

## Client Alert

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## CFPB's Structure is Unconstitutional, D.C. Circuit Court Holds

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Lenders and their attorneys have been closely monitoring the enforcement actions and rules promulgated by the Consumer Financial Protection Bureau or CFPB, which was created under the Dodd-Frank Act. The CFPB's three goals are to educate consumers, enforce federal consumer financial laws, and study consumers and the financial products market. To this end, the CFPB has exclusive authority to enforce eighteen federal consumer laws and regulates "covered persons" who offer or provide "consumer financial services or products." Congress envisioned the CFPB as the exclusive watchdog agency for consumer financial products, an already broad category which the CFPB has, in its short five-year existence, interpreted even more broadly. For example, the CFPB has instituted enforcement actions against private colleges and cell phone companies under the Fair Debt Collection Practices Act.

The lending industry has been closely monitoring the CFPB's actions against PHH Corporation, a mortgage lender. On October 11, 2016, the District of Columbia's Circuit Court of Appeals entered its decision reviewing an order which the CFPB entered against PHH. The CFPB had imposed a \$109 million penalty against PHH for violating the Real Estate Settlement Procedures Act (RESPA) due to "kickbacks" received for settlement services. It seemed unlikely that the order would survive an appeal, since (1) the Department of Housing and Urban Development (HUD, the agency tasked with enforcing RESPA prior to the CFPB's formation) had previously held that these types of payments are not considered improper kickbacks if the payment is consistent with the value of the service and (2) many of the violations

occurred earlier than RESPA's 3-year statute of limitations. As expected, the Court vacated the order. The Court held that "the CFPB's interpretation flouts not only the text of the statute but also decades of carefully and repeatedly considered government interpretations" and "[w]e therefore find this particular CFPB argument deeply unsettling in a Nation built on the Rule of Law. When a government agency officially and expressly tells you that you are legally allowed to do something, but later tells you 'just kidding' and enforces the law *retroactively* against you and sanctions you for actions you took in reliance on the government's assurances, that amounts to a serious due process violation. The rule of law constrains the governors as well as the governed."

Most importantly, however, the Court held that "the CFPB is unconstitutionally structured": "Because the CFPB is an independent agency headed by a single Director and not by a multi-member commission, the Director of the CFPB possesses more unilateral authority – that is, authority to take action on one's own, subject to no check - than any single commissioner or board member in any other independent agency in the U.S. Government. Indeed, as we will explain, the Director enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President." The Court rejected PHH's argument that "the constitutional flaw means that we must shut down the entire CFPB (if not invalidate the entire Dodd-Frank Act)" and instead "severed" the provision of the CFPB creation statute which stated that the director of the CFPB can only be removed for cause.

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As a result, now the President has "the power to remove the Director at will, and to supervise and direct the Director. The CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury."

While this is strong language from the Court, in reality, it does little to change the CFPB's operations, and its prior enforcement actions and rule making decisions remain unaffected. While the CFPB Director now serves at the pleasure of the President, this change will also have little impact, as all other cabinet position holders serve in the same manner.

Expect to see a lot of news about restructuring the CFPB in the wake of the PHH decision and in this election cycle. Shumaker, Loop & Kendrick, LLP's Financial Institutions practice group monitors CFPB actions and rulemaking to advise its clients about compliance and avoiding risk in the wake of the CFPB's new rules. For more information, please contact Meghan Serrano at <a href="mailto:mserrano@slk-law.com">mserrano@slk-law.com</a>.

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