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D.C. Circuit's Invalidation of President Obama's Recess Appointments Raises Questions Concerning Actions Taken by the Consumer Financial Protection Board's Director

The D.C. Circuit's Decision in *Noel Canning*

On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit held that President Obama's recess appointments to the National Labor Relations Board (NLRB) were unconstitutional. Citing his authority under the Constitution's Recess Appointment Clause, President Obama had appointed three individuals to the NLRB during an intra-session recess of the Senate in January 2012. After the NLRB subsequently found that a company violated the National Labor Relations Act in connection with a collective bargaining agreement, the company challenged the NLRB's authority to act claiming, among other things, that the NLRB lacked a lawful quorum.

The D.C. Circuit agreed that the President's appointments were invalid. Relying on a number of historical sources, the court reasoned that the President's power under the Recess Appointments Clause extends the Recess between sessions of the Senate only and not to any intra-session recess of the Senate that may arise. The court went on to state that the President's Recess Appointment power may only be used to fill vacancies that first occur during the Recess of the Senate and not to any vacancy that happens to exist during a recess. As a result, the appointments to the NLRB were invalid, and because this meant that the NLRB lacked a valid quorum, the D.C. Circuit concluded the NLRB's orders were void.

The D.C. Circuit's January 25th decision is the first court of appeals decision to invalidate a presidential recess appointment and creates a circuit split on the scope of the President's appointment authority. It is likely that the Department of Justice and NLRB will seek further review of the panel's decision either from the D.C. Circuit *en banc* or the Supreme Court.

One of the agencies potentially impacted by the decision is the Consumer Financial Protection Bureau (CFPB) because its Director, Richard Cordray, was appointed by President Obama through the same mechanism that the D.C. Circuit's *Noel Canning* decision calls into question.

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***Noel Canning*'s Impact on the CFPB's Authority Raises Many Questions**

President Obama appointed CFPB Director Cordray through the same exercise of recess appointment power invalidated by the D.C. Circuit. But unlike the NLRB's quorum requirements, which limits the NLRB's power to act unless it has three members, a number of the CFPB's powers are not contingent on having a Director.

For authorities transferred to the CFPB from other consumer protection agencies, Congress specified in Section 1066 of the Dodd-Frank Act that the Secretary of the Treasury is authorized to perform certain functions of the Bureau "until the Director of the Bureau is confirmed by the Senate." The Department of the Treasury has taken the position that the Secretary's authority under Section 1066 does not expire on the designated transfer date of the CFPB out of the Department of the Treasury and that the Secretary's authority continues until a Director is confirmed by the Senate. If correct, the Secretary of Treasury may continue to retain the authority to carry out the functions of the Bureau under Subtitle F of Title X of Dodd-Frank (Sections 1061-1067), including to:

- prescribe rules, issue orders, and produce guidance related to the federal consumer financial laws that were within the authority of the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the FDIC, and the National Credit Union Administration;
- conduct certain examinations of banks, savings associations, and credit unions with total assets exceeding $10 billion;
- issue guidelines and rules under the enumerated consumer laws that had been under authority of the FTC before the transfer date;
- conduct all consumer protection functions relating to the Real Estate Settlement Procedures Act, the Secure and Fair Enforcement for Mortgage Licensing Act, and the Interstate Land Sales Full Disclosure Act that had been within authority of the Secretary of the Department of Housing and Urban Development; and
- enforce all orders, resolutions, determinations, agreements, and rulings that have been issued, made, prescribed, or allowed to become effective before the designated transfer date by any transferor agency or by a court of competent jurisdiction, in the performance of consumer financial protection functions that are transferred to the Bureau, with respect to a bank, savings association, or credit union with total assets in excess of $10 billion.

It should be noted, however, that if Director Cordray has taken actions under these transferred authorities without the concurrence of the Secretary of Treasury, an open question remains as to whether the CFPB's actions would need to be reissued, or in some way ratified by the Secretary of the Treasury. In the short term, the validity of the CFPB's actions under these transferred authorities could be called into in question, though any defects may be cured.

In addition to these transferred authorities, Congress delegated to the CFPB a series of new federal consumer financial regulatory authorities. Because the CFPB's new, non-transferred authorities cannot be exercised by the Secretary of the

Treasury, the CFPB's new authorities are at greatest risk from the D.C. Circuit's decision in *Noel Canning*. Among these new authorities are provisions authorizing the CFPB to:

- prohibit unfair, deceptive, or abusive acts or practices in connection with certain consumer financial products and services;
- prescribe rules and require model disclosure forms to ensure that the features of a consumer financial product or service are fairly, accurately, and effectively disclosed both initially and over the term of the product or service; and
- supervise nondepository institutions under Section 1024 of Dodd-Frank, including by: (i) prescribing rules defining the scope of nondepository institutions and establishing recordkeeping requirements that the CFPB determines are necessary for such supervision, and (ii) conducting examinations of nondepository institutions.

Noel Canning injects significant uncertainty into the CFPB's authorities and actions in the short term, particularly as to the new consumer protection authorities delegated to it by Congress in the Dodd-Frank Act.

If you have any questions regarding these issues or the Consumer Financial Protection Bureau, please contact Jeffrey Spigel at +1 202 626 2626, Peter Todaro at +1 202 626 5518, or Alexander Haas at +1 202 626 5502.