



## Alerts

### PHH v. CFPB: CFPB Not Dodging Constitutionality Questions

April 4, 2017

*Consumer Financial Services Alert*

Friday March 31<sup>st</sup> marked the deadline for CFPB to file its brief in response to PHH in the en banc hearing. In granting en banc review, the court sought guidance from the parties on 3 specific questions. Here's a quick summary of CFPB's answers to those questions.

**1) Is the Bureau's structure unconstitutional because its Director may be removed only for cause, and if so, is the appropriate remedy to sever the for-cause removal provision from the Consumer Financial Protection Act?**

Yes & Yes.

In its brief, CFPB argues that the Bureau's structure does not interfere with the ability of any branch to perform its assigned functions, including the President's executive, so it does not violate the separation of powers doctrine.

As to whether the President's ability to execute the powers of his office are altered by the existence of a single director or multi-member commission, the CFPB quotes U.S. Supreme Court precedent arguing that simply because Congress chose a different structure than a board or commission does not make the single director any less accountable to the President. In short, an "historical anomaly" does not necessarily equate to unconstitutionality. CFPB emphasizes its core powers being functionally equivalent to the Federal Trade Commission (FTC).

Notably, the CFPB takes the [United States' amicus brief](#) head on, distinguishing the cases and propositions the United States cited and emphasizing the Bureau's mandate to carry into effect the legislative policies created by Congress, just like the FTC.

**2) May this Court avoid addressing the constitutionality of the Bureau's structure if it adopts the panel's holdings as to PHH's liability under RESPA, and should it adopt those holdings?**

No & No.

In urging the court to make a decision regarding the constitutionality of the CFPB's structure, the Bureau states, "The Bureau's constitutionality has been challenged frequently, but has yet to be addressed by a court of appeals...Even if this Court could, on statutory grounds, vacate the Bureau's Order, it should

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address the Bureau's constitutionality—the issue has been fully briefed, it recurs with increasing frequency elsewhere, and is ripe for decision."

As to the underlying RESPA statutory issues, the CFPB repeats its contention that the Director correctly remedied a reinsurance kickback scheme, and that the statute of limitations does not apply to administrative proceedings.

**3) What is the appropriate disposition of this case if this Court concludes that the SEC's administrative law judges are inferior officers under *Lucia v. SEC*?**

The court should either: a) Seek additional briefing from the parties as to whether the *Lucia* decision should control in this case, or b) uphold the CFPB's constitutionality, vacate the Bureau's order without addressing PHH's liability under RESPA, and remand for further proceedings before a properly appointed ALJ.

The Bureau's answers to these questions show its readiness to press on in this battle by forcing a decision on its Constitutionality that could be taken up by the U.S. Supreme Court, as well as attempting to keep the scope of its powers in tact by leaving open the possibility for further briefing on the issues surrounding the *Lucia* decision.

Also on Friday, friends of the CFPB, including several consumer rights groups, filed briefs in support of the Bureau. One such [amicus brief](#) was filed by 40 current and former Democratic federal lawmakers. The amici included some of the original shapers of the CFPB: Sen. Chris Dodd, Rep. Barney Frank, and Sen. Elizabeth Warren.

Oral arguments will be heard by the Court on May 24.

Read the full brief [here](#).

Read a brief summary of PHH's position [here](#).

For more information please contact [Vaishali Rao](#).

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*