

[Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—Additional interested organizations ask to intervene in PHH Corp.'s appeal, \(Feb. 15, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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State National Bank of Big Spring and two conservative advocacy groups have asked for permission to intervene in a possible *en banc* rehearing of a U.S. appellate court decision that the Consumer Financial Protection Bureau's structure violates constitutional separation of powers principles. Requests to intervene in *PHH Corp. v. CFPB* filed by two members of Congress, 17 attorneys general, and several consumer advocacy organizations are pending as well (see [Banking and Finance Law Daily](#), Feb. 13, 2017).

The CFPB has asked the full U.S. Court of Appeals for the District of Columbia Circuit to rehear a three-judge panel's decision that separation of powers principles prevent the bureau from existing as an independent agency with a single director who can be removed only for cause. The panel majority said the CFPB must be treated as an executive agency whose director can be removed by the president at will (see [PHH Corp. v. CFPB](#), [Banking and Finance Law Daily](#), Oct. 11, 2016).

Interveners. The bank and the two organizations sued the Treasury Secretary in 2012, claiming that the CFPB's structure is unconstitutional. The appellate court decided in 2015 that the bank has standing to raise the challenge (see [Banking and Finance Law Daily](#), July 24, 2015), and the bank points that out in the current intervention request.

In its request to intervene, the bank expresses its concern that the appellate court could choose to decide the *PHH Corp.* appeal on strictly statutory grounds, by determining that the CFPB's attempt to enforce the Real Estate Settlement Procedures Act against PHH Corp. was based on an incorrect interpretation of RESPA. Big Spring bank believes this would deprive it of the opportunity for a quick, binding decision on the separation of powers issue that is presented in both cases and thus prolong the bank's suit, which already is nearly five years old.

The bank, however, is faced by a problem it shares with the others who want to intervene—the request might have been made too late. As a general rule, the motion to intervene should have been filed within 30 days after PHH Corp. asked for a review of the CFPB's decision. Big Spring bank argues that there is good cause to extend the 30-day period, as the court has done in other cases.

The bank also contends that it has a legally-protected interest in the *PHH Corp. v. CFPB* litigation and that PHH Corp. will not adequately represent that interest. PHH Corp.'s main goal is to avoid the \$109 million penalty levied on it by the bureau, the bank asserts, and a decision on statutory grounds would do that just as effectively as a decision on constitutional grounds, according to the bank.

Big Spring bank has also tried to link its suit with that of PHH Corp. in another way. The bank asked the U.S. district judge hearing its case to enter summary judgment on the separation of powers claim and then certify that decision to the appellate court for an interlocutory appeal (see [Banking and Finance Law Daily](#), Jan. 6, 2017). However, the CFPB has opposed that effort, and the judge said he is inclined to allow the appellate court to decide PHH Corp.'s case first.

Advocacy groups. The 60 Plus Association describes itself as "a nonpartisan seniors advocacy group with a free enterprise, less government, and fewer taxes view towards issues important to seniors," positioning itself as a conservative alternative to the American Association of Retired Persons. The Competitive Enterprise Institute

calls itself "a non-profit public policy organization dedicated to advancing the principles of limited government, free enterprise, and individual liberty."

Companies: Competitive Enterprise Institute; PHH Corporation; 60 Plus Association; State National Bank of Big Spring

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