CFPB Defends Its Constitutionality to Ninth Circuit Panel: *Will Kraninger Have a Change of Heart?*

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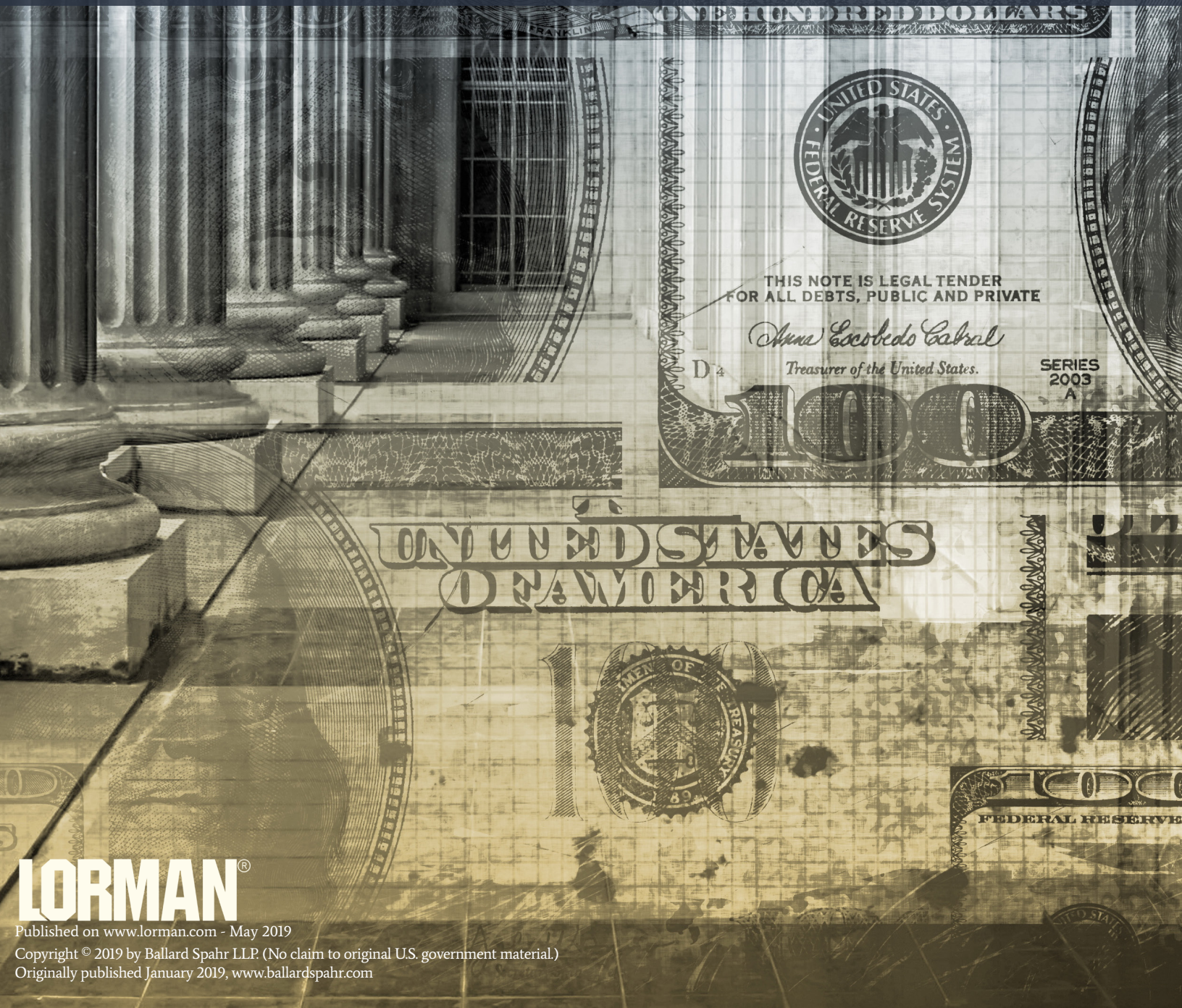

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CFPB Defends Its Constitutionality to Ninth Circuit Panel: Will Kraninger Have a Change of Heart?

