

United States House of Representatives
Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20515

October 19, 2016

The Honorable Richard Cordray
Director
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C.

Dear Director Cordray:

I write regarding the October 11, 2016 decision by the United States Court of Appeals for the District of Columbia Circuit in *PHH Corp. et al. v. CFPB*.¹ This decision found, among other things, that “[t]he CFPB’s concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a...risk of arbitrary decision making and abuse of power, and a...threat to individual liberty.”² The court held that “the CFPB is unconstitutionally structured.”³ To remedy this unconstitutional defect, the court severed the for-cause removal provision from Section 1011(c)(3) of the Dodd-Frank Act from the remainder of the Act.⁴ As a consequence, the President now will have the power to remove you (and any future Director) from office at will, and to supervise and direct your actions.

Importantly, the Court of Appeals wrote that, as a result of its ruling, the CFPB “will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury.”⁵ As you may be aware, President Obama and past Presidents have issued several Executive Orders governing the rulemaking activities of executive agencies. Because some of these executive orders were advisory rather than mandatory for independent regulatory agencies, you and your staff may have been previously under the mistaken impression that these orders did not apply to the CFPB. However, the *PHH* decision makes clear that the Constitution requires that the CFPB be treated as an

¹ *PHH Corp., et al. v. CFPB*, Case No. 15-1177, D.C. Cir. (Oct. 11, 2016), available at [https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/\\$file/15-1177-1640101.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/AAC6BFFC4C42614C852580490053C38B/$file/15-1177-1640101.pdf).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

executive agency, and that the CFPB is not, and may no longer be considered to be, an independent regulatory agency. Consequently, it is also clear that Executive Orders applicable to executive agencies apply in full to the CFPB.

Among the Executive Orders that apply to the CFPB are the following⁶:

Executive Order 12866: Regulatory Planning and Review

Issued by President Clinton in October 1993, Executive Order 12866 mandates that federal agencies “promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people.”⁷ In deciding whether and how to regulate, agencies must:

assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.⁸

To guide agencies in the issuance of rules consistent with Executive Order 12866, OMB has issued OMB Circular A-4, which states that a “good regulatory analysis should include the following three basic elements: (1) a statement of the need for the proposed action, (2) an examination of alternative approaches, and (3) an evaluation of the benefits and costs— quantitative and qualitative—of the proposed action and the main alternatives identified by the analysis.”⁹

⁶ See generally, Congressional Research Service, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process* (Dec. 9, 2014), available at <https://www.fas.org/sgp/crs/misc/R41974.pdf>.

⁷ Executive Order 12866, “Regulatory Planning and Review,” 58 Federal Register 51735, October 4, 1993, available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo12866_10041993.pdf.

⁸ Id.

⁹ OMB Circular A-4, “Regulatory Analysis,” (Sept. 17, 2003), available at http://www.whitehouse.gov/omb/assets/regulatory_matters_pdf/a-4.pdf. For additional guidance on compliance with Executive Order 12866, see OMB, *Agency Checklist: Regulatory Impact Analysis* (Oct. 28, 2010), available at https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/RIA_Checklist.pdf; OMB, *Regulatory Impact Analysis: Frequently Asked Questions* (Feb. 7, 2011), available at https://www.whitehouse.gov/sites/default/files/omb/assets/OMB/circulars/a004/a-4_FAQ.pdf; OMB, *Regulatory Impact Analysis: A Primer* (Aug. 2011), available at

Executive Order 13563: Improving Regulations and Regulatory Review

Issued by President Obama in January 2011, Executive Order 13563 reiterates the general principles of regulation in Executive Order 12866 and says agencies must: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; (2) tailor regulations to impose the least burden on society; and (3) select regulatory approaches that maximize net benefits.¹⁰ The order also directs agencies to “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”¹¹ It also requires agencies to develop a plan under which they would periodically review their existing significant rules.¹²

Executive Order 13132: Federalism

Issued by President Clinton in August 1999, Executive Order 13132 requires an agency to prepare a “federalism summary impact statement” whenever it issues a rule that has “significant federalism implications.”¹³ The assessment is to contain “a description of the extent of the agency’s prior consultation with State and local officials, a summary of the nature of their concerns and the agency’s position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met.”¹⁴

Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Issued by President Clinton in November 2000, Executive Order 13175 requires covered agencies to “have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.”¹⁵ In addition, the order states that no agency shall promulgate a regulation that has tribal implications and preempts tribal law without first consulting with tribal officials, providing OMB with a “tribal summary impact statement,” and making available to OMB any written communications the tribal

https://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/circular-a-4_regulatory-impact-analysis-a-primer.pdf.

¹⁰ Executive Order 13563, “Improving Regulations and Regulatory Review,” 76 Federal Register 3821, January 21, 2011.

¹¹ Id.

¹² Id.

¹³ Executive Order 13132, “Federalism,” 64 Federal Register 43255, August 10, 1999.

¹⁴ Id.

¹⁵ Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 Federal Register 67249, November 9, 2000.

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officials submitted to the agency.¹⁶ President Obama re-emphasized this executive order in a November 5, 2009 *Memorandum for the Heads of Executive Departments and Agencies* entitled "Tribal Consultation."¹⁷

Mr. Director, these executive orders, issued by Presidents Clinton and Obama, represent modest attempts to ensure that executive agencies are accountable to the American people through the President they elect, and to prevent agencies from recklessly promulgating damaging rules by requiring that they conduct meaningful cost-benefit analyses and consult with affected parties, including states and Indian tribes.

Given your professed commitment to democratic and constitutional accountability, I urge you to carefully consider the potential for any decision you might make as CFPB Director to appeal the constitutional holding of the Court of Appeals' decision in *PHH Corp. et al. v. CFPB* to be interpreted as undermining such accountability. In order to assure the public of the CFPB's intent to abide by President Obama's directives, please provide the Committee by no later than October 26, 2016 your written assurance that the CFPB will comply in full with the requirements of Executive Orders 12866, 13563, 13132, and 13175 prior to issuing any future final rule, including rules governing arbitration agreements; payday, vehicle title, and installment loans; and debt collection.

Respectfully yours,


JEB HENSARLING
Chairman

cc: The Honorable Maxine Waters, Ranking Member

¹⁶ Id.

¹⁷ See <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>. This memorandum states: "History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship. My Administration is committed to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications including, as an initial step, through complete and consistent implementation of Executive Order 13175."