

Client Alert

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Prospects for Change at the CFPB

In the first days after Donald Trump was elected President, many in banking gave voice to the hope that one way or the other, the President would be able to reign in, or even eliminate, the CFPB. Perhaps, Congress, at long last, would be able to make significant changes to Dodd-Frank. Even with Congressional majorities in both houses, and a Republican-ish President, it is unlikely that the CFPB will be changed drastically by statute. As Nancy Pelosi is fond of saying, “they do not have the votes” – meaning that the Republicans do not have a 60-Senator majority sufficient to overcome any filibuster.¹

Anyone who has read Ron Rubin’s first-person account of the “litmus” test used in hiring at the CFPB, however, realizes that for real change to occur, it will take new leadership. This is especially true after Director Cordray’s appointments – only a week before the inauguration – of new senior leadership. Although Director Cordray will ultimately be replaced, it may be late 2017, at the earliest, before that occurs.

PHH. As you may be aware, there was an important decision rendered recently in the US Court of Appeals for the DC Circuit. Although it is only one of the eleven circuits, it is the circuit that must substantially deal with administrative law issues. On October 11, the DC Circuit, in the case of PHH Corp. v. CFPB, found that the single-director structure, coupled with an impressive litany of insulating rights and powers of the CFPB, in the aggregate, violated Separation of Powers. Writing for the Court, Judge Kavanaugh determined that in order to reform the constitutional defect, the President could remove the director without cause (Dodd-Frank stated that the President can only remove the Director for “inefficiency, neglect of duty or malfeasance in office”).

Director Cordray has emphatically stated that he will serve out his term and will sue to enforce his ability to do so, if need be. He will be aided in his efforts by the judicial process. Senators Sasse and Lee have called for the President to fire “King Richard.” President Trump has interviewed recently retired Representative Randy Neugebauer, a Republican from Lubbock, Texas, and former member of the House Financial Services Committee, regarding the directorship of the CFPB.

Before Christmas, on the eve of the deadline, the CFPB petitioned the US Court of Appeals for the DC Circuit for *en banc* review of the earlier three-judge panel decision. The request stays Judge Kavanaugh’s ruling until the DC Circuit determined whether to review the decision *en banc*. The Court of Appeals normally takes a couple of months to decide on these types of petitions.

Ultimately the DC Circuit could grant a hearing date or request briefing on the issues. If it requests briefing, a hearing would not occur until at least the middle of 2017. If the CFPB were to lose before the *en banc* Court, it could still seek to file a writ of certiorari to the US Supreme Court. The start of the time frame for such an action would obviously depend on when the decision is reached by the DC Circuit Court of Appeals, however a writ must be filed 90 days from the date of the decision. Alternatively, if the

¹ The most likely legislative changes to the CFPB would change governance of the agency from a single director to a five-person commission and subject its budget to Congressional authorization. The typical commission structure would limit appointees to three representatives out of five from any one party. Over time, these changes would presumably moderate the actions of the agency.

Court of Appeals denies the petition for the *en banc* panel, the CFPB would have 90 days from that date to request certiorari from the US Supreme Court. Based on its *en banc* petition, the CFPB is likely to wait until the very last moment to make that request.

The effect of the election, however, would kick in should the DC Circuit deny the CFPB's petition or render a decision adverse to the CFPB. The CFPB will not be able to petition for certiorari without sign-off from the Solicitor General. Presumably, a Trump appointee would not allow such a request. If the Solicitor General declined the request, the case would effectively be ended unless the Solicitor General would nevertheless allow the agency to proceed with the writ of certiorari on its own.

It is likely that the Court of Appeals will grant the *en banc* petition. The PHH case is the most significant Separation of Powers case in a generation. In light of the increasing significance of regulatory bodies on the economy and the ability the DC Circuit Court of Appeals would have to set rules in a murky area, the case has much going for it. Of course, the other judges could opt to duck the political "hot potato" or believe that Judge Kavanaugh's well-reasoned and measured response should be allowed to stand. Assuming the Court of Appeals takes the case up *en banc*, then it is likely that a decision would not be rendered before the end of the third or beginning of the fourth quarter of 2017. This would push the deadline for a certiorari petition back to the end of 2017 or into 2018.

The Supreme Court. Should the case lead to a certiorari petition, the current composition of the Court, currently deadlocked 4 to 4, is of critical importance. Because it only requires four justices (the so-called Rule of Four) to grant certiorari, the Democrats on the Supreme Court would be able to have the matter heard. In such case, oral arguments and a decision would likely stretch beyond Director Cordray's term. President Trump is expected to appoint a Justice more likely to side with the more conservative members of the court. The new appointment may loom large in deciding the ultimate fate of the CFPB.

Removal of Director Cordray. In the meantime, the new President could seek to remove Director Cordray independent of the PHH case. Senators Sasse and Lee argue that Director Cordray has, in fact, acted in a way that would allow a "for-cause" termination. Alternatively, the President could take the position that he has the authority to remove Director Cordray. The President has the ability to decline to enforce statutes that are unconstitutional, especially those that limit Presidential authority. If President Trump were to do so, based on past actions, Director Cordray would need to vacate his office and then sue to contest whether such removal was permissible.

In light of the divided nature of government and the controversial issues that President Trump will have on his list upon assuming the office, President Trump may opt to skip the fight on this issue. He could do so by:

- letting the PHH case play out,
- seeing if Congress would eliminate the issue by changing the CFPB structure, or
- waiting for the Director to quit.

The last point is not so farfetched despite Director Cordray's statements. Director Cordray has political aspirations. He has previously run for Senate in Ohio. If he were to choose to run for governor in 2018, he would presumably need lead time to mount a campaign.

In short, the CFPB direction changes one way or the other, but it may not be until late 2017. In the meantime, the CFPB has continued to churn out enforcement actions without much let-up. After the PHH ruling, the CFPB brought two suits to compel responses to civil investigative demands, assessed penalties against Equifax, Inc. and TransUnion related to marketing of credit scores, sued Navient (formerly Sallie Mae) over servicing practices, sued TCF National Bank for its overdraft protection program, and fined pawn brokers, military lenders and consumer lenders. In light of the above, this trend can be expected to continue through much of early 2017.

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