



## Supreme Court Will Resolve Questions About Obama Recess Appointments and CFPB Authority

As anticipated, the United States Supreme Court has granted certiorari in *National Labor Relations Board v. Noel Canning*, signaling the next chapter in the challenges that have been raised as to the legitimacy of certain recess appointments made by President Barack Obama, including that of Richard Cordray as director of the Consumer Financial Protection Bureau. As discussed in our previous [alert](#), a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit invalidated a National Labor Relations Board decision against Noel Canning on the grounds that three of the board's members were not properly appointed. President Obama appointed the board members on January 4, 2012, during an asserted "intra-session" Senate recess. The appellate panel analyzed the Recess Appointment Clause of the U.S. Constitution, which provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." The panel concluded that the appointment did not occur during a "recess," as that term was originally intended, and, further, that the NLRB vacancies did not "happen" during the recess but instead had arisen well before the Senate break.

In accepting review of *Noel Canning*, the Supreme Court will consider not only under what circumstances the president may exercise the recess appointment power, but also whether that power is limited to vacancies that first arise during the recess when the appointment occurs. The Supreme Court will also consider whether the President's recess-appointment power may be exercised when

the Senate is convening every three days in pro forma sessions.

The Obama administration urged the Supreme Court to grant certiorari, noting the "significant disruption" threatened by the D.C. Circuit's holding. The Third Circuit has partially followed the *Noel Canning* panel's position, invalidating another decision by the NLRB on similar constitutional grounds. (Read our alert of the Third Circuit's decision [here](#).)

Given that CFPB Director Cordray was appointed on the same day as the contested NLRB members and under the same recess appointment authority, the Supreme Court's decision in *Noel Canning* could have dramatic consequences for the CFPB. The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, which created the CFPB, provides that without a director, the agency could exercise only those powers that were transferred to it from other federal agencies as of July 21, 2011. The new powers that were granted to the agency under the act, including (among other things) the authority to supervise and bring enforcement actions against smaller depository financial institutions (such as banks, thrifts, savings associations and credit unions with \$10 billion or less in assets) and covered nondepository financial institutions (such as payday lenders, mortgage lenders and servicers, and student lenders), would not become effective until the agency had a director approved by the Senate.

*This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.*

If the Supreme Court adopts the D.C. Circuit's position, holding the recess appointments constitutionally invalid, serious challenges to CFPB's enforcement and regulatory actions to date may follow, asserting that the agency lacked authority for those actions. Overturning the NLRB appointments – and, by extension, Cordray's – would also put tremendous pressure on the Obama administration to compromise on demands that have been made by Republican senators to restructure the CFPB's leadership from a single director to a five-person commission (like the Federal Trade Commission) and make it subject to the congressional appropriations process. Otherwise, the agency would be severely limited in terms of what enforcement, supervisory and rulemaking actions it would be able to take going forward.

Conversely, a reversal by the Supreme Court would effectively nullify the challenges to Cordray's tenure and would likely invigorate the CFPB. With questions about the agency's authority put to rest, the CFPB could be expected to continue engaging in prolific rulemaking activity and to expand its supervisory activities to include additional nonbanking consumer financial industries. Most significantly, where the CFPB has brought only one contested civil enforcement action over the 17 months since Mr. Cordray was appointed, possibly due to the agency's own uncertainty about its enforcement powers, a Supreme Court ratification of the CFPB's authority would very likely result in a dramatic increase in the agency's civil enforcement activity.

In the meantime, the uncertainty about the CFPB's powers that exists until the Supreme Court hears and rules on the Noel Canning case during the 2013-2014 court term does not seem to be causing any slowdown in the agency's regulatory and uncontested enforcement actions. Among other actions, the agency recently issued a final rule setting out a process for identifying "high-risk" nonbanking consumer financial persons and entities that pose a risk to consumers and making them subject to the CFPB's supervision. (Read our alert on this advisory bulletin [here](#).) It also issued an advisory bulletin on "Responsible Business Conduct" that the CFPB might consider as mitigating factors in its enforcement actions (read our alert on this advisory bulletin [here](#)), signaling that the agency has no intention of curbing its aggressive investigation and enforcement plans.

For more information about the content of this alert, please contact [Michael Mallow](#) or [Michael Thurman](#).

#### Loeb & Loeb LLP's Consumer Financial Protection Bureau Task Force

Our Task Force is composed of experienced litigators and trial attorneys who defend investigations and enforcement actions alleging violations of consumer protection and unfair competition laws, including consumer financial laws. Our goal is to provide clients with efficient, cost-effective representation in complex consumer-related litigation encompassing a diverse range of legal areas. We strive to keep our clients "off the radar" by training them to prepare for and defend claims and investigations before they arise. For those clients who engage us after litigation has already been filed, we focus on the economics of litigation and endeavor to develop defense strategies that maximize business objectives while capturing and implementing the valuable lessons that can be derived from every litigation or investigation. For more information, please [click here](#).

This client alert is a publication of Loeb & Loeb LLP and is intended to provide information on recent legal developments. This client alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To assure compliance with Treasury Department rules governing tax practice, we inform you that any advice (including in any attachment) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer, and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2013 Loeb & Loeb LLP. All rights reserved.

#### Attorneys

---

LIVIA M. KISER	LKISER@LOEB.COM	312.464.3170
MICHAEL MALLOW	MMALLOW@LOEB.COM	310.282.2263
MICHAEL A. THURMAN	MTHURMAN@LOEB.COM	310.282.2122

---