

## **SPECIAL ALERT: D.C. CIRCUIT GRANTS PETITION FOR REHEARING IN CFPB v. PHH CORP.; VACATES JUDGMENT BASED ON BUREAU'S UNCONSTITUTIONALITY**

On February 16, the U.S. Court of Appeals for the D.C. Circuit granted the CFPB's petition for rehearing en banc of the October 2016 panel decision in *CFPB v. PHH Corporation*. Among other things, the panel decision declared the Bureau's single-Director structure unconstitutional and would have allowed the President to remove the CFPB's Director at will rather than "for cause" as set forth in the Dodd-Frank Act. As a result of the petition for rehearing being granted, the panel's judgment is vacated and the full D.C. Circuit will hear PHH's appeal of the \$109 million penalty imposed by the CFPB under the anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA). Oral argument is scheduled for May 24, 2017.

As discussed in detail in our [prior alert](#), the October panel decision unanimously concluded that the CFPB misinterpreted RESPA, violated due process by disregarding prior interpretations of the statute and applying its own interpretation retroactively, and failed to abide by RESPA's three-year statute of limitations. However, only two of the three judges on the panel concluded that the CFPB's status as an independent agency headed by a single Director violated the separation of powers under Article II of the U.S. Constitution. The third panel member, Judge Henderson, dissented from this portion of the opinion on the grounds that it was not necessary to reach the constitutional issue because the panel was already reversing the CFPB's penalty on other grounds.

Therefore, it is noteworthy that the D.C. Circuit's order granting rehearing states that, "[w]hile not otherwise limited, the parties are directed to address in their briefs" the following three issues:

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 ruling on the statutory issues in this case?
3. If the en banc court, which has today separately ordered en banc consideration of *Lucia v. SEC*, 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? (In *Lucia*, a panel of the D.C. Circuit rejected arguments that an SEC administrative proceeding was unconstitutional because the presiding administrative law judge (ALJ) was unconstitutionally appointed. That issue is relevant in *PHH* because the CFPB's claims were initially heard by an ALJ and one of the panelists, Judge Randolph, filed a short concurrence stating his belief that the CFPB's ALJ was unconstitutionally appointed. Oral argument in *Lucia* is also scheduled for May 24.)

While these questions indicate that the full D.C. Circuit is particularly interested in the constitutional issues, it appears that the CFPB's interpretation of RESPA will still be relevant insofar as the second question asks whether the court can avoid the constitutional issues by ruling against the Bureau on statutory grounds. A possible exception is the panel's conclusion that the CFPB erred in concluding that

RESPA's three-year statute of limitations did not apply in administrative actions, which the CFPB did not contest in its petition for rehearing.

Because the panel's judgment was stayed pending resolution of the CFPB's petition for rehearing and has now been vacated, the Dodd-Frank Act provision limiting the President's ability to remove the CFPB's Director due to "inefficiency, neglect of duty, or malfeasance in office" remains in effect. Some members of Congress have called on President Trump to remove CFPB Director Richard Cordray under this standard.

If you have questions about the decision or other related issues, visit our [Consumer Financial Protection Bureau practice](#) for more information, or contact a BuckleySandler attorney with whom you have worked in the past.