



PHH Decision May Not Subject CFPB to Cost-Benefit Order

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A recent federal appeals court ruling that gives the White House more power over the Consumer Financial Protection Bureau doesn't necessarily mean it will now be subject to the same cost-benefit mandates as other federal agencies.

House Financial Services Committee Chairman Jeb Hensarling (R-Texas) has said the Oct. 11 ruling by the U.S. Court of Appeals for the District of Columbia Circuit means the CFPB must abide by Executive Order 12866, which mandates federal agencies to “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”

Hensarling's interpretation may overstate the potential impact of the decision in *CFPB v. PHH*, which struck only one part of the 2010 law, the for-cause provision, and said the president has the power to remove the CFPB director at will, according to administrative law experts.

“He ran away with something in the opinion that said, ‘Well, now, the CFPB is now just like any other executive agency,’ and he extrapolated from that to mean in all other respects they're the same now and they have to follow these executive orders,” Brett Kitt, a lawyer who has worked for the CFPB and Greenberg Traurig, told Bloomberg BNA in a phone interview. “But I don't think that's what the court really meant. I think they just meant that just like any other executive department the head of that department or agency can be fired for cause.”

The stakes are high for the CFPB, which could see its robust rulemaking agenda slowed down considerably if subjected to outside scrutiny about how it quantifies the exact costs and benefits of proposed consumer safeguards.

The CFPB confirmed it responded to Hensarling's letter, but did not comment further. In a separate court filing, the bureau said that the decision in favor of PHH was “wrongly decided” and won't last. Director Richard Cordray said the bureau “is considering its options for seeking further review” in an Oct. 25 speech to the Mortgage Bankers Association.

Contesting Hensarling Interpretation

John Coates, a Harvard Law School professor, said Executive Order 12866 explicitly excludes “independent regulatory agencies,” as listed at 44 U.S.C. 3502(10). And the CFPB was specifically included by Congress when the agency was created.

“Nothing in the PHH decision purported to interpret, address or even refer to this clear statement of Congressional intent. Nothing that I saw in the Hensarling letter addresses it, either. It remains law,” he said.

Furthermore, Congress imposed specific statutory regulatory procedure requirements on the CFPB that are different from the executive orders referred to by Hensarling, said Coates, who pointed to a part of Dodd-Frank known as Section 1022 that addresses cost-benefit analysis.

“Hensarling’s letter seems to be an attempt to alter the regulatory procedures that the CFPB must follow without going through the normal legislative process — an attempted end-run around the rest of Congress,” Coates said in an e-mail to Bloomberg BNA. “Like most end-run attempts, it will probably be thrown for a loss.”

Subject to Executive Orders?

Two judges on the D.C. Circuit's three-judge panel said the CFPB's single-director structure violates the U.S. Constitution. The majority opinion by Judge Brett Kavanaugh described the CFPB, after the striking of the “for cause” provision, as a “single-Director executive agency,” and said its function “as an executive agency” will not frustrate the overall operation of the Dodd-Frank Act.

But beyond that, other questions about the impact of the ruling — which could be reversed on appeal — are still up in the air.

But there remains some disagreement about the extent to which the court’s ruling will impact the CFPB’s operations beyond allowing the president to replace the bureau’s director at will.

“I think that in making that agency subject to serving at the will of the president, I think it's a logical extension that they would be subject to executive orders,” Gregory Lisa, a partner at Hogan Lovells and a former CFPB enforcement lawyer, told Bloomberg BNA by phone.

Thaya Brook Knight, associate director of financial regulation studies at the Cato Institute also said the ruling means the CFPB must be treated as an executive agency and be subject to executive orders.

“I can't think of any other agency where you have a director who's removable at will by the president and yet is an independent agency,” she said in a phone interview. “To my mind, that seems almost mutually exclusive.”

Jane Luxton, a member of Clark Hill, said in an e-mail she agreed with Hensarling that the PHH ruling that the CFPB is the functional equivalent of an executive agency means it is subject to EO 12866 and the order's direction on conducting cost benefit analyses. Furthermore, she said EO 12866 involves an interagency review process that the CFPB will be subject to.

Section 1022 of Dodd-Frank says the CFPB shall consider costs and benefits of its rules. And under the Small Business Regulatory Enforcement Fairness Act (SBREFA), the agency is required to convene a small business advocacy review panel for rules that are expected to have a significant economic impact on a substantial number of small entities.

Cost-Benefit Mandates

Luxton said while the CFPB is already subject to a cost benefit requirement under the Dodd Frank Act that is more stringent than those of most agencies, the bureau, so far, has not showed much deference to the requirement. She said its cost benefit analysis in the payday lending proposed rule, for example, could at best be described as cursory.

“I am sure it will be tested,” Luxton said. “The additional weight of being subject to EO 12866 will only increase the level of scrutiny by the courts.”

And while it is difficult to quantify benefits, Luxton said, other agencies such as the Environmental Protection Agency have had that type of duty for many years — for example, quantifying the benefits in terms of lives saved, reduced health effects, and other difficult questions.

“Their successes and failures in getting those analyses right have been the subject of many court cases, and we can expect more of that type of action regarding the CFPB in the future as a result of the PHH ruling, unless of course it is reversed on further appeal,” she said.

Wait and See

In the interim, consumer advocates say it makes little sense for OIRA to review CFPB rules when the court decision is not final and could be reversed.

“Even if the decision were upheld, current law specifically identifies the CFPB as an independent agency that is excluded from the executive order requiring OIRA review,” Amit Narang, regulatory policy advocate for Public Citizen said in a statement Oct. 19. “That law was not altered by the court’s opinion.”

The CFPB could ultimately lose on appeal and be deemed to be subject to the cost-benefit analysis but the next president could still decide not to subject the agency to the requirement.

“Even if Hensarling were right, that doesn't mean the executive branch has to apply that executive order,” Lisa said. “The next president can amend, can rescind, can do whatever he or she wants.”