

Insights: Alerts

DC Circuit Grants CFPB's Petition for Rehearing En Banc in PHH Case

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On February 16, the U.S. Court of Appeals for the D.C. Circuit entered an order¹ granting the Consumer Financial Protection Bureau's (CFPB) petition for rehearing en banc in the *PHH Corporation, et al., v. Consumer Financial Protection Bureau* case.² The court based its decision on *amici curiae* briefs supporting the petition, the United States' response to the petition, the petitioners' response to the petition, the petitioners' supplemental response, and a majority of eligible judges' vote in favor of the petition. Consequently, the order vacates the panel's October 2016 judgment, sets a briefing schedule, and sets May 24, 2017 as the date for oral argument.

As [previously reported](#), the panel's October 2016 judgment held that the CFPB is unconstitutionally structured in its current form. There, the court relied heavily on the fact that the CFPB is an independent agency headed by a single director and not by a multimember commission, and that the director is only removable by the President "for cause." Among the three issues the court asked the parties to brief include questions concerning (1) whether the CFPB's structure as a single-director, independent agency is consistent with Article II of the Constitution, and if not, whether the proper remedy is to sever the "for cause" provision of the statute; and (2) whether the court can appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case.

In the short term, the CFPB and its ongoing operations will continue to operate as an independent agency, rather than as an executive agency, making it more difficult for the Trump Administration to impose any leadership changes at the CFPB and sustaining the President's power to remove the CFPB director only "for cause," rather than "at will." Since CFPB Director Richard Cordray has not signaled any plans to step down from his position before his five-year term concludes in July 2018, it appears that the CFPB will maintain its current enforcement, supervisory, and regulatory posture, absent any legislative changes.³

¹ [https://www.cadc.uscourts.gov/internet/opinions.nsf/5D0253C4E25B93FB852580C9005F3AE1/\\$file/15-1177-1661681.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/5D0253C4E25B93FB852580C9005F3AE1/$file/15-1177-1661681.pdf).

²In 1994, PHH, a mortgage lender, established a wholly-owned subsidiary known as Atrium Insurance Corporation, which provided reinsurance to the mortgage insurers that insured mortgages originated by PHH. In return, PHH often referred borrowers to mortgage insurers that used Atrium's reinsurance services — a practice known as "captive reinsurance" arrangements. In 2014, the CFPB initiated an administrative enforcement action

against PHH, alleging that PHH's captive reinsurance arrangement with the mortgage insurers violated Section 8 of the Real Estate Settlement Procedures Act (RESPA). The CFPB ordered PHH to pay \$109 million in disgorgement and enjoined PHH from entering into future captive reinsurance arrangements.

³Recent press reports indicate that House Financial Services Committee Chairman Jeb Hensarling (R-Texas) is preparing several amendments to his proposed Financial CHOICE Act legislation that would retain the CFPB's single director structure now in place, but put that person directly under the President's authority. Other changes to the CFPB proposed by Rep. Hensarling would include eliminating its ability to supervise financial institutions, its ability to levy fines against institutions (as its enforcement powers would be limited to cease and desist letters and subpoenas), and its ability to issue regulations except those directly authorized by Congress. In addition, the CFPB would no longer be able to regulate entities already regulated by the Securities and Exchange Commission or the Commodity Futures Trading Commission.

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