*Written by **Alan S. Kaplinsky** - January 17, 2019*

The pendency of three cases in circuit courts challenging the CFPB's constitutionality has given rise to speculation as to whether the CFPB will continue to defend its constitutionality under Director Kraninger's leadership. The CFPB continued to defend its constitutionality in these cases while under former Acting Director Mulvaney's leadership. It did so, however, as a fallback to its primary argument that because Mr. Mulvaney was removable at will by the President and had ratified the CFPB's decision to bring the lawsuit in question, any constitutional defect that may have existed with the CFPB's initiation of the lawsuit was cured.

On January 9, a Ninth Circuit panel heard oral argument in *CFPB v. Seila Law LLC*, one of the three pending circuit court cases. The appellant in *Seila Law* is asking the Ninth Circuit to overturn the district court's refusal to set aside a Bureau civil investigative demand, arguing that the CID is invalid because the CFPB's structure is unconstitutional. In its answering brief filed with the Ninth Circuit, the CFPB relied on the ratification argument and its fallback constitutionality argument. (Mr. Mulvaney was Acting Director at the time of briefing.)

At the oral argument, the CFPB maintained the positions taken in its brief, namely that Mr. Mulvaney's ratification cured any constitutional defect and, in any event, the Bureau's structure is constitutional under U.S. Supreme Court precedent and the D.C. Circuit's en banc PHH decision. This would suggest that Director Kraninger, like former Acting Director Mulvaney, will continue to defend the CFPB's constitutionality in the other pending cases.

Should she do so, however, Ms. Kraninger will be at odds with the position of the Department of Justice. In opposing the petition for certiorari filed by State National Bank of Big Spring (which the Supreme Court denied this week), DOJ argued that while it agreed with the bank that the CFPB's structure is unconstitutional and the proper remedy would be to sever the Dodd-Frank Act's for-cause removal provision, the case was a poor vehicle for deciding the constitutionality issue. It also noted that its position "is that of the United States, not the position of the Bureau to date." The DOJ had asked the Supreme Court to allow the CFPB to weigh in should it grant the petition for certiorari. (The DOJ's position could have added significance because of the Dodd-Frank provision that requires the Bureau to seek the Attorney General's consent before it can represent itself in the Supreme Court.)

If Director Kraninger does have a change of heart, she will be following in the shoes of Joseph Otting, who was appointed Acting FHFA Director by President Trump (and also serves as Comptroller of the Currency). Next week, the Fifth Circuit is scheduled to hold oral argument in the en banc rehearing

of *Collins v. Mnuchin*, in which a Fifth Circuit panel found that the FHFA is unconstitutionally structured because it is excessively insulated from Executive Branch oversight. The plaintiffs, shareholders of two of the housing government services enterprises (GSEs), are seeking to invalidate an amendment to a preferred stock agreement between the Treasury Department and the FHFA as conservator for the GSEs.

The Fifth Circuit panel had determined that the appropriate remedy for the constitutional violation was to sever the provision of the Housing and Economic Recovery Act of 2008 (HERA) that only allows the President to remove the FHFA Director "for cause" while "leav[ing] intact the remainder of HERA and the FHFA's past actions." The plaintiffs sought a rehearing en banc to overturn the panel's rulings that the FHFA acted within its statutory authority in entering into the agreement and that the FHFA's unconstitutional structure did not impact the agreement's validity. The FHFA also sought a rehearing en banc but with the goal of overturning the panel's determination that the plaintiffs had Article III standing to bring a constitutional challenge.

Despite having argued in its petition for rehearing that the panel's constitutionality ruling was incorrect, the FHFA has now announced that it will not defend the FHFA's constitutionality to the en banc court. In the En Banc Supplement Brief of the FHFA and Mr. Otting, the FHFA states that Mr. Otting "has reconsidered the issues presented in this case." It further states that while it remains the FHFA's position that the plaintiffs' lack of standing makes it unnecessary for the en banc court to reach

the constitutionality issue, to the extent the court concludes it is necessary to do so "FHFA will not defend the constitutionality of HERA's for cause removal provision and agrees with the analysis in Section II.A of the Treasury's Supplemental Brief that the provision infringes on the President's control of executive authority."

The two other pending circuit court cases challenging the CFPB's constitutionality are the All American Check Cashing case pending in the Fifth Circuit and the RD Legal Funding case pending in the Second Circuit. Oral argument is tentatively calendared for the week of March 11, 2019 in the All American Check Cashing case and briefing is scheduled to begin next month in the RD Legal Funding case.

For questions regarding this update, please contact: Alan S. Kaplinsky
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