

Consumer Financial Protection Bureau (CFPB)
Director Richard Cordray has announced his plans to retire by the end of November. This memorandum describes the procedural alternatives for filling a vacancy at a federal agency and discusses the application of those procedures to the CFPB.¹

Summary

There are multiple possible scenarios for filling this vacancy.

First, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) provides for the Deputy Director of the CFPB to serve as the Acting Director of the agency in the “absence or unavailability” of the Director. This authority would permit David Silberman, the current Acting Deputy Director, to become the Acting Director upon the resignation of Director Cordray.

Second, the President, citing the Federal Vacancies Reform Act (FVRA), could designate another individual as the Acting Director, but that action could be subject to legal challenge based upon a recent ruling by the US Supreme Court.

Third, the Secretary of the Treasury could also assert control over the CFPB based upon a “transitional” authority in the Dodd-Frank Act. It is our view, however, that the Secretary’s transitional authority is no longer applicable, given that the CFPB is fully established and that the provision potentially is subject to challenge as a violation of the Appointments Clause of the Constitution.

Fourth, based on the theories in the pending PHH case, the President could remove David Silberman and designate an Acting Director under the FVRA, but since the PHH case is still pending, this course of action could be subject to legal challenge.

Regardless of how a vacancy may be filled on an interim basis, after Director Cordray leaves office, the President may nominate any individual to serve as the new Director of the CFPB, subject to Senate confirmation.

Background

Federal law establishes three separate procedures for filling a vacancy at a federal agency: (1) the procedures in the FVRA; (2) a recess appointment by the President; and (3) procedures contained in an agency’s enabling act. These alternative procedures are explained below.

Federal Vacancies Reform Act

The FVRA provides that a vacancy at a federal agency may be filled in one of three ways: (1) the first assistant to the agency head may automatically assume the functions and duties of the office; (2) the President may direct an officer who is occupying a different Senate-confirmed position in the government to perform those tasks; or (3) the President may select an officer or employee who is occupying a position in the same agency, who has a civil service pay rate of a GS-15 or above, and who has been at the agency for at least 90 days in the last year prior to the selection of that officer or employee.² As a general rule, an individual filling a vacancy under the FVRA may serve 210 days following the vacancy.³

The FVRA also defers to more express succession provisions in an agency’s authorizing statute. The FVRA provides that its procedures do not apply in a situation in which “a statutory provision expressly . . . designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.”⁴

Recess Appointments

The Constitution gives the President the power to make appointments during periods in which the Senate is in recess, and recess appointments run until the end of the following session of the Senate.⁵ In a recent case, the US Supreme Court held that, as a rule, the President may use this authority only during a Senate recess of 10 days or longer, and that the Senate, not the President, decides when it is in recess.⁶ In practice, this has permitted the Senate to go into “pro forma” sessions and block potential recess appointments. There has not been a single attempted recess appointment by a president since 2012.⁷

1 Lorraine Woellert, Zachary Warmbrodt & Daniel Strauss, “Cordray to Resign from CFPB, Clouding Future of Watchdog Agency,” Politico, Nov. 15, 2017, https://www.politico.com/story/2017/11/15/richard-cordray-resigns-consumer-financial-protection-bureau-244933?hpid=hp_hp-top-table-main-cordray-resigns-consumer-financial-protection-bureau_244933%3Ahomepage%2Fstory.

2 5 U.S.C. §§3345-3349d.

3 210 days is the least amount of time an acting officer can serve. If there is a nomination, the 210 days is tolled. If the nomination is rejected or sent back, the clock resumes ticking. If there is a second nomination, a new tolling period starts. As a consequence, acting officers can serve (and have) longer than a recess appointee.

4 5 U.S.C. § 3347(a)(1)(B).

5 Art 2, § 2, cl.3

6 *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S.Ct. 2550 (2014). A recess of three days is not long enough to trigger the authority. A recess of more than three days but fewer than 10 days is “presumptively too short to fall within the Clause” but “leaves open the possibility that a very unusual circumstance could demand the exercise of the recess-appointment power during a shorter break.”

