

## **The Latest PHH Corp. v CFPB Decision and the New CFPB Culture**

**By John Dolgetta, Esq.**

On January 31, 2018, an *en banc* panel of the Federal Circuit Court of Appeals for the District of Columbia (“En Banc Panel” or “Panel”) issued an important decision in its rehearing of *PHH Corp. et al. v. Consumer Financial Protection Bureau* (“*PHH Corp.*”). (See full decision at <http://bit.ly/2rXR99r>). The previous decision of the D.C. Circuit Court issued on October 11, 2016 was discussed in a [November, 2016 Real Estate In-Depth article](#). (See article at <http://bit.ly/2kfPR3u>). The En Banc Panel decided two central issues: (1) whether the make-up of the Consumer Financial Protection Bureau (“CFPB”) with a single agency head (i.e., the Director) who can be removed by the President only for cause (i.e., for “inefficiency, neglect of duty, or malfeasance in office”) is constitutional, and (2) whether PHH Corp. and the other entities violated anti-referral and anti-kickback provisions of the Real Estate Settlement Procedures Act of 1974 (“RESPA”) in light of previously issued guidance from the Department of Housing and Urban Development (“HUD”). While both issues are critical, the latter more directly affects the real estate industry and the industry’s use of marketing service agreements (“MSAs”).

### **Is the CFPB’s Structure Constitutional?**

In its decision, the En Banc Panel overturned the original ruling of the three-judge Circuit Court panel issued on October 11, 2016, which held that the make-up of the CFPB was unconstitutional because the Director had unchecked power, could only be removed by the President “for cause” and had ultimate appellate review power (which allows the Director to review and overturn decisions made by an administrative law judge who presides over an enforcement action hearing (which, in the first instance, is brought by the Director of the CFPB)).

While the CFPB’s current structure (especially the “appellate review” power) seems to be a bit concerning, the En Banc Panel ultimately ruled that the CFPB’s structure was constitutional. The Panel explained that Congress specifically provided for this structure in order to protect the Director from political influence or motivation while running the agency. It further opined that the limited five-year term and the “for cause” removal clause did provide the appropriate “check” and “balance” on the Director. However, there were several dissenting Justices who did not agree with the majority’s decision.

### **RESPA Violations and the Legality of MSAs**

While a significant portion of the 250-page decision dealt with the constitutionality issue, an equally important aspect of the Panel’s decision involves its determination of whether PHH Corp. violated RESPA’s anti-referral and anti-kickback provisions. Ultimately, the Panel reaffirmed, unanimously, the decision of the previous three-judge panel, which overturned the \$109 million sanction against PHH Corp. (and others) and which held “...that Section 8 permits captive reinsurance arrangements so long as mortgage insurers *pay no more than reasonable market value* [emphasis added] for reinsurance.” This reinforces the position that as long as real

estate service providers follow RESPA, there are exceptions detailed in Section 8(c) which permit certain arrangements. (*See* [12 U.S. Code Section 2607](#) at <http://bit.ly/2sjoTOD>).

The En Banc Panel further held that “...even if the Director’s contrary interpretation (that RESPA prohibits tying arrangements) were permissible, ..., it was an unlawfully retroactive reversal of the federal government’s prior position. [citation omitted].” Director Cordray simply ignored previous HUD guidance issued in 1997 (“HUD’s 1997 Guidance”) which provided that certain referral arrangements (similar to those entered into by PHH Corp. and various other entities) were permissible provided HUD’s guidelines were followed. (*See* article entitled “[PHH v. CFPB, explained](#)”, by Amy Tankersley, *Inman*, at <http://bit.ly/2BIs0s3>, which summarizes HUD’s 1997 Guidance and provides an extensive history of the facts giving rise and leading up to the *PHH Corp.* action).

Director Cordray’s position was that any arrangement between PHH Corp. and the other petitioners violated RESPA. Director Cordray took a similar stance in connection with several other enforcement actions initiated against other real estate service providers, such as Prospect Mortgage, Wells Fargo, and numerous others. (*See* Real Estate In-Depth article entitled “[The CFPB: Knocked Down But Not Out](#)” at <http://bit.ly/2G0MTbi>). While the En Banc Panel did strike down the large fines and penalties, it did remand the case back to the CFPB for the limited purpose of having it determine the sole issue of whether the fees paid (i.e., the premiums) were reasonable and in line with market value.

