

Client Alert

National Class Action Practice Group

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D.C. Circuit Rules CFPB's Structure Unconstitutional

In a news-making decision with significant political implications, but probably limited near-term business or legal effects, the United States Court of Appeals for the District of Columbia Circuit held on Tuesday, October 11, 2016, that the structure of the Consumer Financial Protection Bureau (“CFPB”) is unconstitutional.¹

Overview of Decision

Established by the Dodd-Frank Act of 2010, the CFPB is an independent agency that is led by a single director, whom the President can remove only for cause—that is, only “in cases of inefficiency, neglect of duty, or malfeasance in office.”² The CFPB is thus structured differently from most federal agencies, which are often led by multi-member commissions and whose directors or commissioners the President can remove at will. The D.C. Circuit determined that the CFPB’s unusual structure, combined with its vast statutory mandate, vests too much authority in a single unelected government official to pass constitutional muster. “Indeed,” the court observed, “other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power.”³ In its lengthy ruling, the D.C. Circuit elaborated on the extensive powers exercised by the CFPB and its director:

[T]he CFPB possesses the power to “prescribe rules or issue orders or guidelines pursuant to” 19 distinct consumer protection laws. That power was previously exercised by seven different government agencies. The CFPB may pursue actions to enforce the consumer protection laws in federal court, as well as in administrative actions before administrative law judges, and may issue subpoenas requesting documents or testimony in connection with those enforcement actions. The CFPB has the power to impose a wide range of legal and equitable relief, including restitution, disgorgement, money damages, injunctions, and civil monetary penalties. And all of this massive power is lodged in one person — the Director — who is not supervised, directed, or checked by the President or by other directors. . . .⁴

This stands in stark contrast with every other independent agency in our nation’s history (aside from minor, “anomalous” exceptions), which have

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been headed by multi-member bodies “of experts appointed by law and informed by experience.”⁵ Prominent examples include the Federal Trade Commission, the Federal Communications Commission, and the Securities and Exchange Commission. The court explained that the “commission model” exemplified by these other independent agencies helps “safeguard[] the individual liberty protected by the Constitution,” because it “help[s] prevent arbitrary decisionmaking and abuses of power” by not “concentrat[ing] power in the hands of one individual.”⁶

Relying heavily on the lack of “historical precedent” for a single-director, independent agency, the court held that the CFPB’s structure violated the Constitution.⁷ “The CFPB,” the court wrote, “is exceptional in our constitutional structure and unprecedented in our constitutional history.”⁸ That lack of historical precedent doomed the CFPB, the court reasoned, because “history and tradition are important guides in separation of powers cases that, like this one, are not resolved by the constitutional text alone.”⁹

While the court’s ruling was sweeping, the remedy it fashioned was not. Rather than ordering that the CFPB be shuttered, as many of its critics had hoped, the court simply severed the “for cause” provision in the Dodd-Frank Act — i.e., the provision that made the CFPB an independent agency. Without the for-cause provision in the statute, the court ruled that the CFPB must “[o]perat[e] . . . under the supervision and direction of the President.”¹⁰ In short, “the CFPB now will operate as an executive agency,” and “[t]he President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time.”¹¹

Business and Legal Implications

The court made clear that the CFPB may still “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.” Consequently, despite its political significance, the ruling is unlikely to have an immediate effect on the businesses that are subject to CFPB regulation and oversight. If the next President appoints a director whose policy views differ significantly from those of the current director Richard Cordray, however, the decision could turn out to be a game-changer, especially if the President replaces Mr. Cordray with a director inclined to turn back the proposed ban on the use of class-action waivers in certain financial services contracts. In addition, the court’s criticism of the CFPB’s interpretation of certain consumer protection statutes may provide a foundation to challenge other CFPB rules and policies, including the proposed ban on class-action waivers. We will continue to monitor these developments.

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¹ *PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, Slip Op. (D.C. Cir. Oct. 11, 2016).

² *Id.* at 21-22, n.2.

³ *Id.* at 25.

⁴ *Id.* at 24-25 (internal citations omitted).

⁵ *Id.* at 55 (quoting *Humphrey’s Executor v. United States*, 295 U.S. 602, 624 (1935)).

⁶ *Id.* at 43-44.

⁷ *Id.* at 9-10.

⁸ *Id.* at 34.

⁹ *Id.* at 36.

¹⁰ *Id.* at 67-68.

¹¹ *Id.* at 69.