

A Right to Remain Anonymous? CFPB Again Tested on Limits of Its Investigative Authority

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Earlier this month an anonymous company sued the CFPB, questioning whether the agency has the authority to conduct investigations following the D.C. Circuit's *PHH Corp. v. CFPB* decision (recall that the *PHH Corp.* decision famously deems the CFPB's single-Director structure to be unconstitutional). "John Doe Company," which offers pension advances to consumers, claims that a civil investigative demand ("CID") issued by the CFPB unlawfully seeks "essentially every business and financial record ever generated" by the company, as well as disclosure of "every person or entity [the company] has done business with." When the CFPB denied John Doe's petition to set aside the CID and its request for confidential treatment, John Doe sued for declaratory and injunctive relief in light of *PHH Corp.* The crux of John Doe's complaint is that any subpoena issued while operating "under the structure that *PHH Corp.* found unconstitutional" is also unconstitutional.

John Doe's gambit is yet another challenge to the CFPB's vast investigative and enforcement authority. It is old news that *PHH Corp.* has emboldened financial services providers. At least four other companies are currently fighting the CFPB's investigative authority in federal courts. However, the significant part of John Doe's request is that it has asked the court to prevent the CFPB from publicizing the Company's name in the CFPB's denial of the Company's petition to set aside the CID. This is a new front in the battle against CFPB overreach.

The stakes here can be high. Companies facing a CFPB investigation often confront a difficult choice of complying with the investigative demand or fighting the CFPB's authority. But challenging the CFPB is an uphill battle and comes with a cost. Director Cordray, who also authorizes each investigation, also rules on the initial part of any challenge to the CFPB's authority. To date, he has denied every such challenge. When the Director denies a challenge, the Bureau publicizes that decision, including the name of the company challenging the investigation. Where news of a CFPB investigation can rattle investors, harm public confidence, or tip off other regulators to a potential problem, CID recipients tend to carefully weigh their decisions to challenge the Bureau's authority. If John Doe is successful here, however, others may be emboldened to challenge the CFPB's authority, as it would provide a path to preventing a private investigation from becoming a public spectacle. A right to "remain anonymous" would be a powerful tool to use in responding to CFPB investigations.

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