

CFPB Watch

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President Uses Recess Appointment Authority to Install Cordray as CFPB Director

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More than a year-and-a-half after President Obama signed into law the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, which created the Consumer Financial Protection Bureau (“CFPB”), the CFPB finally has a “Director” – although the Director is not who many thought and hoped it would be (Elizabeth Warren), nor was the process of installing the Director in office the process contemplated by the authors of the Dodd-Frank Act, which says that “... the Director shall be appointed by the President, by and with the advice and consent of the Senate.” (Sec. 1011(b)(2)).

By the time the inaugural Director of the CFPB was installed, former Ohio Attorney General Richard Cordray was the nominee to head the fledgling bureau rather than Harvard Law Professor Elizabeth Warren, who is back in Massachusetts running for the United States Senate seat currently held by Senator Scott Brown (R-MA) who, ironically, was one of only three Republican senators who voted to approve the Dodd-Frank Act that created the CFPB. And the process followed was not through a vote in the Senate reflecting “the advice and consent of the Senate” provided for in the Dodd-Frank Act, but through the President announcing that he was appointing Cordray as Director using the authority that the United States Constitution (Article II, sec. 2, clause 3) confers upon the President “... to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session ...”

President Obama's action of invoking the Constitution's recess appointment authority drew praise from some and condemnation from others.

Rep. Barney Frank (D-MA), co-author of the Dodd-Frank Act, praised the action, saying that “President Obama has responded in an entirely appropriate way to [Congress'] refusing to consider a nomination, not because of any flaws in the nominee, but because they are frustrated that they are unable to repeal, or weaken, a duly passed statute.” House Financial Services Committee Member Brad Miller (D-NC) shared Frank's view, saying that “President Obama made the right decision to move forward with this appointment. He's tried for well more than a year to negotiate in good faith with Senate Republicans, but there's been no good faith by Senate Republicans. Their abuse of constitutional confirmation powers and Senate rules is unprecedented.”

Others have a different view. Speaker of the House John Boehner (R-OH) declared that use of the recess appointment process in this instance “... goes beyond the President's authority, and I expect the courts will find the appointment to be illegitimate” while Senator Orrin Hatch (R-UT) criticized the President's action saying that “[b]y opening this door, the White House is saying it can appoint any person at any time to any position it chooses without the Senate.” Chairman Spencer Bachus (R-AL) of the House Financial Services Committee stated that “President Obama has delegitimized the CFPB and has opened the agency up to legitimate legal challenges that will cripple it for years...”

The following facts are clear.

- July 21, 2010: President Obama signed the Dodd-Frank Act into law, creating the CFPB.
- July 18, 2011: President Obama nominated Richard Cordray to be the first Director of the CFPB and sent his nomination to the Senate.
- September 6, 2011: The Senate Banking Committee held a confirmation hearing on the Cordray nomination.
- October 6, 2011: The Senate Banking Committee voted to send Mr. Cordray's nomination to the full Senate with a straight party line vote 12-10.
- December 8, 2011: By a vote of 53 yeas, 45 nays and 1 “present” the Senate failed to muster the 60 votes required to invoke cloture and close further debate on the Cordray nomination.
- January 3, 2012: The Senate Convened the Second Session of 112th Congress.
- January 4, 2012: President Obama invokes his “recess appointment” authority to install Richard

Cordray as Director of the CFPB.

Given the acrimony surrounding the Cordray appointment, the common expectation is that the President's action will be challenged in Court. Conceding the fact that the Constitution confers upon the President recess appointment authority, below are some of the issues that may be raised in upcoming legal challenges to the exercise of that authority in the appointment of Richard Cordray to be Director of the CFPB:

- Since the Senate had reconvened the day before the President invoked his recess appointment authority was the Senate "in recess" for purposes of making recess appointments?
- Since the CFPB Director position theoretically became "vacant" when the President signed the Dodd-Frank Act into law on July 21, 2010, and the Constitution gives the President authority "... *to fill up all Vacancies that may happen during the Recess of the Senate...*," did the Cordray appointment meet that Constitutional test?
- Since Sec. 1066(a) of the Dodd-Frank Act says that "... The Secretary [of the Treasury] is authorized to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate ..." [emphasis added] does the inaugural Director need actual Senate confirmation for the CFPB to exercise its function?
- Since the explanatory language in the "conference report" to the Dodd-Frank Act says that "[The CFPB] will be run by a Director who is Presidentially appointed and Senate confirmed" does that give an advantage to those who would like to "undo" the recess appointment?

If upheld, a recess appointment expires at the end of the Senate's "next session." Since the Senate convened the 2nd Session of the 112th Congress on January 3, 2012, the end of the Senate's "next session" would be end of the 1st Session of the 113th Congress which will occur following the November Presidential and Congressional elections. Accordingly, if the recess appointment survives challenge, Director Cordray could serve almost two years as a recess appointee – and longer if, in the interim, the Senate votes to confirm him for the full five-year term provided for in the Dodd-Frank Act.

We trust that this and future issues of the CFPB Watch will be useful. Please note that this analysis is provided for educational and informational purposes. Careful review of the topics covered, including on-going developments, is recommended.

About Venable's CFPB Task Force

We are dedicated to providing our thoughts and observations on the CFPB and the impact that its policy determinations will have on the current and long-term businesses of consumer financial product and service providers. Task Force updates and materials can be found at www.Venable.com/cfpb-task-force.