

Financial Institutions Webinar: CFPB Litigation Roundup

November 30, 2017

Franca Harris Gutierrez, Partner, WilmerHale

Dan Kearney, Partner, WilmerHale

Jamie Dycus, Counsel, WilmerHale

Bradford Hardin, Counsel, WilmerHale

Attorney Advertising



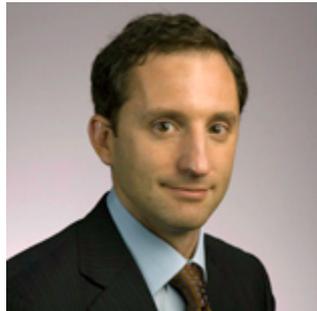
WILMER CUTLER PICKERING HALE AND DORR LLP®



Speakers



**Franca Harris
Gutierrez**
Partner



Dan Kearney
Partner



Jamie Dycus
Counsel



Bradford Hardin
Counsel



Webinar Guidelines

- Participants are in listen-only mode
- Submit questions via the Q&A box on the bottom right panel
- Questions will be answered as time permits
- Offering 1.0 CLE credit in California and New York*
- WebEx customer support: +1 888 447 1119, press 2

**WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional credit in New York. This program, therefore, is not approved for New York newly admitted attorneys. Attendees of this program also may be able to claim England & Wales Unaccredited CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.*

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

**WilmerHale has been accredited by the New York State and California State Continuing Legal Education Boards as a provider of continuing legal education. This program is being planned with the intention to offer CLE credit in California and non-transitional credit in New York. This program, therefore, is not approved for New York newly admitted attorneys. Attendees of this program also may be able to claim England & Wales Unaccredited CPD for this program. WilmerHale is not an accredited provider of Virginia CLE, but we will apply for Virginia CLE credit if requested. The type and amount of credit awarded will be determined solely by the Virginia CLE Board. Attendees requesting CLE credit must attend the entire program.*

Wilmer Cutler Pickering Hale and Dorr LLP is a Delaware limited liability partnership. WilmerHale principal law offices: 60 State Street, Boston, Massachusetts 02109, +1 617 526 6000; 1875 Pennsylvania Avenue, NW, Washington, DC 20006, +1 202 663 6000. Our United Kingdom office is operated under a separate Delaware limited liability partnership of solicitors and registered foreign lawyers authorized and regulated by the Solicitors Regulation Authority (SRA No. 287488). Our professional rules can be found at www.sra.org.uk/solicitors/code-of-conduct.page. A list of partners and their professional qualifications is available for inspection at our UK office. In Beijing, we are registered to operate as a Foreign Law Firm Representative Office. This material is for general informational purposes only and does not represent our advice as to any particular set of facts; nor does it represent any undertaking to keep recipients advised of all legal developments. Prior results do not guarantee a similar outcome. © 2004-2016 Wilmer Cutler Pickering Hale and Dorr LLP