

## [Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—D.C. Cir.: CFPB seeks rehearing of unconstitutional single-director structure ruling, \(Nov. 21, 2016\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The Consumer Financial Protection Bureau has asked the full U.S. Court of Appeals for the District of Columbia Circuit to rehear an appeal in which a three-judge panel rejected the bureau's single-director structure as unconstitutional. The panel decided that an independent agency led by a single director who could be removed only for cause violated separation of powers principles. The proper remedy, the panel said, was to treat the CFPB as an executive agency whose director could be fired by the president without cause (see [PHH Corporation v. CFPB](#), discussed in [Banking and Finance Law Daily Oct. 11, 2016](#)). The CFPB's [petition](#) also asks for rehearing of whether its interpretation of the Real Estate Settlement Procedures Act was correct.

**CFPB enforcement action.** The genesis of the decision was a CFPB administrative enforcement action claiming that PHH's reinsurance arrangements violated the RESPA ban on kickbacks and unearned fees. Under the arrangements, PHH would refer borrowers who needed mortgage insurance to its preferred mortgage insurers. These insurers were preferred because they had agreed to buy reinsurance from a PHH subsidiary. The Department of Housing and Urban Development, which was responsible for RESPA interpretations before the Dodd-Frank Act, approved this type of arrangement as long as the mortgage insurer paid only reasonable market value for reinsurance and the reinsurance actually was provided.

In the enforcement action, the CFPB changed that interpretation, arguing that the arrangement was impermissible because it amounted to a tying arrangement.

The majority of the three-judge panel decided that the arrangement complied with RESPA as long as it complied with HUD's interpretation. It also rejected the CFPB's attempt to apply the reinterpretation retroactively and the bureau's claim that there was no statute of limitations on its administrative enforcement powers.

**Fractured panel opinion.** In fact, the three-judge panel was unable to agree on a basis for its ruling that the bureau's administrative action had to be reversed. Of the three judges:

- Circuit Judge Kavanaugh, who wrote the opinion of the court, believed that the CFPB was structured unconstitutionally and that it had misinterpreted RESPA;
- Circuit Judge Henderson dissented from the court's opinion on constitutionality, believing that RESPA had been misinterpreted and that the action should be reversed on that basis, making consideration of the bureau's structure unnecessary; and
- Senior Circuit Judge Randolph concurred, citing only a belief that the entire administrative proceeding was unconstitutional because the administrative law judge was not appointed by the president as required by the Constitution.

**Rehearing request.** The CFPB's petition for rehearing by the full circuit argues that the panel's separation of powers decision and its RESPA interpretation both are incorrect.

The decision that the CFPB is unconstitutionally structured is incorrect, the bureau asserts, because precedent cited by opinion of the panel does not forbid an independent agency to have only a single director. The panel was wrong to disregard three examples of independent agencies that have such a structure. Also, contrary to the opinion, an agency with a single-director structure is at least as accountable to the president as an agency with a multi-member structure, the bureau argues.

The panel's interpretation of RESPA would "defeat a primary purpose of that act," the bureau's petition continues. The issue was not whether PHH received a fee; the issue was whether PHH received a "thing of value" in exchange for the referral of insurance business. The act covered more than just payments, so it could cover tying arrangements. Moreover, the insurance companies' payment made to procure referrals could never be bona fide, since "bona fide" means "in good faith."

The bureau also asks for a reconsideration of whether its interpretation of RESPA could be applied retroactively.

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Companies: PHH Corporation

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