FINANCIAL SERVICES UPDATE

March 23, 2017

Trump Administration Alleges CFPB Structure is Unconstitutional

In a move that was at once unsurprising but also a stark reversal in the federal government's position, President Trump's Department of Justice (DOJ) filed an amicus brief on March 17, 2017, in the closely watched case *PHH Corp. v. CFPB*, arguing that the Consumer Financial Protection Bureau's structure is unconstitutional and that the president should be able to remove the agency director at will. The action, unusual because it pits two federal agencies against each other and challenges the leadership of an agency that is part of Trump's government, is another blow to the watchdog agency that has come under increased attacks from Republicans.

The Background

In October 2016, a split three-judge panel of the D.C. Circuit Court of Appeals ruled that the CFPB's structure violates the constitutional separation of powers and departs from the historical practice of independent agencies headed by multiple commissioners or board members. The CFPB was designed by the Dodd-Frank Act as an independent agency headed by a single director who could be removed only for cause. As a remedy, the panel ordered that the CFPB be restructured so the director could be removed by the president at will. In February 2017, the D.C. Circuit granted the CFPB's request for an en banc rehearing and vacated the prior ruling.

In its recent brief, the DOJ agreed with the panel's prior ruling that the CFPB's leadership structure is unconstitutional and that the panel's remedy, granting the president the power to fire the director at will rather than for cause, was sufficient to fix the problem. However, the DOJ did not go as far as PHH Corp., which has argued that the only way to fix the constitutional problems is to eliminate the CFPB entirely. Notably, the Obama DOJ previously filed a brief in the case supporting the CFPB and criticizing the panel's constitutional analysis.

The PHH case began innocuously enough as a dispute over captive reinsurance arrangements. In January 2014, the CFPB initiated an administrative proceeding against PHH claiming that PHH used mortgage reinsurance arrangements to solicit and collect illegal kickback payments in violation of the Real Estate Settlement Procedures Act (RESPA). An administrative law judge recommended finding that PHH violated RESPA's anti-kickback provisions. PHH appealed to the CFPB, the first time an administrative enforcement proceeding had been appealed to that agency. In his ruling, CFPB Director Richard Cordray retroactively applied a CFPB interpretation of RESPA, determined that PHH violated RESPA, and increased the disgorgement penalty from $6.44 million to $109 million. Thereafter, PHH appealed to the D.C. Circuit Court and argued not only against Cordray's retroactive reinterpretation of the statute but also that the agency's decision was invalid for the independent reason that the CFPB's structure violates the Constitution.

The DOJ's brief comes as Republicans and the Trump administration look for ways to rein in the CFPB's powers and "dismantle" parts of the Dodd-Frank Act. While it remains to be seen how influential the DOJ's brief will ultimately be, the court will almost certainly consider the views of the DOJ. The brief shows that the DOJ actively opposes the CFPB and that it may not defend the agency if the case reaches the Supreme Court. Trump has been vocal that his administration is looking for ways to "handle" Cordray, and many believe that the pending case has limited his ability to take any formal steps against the director.

What's Next?

Oral arguments for the en banc rehearing of the case are scheduled for May 24, 2017. If the full D.C. Circuit Court decides the case in a manner similar to the panel's decision last October and severs the for-cause removal provision, the CFPB could undergo drastic changes. President Trump would likely make his long-awaited move against Cordray and appoint an individual who would be less aggressive in enacting new regulations and enforcing existing ones. Accordingly, the CFPB could become a much weaker agency.

Beyond the PHH case, the CFPB faces other threats to its future. For example, the House Committee on Financial Services recently held a hearing titled "The Bureau of Consumer Financial Protection's Unconstitutional Design." Additionally, several bills have been introduced to alter the CFPB's structure and operations, with additional proposed legislation expected.

Until formal action occurs with respect to the CFPB, clients should continue with business as usual, but we encourage everyone to stay abreast of the CFPB and its actions. Our Consumer Financial Services and Government Affairs teams are closely monitoring the progress of the PHH case and the many issues related to the future of the CFPB.

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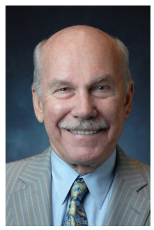

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