fix the CFPB's structure: (1) eliminate the removal only for cause provision; and (2) make the CFPB's budget part of the ordinary appropriations process.

CHOICE Act 2.0

Among all legislative measures seeking to reform the CFPB, one important contender worthy of consideration is the Financial CHOICE Act (CHOICE Act 2.0). House Financial Services Committee Chairman Jeb Hensarling (R-TX) introduced the first version of the bill in September 2016. According to a committee memo obtained by *Politico* dated February 6, 2017, Chairman Hensarling plans to make several revisions to the original bill. Notably, the memo does not mention the original bill's proposal to subject the CFPB to Congressional appropriations and seems to focus only on changes to the original language. One such change is quite dramatic – CHOICE Act 2.0 scraps the five-member commission from the original bill in favor of a "sole director, removable by the President at-will." On that issue, the Democrats must face the question of whether they might want a couple of Democrat selections placed on a five member commission, or live with a Trump appointee acting as an independent sole Director.

In addition, CHOICE Act 2.0 would repeal a number of Dodd-Frank provisions relating to the CFPB, including the Bureau's authority to prosecute Unfair, Deceptive, or Abusive Acts and Practices (UDAAP), its supervisory and market monitoring authority, its consumer education function and its research function. All rulemaking authority would be limited to enumerated federal consumer financial services statues and the CFPB consumer complaint database would be eliminated. CHOICE Act 2.0 would strengthen existing statutory language to clarify that the CFPB's jurisdiction does not include entities regulated by either the Securities and Exchange Commission (SEC) or the Commodity Futures Trading Commission (CFTC). These proposals would drastically alter the CFPB and significantly reduce its power.

While CHOICE Act 2.0 and other legislative measures that seek to reform or eliminate the CFPB indicate the strong opinions of several Republican lawmakers, they are almost certainly set to stay as opinions instead of becoming actual law. Given the narrow advantage Republicans hold in the Senate, none of these CFPB "wish list" proposals stand to garner any support from Democrats and overcome a likely filibuster. Despite this, Senate Republicans could utilize the budget process known as reconciliation to pass a bill with a simple majority vote. Such a procedure could enable the Republicans to reach some of the goals of the CHOICE Act 2.0, namely those that have revenue impacts, but generally not those related to the provisions establishing its authority. In a February 8, 2017, op-ed in the *Wall Street Journal*, Chairman Hensarling suggested that the House Financial Services Committee and the Senate Banking Committee could direct the Federal Reserve to "terminate CFPB funding." While use of reconciliation is possible, there are no indications that the process will be utilized for financial services reform this year, given that Senate Republicans appear to be primarily focused on healthcare and tax reform before tackling financial services. Thus, less dramatic changes to the CFPB appear more feasible than the currently proposed fundamental shifts in authority, which would need to obtain support from across the aisle.

President Trump and the CFPB

Turning briefly to the White House, President Trump has not publicly indicated his plans for the CFPB. The President has, however, issued executive orders that require (1) a written review of current financial services laws and regulations; (2) a regulation "freeze"; and (3) a reduction in the current number of regulations. It remains to be seen how these executive orders will impact the CFPB since it is an independent agency exempt from some of those orders, but they certainly do not encourage any significant rulemaking efforts at the Bureau.

As for potential replacements of Director Cordray, in January 2017, then-President-Elect Trump met with former Representative Randy Neugebauer (R-TX), who proposed legislation gutting the Bureau during his tenure on the House Financial Services Committee. Mr. Neugebauer has been mentioned as a possible successor to lead the CFPB, but further talks (at least in public) do not appear to have taken place since January – calling into question the viability of his candidacy.

Going Forward

From the chambers of the DC Circuit to the halls of Congress – the CFPB's future is uncertain no matter where one looks. The DC Circuit's decision following its *en banc* rehearing in May will likely offer some insight as to whether the governance of the Bureau will be able to weather the storm. In the meantime, lawmakers appear poised to continue introducing measures that dismantle the CFPB. Such undertakings will prove difficult given competing legislative priorities in the Senate and the expected adamant opposition of the Democrats to fundamental changes in the CFPB. Thus, targeted reforms – rather than far-reaching foundational shifts – appear more likely for lawmakers set to reform the CFPB this Congress.

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