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The Appointment of a Director of the Bureau of Consumer Financial Protection*

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The Washington Post recently reported that the Senate Majority Leader agreed to keep the Senate in session pro forma through the end of the session in exchange for receiving approval from the Republicans in the Senate to permit 54 appointments to be confirmed. That highlights again a constitutional provision that is often overlooked except when a senator or group of senators prevents a nominee from assuming a position to which the President has attempted to appoint him or her — The Appointments Clause.

Article II, section 2 of the U.S. Constitution says:

> [The president] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... all... Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Dodd-Frank Act created the office of Director of the Bureau of Consumer Financial Protection and authorized the Director, among other things, to serve as the head of the Bureau; to appoint various officers including the Deputy Director of the Bureau, and to employ the employees necessary to conduct the business of the Bureau and to set their compensation; to establish a variety of offices and boards such as that of the Office of Research, the Office of Fair Lending and Equal Opportunity, the Office of Financial Education, the Office of Service Members Affairs, the Office of Financial Protection for Older Americans, and the Consumer Advisory Board; and

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to submit a budget and financial statements of the Bureau to OMB and a request for authorized funds, when needed, to Congress.

The Director is also authorized to prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the federal consumer financial laws and to prevent evasions thereof. The Director may require reports from smaller banks; the "Bureau" from larger ones.

The "Bureau" is authorized to establish the general powers of the Bureau with respect to all executive and administrative functions, including implementing the federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions.

The Director is barred from exercising any rulemaking with respect to manufactured housing retailers, and the "Bureau" is barred with respect to many other groups such as Realtors, attorneys, accountants, insurance companies, etc. The "Bureau" is authorized to prohibit unfair, deceptive or abusive acts or practices to ensure that disclosures meet the statutory standards; to provide consumers access to information; and together with the Secretary of the Treasury, appoint a private education loan ombudsman.

The Bureau and certain officers of various agencies shall agree upon the transfer of certain personnel to the Bureau, effective no later than 90 days after the designated transfer date, and if there is no Director, the Secretary of the Treasury may perform these transitional functions of the Bureau under subtitle F (Transfer of Functions and Personnel - Transitional Provisions). On the designated transfer date, a wide variety of consumer financial laws are transferred to the jurisdiction of the Bureau and no longer are within the jurisdiction of the agencies from which they are transferred.

Since no Director has been nominated yet, and since the Majority Leader has agreed to continue pro forma sessions the rest of this session to avoid any recess appointments, can rules be promulgated or enforcement actions be taken should continual pro forma sessions become the order of the day in the next Congress? That, of course, is one possible outcome, particularly if control of one of the Houses shifts as a result of the upcoming election. Majority Leader Reid kept the Senate in pro forma session from November 2007 through the end of the presidency of President Bush in part to prevent President Bush from making recess appointments.

To answer that, some assumptions must be made:

- To recess, both houses must agree on a concurrent resolution to do so;
- There is no recess between adjournment sine die and commencement of the next Congress;
- The Vacancies Reform Act of 1998 (U.S.C. 3345-3349d) requires a confirmed officer to die, resign, or otherwise be unable to perform the duties of the office for a vacancy to exist within the meaning of that act.
- The Bureau is an independent agency and its head does not report to any board or cabinet official; and
- When the statute establishing a new agency requires that the head of the agency be nominated by the President and confirmed by the Senate, there is no vacancy in that position until someone is nominated and confirmed under the appointments clause. Therefore, no one can serve in an Acting position as the head of the agency.

If these assumptions are true, and I believe they are, what happens if one of the Houses of Congress does not adjourn between now and the designated transfer date?

A Director of the Bureau will only be able to take office if he or she is nominated by the President and confirmed by the Senate - that's what Dodd-Frank says. Under that appointment, he or she will be able to serve the full 5 years accorded each term in the statute. While a recess appointment would provide an individual with similar full authority as Director with certain limits on the time he or she could serve in that position, no recess appointment can be made if one of the Houses did not agree to recess: no recess, no recess appointment. Similarly, no one could be appointed as Acting Director because there is no vacancy when a position has not first been filled in conformance with the Appointments Clause; there is an absence of a director, but no vacancy within the meaning of the various statutes.

The language difference in the statute in which some powers and authority are given to the Director and some are given to the Bureau creates some problem, because generally, at least since the changes made by the Hoover

Commission, authority is given to the head of the agency to conduct all the powers of the agency. This statutory language is somewhat confusing, but still seems to be a distinction without a difference. The Bureau cannot act without acting through individuals, and since the Director is said to be the "head" of the Bureau, the Bureau must act through the individual that is the Director. If not, then it is unclear who it could be that is authorized to issue rules, orders, guidance or any other official document of the Bureau. After a Director is confirmed and takes office, he or she could, of course, delegate many powers to others. But absent the establishment first of a confirmed Director, it is difficult to see how powers could be delegated.

If there is no Director at the time of the designated transfer date, now established as July 21, 2011 but subject to some limited extension, what is the situation?

While it is not completely clear, there is a good chance that there will be an astonishing lack of capacity to enforce federal consumer laws. Authority to enforce and administer the federal consumer financial laws as enumerated in the Dodd-Frank Act, with some limited exceptions, will have been transferred to the Bureau, but an argument can be made that the Bureau, lacking a Director, will not be able to enforce or administer those laws. At the same time, those laws will no longer be within the jurisdiction of the agencies from which they will have been transferred, so those agencies will not have the authority to administer them. In addition, there is also a good argument to be made that the new laws passed by the Dodd-Frank Act will be unable to be enforced by the Bureau, since it has no Director.

That does not necessarily mean that the laws adopted in the Dodd-Frank Act or those already on the books cannot be enforced. An individual that has been damaged because a third party has engaged in some act or practice that violates the statute has a cause of action unless private rights of action are barred, which by and large they are not in Titles X or XIV. Similarly, there is an argument that says that a state attorney general may be able to bring an action on behalf of the state of the citizens of the state for violations of the statute.

But it does mean that the Bureau might well be unable to take the actions one would expect of the agency created by Title X of the Dodd-Frank Act, and other agencies would have lost the authority to enforce the laws previously within their jurisdiction. Is this good public policy?

Probably not, but there is another public policy argument, based on a superior law, that overrides that one. That is a public policy based on the Appointments Clause of the Constitution. The clause can be read fairly to say that appointments of the president to the most senior officials of the government should not be permitted to be given by the president as if the president were a monarch and had no one to whom to answer for the quality or lack of quality of the appointees other than himself or herself. While the Congress cannot initiate appointments, the checks and balances that make our Constitution unusual in this case limit that otherwise unbridled authority. The Congress, in a real sense, has been made a partner (albeit a junior partner) with the president in the appointment powers of senior government officials. That is the overriding public policy at work in this situation.

Unless there are successful arguments against these various assumptions and conclusions, the answer is clear – nominate someone and seek confirmation. If that nominee is rejected, nothing has changed, so nominate another, and keep doing it until someone is nominated and confirmed.

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