

Recess Appointment of Cordray Enabled CFPB Action, But Will It Pass Legal Muster?

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In January, during the mid-session recess of Congress, President Obama announced the appointment of Richard Cordray to serve as the first Director of the Consumer Financial Protection Bureau. Under the tradition of recess appointments, Cordray may serve as Director until the end of 2013.¹ The appointment was important, in part, because Dodd-Frank restricts the Bureau's regulatory authority when no Director is in place. In the immediate aftermath of his installation, Cordray announced the implementation of the CFPB's supervision program for nonbank financial institutions.

The recess appointment came after Republicans used procedural mechanisms to stymie the confirmation of Cordray for several months. The vast majority of Senate Republicans had pledged to oppose the confirmation of a CFPB Director until the agency's leadership structure is changed from a unitary Director to a five-member board and until other federal banking regulators, under the auspices of the Financial Stability Oversight Council, can more easily overrule Bureau actions that, they deem, could undermine the safety and soundness of the financial system.² On several occasions in recent months, Republicans utilized Senate rules to impede Cordray's nomination, even though a majority of senators supported it.

As Director, Cordray will lead an agency that Dodd-Frank established as an independent watchdog to protect consumers from abusive practices by both large bank and nonbank financial institutions. The law vests significant power in the Director to promulgate regulations aimed at financial institutions and to undertake enforcement actions against companies accused of violating federal consumer financial protection laws. The law also entrusts the CFPB with the primary responsibility of supervising – that is, conducting examinations, requiring submission of reports, and mandating registration of – depository institutions that, together with their affiliates, hold more than \$10 billion in assets. Dodd-Frank also directs the CFPB to decide via rulemaking whether, and to what extent, it should exercise supervisory authority over some



¹ U.S. CONST. art. III, § 3, cl. 2.

² See <http://www.aba.com/aba/documents/blogs/doddfrank/SenateToObamaCFPBApril2011.pdf> (May 2, 2011).

³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1024.

nonbank institutions that offer financial products or services, such as nonbank lenders, money services businesses, and others.

Although the agency has been operational for many months, the installation of a Director at the CFPB is important because Dodd-Frank restricts the Bureau's regulatory authority under circumstances where no Director is in place. In a report analyzing the legal authorities under Dodd-Frank, the Inspectors General of the Department of the Treasury and the Federal Reserve Board determined that the law permits the Bureau to promulgate and enforce rules related to existing consumer financial laws, and to conduct examinations of banks, savings associations, and credit unions with over \$10 billion in assets without a Director in place. But, the Inspectors General asserted, Dodd-Frank largely precludes the CFPB from supervising nonbank institutions without a Director in place. This interpretation essentially left the CFPB in limbo for many months as Cordray's nomination languished in the Senate and resulted in intense speculation as to whether the President would make a recess appointment.

Immediate Actions by Cordray

In the immediate aftermath of his installation as CFPB Director, Cordray announced the implementation of the CFPB's supervision program for nonbank financial institutions. This program will initially target mortgage originators, brokers, and servicers, and later, payday lenders, and private education lenders. The CFPB will determine how frequently it will examine a company, in large part, based on the risks posed to consumers by a given company's financial products or services. Consumer complaints to the CFPB about an institution could be a "red flag" that will increase the Bureau's scrutiny of nonbank financial institutions.

In short order, Cordray is expected to move to implement regulations that call for "larger participants" in other nonbank financial markets to fall under CFPB supervision. In the summer of 2011, the Bureau solicited comments from stakeholders on how the CFPB should construct such a program and which markets the agency should target. On the latter issue, the CFPB identified debt collection, consumer reporting, prepaid cards, debt relief service, consumer credit, money transmitting, and check cashing as markets in which the largest participants might fall under CFPB supervision.

Assessing the Legality of the Appointment

Even as the CFPB acts under Cordray's leadership, stakeholders will continue to debate whether President Obama acted legally in making the recess appointment. Indeed, just last week, 39 Senate Republicans vowed in a letter to jointly file an amicus brief for a lawsuit challenging the constitutionality of the recess appointment.

Prior to making the appointment, the President received formal legal advice from the U.S. Department of Justice that justified a temporary appointment of a nominee during a recess of the Senate, even when the Senate has been holding *pro forma* sessions. The Recess Appointments Clause of the Constitution explicitly states that the President has the power to fill vacancies during a Senate recess by making appointments that expire at the end of the next session. The DOJ has long interpreted the term "recess" to include



⁴ *Id.*

⁵ Review of CFPB Implementation Planning Activities, FRB OIG 2011-03, OIG-11-088 at 3-4 (July 15, 2011), available at http://www.federalreserve.gov/oig/files/OIG_2011_Review_of_CFPB_Implementation_Planning_Activities.pdf.

⁶ Supervision and Examination Manual, Consumer Financial Protection Bureau UDAAP 9, available at http://www.consumerfinance.gov/wp-content/themes/cfpb_theme/images/supervision_examination_manual_11211.pdf (Oct. 2011).

⁷ Defining Larger Participants in Certain Consumer Financial Products and Services Markets, Notice and Request for Comment, 76 Fed. Reg. 125 available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2011-0002-0001> (proposed June 29, 2011).

"intrasession recesses", and, in determining whether a recess appointment is constitutionally permissible, the Department analyzes whether "the adjournment of the Senate is of such duration that the Senate could not 'receive communications from the President or participate as a body in making appointments.'"⁸ In advising the President that he could lawfully appoint Cordray during the congressional recess from mid-December 2011 through mid-January 2012, DOJ concluded that *pro forma* sessions – several of which lasted mere seconds and at which the Senate conducted no legislative business – do not interrupt a Senate recess because they did not allow the Senate to "participate as a body in making appointments." In situations where the Senate is unable to give "advice and consent" to nominations made by the President, the Department concluded, the President is free under the Constitution to make a recess appointment.

Critics of the appointment argue that the Senate is, indeed, able to conduct business and receive presidential messages during the short *pro forma* sessions. Some critics also contend that the President is undermining the constitutional doctrine of separation of powers between the three co-equal branches of the federal government by interpreting that the Administration – rather than the Senate itself – has the right to determine when the Senate is in recess. Finally, the President's detractors question whether his recess appointment power extends to filling positions in new government agencies that have never been "vacated."

What's Next?

As the debate over the President's controversial move rages on, lawsuits challenging the President's authority to make the recess appointments will likely proceed. Indeed, at least one lawsuit has already been filed challenging the President's recess appointment of new members to the National Labor Relations Board ("NLRB"), which occurred on the same day as the Cordray appointment. Lawsuits challenging the CFPB appointment could be filed in short order or they could arrive once the Bureau issues a regulation or engages in an examination of financial institution. The latter scenario could strengthen the contention of the opponents of the appointment that they have "standing" – that is, that they can demonstrate that they have been actually harmed by virtue of the appointment – to challenge it. We will continue to provide updates on the status of the CFPB's operations and any legal actions that dispute the validity of the Bureau's actions.

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⁸ Department of Justice, Lawfulness of Recess Appointments During a Recess of The Senate Notwithstanding Periodic Pro Forma Sessions 5, available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf> (Jan. 6, 2012).

⁹ *Id.*

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