Another important aspect of the decision is that the En Banc Panel upheld the validity of the three-year statute of limitations, which Director Cordray interpreted did not apply to administrative hearings and only applied to cases filed in court. Director Cordray attempted to go back many years (beyond just the 3-year window) in arriving at the \$109 million assessment against PHH Corp. and the other petitioners.

The En Banc Panel’s decision to unanimously uphold the above aspects of the three-judge panel is yet another critical and positive step in providing additional clarity on the legality of MSAs. This decision opens the door to real estate service providers in that it allows them to consider whether they would like to establish a MSA rather than simply dismiss the idea outright due to fear of being prosecuted for any act that the Director believes to be in violation of RESPA, even if it may be permissible. These arrangements, when established in accordance with the law and HUD’s 1997 Guidance, can be very impactful marketing and referral tools. Leon Cameron, Esq., Director of Legal Services & Professional Standards Administrator of HGAR, discussed the “do’s” and “don’ts” of setting up MSAs in a recent Real Estate In-Depth article entitled “[Things to Consider Before Entering into a Marketing Service Agreement](#).” (*See* article at <http://bit.ly/2skSBCL>).

### **Cordray’s Departure, Mulvaney’s New CFPB Culture**

While the importance of the constitutional element of the decision has less of an impact on the real estate industry, it is worthy to note that the CFPB’s structure can still be of concern if a Director makes it his or her “mission” to aggressively go after lenders, title companies, insurance companies, attorneys, real estate agents and other real estate service providers which

come under RESPA regulations. The case may involve a further appeal to the Supreme Court on the question of whether the structure of the CFPB is constitutional but for now that may not be too much of a concern in light of the resignation of Director Cordray and the appointment of Mick Mulvaney as interim Acting Director. With the appointment of Acting Director Mulvaney, there has also come a change in culture at the CFPB.

On January 23, 2018, Acting Director Mulvaney issued an email to the staff at the CFPB which explains in detail the change in focus of the CFPB. (*See* Email from Acting Director Mick Mulvaney entitled ["To Everybody from the Acting Director"](http://bit.ly/2DZELLC) at <http://bit.ly/2DZELLC>). Director Mulvaney expressed that the "...previous governing philosophy here was to aggressively 'push the envelope' in pursuit of the 'mission'...." Director Mulvaney further states that "[i]t is not appropriate for any government entity to 'push the envelope' when it comes into conflict with our citizens. The damage we can do to people can linger for years and cost them their jobs, their savings, and their homes."

The new mission of the CFPB, according to Acting Director Mulvaney, is one where the agency will "...exercise humility and prudence, the almost unparalleled power given to [it] to faithfully enforce the law in furtherance of the mandate given to [it] by Congress. But we go no further. Simply put, the days of aggressively 'pushing the envelope' of the law in the name of the 'mission' are over." Director Mulvaney believes that the CFPB should conduct a more "quantitative" analysis and that it should exercise more restraint before it initiates enforcement actions against and investigations into companies.

Another goal of Acting Director Mulvaney is for the CFPB to focus on promulgating additional formal regulations and guidance so that the companies, the CFPB is charged with regulating, know the rules and know whether or not they are violating the law. In furtherance of this goal, Acting Director Mulvaney has issued several "Requests for Information" in order to obtain public commentary on various areas which he believes are in need of clarification and apply the findings in order to make the CFPB a more efficient, fair and transparent agency in its dealings with both the consumer and the companies it regulates. (*See* ["Request for Information Regarding Bureau Enforcement Processes"](http://bit.ly/2si846F) at <http://bit.ly/2si846F>; ["Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings"](http://bit.ly/2Ea9HVP) at <http://bit.ly/2Ea9HVP>; and ["Request for Information regarding Bureau Investigative Demands and Associated Processes"](http://bit.ly/2BqxSge) at <http://bit.ly/2BqxSge>).

When the first decision came out in October, 2016, Director Cordray made the intentions of the CFPB very clear: "it will not go quietly into that good night". However, with the appointment of Acting Director Mulvaney, the CFPB is becoming a more "quiet" agency with a toned-down, more deliberative mission. Director Mulvaney has made it clear that we should fear an agency with such unfettered powers. While the decision by the En Banc Panel is a positive development in the industry, MSAs and referral arrangements need to be carefully assessed and scrutinized before they are implemented. It is important for the real estate service providers to review the resources made available to them by the National Association of Realtors®, the extensive literature on the subject, and ultimately, engage legal counsel in order to structure an MSA or other arrangement in compliance with the law so that the benefits of such arrangements can be realized and, therefore, increase business for the real estate service providers.

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