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Cordray's Confirmation to CFPB Likely to Bring More Investigations and Enforcement

Almost two years after he was initially nominated, the Senate voted 66-34 on July 16, 2013 to confirm Richard Cordray as the first director of the Consumer Financial Protection Bureau (CFPB). The agency was created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and Mr. Cordray has been serving as director under a recess appointment made by President Obama in January 2012. To a large extent, this confirmation lifts the cloud over the CFPB's jurisdiction and powers cast by the Supreme Court's pending decision on the validity of President Obama's recess appointments in *Noel Canning v. NLRB* (12-281). Below is a brief discussion of what Mr. Cordray's confirmation means for the CFPB and the banks and finance companies it regulates.

The CFPB Will Be More Assertive on Compliance and Enforcement

With Mr. Corday's confirmation, financial services companies should expect the CFPB to take even stronger and more assertive compliance positions – and to back those positions with more frequent enforcement actions. Steps to consider:

- Compliance programs should provide for training for employees on all applicable federal financial consumer laws, such as TILA, ECOA, and FDCPA.
- Regular audits should test for compliance with all federal financial consumer laws and for Unfair, Deceptive, and Abusive Practices (UDAAP) as defined by the CFPB.
- Administrators must stay current with the CFPB's formal and informal guidance, including white papers, on what it considers to be UDAAP violations. (To the consternation of compliance officers everywhere, the CFPB has announced that it will also use its investigation and enforcement authority to "announce" what practices it considers to be UDAAP violations.)
- Each business unit should have defined processes to quickly and substantively respond to consumer complaints and requests, and must keep a record of the results. Systems should be in place to keep every denial letter and other documentation as required under federal laws.

We expect the CFPB to increasingly expect compliance programs to be capable of readily producing substantive supporting documentation for every action required by federal consumer financial laws. Companies can no longer expect to be treated as innocent until proven guilty. They must meet the CFPB's new mantra: guilty unless compliance is proven in each transaction.

Legitimacy of CFPB's Actions Prior to Cordray's Confirmation – Still Unclear

While Mr. Cordray's confirmation allows the CFPB to issue new rules and regulations and to pursue enforcement actions, the legitimacy of the CFPB's actions before July 2013 will still depend on the Supreme Court's decision in *Noel Canning*. Any entity currently facing an investigation or enforcement action from the CFPB should have already considered an objection to the proceeding based on the invalidity of the recess appointment. Those challenges must be made early in the process to avoid waiver.

Even a resounding decision against the recess appointments in *Noel Canning* will not automatically render Mr. Cordray's pre-confirmation enforcement actions void. The Supreme Court will consider only the NLRB's authority in *Noel Canning*, and not that of the CFPB, which will require a separate case (several of which are now pending). Depending on the facts of the case, a court could apply the *de facto* officer doctrine to uphold the CFPB's decisions that occurred before, for example, the D.C. Circuit's January 2013 ruling on the recess appointments. Congress or Mr. Cordray himself could attempt to retroactively ratify the CFPB's actions, though their authority to do so is dubious.

Challenges to the CFPB's Pre-Confirmation Regulations – Potential Defense to Enforcement Action, Not a Reason to Put Off Compliance

The rules and regulations issued by the CFPB before July 2013, especially those issued under the CFPB's new powers, are also still at risk under *Noel Canning*. The CFPB's rulemaking powers require a director, and a challenge to his authority to issue those rules before July 2013 may well be successful. Enforcement actions and penalties may be avoided through litigation, but there is nothing to stop the CFPB from re-issuing the challenged regulation now that it has a director confirmed by the Senate. The CFPB has taken a strong public stance that its rules and regulations will survive any decision in *Noel Canning* or any challenge to Mr. Cordray's recess nomination. There is, therefore, little chance that the CFPB will take the safe route of re-issuing those regulations before they can be challenged in court. But financial services companies have little to gain by neglecting compliance because a reasonable challenge can be made to the regulations – the CFPB has already held several financial services companies accountable, including American Express, Capital One and other leading financial institutions with tens of millions of dollars in penalties for what it saw as UDAAP violations. It is unlikely to forgive noncompliance with its new regulations just because there is a good-faith basis to believe that the regulations were invalid when promulgated.

Mr. Cordray's confirmation eliminates any doubts over the CFPB's investigative and enforcement powers going forward. Squire Sanders' lawyers will continue to monitor the CFPB as it develops and enforces regulations and are well-positioned to assist clients who find themselves subject to a CFPB investigative or enforcement proceeding.

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