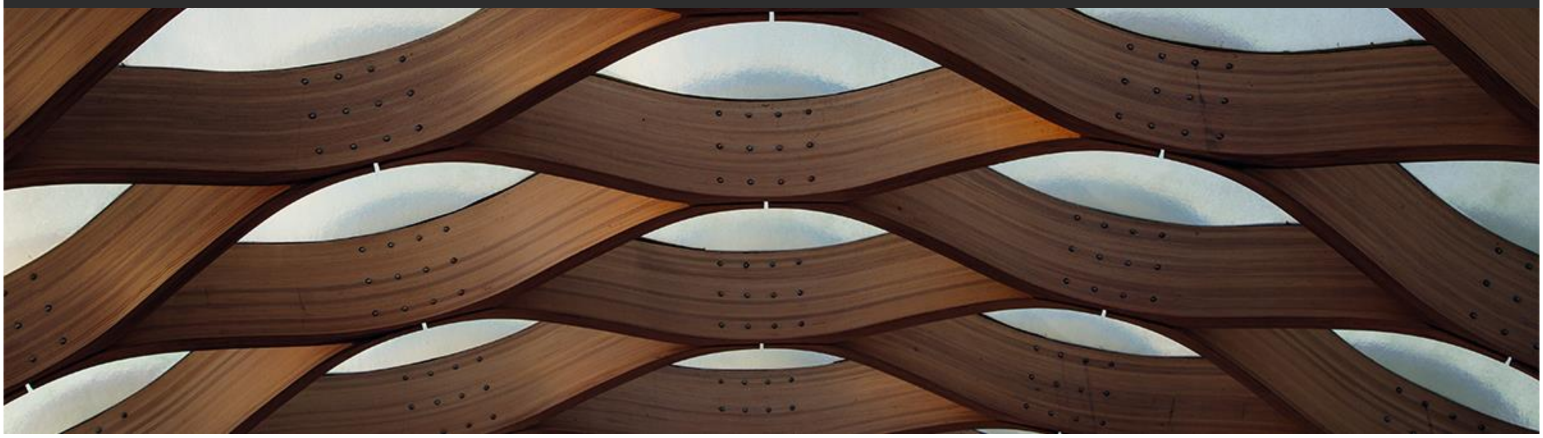

November 2017

Richard Cordray Resigns — Who's going to mind the CFPB store?

With the announcement of Richard Cordray's resignation as Director of the federal Consumer Financial Protection Bureau (CFPB) by the end of November 2017, the latest D.C. guessing game is who will take over the helm of the CFPB. This simple question is really two questions. First, who will run the agency on an interim basis? Second, who will President Trump nominate to be the permanent Director, a position requiring Senate confirmation? This second question will likely be the subject of much political discussion and may not be answered for months.

The first question implicates two potentially conflicting legal standards:

- Under Dodd-Frank Section 1011(b)(5)(B), the CFPB's Deputy Director, appointed by the Director, shall serve as Acting Director "in the absence or unavailability of the Director." This provision raises several issues. First, Cordray has not appointed a Deputy Director. Instead, he only appointed David Silberman to be the "Acting Deputy Director." Therefore, unless Cordray appoints Silberman or someone else as the Deputy Director before he leaves, it is unclear whether the Acting Deputy Director can qualify to become the Acting Director. Additionally, it is unclear whether the Deputy Director automatically serves as the Acting Director because it is unclear whether the phrase "absence or unavailability" extends to a vacancy by resignation.
- President Trump can appoint an "Acting Director" under the Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 (the Vacancy Act). However, the Vacancy Act contains a number of significant restrictions. Only the following individuals are eligible to be "Acting Director":

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1. The "first assistant to the office of such officer." This would appear to be David Silberman; or,

2. The President can designate an employee of the agency if that employee served in a position in the agency for at least 90 days during the preceding 365 days at a pay grade of at least GS-15; or,

3. The President can designate a person then serving as an officer of another agency who was presidentially appointed and has been confirmed by the Senate.

Of these three alternatives, the first two appear to be politically doubtful. The known philosophical leanings of Silberman and other qualifying senior employees of the CFPB seem to be contrary to those of the current administration.

The more likely choice would be the President's appointment of an existing Senate confirmed officer. Possible appointees would be either OMB Director Mick Mulvaney or Secretary of the Treasury Steven Mnuchin. Either of them would continue to serve in their current position as well as serving as CFPB Acting Director. This appointment would be for a period of 210 days from the date of vacancy, subject to a number of exceptions, 5 U.S.C. § 3346. Once appointed as Acting Director, a new Deputy Director or Acting Deputy Director could then be appointed to handle the day-to-day operation of the CFPB.

Once the new interim replacements for Director Cordray and his senior team are in place, then the D.C. guessing game will turn to who President Trump will nominate as the next permanent CFPB Director.

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