Insights

When Is An Acting Director Not Really An Acting Director? Richard Cordray's Parting Shot Against The Trump Administration.

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Richard Cordray officially resigned as the first Director of the Consumer Financial Protection Bureau (the "CFPB" or the "Bureau"), on Friday, November 24, 2017. While Mr. Cordray's resignation was previously announced, the industry did not anticipate the parting shot he would make against the Trump Administration, by appointing Leandra English as the Deputy Director, and thereby "Acting Director," of the Bureau, as one of his final official acts. The White House had previously announced that current Office of Management and Budget Director Michael Mulvaney would serve as Acting Director of the CFPB until the Senate confirmed a successor to Mr. Cordray. Mr. Mulvaney has been openly critical of Mr. Cordray and the Bureau, and was expected to work quickly to reverse as many of Mr. Cordray's anti-industry initiatives as possible while serving in the Acting Director role.

On Sunday, November 26, 2017, Ms. English filed suit against President Trump and Mr. Mulvaney in the U.S. District Court for the District of Columbia, asserting that she was the rightful Acting Director of the Bureau, asking the court to declare her as such, and seeking to restrain the President from appointing anyone else to the Acting Director position. The legal dispute centers around whether the Dodd-Frank Act or the Federal Vacancies Reform Act of 1988 (the "FVRA")[1] controls. In short, Ms. English asserts that the Dodd-Frank Act controls - specifically the provision stating as follows: "There is established the position of Deputy Director, who shall - (A) be appointed by the Director; and (B) serve as acting Director in the absence or unavailability of the Director." [2]

Conversely, the Trump Administration asserts that the FVRA controls. The FVRA provides in part:

> "If an officer of an Executive agency whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity . . . ; (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity . . . ." [3]

We anticipate that the Administration will argue that the Dodd-Frank provisions cited by Ms. English refer to the absence or unavailability of a sitting Director, and not of a Director who is absent or unavailable by virtue of their own resignation. Some media outlets were reporting this morning that the CFPB General Counsel has issued an internal memorandum consistent with the Administration's position.

The CFPB's position is based on the familiar assertion that the Bureau is an independent agency with a Director that is only subject to removal "for cause" by the President. The issue of whether the CFPB Director is removable at will, or only for cause, is currently under consideration by the same court in which Ms. English's case is pending. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). That case is still pending, following oral arguments on this issue by both parties in May of this year.

The court is expected to move quickly to consider the issues presented in Ms. English's Complaint. A strict interpretation of the competing statutes would appear to favor the Administration's position; however, given the delay in the same court's issuance of an opinion in *PHH Corp.*, exactly where it stands on the independence of the Bureau is yet to be fully revealed.

In the interim, it has been reported that Mr. Mulvaney arrived at the CFPB this morning, and began to work from the Director's office.

The **Krieg DeVault Financial Institutions team** is continuing to monitor developments at the CFPB, and will be providing further updates as the leadership and future direction of the Bureau becomes more clear in the coming days and weeks.

[1] 5 U.S.C.A. §§ 3345-3349d.

[2] 12 U.S.C.A. § 5491(b)(5).

[3] 5 U.S.C.A. § 3345(a).