7 Given this practical limitation, the option of a recess appointment to CFPB is not addressed in the discussion section of this memorandum

Authorizing Statutes

An agency's authorizing statute may include express procedures for filling a vacancy, and, as noted, the FVRA does not apply in such cases. The designation of Keith Noreika to be the Acting Comptroller of the Currency provides an example of the exercise of such an express provision. The National Bank Act provides that the Secretary of the Treasury may appoint as many as four Deputy Comptrollers of the Currency. The Act then states that "During a vacancy in the office or during the absence or disability of the Comptroller, each Deputy Comptroller shall possess the power and perform the duties . . . of the Comptroller under such order of succession following the First Deputy Comptroller as the Comptroller shall direct."⁸ These provisions were used in the appointment of Acting Comptroller Noreika. In May 2017, before Comptroller Thomas Curry left office, the Secretary of the Treasury designated Keith Noreika as the First Deputy Comptroller.⁹ Once Comptroller Curry left the position, Keith Noreika became Acting Comptroller, as provided for in the National Bank Act. As discussed following, the Dodd-Frank Act includes two provisions that address the circumstances in which the CFPB is without a director.

Discussion

The Dodd-Frank Act includes an express provision addressing succession at CFPB. Section 1011 of the Act authorizes the Director of CFPB to appoint a Deputy Director, and provides that the Deputy Director will serve as the Acting Director "in the absence or unavailability of the Director."¹⁰ Director Cordray appointed David Silberman as Acting Deputy Director in January 2016.¹¹ Thus, under the terms of section 1011 of the Dodd-Frank Act, David Silberman would become the Acting Director of CFPB upon Director Cordray's resignation.

The Dodd-Frank Act also has a provision granting some authority to the Secretary of the Treasury until a Director is confirmed by the Senate.¹² Section 1066 provides that the Secretary of the Treasury is authorized to perform the functions of the CFPB until a Director is confirmed.¹³ Press stories have indicated that the Secretary could use this authority and assume control of the CFPB following Director Cordray's departure.¹⁴ However, section 1066 is part of a subtitle in Dodd-Frank Act that relates to the initial establishment of the CFPB and the transfer of functions and personnel from other agencies

to CFPB. It is a fundamental tenet of statutory interpretation that a statute's provisions should be read as a "harmonious whole."¹⁵ Since CFPB is no longer in a start-up phase, a harmonious reading of the statute would suggest that the succession provisions in section 1011 would now apply to a vacancy at the CFPB, not the Secretary's transitional authority in section 1066.¹⁶ Moreover, if section 1066 were read to allow the Secretary to assume control over the CFPB, the provision would be subject to challenge under the Appointments Clause of the Constitution.¹⁷ By directing the Secretary to assume those powers for an indefinite period, Congress would have effectively made an appointment of an executive official, which is constitutionally forbidden.

Others have argued that the FVRA would apply when Director Cordray resigns, not the succession provisions in the Dodd-Frank Act. This argument is based upon the facts that: (1) David Silberman is not the Deputy Director of the agency, but is the Acting Deputy Director; and (2) the Dodd-Frank Act does not expressly refer to a "vacancy," but only situations in which the Director is "absent or unavailable."

We do not believe the fact that David Silberman is "acting" affects the application of the provisions in the Dodd-Frank Act. If there were any question on this issue, Director Cordray could remove the "acting" status from David Silberman's title before stepping down from office.

The argument that the Dodd-Frank Act's succession provisions do not apply to a vacancy has more weight. Other federal statutes expressly refer to situations in which an office is "vacant,"¹⁸ and courts occasionally conclude that Congress's failure to use a particular term or phrase is a reliable indication of congressional intent (i.e., Congress knows how to write a law). Thus, the fact that the succession provisions in the Dodd-Frank Act do not refer to a "vacancy" could be interpreted to mean that those provisions do not apply when Director Cordray resigns and the office is vacant.

8 12 U.S.C. § 4.

9 <https://www.treasury.gov/press-center/press-releases/Pages/sm0072.aspx>.

10 12 U.S.C. § 5491(b)(5).

11 <https://www.consumerfinance.gov/about-us/newsroom/david-silberman-named-acting-deputy-director-of-the-cfpb/>.

12 12 U.S.C. § 5586(a).

13 For an analysis of this provision, see Mort Rosenberg, "Why the Secretary of the Treasury Cannot Assume the Powers and Duties of the CFPB Director," Our Perspectives, Aug. 2011, http://www.bsnlawfirm.com/newsletter/OP1108_Extra1.pdf.

14 See, e.g., Ben White & Aubrey Eliza Weaver, "Cordray Out," Morning Money, Politico, Nov. 16, 2017, <https://www.politico.com/newsletters/morning-money/2017/11/16/cordray-out-223379>.

