COURT RULING ON CFPB

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If you are engaged in the consumer finance industry, including payday lending or check cashing, a recent court decision challenges the fundamental legal authority of the federal agency regulating the industry. The fallout from this decision will have far reaching consequences for how the consumer finance industry is going to be regulated going forward.

The Consumer Finance Protection Bureau ("CFPB") regulates the consumer finance industry. Since its inception, the CFPB has been accused of rampant and unchecked over-regulation to the point of choking such businesses out of existence. With the October 11, 2016, decision of the U.S. Court of Appeals for the District of Columbia Circuit, essentially lays the blame with agency director.

In the case of *PHH Corp, et al. v. Consumer Financial Protection Bureau*, the court found that the "one-director" structure established to run the CFPB is unconstitutional. The Court said that the CFPB's one-director structure vests authority in one individual who is "unaccountable [and] unchecked" and who could engage in arbitrary decision-making.

The opinion was the result of a lawsuit filed by PHH Corporation in response to a $109 million penalty imposed by the CFPB. PHH argued that the "CFPB's status as an independent agency headed by a single Director violated Article II of the Constitution." Historically, independent agencies such as the CFPB have been headed by multiple commissioners who acted as a check on one another.

Judge Brett Kavanaugh, writing for the majority, in a 110 page opinion, stated: "Because the CFPB is an independent agency headed by a single director and not by a multi-member commission, the director of the CFPB possesses more unilateral authority-that is, authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." He deemed the restricted oversight of the CFPB's director a "threat to individual liberty," and was particularly disturbed that currently the director can be fired only for cause that includes, "inefficiency, neglect of duty or malfeasance." To address this and maintain continuity of the agency's operation, "[t]he CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury" and that the "for-cause provision" would be severed, allowing President Barack Obama and any subsequent President to remove the director at will and to supervise and direct the CFPB director.

The CFPB was initially the brainchild of then Harvard Law School Professor, and now Senator Elizabeth Warren, and was in part a response to the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. It is an independent agency of the U.S. Government that, per its website, is charged with assisting "consumer finance markets by making rules more effective, by consistently and fairly enforcing those rules, and by empowering consumers to take more control of their lives." Warren was not selected as its first director due to perceived Republican opposition. Early in 2012, Richard Cordray became a recess appointment by President Barack Obama. Cordray's appointment was subsequently approved by a vote of the Senate in July, 2013. With this ruling then, the CFPB is no longer as independent as intentioned, but is now tied to the President and subject to executive policy-making. This in turn will be affected by the upcoming Presidential election in November.

Meanwhile, the CFPB issued proposed rules, the comment period for which ended on October 7, regulating the payday, vehicle title and high-cost installment lending industry. In the proposed rules, the CFPB is seeking to impose additional requirements on industry participants. With the continuity of operations referenced in the Court’s opinion, consumer finance businesses, including payday lenders, and other related entities should closely monitor the progress of these rules and their impact on a statewide level, especially when attempting to navigate through the local statutes and rules of state regulators.

For more information on this tope, please contact the author, Colin Roopnarine, on the firm’s Government and Regulatory team.

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