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The Intriguing Situation at CFPB Now That the Administration Will Change*

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The Intriguing Situation at CFPB Now That the Administration Will Change

The election results being what they are, questions necessarily arise with respect to the position of Director at CFPB. The combination of the Congressional Review Act, active use of a provision in Dodd-Frank somewhat overlooked until now, the Vacancies Act, interpretations of the present statute by courts (including a Supreme Court that soon might have a full contingent of justices) combined with the intense interest in some Members of Congress in reconsidering the structure of CFPB leads to theater-like intrigue.

The current situation

Director Cordray is in office under what the statute says is a five year term that will end about 18 months after the new President is inaugurated.[1] A three judge panel of the D.C. Circuit Court of Appeals has determined (not quite unanimously) that the term is subject to removal at will, but papers have been filed that seek to move that decision to consideration by all the judges in the D.C. Circuit. Also in the wings for either party is a possible appeal to the U.S. Supreme Court.

As further background, CFPB has promulgated many rules and regulations that were sent to Congress per the statute after May 30, 2016 (a date that seems to be significant) and it is actively considering other regulations not yet promulgated. Enforcement actions are at various stages.

The new President will be inaugurated on January 20 of the coming year and approval of many appointees, including a new Attorney General is expected soon thereafter since filibustering them will not be possible under the rules adopted by the Democrat led Senate previously (the Supreme Court nominee presents the possibility of a filibuster at this time, however).

*The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

[1]He was approved on July 16, 2013 so his term ends July 15, 2018.

Next

While the new President has many objectives more pressing than changing Directors at CFPB, there is an active group of his supporters that feel keenly it should be done. Can he do it, and if he tries, what are the possible complications?

First, the actions in PHH are important but not determinative. Even if the Bureau gets the D.C. Circuit to stay the sending of the mandate to CFPB to follow the opinion of the three judge panel, that doesn't itself make law. It just says that the Director's decision cannot yet be changed notwithstanding the decision of the three judge panel.

Even if the D.C. Circuit en banc rules that he cannot be removed at will, that does not restrict the President. That would simply be an opinion of one Circuit — an important one of course — but still just one circuit. The President could ignore that and remove Director Cordray with a letter of dismissal handed to the Director by a newly appointed Acting Director that fits within the limitations of the Vacancies Act. That would have to be someone in the Bureau at least at a GS-15 level or someone elsewhere in government that has already been approved by the Senate. The third possibility in the Vacancies Act is for the first assistant to take over, and in Dodd-Frank, there is a specific provision that says the Deputy Director shall serve if the Director is unable to do so but that can be easily overcome by the President.[2]

Director Cordray could resist dismissal and would most likely have standing to bring a lawsuit requesting an injunction against that action, and probably could find a judge in the D.C. Circuit that would give him that result. Then we would continue to debate the case in the Circuit, unless the President had been successful in installing a ninth Justice at the Supreme Court, in which case that decision would move fairly quickly to that Court for determination. There are nice questions surrounding who would pay for Director Cordray's appeal, but there are sufficient persons interested in maintaining Director Cordray in office that funding the appeal would not be impossible for the Director, and if he won, he would of course, be reimbursed. The new Attorney General would be involved in the case, however (more about that later), but it would seem that Director Cordray would have standing as an individual to bring the action.

And then?

Let's say that the Director loses. That means that the President could have an appointee operating within the Bureau that is willing to make major changes in the way the Bureau is run.[3] He or she would have authority to remove most of the senior staff and others not protected by civil service rules. That person cannot, of course, stay there forever and cannot be nominated for the permanent positon. But it does give the President some time to select a permanent Director of the Bureau who could operate under the same autocratic rules that Dodd-Frank created. Rumblings for a desire to create a commission could be quieted since now the other side is in charge, or perhaps those opposed to a commission would not be supportive.

If the Director wins, what then?[4] If he wins and remains in charge, what problems does he face

[2]Should the Deputy (who at the present time is an Acting Deputy Director) attempt to serve after the President has removed the Director, a second letter from the President should clear that up.

[3]Finding such a person that fits within the limitation of the Vacancies Act may be hard, but probably not impossible.

