

Financial Institutions Webinar: CFPB Litigation Roundup

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Franca Harris Gutierrez, Partner, WilmerHale

Dan Kearney, Partner, WilmerHale

Jamie Dycus, Counsel, WilmerHale

Bradford Hardin, Counsel, WilmerHale



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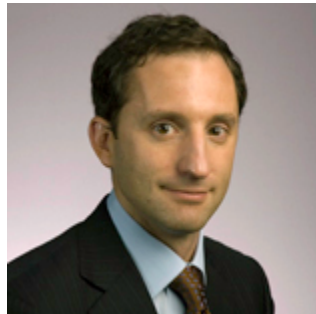
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Speakers



**Franca Harris
Gutierrez**
Partner



Dan Kearney
Partner



Jamie Dycus
Counsel



Bradford Hardin
Counsel



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- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
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Overview of CFPB Litigation Trends

- Leadership Transition
- Review of Existing Actions
 - Constitutional Issues
 - Statute of Limitations
- Regulation by Enforcement
- Jurisdictional Issues

Director Uncertainty

Acting Director – Mulvaney v. English

- Dodd-Frank – Unavailability vs. Vacancy
- Vacancies Reform Act
 - OLC Precedent
 - NLRA 9th Circuit Precedent

Senate-Confirmed Director

- Expect nominee in coming weeks
- 50-vote threshold





Review of Existing Actions

- ***PHH Corp. v. CFPB* (D.C. Cir. 2017—argued May 24; opinion pending)**
- Constitutional Issue
 - Panel found that the CFPB's structure as an independent agency with a single director and a for-cause removal requirement violated the Constitution's Separation of Powers doctrine
 - *En banc* hearing focused on whether CFPB's structure diminishes Presidential power and on whether structure is sufficiently similar to structures preciously approved by the Court
- Statute of Limitations – Administrative Proceedings
 - CFPB argued before the panel no statute of limitations applied for administrative actions
 - Panel opinion held the 3-year statute of limitations under RESPA applied
 - For *en banc* rehearing, CFPB has changed argument to say the 5-year statute of limitations under 28 U.S.C. § 2462 applies



Existing Actions – Implications of Constitutional Challenges

- The CFPB's structure has been challenged as violating the Constitution's separation of powers doctrine
 - Issue is before the *en banc* D.C. Circuit in *PHH Corp. v. CFPB*
 - Even if structure found unconstitutional, implications for pending Bureau actions will depend on:
 - Severability of for-cause removal provision from the CFP Act
 - Applicability of the *de facto* officer doctrine to actions taken by Director Cordray
 - The ability (and willingness) of a future Director or Acting Director to ratify past actions taken by Director Cordray

Existing Actions – Statute of Limitations

- CFPB has taken aggressive positions on the applicable statute of limitations
 - Administrative forum: Argued no statute of limitations applies
 - Federal Court forum: Bureau has argued that it is not bound by the statute of limitations that otherwise applies to civil actions
- Issue largely unresolved by the Court
 - ***CFPB v. Hanna* (N.D. Ga. 2015)**: Court stated Congress must have envisioned some statute of limitations applying when the Bureau brings actions under the FDCPA, but deferred decision until summary judgement



Regulation by Enforcement

- Due process/retroactivity
 - “[I]ndividuals should have an opportunity to know what the law is and to conform their conduct accordingly.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).
- Selective enforcement
 - Enforcement actions as “guides to all participants in the marketplace to avoid similar violations.” Richard Cordray, March 9, 2016.
- Regulatory uncertainty
 - Reduced innovation/increased compliance and other costs



Regulation by Enforcement – UDAAP

- Persistent uncertainty about interpretation
 - A “flexible” standard
 - Roots in FTC Act
 - Questions re: “substantial assistance”
- Fact-intensive nature of UDAAP claims
 - Difficult to generalize across cases
 - Difficult and expensive to defend



Regulation by Enforcement – UDAAP

- Courts may be reluctant to sustain due process challenges
 - ***CFPB v. D and D Marketing (C.D. Cal. 2016)***: “It is the agency’s prerogative to decide whether to proceed through a rulemaking ... or through an adjudication, where it develops the law through adversarial process.”
- But some courts have imposed other limitations
 - ***CFPB v. Intercept Corp. (D.N.D. 2017)***: Claim dismissed where misconduct and injury inadequately alleged.
 - ***CFPB v. Nationwide Biweekly Administration, Inc. (N.D. Cal. 2017)***: No restitution where no showing all consumers were injured.

Regulation by Enforcement – UDAAP

- Lenders tried to pair with Native American tribes, which have sovereign immunity, to offer loans exempt from state usury laws
- The CFPB is expressly prohibited from establishing usury limits. See 12 U.S.C. § 5517(o). However, it has brought actions under UDAAP to effectively regulate this practice.
- ***CFPB v. Cash Call (C.D. Cal. 2016)***: State (not tribal) law governed and UDAAP claims sustained



Regulation by Enforcement – Reforms

- Bureau options to create certainty/rationality
 - Promulgate regulations/additional guidance
 - Prefer litigation over administrative proceedings
 - Exercise enforcement discretion more uniformly



Jurisdictional Issues

- CFPB Expanding Bounds of Authority
 - Data Security
 - Structured Settlements
- Overly Broad CIDs
 - Federal Reserve Board's IG Report (Sept. 20, 2017) – recommendation to include statements clearly describing conduct under investigation

Jurisdictional Issues – CID Challenges

- CIDs are not self-enforcing
 - ***John Doe Company v. CFPB* (D.C. Cir. 2017)**: “CIDs are not self-enforcing, and non-compliance triggers no fine or penalty. The Company thus needed to do nothing in response to the CID it received. If a recipient declines to respond to the CID, the Bureau must obtain a court order to enforce it.”
- Defendants can be successful by making a plausible claim that CFPB is exceeding its jurisdiction
 - ***CFPB v. Accrediting Council for Independent Colleges and Schools* (D.C. Cir. 2017)**: Requires a more definite statement of purpose in the CID to permit the recipient and the court the ability to evaluate the basis for jurisdiction

Jurisdictional Issues – CID Challenges

- Courts have rejected arguments that CIDs were overbroad or overly burdensome
 - ***CFPB v. Harbour Portfolio Advisors* (E.D. Mich. 2017)**: Court held that the CFPB's authority to issue a CID was very broad, refused to stay the period pending appellate review of the decision
- Not all plausible jurisdictional challenges are successful
 - ***CFPB v. Great Plains Lending* (9th Cir. 2017)**: Tribal lenders argued CFPB lacked authority to investigate because Congress intended to exempt tribes; court disagreed



Questions?

**Franca Harris Gutierrez, Partner,
WilmerHale**

+1 202 663 6557

franca.gutierrez@wilmerhale.com

Dan Kearney, Partner, WilmerHale

+1 202 663 6285

daniel.kearney@wilmerhale.com

Bradford Hardin, Counsel, WilmerHale

+1 202 663 6073

bradford.hardin@wilmerhale.com

Jamie Dycus, Counsel, WilmerHale

+1 212 937 7236

jamie.dycus@wilmerhale.com

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