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## White House Appoints Richard Cordray as the First Director of the Consumer Financial Protection Bureau

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The White House announced today that President Obama has made a recess appointment of Richard Cordray as the first Director of the Consumer Financial Protection Bureau ("Bureau"). This appointment marked the latest move in an extended battle between the White House and Senate Republicans over the Bureau. In May 2011, 44 Republican Senators wrote the President, vowing to oppose confirmation of a Director without substantial changes to the composition, structure and funding of the Bureau. In December 2011, 45 Senators blocked a vote on the nomination of Cordray to head the Bureau, and the Senate subsequently returned the nomination to the White House without taking further action.

At the time, the President announced that he would not "take any options off the table" regarding Cordray's nomination.<sup>1</sup> Today, he exercised the option of appointing Cordray as Director under the President's constitutional power to "fill up all Vacancies that may happen during the Recess of the Senate."<sup>2</sup> We expect there will be much controversy surrounding the President's actions, and quite likely a legal challenge, but without taking sides, we think it is worth focusing on some of the potential benefits of the decision. We also note that Cordray and the new Bureau have taken a number of very positive steps early on to develop cooperative relationships with other regulators and entities within its jurisdiction, including moving to adopt an SEC-style Wells Process providing due process protections in connection with enforcement actions.<sup>3</sup>

### What a Valid Recess Appointment Would Accomplish

This appointment would not only provide the Bureau with its first Director, but would also expand significantly the Bureau's activities. The Bureau has, to date, taken the position that some of its statutory authority could not be exercised until a Director had been confirmed. Under 12 U.S.C. § 5586(a), the Secretary of the Treasury has the authority "to perform the functions of the Bureau *under this subtitle*"—subtitle F of the Consumer Financial Protection Act— "until the Director of the Bureau is confirmed by the Senate."<sup>4</sup>(Emphasis added.) Bureau functions outside subtitle F include the supervision and registration of non-bank institutions (such as check-cashing companies and payday lenders) and the regulation of unfair, deceptive, or abusive acts or practices.<sup>5</sup> Hence, the

appointment of a Director will likely expand the authorities exercised by the Bureau.

While a recess appointment is temporary, its consequences for the Bureau could be permanent. An officer granted a recess appointment may hold his or her office until the end of the session of the Senate following the appointment. Because the Senate just began its second session of the 112th Congress, today's recess appointment would allow Cordray to serve as Director until the end of the first session of the Senate during the 113th Congress, which would likely occur sometime in December of 2013. However, Cordray could appoint a Deputy Director, who could validly serve as Acting Director after Cordray's recess appointment ended.<sup>6</sup>

### **Legal Issues Relating to the Recess Appointment**

Despite the potential benefits, we acknowledge that the President's recess appointment raises significant legal issues, and could be subject to legal challenges brought in federal court by, among others, institutions (or associations containing such institutions) injured by any Bureau action that could not have been performed prior to the appointment of a Director.

The critical legal issue here is whether the Senate is in "recess" within the meaning of the Recess Appointments Clause. Both the Senate and the President have generally embraced a practical construction of the meaning of "recess" in the Recess Appointments Clause, emphasizing that the guiding factor is whether the Senate is able to provide advice and consent on nominations.<sup>7</sup> Nevertheless, the Department of Justice has also stated, in a 1921 opinion from the Attorney General, that, at least with respect to an adjournment in the course of a session, "an adjournment of 5 or even 10 days [cannot] be said to constitute the recess intended by the Constitution."<sup>8</sup> And the Department has suggested, as recently as 2004, that an adjournment of three days or less might be considered *de minimis* and, thus, not a "recess" within the meaning of the Recess Appointments Clause.<sup>9</sup> Indeed, with rare exceptions, Presidents have not made recess appointments during adjournments of fewer than three days, with the vast majority occurring during adjournments of 10 or more days.<sup>10</sup>

In keeping with the view that a "recess" must last longer than three days, the Senate has held "*pro forma*" sessions every fourth day—both now, and during the last two years of the Administration of President George W. Bush—with an eye towards preventing recess appointments. During these sessions, a single Senator briefly gavels the Senate into session and then adjourns the Senate until the next *pro forma* session. The Senate has been following this practice since it adjourned on December 17, 2011.

Today's appointment will test whether a three-day gap between *pro forma* sessions constitutes a "recess" that allows the President to exercise his recess appointments power. The Obama Administration may argue that extended adjournments broken only by *pro forma* sessions are recesses (or the functional equivalent thereof) because the Senate is unavailable to provide advice and consent on Presidential nominations. The Administration might even argue more aggressively, as two former Bush Administration officials from the Department of Justice have, that it is

unconstitutional for the Senate to use *pro forma* sessions "to prevent the President from exercising his constitutional authority to make recess appointments."<sup>11</sup>

We will continue to provide updates on the President's action and its consequences, but in the interim we wish Mr. Cordray well, and encourage everyone potentially affected by the action today to focus on the potential positive implications and not just the negatives.

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<sup>1</sup>See <https://obamawhitehouse.archives.gov/photos-and-video/video/2011/12/08/president-obama-speaks-confirming-richard-cordray?page=5>.

<sup>2</sup> U.S. Const., art. II, § 2, cl. 3.

<sup>3</sup>See our November 8, 2011 alert "Consumer Financial Protection Bureau Announces Early Warning Notice Process for Enforcement Proceedings"

<sup>4</sup> The fact that 12 U.S.C. § 5586(a) refers to a Director who "has been confirmed by the Senate" raises the issue of whether a recess appointment satisfies that provision.

<sup>5</sup> 12 U.S.C. §§ 5512(b)(1), 5514(b), 5531, 5532, & 5536.

<sup>6</sup>See 12 U.S.C. §§ 5491(b)(5) (authorizing Director to appoint Deputy Director) & 5492(b) (authorizing Director to delegate powers of the Bureau); see also the Vacancy Reform Act, 5 U.S.C. § 3345-49d (allowing the first assistant in an office to perform the functions and duties of a Director in the event of a vacancy).

<sup>7</sup>See, e.g., 1 Op. Att'y Gen. 631, 633-634 (1823) (Wirt); S. Rep. No. 4389, 58th Cong., 3d Sess. (1905), 39 Cong. Rec. 3823-3824 (1905).

<sup>8</sup> 33 Op. Att'y Gen. 20, 25 (1921) (Daugherty); *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15, 16 (1992) (noting approval of General Daugherty's 1921 opinion by subsequent Attorneys General, the Office of Legal Counsel, and the Comptroller General).

<sup>9</sup>See, e.g., Brief for Intervenor United States, at 29-30, *Stephens v. Evans*, No. 02-16424 (11th Cir. July 30, 2004); Reply Brief for Intervenor United States, at 2, 20-23, *Stephens v. Evans*, No. 02-16424

(11th Cir. Sept. 8, 2004); Brief for the United States in Opp'n to Pet'n for Writ of Cert., at 15, *Franklin v. United States*, No. 04-5858; Brief for the United States in Opp'n to Pet'n for Writ of Cert., at 11, *Evans v. United States*, No. 04-828.

<sup>10</sup> A notable exception is President Theodore Roosevelt's recess appointment of 160 (mostly military) officers in the *hours* between the end of the first session of the 58th Congress and the beginning of the second session.

<sup>11</sup> See Steven G. Bradbury & John P. Elwood, Call the Senate's Bluff on Recess Appointments, Wash. Post (Oct. 15, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/14/AR2010101405441.html>.

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