



## Present Status of PHH Case and Next Steps\*

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### Background

In earlier proceedings, Director Cordray heard an appeal from a decision of an Administrative Law Judge<sup>1</sup> in an administrative hearing brought by the Enforcement Division of CFPB against PHH for illegal kickback provisions in an insurance reinsurance program. The Director heard the case de novo and reached major decisions differently from the ALJ; the result was a substantial increase in penalties (from \$6.4 million to \$109 million) and significant differences in conclusions of law.

On appeal, a three judge panel of the DC Circuit reversed the decision of the Director on significant issues of RESPA interpretation and administrative law, and in addition, concluded that the limitation in the statute under which the Director could be removed only for specific cause was unconstitutional, emphasizing that the Director was a single person, not a commission. It remedied that defect by concluding that the Director could be removed without cause, and remanded the matter back to the Director to proceed pursuant to that opinion.<sup>2</sup>

The Court of Appeals for the DC Circuit has recently granted a motion by CFPB to hold an en banc rehearing of the appeal of PHH from the decision of the Director of CFPB. The mandate of a three judge panel of the Court handed down in the earlier review of that decision has been stayed while the full panel decides the appeal. A brisk briefing schedule has been established with oral arguments set for May 24, a date that most likely will not be moved. Based on that, most observers of the Court expect a decision to be published in late 3Q or early 4Q of this year.

While next steps following the decision are difficult to decide not knowing what that decision might be, there is some feeling that this case may be headed ultimately to the U.S. Supreme Court.

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\*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

<sup>1</sup>The ALJ was borrowed from a panel of SEC ALJs that had been chosen not by appointment by the SEC Chair or the full Commission, but by a panel of staff members.

<sup>2</sup>One of the three judges opined that the constitutional issue need not be reached. Another in a concurring opinion opined that the ALJ was inappropriately appointed and so the entire proceeding should have been dismissed.

## What's next - Issues to be addressed in the review before the full panel

Briefs will be exchanged, some amicus briefs have been filed, and oral argument will take place before a large panel of judges of the DC Circuit Court on May 24, 2017. A decision will thereafter be made by the panel.

One of the more interesting amicus briefs that has been filed is that of the Solicitor General of the United States, since in that brief the SG argued that the provisions in the law that established the Director's position was unconstitutional since it created a single director rather than a commission, and in the context of the authority given to the director, that was inconsistent with the constitution.

While all issues of the case may be argued and decided by the en banc Court, it specifically asked the parties to brief these three questions:

1. Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution and, if not, is the proper remedy to sever the for-cause provision of the statute?
2. May the court appropriately avoid deciding that constitutional question given the panel's rulings on the statutory issues in this case?
3. If the en banc court, which has today separately ordered en banc consideration of Lucia v. S.E.C., 832 F.3d 277 (D.C. Cir. 2016), concludes in that case that the administrative law judge who handled that case was an inferior officer rather than an employee, what is the appropriate disposition of this case?

## Implications

### *Authority to remove 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 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. But the mandate implementing that opinion has been stayed, pending the decision of the full panel. That, of course, does not bind the President 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 might get messy, and where that litigation might go is difficult to determine. Having the background of one or more Courts saying that such removal was constitutional makes it much easier for the President to remove the Director if he chooses to do so.

Assuming that the en banc panel does not conclude that the Director can be removed without cause, the Director would find himself in office, at least until the Supreme Court reached a contrary conclusion should there be an appeal to that Court, until his term expired, or until the President removes him citing cause.<sup>3</sup>

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<sup>3</sup>The statute provides inefficiency, neglect of duty, or malfeasance as appropriate causes.

In brief, the substance of the present constitutional argument is based on Article II of the Constitution, namely that the executive powers of the government shall be vested in the President. Do the powers granted to the Director by the statute and the lack of limitation in that statute on those powers amount to an assumption of the executive powers of the president if the President may only remove the Director from office for cause?

### *Statutory issues*

There are many statutory issues. While the three judge panel found for PHH and against the Bureau on those discussed, at this point that mandate containing the directions to the Director to act according to those interpretations has been stayed. Therefore, nothing has changed from the decisions made by the Director, notwithstanding the opinion of the three judge panel. The en banc panel could decide most of those issues in its review. Here are a few of the interpretations made by the Director:

1. No statute of limitations applies to administrative proceedings brought by CFPB. (The Court disagreed)
2. Section 8(c)(2) of RESPA is not an exemption from liability imposed by sec. 8(a). Recall that sec. 8(c)(2) provides that “nothing in sec. 8 shall be construed as prohibiting the payment to any person or a bona fide salary or compensation or other payment for goods or facilities furnished or services actually performed.” The Director found that this is a clarification provision, not an exemption. (The Court disagreed)
3. Reviews of Administrative Law Judges’ decisions to the Director will be reviewed de novo and under a preponderance of the evidence rules. (The Court did not opine)
4. Guidance from agencies will be precedential only if published in the Federal Register. “The letter is not in such a form as to be binding on any adjudicator. The letter was never published in the Federal Register. Thus the letter provides no protection to PHH in this proceeding. Documents not published in the Federal Register do not constitute a rule, regulation or interpretation and do not offer protection for purposes of RESPA authority.” (The Court disagreed)
5. New interpretations can be applied retroactively. (The Court disagreed)

### *Possible results?*

Here are a few of the possible results:

1. The panel could dismiss the appeal of PHH from the Director’s decision, leaving in place the interpretations of the statutes and the constitutional interpretation that was the foundation for the establishment of the powers of the Director.
2. 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.

3. The panel could conclude that the case should be dismissed because the ALJ was inappropriately appointed, or could decide he was inappropriately appointed but that the remedy should be something short of dismissal of the proceedings.
4. The panel could decide the interpretative questions and choose not to reach the constitutional questions.
5. 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 might be based on Judge Kaufman's reasoning, or some other reasoning such as one that argues that the collection of unlimited powers placed on the Director violates Article I, Section 1 of the Constitution, the non-delegation clause.
6. A path to review by the SCOTUS is likely for most of the decisions the panel would reach.<sup>4</sup>

If the President leaves the Director in place, the Director faces a potentially difficult environment in which to conduct the Bureau's business. The Congressional Review Act is available to Congress to stop rules he might promulgate. Enforcement at the SCOTUS level will be constrained by the statutory requirement to get prior approval of the Solicitor General for the Bureau to represent itself before the Supreme Court on any matter, although on the issue currently before the Courts, it is probable that in some way SCOTUS would receive the views of both the SG and the Director of CFPB. At the level at which judicial or administrative proceedings are initiated, the Bureau must first touch base with the other agencies before proceeding and any memoranda of understanding on how this will be done can be terminated by the agencies and new ones negotiated. In a short period of time, it is probable that there will be a newly appointed Comptroller of the Currency and Chairman of the FDIC. In addition, there will probably be legislative efforts addressed at the authority and responsibilities of the Bureau, all of which will take some of the time of the Director and agency staff. The Director must consider how to negotiate his responsibilities in this environment.

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<sup>4</sup>Of course, the parties could settle the case at any time, and as part of that settlement agree to vacate the prior proceedings. The Court would probably permit that. They could also settle it and not agree upon vacating the proceedings, leaving a decision outstanding.