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D.C. Circuit Hands the CFPB a Setback?

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At the end of last week, the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in *Noel Canning v. National Labor Relations Board*, holding that President Obama's recess appointments to the National Labor Relations Board ("NLRB") were invalid.¹ The rationale of *Noel Canning* also calls into question the validity of Richard Cordray's recess appointment to Director of the Bureau of Consumer Financial Protection (the "Bureau") and many of the Bureau's activities to date. Bureau activities that are now uncertain include several final rules that the Bureau has issued and supervisory actions that the Bureau has taken. *Noel Canning* could also prompt future reforms to the Bureau's governance or funding.

WHAT DID THE D.C. CIRCUIT HOLD?

A three-judge panel of the D.C. Circuit ruled that three appointments that President Obama made to the NLRB on January 4, 2012, were not made in accordance with the Recess Appointments Clause of the U.S. Constitution² because they were not made during a recess that occurred between sessions of Congress (i.e., an "intersession" recess). The Administration had argued that the appointments were valid because the Senate was meeting only in *pro forma* sessions every three business days between December 20, 2011, and January 23, 2012, during which time no legislation was passed, no votes were held, and no nominations were considered. But the second session of the 112th Congress had begun on the day before the appointments, January 3, 2012. The D.C. Circuit held that the President may make recess appointments only during the recess that occurs between separate sessions of Congress, not during breaks that occur during a session. The court stated that the language of the Constitution "points to the inescapable conclusion that the Framers intended something specific by the term 'the Recess,' and that it was something different than a generic break in proceedings."³ The court also held that recess appointments may be made only to fill vacancies that occur during intersession recesses, not vacancies that simply remain unfilled during a recess.

The Administration may now petition the D.C. Circuit for rehearing *en banc* within 45 days. If rehearing *en banc* is granted, the full D.C. Circuit would hear the case. If rehearing *en banc* is denied, or if the Administration decides to bypass asking for rehearing, then the Administration has 90 days to petition the Supreme Court for certiorari review. It is believed that the issue is important enough that the Administration may dispense with a rehearing petition and seek review directly before the Supreme Court.

WHAT IS THE EFFECT OF THIS RULING ON THE RECESS APPOINTMENT OF RICHARD CORDRAY AS DIRECTOR OF THE BUREAU?

The *Noel Canning* decision has no direct effect on the recess appointment of Richard Cordray as Director of the Bureau because the Cordray appointment was not challenged in *Noel Canning*. However, the Cordray

¹ *Noel Canning v. NLRB*, 2013 U.S. App. LEXIS 1659 (D.C. Cir. 2013).

² U.S. Const., art. II, § 2, cl. 3.

³ *Noel Canning*, 2013 U.S. App. LEXIS 1659, at *25.

Client Alert.

appointment was made on the same day, in the same manner, and with the same justification as the NLRB appointments. Therefore, a person who claims they are aggrieved by Bureau action may try to rely on *Noel Canning* to challenge the action. Indeed, the plaintiffs in *State National Bank of Big Spring v. Geithner*, which is pending in the U.S. District Court for the District of Columbia, are already challenging the Cordray appointment.⁴ As discussed further below, a nonbank that is being examined by the Bureau could also seek a court order declaring that the Bureau has no authority to examine the nonbank, to compel the production of witnesses or documents, or to enter onto its premises for the purposes of examination.

WHAT EFFECT COULD THE INVALIDATION OF THE CORDRAY APPOINTMENT HAVE ON THE ACTIONS THAT THE BUREAU HAS TAKEN TO DATE OR WILL TAKE IN THE FUTURE?

The Bureau has not taken many formal actions in the year since Cordray was appointed. The Bureau has entered a handful of enforcement actions (three against banks and three against debt relief companies), conducted several exams of banks and nonbanks (but no public supervisory action arising out of those exams), and promulgated a number of final rules.⁵

Courts may find that the actions taken by an invalidly appointed agency official are nonetheless valid, citing the so-called “*De Facto Officer Doctrine*.” The *De Facto Officer Doctrine* is an equitable doctrine that courts invoke from time to time to prevent chaos due to invalid appointments.⁶ Although the *De Facto Officer Doctrine* is by no mean automatic, and should only apply in extenuating circumstances,⁷ courts have some leeway to ratify actions already taken by Cordray as Director.

In this regard, certain authority granted under the Consumer Financial Protection Act of 2010 (the “Act”)⁸ is specifically vested in the Director of the Bureau. And, without a valid Director, this authority cannot be exercised. Among other things, the Act authorizes only the Director to

- appoint employees and establish offices within the Bureau;⁹
- prescribe certain rules, beyond those implementing the “Federal consumer financial laws” (as defined in the Act, to include TILA, FCRA, and ECOA, among other federal laws), and issue orders and guidance regarding the same;¹⁰ and
- supervise and examine nondepository covered persons, for purposes other than compliance with Federal consumer financial laws.¹¹

⁴ *State National Bank of Big Spring v. Geithner*, No. 1:12-cv-1032-ESH (D.D.C.).

⁵ See, e.g., 77 Fed. Reg. 42,873 (July 20, 2012) and 77 Fed. Reg. 65,775 (Oct. 31, 2012).

⁶ See *Ryder v. United States*, 515 U.S. 177 (1995) (declining to apply the *De Facto Officer Doctrine*).

⁷ See *id.* at 185 (stating that the *De Facto Officer Doctrine* should be applied only where “grave disruption or inequity” would result from the granting of retrospective relief).

⁸ Pub. L. No. 111–203, 124 Stat. 1955 (July 21, 2010) (codified in relevant part at 12 U.S.C. §§ 5301 et seq.).

⁹ For example, under the Act, only the Director is authorized to establish an Office of Fair Lending and Equal Opportunity and an Office of Service Member Affairs and appoint assistant directors of those offices. See 12 U.S.C. §§ 5493(c) and (e).

¹⁰ See 12 U.S.C. § 5512(b). Note, however, that the Bureau has rulemaking authority for the Federal consumer financial laws. See 12 U.S.C. § 5512(a). In addition, the Bureau, upon consultation with the Federal Trade Commission, may issue rules regarding larger participants. See 12 U.S.C. § 5514(a)(2).

¹¹ 12 U.S.C. § 5514(a).

Client Alert.

Even in the absence of a confirmed Director, the Act provides that the Secretary of the Treasury may perform certain functions (i.e., those within Subtitle F of the Act) until a Director is confirmed.¹² These functions were identified by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System¹³ and include

- prescribing rules, issuing orders, and producing guidance related to the Federal consumer financial laws;
- conducting examinations concerning the Federal consumer financial laws of depository institutions with total assets in excess of \$10 billion (and their affiliates);
- enforcing orders, resolutions, etc., issued prior to July 21, 2011, with respect to depository institutions with total assets in excess of \$10 billion (and their affiliates); and
- replacing the federal agencies that transferred power to the Bureau in any lawsuit or proceeding commenced prior to July 21, 2011, concerning the authority transferred to the Bureau.

Irrespective of whether the Cordray appointment is invalidated, the Act authorizes the Secretary to perform these functions in lieu of a validly appointed director.

Still, beyond the transitional authority granted to the Secretary and the authority that the Act grants to the Bureau more broadly, a Bureau operating without a Director would not have the full breadth of authority envisaged by Congress under the Act.

We will continue to monitor and report on developments related to *Noel Canning*, as well as challenges to the Cordray appointment.

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¹² 12 U.S.C. § 5586(a).

¹³ See Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System, OIG-CA-11-004 (Jan. 10, 2011), available at http://www.federalreserve.gov/oig/files/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf.

Client Alert.

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