

The leadership changes at the Bureau of Consumer Financial Protection (BCFP or Bureau) have raised several questions regarding succession at the agency and nuances of the term limits for the Acting Director. This article attempts to provide some clarity on these issues.

Dueling Acting Directors

Richard Cordray stepped down as Director of the BCFP on Friday, November 24, 2017, and immediately prior to stepping down, named Leandra English the Deputy Director of the Bureau. Cordray's resignation led to a battle in who then is the Acting Director of the Bureau? There are two possibilities: (1) under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), the Deputy Director shall "serve as acting Director in the absence or unavailability of the Director;"¹ or (2) under the Federal Vacancies Reform Act (Vacancies Act), in the event of the Director's resignation, the President may direct a person who serves in a Senate-approved position to be Acting Director, subject to certain time limits.²

On Monday, November 27, 2017, two people showed up for the job of Acting Director: Leandra English, claiming the role under operation of the Dodd-Frank Act, and Office of Management and Budget (OMB) Director Mick Mulvaney, who was designated by President Trump as Acting Director under the Vacancies Act.³ English filed for a temporary injunction, and while she was unsuccessful in the court, she appealed to a three-judge panel of the US Court of Appeals for the DC Circuit.⁴ On July 6, English announced that, in light of the President nominating a new director, she is stepping down from the BCFP and withdrawing her appeal, thus putting an end to this case.

Terms of Acting Director

Under the Vacancies Act, Acting Director Mulvaney's term is 210 days,⁵ which would end on June 22, **unless** the President nominates someone to be the Director prior to that date. As we now know, President Trump has nominated Kathy Kraninger to be the Director of the Bureau.⁶ While her nomination is pending in the Senate, Mulvaney can continue to serve as Acting Director, **without any time limitation.**

If Kraninger's nomination is withdrawn or if it is rejected or returned by the Senate, a new clock begins for Mulvaney's term – meaning he can serve for another 210 days. Importantly, if a nomination is pending at the end of a congressional session, it is returned to the President.⁷ That return, just like a withdrawal or a rejection, would start a new clock on Mulvaney's term.

If the President makes a second nomination during that 210-day period, the clock on Mulvaney's term would stop again. If that second nomination is rejected, withdrawn, or returned by the Senate, a new 210-day clock begins for Mulvaney's term as Acting Director.

What Is Next

On July 19, the Senate Banking Committee will hold a hearing on her nomination. After that hearing, the Committee will need to hold a vote on Kraninger's nomination, and assuming the nomination is reported favorably out of Committee, time would then need to be set aside for consideration on the Senate floor. The Senate's calendar, along with other Senate priorities (including judicial nominations), make the scheduling for the floor consideration difficult. Additionally, Senator Elizabeth Warren (D-MA) announced plans to place a hold on this nomination (essentially blocking the Senate from considering the nomination) until Kraninger explains her role in the Administration's "zero tolerance" immigration policy.⁸

To be clear, while Kraninger's nomination is pending in the Senate, Mulvaney can remain as Acting Director, without any time limits.

1 12 U.S.C. § 5491(b)(5).

2 5 U.S.C. § 3345(a).

3 President Trump designated OMB Director Mulvaney to serve as Acting Director for the Bureau on November 24, 2017.

4 *English v. Trump*, D.C. Cir., No. 18-5007.

5 5 U.S.C. § 3346.

6 <https://www.npr.org/2018/06/16/620730033/president-trump-taps-mulvaney-associate-to-lead-consumer-bureau>.

7 The Senate, by unanimous consent, can waive the requirement that the nomination be "returned," in which case, the nomination would be pending when the 116th Congress convenes in 2019.

8 <http://thehill.com/policy/finance/392965-warren-to-put-hold-on-trump-consumer-bureau-nominee>.

If the nomination is still pending by the end of 2018, when the 115th Congress adjourns, Kraninger's nomination would be returned to the President. That "return" would begin the second 210-day term for Acting Director Mulvaney.⁹ The President would then need to nominate someone else or re-nominate Kraninger for the position, at which time, the clock on Mulvaney's term stops again. If that second nomination is withdrawn, or rejected or returned by the Senate, Mulvaney would get another 210-day term as Acting Director.¹⁰

All of this is to say that, absent Senate approval of Kraninger before the end of the year, it is easy to see a path in which Mulvaney continues to serve as Acting BCFP Director well into 2019, and even possibly 2020. However, even if Kraninger is approved by the Senate, it is widely expected that she would continue the work of Mulvaney, both in terms of the strategy and priorities of the Bureau.

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⁹ This is assuming that the President re-appoints Mulvaney to serve as Acting Director. Alternatively, President Trump could appoint another Senate-confirmed administration official to serve as Acting Director.

¹⁰ Again, assuming the President re-appoints him.