15 Larry Eig, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, Dec. 19, 2011, p 2.

16 Also, while the Inspectors General for Treasury and the Federal Reserve Board concluded that section 1066 gives the Secretary of the Treasury authority to prescribe regulations, issue orders and provide guidance with respect to consumer protection laws transferred to the Bureau (see Letter to Honorable Spencer Bachus and Honorable Judy Biggert from Eric Thorson and Elizabeth Coleman dated January 10, 2011), section 1066 reasonably may be read to limit the Secretary's authority to just the functions specifically addressed in subtitle F of title X of the Dodd-Frank Act. Those functions relate to the transfer of employees and the preparation of workforce plans, not substantive rulemaking or enforcement.

17 Another fundamental tenet of statutory construction is the avoidance of constitutional issues. See Eig, p 23.

18 For example, the Deputy Director of the Office of Management and Budget is authorized to serve as the Director when the Director is "absent or unable to serve or when the office of the Director is vacant." (31 U.S.C. § 502(b)). Similarly, the Deputy Administrator of the Federal Aviation Administration acts for the Administrator when the Administrator is "absent or unable to serve, or when the office of the Administrator is vacant." (49 U.S.C. § 106(i)).

It is our view that the succession provisions in the Dodd-Frank Act should be read broadly to include a situation in which the Director of CFPB resigns and the office is vacant. The term “unavailable” simply means that something is “not available,” and Director Cordray would not be available to serve as the Director once he resigns. Moreover, a broad reading of the provisions is consistent with the structure of the CFPB and the legislative history of the Dodd-Frank Act, which make it abundantly clear that it was the intent of Congress to make the Director as insulated as possible from Presidential and other executive control or influence. The Dodd-Frank Act: (1) precludes the President from removing the Director at-will; (2) permits a Director whose term has expired to stay on until a successor has actually been confirmed; (3) prevents the Office of Management and Budget (OMB) from controlling how CFPB spends its money; and (4) gives the Office of Information and Regulatory Affairs (OIRA) no power to review any of CFPB’s rulemakings. In addition, CFPB is not subject to congressional appropriations. This structure suggests that Congress did not intend the phrase “absence and unavailability” to be read in any way to allow the President to override the Director’s authority to designate a successor.

Nonetheless, it is foreseeable that the Department of Justice would read the statute differently, and the President could select a replacement for Director Cordray based upon terms of the FVRA. In that case, the President could select an individual who is serving elsewhere in government, but had been confirmed by the Senate, or could select an individual who has been at the CFPB for at least 90 days in a senior career capacity.

That course of action, however, is not without some legal risk. In an opinion issued in April 2017 in *NLRB v. SW General*, the US Supreme Court reviewed the historical relationship between the Senate’s power to approve Presidential appointments and the President’s interest in filling a vacancy.¹⁹ That opinion indicates that, in the Court’s view, the FVRA is just the latest in the line of congressional actions designed to limit the President’s power to make temporary appointments.²⁰ That opinion also characterizes the provision in the FVRA for the first assistant to an agency to be designated to fill a vacancy as the “general rule” under that Act and the “default” provision under that Act.²¹ Therefore, any attempt by the President to place someone other than David Silberman in the position of Acting Director following the resignation of Director Cordray could face a legal challenge.

Finally, assuming David Silberman were to become the Acting Director pursuant to the authorizing statute, it cannot be ruled out that the President would seek to remove him based on theories in the pending PHH case.²² He then may use the FVRA to place another Senate-confirmed officer in that position. However, since the PHH case is still pending, this course of action could be subject to legal challenge. Regardless of what procedures are used to fill a vacancy caused by the resignation of Director Cordray, after Director Cordray resigns, the President could nominate any citizen to serve as the Director, subject to Senate confirmation.

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¹⁹ *NLRB v. SW General, Inc.* 137 S. Ct. 929 (2017).

²⁰ Id. at 935, (“Since President Washington’s first term, Congress has given the President *limited* authority to appoint acting officials to temporarily perform the functions of a vacant [office subject to Presidential appointment and Senate confirmation] without first obtaining Senate approval.”) (emphasis added).

²¹ Id., at 934 and 935.

²² The President’s authority to remove the CFPB director currently is the subject of litigation pending in the Federal Court of Appeals for the District of Columbia. (*PHH Corp., et al. v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. Oct. 11, 2016) (en banc)).