[4]"Winning" depends upon the decision of the courts, of course, and there is reasoning that would make the

in imposing his view of the Bureau?

For starters, he faces the possibility of challenges under the Congressional Review Act on any regulation made final by the Bureau after May 30, 2016.[5]

Under that Act, quick action can be taken, and in the Senate, the resolution is not subject to a filibuster. If a rule is disapproved, another regulation covering the same matters may not be promulgated again by the Bureau in substantially the same form. Bundling resolutions (lumping more than one together for floor consideration) apparently removes the filibuster protection under the present rules of the Senate and under the present terms of the Congressional Review Act.[6]

One way or another, however, there is a threat that must be addressed by the Bureau on rules already finalized and delivered to Congress after May 30, 2016.[7]

With respect to any new rules the Bureau might want to finalize, the constant threat of a joint resolution of disapproval passed under the Congressional Review Act will be present. While this Act has seldom been used in the past, it is now ripe for use since the new Administration will have a chance to review rules with a friendly House and Senate in existence to consider joint resolutions. That is a fairly unusual situation under the Act.[8]

With respect to enforcement, the situation is a bit more complicated. The Bureau has broad powers to bring actions in its own name and does not generally have to rely upon the office of the Solicitor General or the Attorney General. But that is not unalloyed.

Section 1054 of the Dodd-Frank Act is the key provision in the first instance. That section empowers the Bureau but simultaneously requires the Bureau to provide notice to the Attorney General when bringing an action to permit coordination between the Bureau and the Department of Justice. That coordination is to be (and probably is) declared in an agreement between those two offices.[9]

In addition, section 1054 empowers the Bureau to appear before the U.S. Supreme Court but simultaneously requires the Bureau to request that authority for each case from the Attorney General, and the Attorney General must concur. Effectively, that puts the question of whether the Bureau prosecutes such cases before the U.S. Supreme Court in the hands of the Attorney General. That could make for messy appearances and raises the question of whether the Attorney General could drop a suit in the Supreme Court if the Bureau wanted to proceed with it. At a minimum, it raises some questions about the freedom with which the Bureau could operate in the courts, so enforcement actions might be restricted.

creation of the entire Bureau unconstitutional. That was not the choice of the D.C. Circuit in its decision, but might be seriously considered by another court during appeal.

[5]See the November 9, 2016 report on the subject by the Congressional Research Service, "Agency Final Rules Submitted After May 30, 2016, May Be Subject to Disapproval in 2017 Under the Congressional Review Act."

[6]Inability to bundle leads to more floor time being required to take up individual resolutions.

[7]The precise date would be determined by Congress — May 30 is the date estimated by the Congressional Research Service.

[8]Congress passed a number of such resolutions last year but, of course, the President vetoed them and there were insufficient votes in Congress to override the veto.

[9]I suspect that the new Attorney General would have some capacity to terminate that agreement, but have not reviewed the agreement, assuming it exists.

It is clear, therefore, that even if the Director were to remain in office, he would face limitations of various degrees on his power to operate as he has been operating.

In conclusion

In most situations in which each party has some leverage, compromise and settlement is a reality and usually reached. Each party gets something of what it wants, but neither gets all. That seems to be this situation — neither side is completely in control, and the possibility for lengthy legal debate seems ripe.

Those supporting the Bureau simply do not want a director in charge with the powers they are saying the Director has under the statute — it's okay when they have one they like, but not so when they will have one they do not like. They probably would like to have some say by having the ability to have members of their party as part of a multiple head commission. Those opposing the single Director may not be as interested in changing the rules now that they are in charge.

The Congressional Review Act complicates the situation, of course, as does section 1054 of Dodd-Frank for those who have been in charge. Even finding the right person under the limitations of the Vacancies Act may be difficult. Proceeding through the courts on those matters seems unlikely to be entirely successful for either side. And the inability to bundle resolutions could lead to a great amount of floor time that the Houses may not want to spend.

Finally, one never knows what else may be of interest to the parties in Congress or elsewhere for which they would be willing to compromise on the terms of any CFPB compromise. Of course, we have a new President coming into office that says he doesn't settle lawsuits, although, of course, he does.

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