Spotlight On Richard Cordray, Director Of The Consumer Financial Protection Bureau

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By presidential recess appointment on January 4, 2012, Richard Cordray is the new director of the Consumer Financial Protection Bureau ("CFPB"), where he previously served as Chief of Enforcement. President Obama had nominated Cordray as the Director in July, but Senate Republicans blocked Cordray's confirmation last month. The recess appointment circumventing Senate approval has triggered criticism from Republicans, who have claimed that the President "arrogantly circumvented the American people" and called the appointment an "extraordinary and entirely unprecedented power grab."

Now that the CFPB has a director, it can exercise authority under the Dodd-Frank Act to regulate financial institutions beyond the banking industry, such as payday lenders, nonbank mortgage lenders, and certain student loan providers. Without a director, CFPB only had authority to supervise banks. It has already announced a nonbank supervision program and will begin defining who meets the test for "larger participants" in certain nonbank markets.

Cordray's Background

Prior to his tenure at the CFPB, Cordray served as Attorney General of Ohio from January 2009 to January 2011. While there, Cordray recovered more than $2 billion for Ohio retirees, investors, and business owners and aggressively prosecuted both Wall Street institutions and their executives. Notable settlements on behalf of state pension funds include $750 million against American International Group, and $475 million against Bank of America Corporation involving its acquisition of Merrill Lynch & Company.

Earlier in his career, Cordray was an adjunct professor at the Ohio State University College of Law (1989-2002), served as a State Representative for the 33rd Ohio House District (1991-1993), was the first Solicitor General in Ohio's history (1993-1994), and was a sole practitioner and Of Counsel to the law firm Kirkland & Ellis (1995-2007). As state solicitor, Cordray argued numerous cases before the United States Supreme Court, including by special appointment of both the Clinton and Bush Justice Departments. Cordray is a graduate of Michigan State University, Oxford University, and the University of Chicago Law School. He was Editor-in-Chief of the University of Chicago Law Review and later clerked for U.S. Supreme Court Justices Byron White and Anthony Kennedy.

Nonbank Supervision Program

The CFPB wasted no time exercising its new authority. Immediately following the recess appointment on January 5, 2012, the CFPB launched the nation's first federal nonbank supervision program. A "nonbank" - or non-depository business - is a company that offers or provides consumer financial products or services, but does not have a bank, thrift, or credit union charter. This program is an extension of the CFPB's bank supervision program that began at the agency's inception in July 2011. Under the nonbank supervision program, the CFPB will supervise companies of all sizes in the mortgage, payday lending, and private student lending markets, but other businesses, such as consumer installment loans and debt collection, will be subject to CFPB supervision only for "larger participants." If the company is found in violation of federal consumer financial laws, the CFPB will seek corrective action, such as strengthening the company's programs and processes and instituting remedies where appropriate.

"This is an important step forward for protecting consumers," said Cordray in a press release issued by the CFPB on January 5, 2012. "Holding both banks and nonbanks accountable to consumer financial laws will help create a fairer, more transparent market for consumers. It will create a better environment for the honest businesses that serve them. And it will help the overall economic stability of our country."

Last September, Cordray told the Senate Banking Committee that he would make it a priority "to streamline and cut back" a mountain of regulations that has grown over the last thirty years, which he said excessively burdened some banks and discouraged them from lending money to consumers.[1] He would use the agency's "bigger and more flexible toolbox" to police consumer financial laws and would make judicious use of "needlessly acrimonious" lawsuits to enforce financial regulations.[2]

Defining "Larger Participants"

In moving forward to implement its nonbank supervision program, the CFPB plans, among other things, to propose an initial rule to begin defining who meets the test for "larger participants" in certain nonbank markets. Because it will establish the parameters of the CFPB's supervision over nonbank companies, this will be one of the most important pieces of CFPB rulemaking in 2012. The CFPB is mandated by Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act to issue its final larger participants rule by July 21, 2012, the anniversary of the CFPB's official start date. The CFPB also has several other deadlines in the next year, including issuing a proposed rule on information sharing with state regulators and supervisors by July 21.

Potential Constitutional Challenge

The recess appointment could come under fire in a legal challenge. The President has authority to make a recess appointment when the Senate has been out of session for more than three days. Republicans and other opponents have argued that Cordray's appointment is unconstitutional because Congress has not officially recessed. Rather, the Senate has conducted pro forma non-business sessions that last about 30 seconds per day. Democrats first used this procedure to block President George W. Bush from using his recess appointment authority during his second term. And though both parties have used pro forma sessions to avoid recesses and thus block Presidents from making recess appointments, Presidents had respected this practice - until now. Breaking from this precedent lands this appointment in uncertain legal territory. While no formal legal proceedings have been initiated, an official at the Chamber of Commerce told Reuters on January 5th that the group would not dismiss the option of a suit challenging the recess appointment.[3]

The White House and the CFPB, however, intend to move forward with full steam. Cordray remains poised and focused. In remarks at the Brookings Institution, he said "[t]he most important thing is to keep our nose to the grindstone and keep doing our work. We will prove our own case, both to people who represent the public and to the public at large."[4]

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[1] Edward Wyatt, *Consumer Pick Vows to Streamline Regulations*, NEW YORK TIMES (Sept. 6. 2011), available at http://www.nytimes.com/2011/09/07/business/nominee-for-consumer-chief-says-he-will-streamline-regulations.html?sq=Richard%20Cordray&st=cse&scp=3&pagewanted=print

[2] *Id.*

[3] Alexandra Alper, *U.S. Chamber May Challenge Cordray Recess Appointment*, CHICAGO TRIBUNE (Jan. 5, 2012), *available at* http://www.chicagotribune.com/news/politics/sns-rt-us-cordray-chambertre8031m5-20120104,0,865630.story

[4] Remarks by Richard Cordray at the Brookings Institution (Jan. 5, 2012), http://www.consumerfinance.gov/speech/remarks-by-richard-cordray-at-the-brookings-institution/