Why the Secretary of the Treasury Cannot Assume the Powers and Duties of the CFPB Director*

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On July 21, the Bureau of Consumer Financial Protection (CFPB) officially opened its doors for business after nearly a year of organizational set up activities overseen by the Treasury Department. On July 22, it issued an interim final rule regarding the ability of the States to prevent the issuance of variable rate mortgage loans by certain lenders. It can be expected that in the coming days the Bureau will exercise many of the encompassing consumer protection authorities transferred to it by the Dodd-Frank Act (DFA) from other agencies, including carrying on pending enforcement actions inherited from those agencies.

The fly in the regulatory ointment is the question as to who is the lawful head of the Bureau at this time. The DFA provides that it must be a Director who is appointed by the President and confirmed by the Senate (or given a recess appointment). But in anticipation of a need for an orderly transfer and start up process and the possibility of an extended confirmation proceeding, the DFA also provided that there would be a transition period, to be presided over by the Treasury Secretary. During this transition period, the Act provides that the Secretary will facilitate the organizational set up and staffing of the Bureau, including the transfer of consumer protection authorities from other Federal agencies, and the authority to designate the specific date on which the Bureau would commence operations. In January, the Secretary designated July 21 as the start up date. However, the President failed to send up a nomination for Director until July 28 and confirmation hearings will not be held before early September.

Section 1066(a) of the DFA authorizes the Secretary "to perform the functions of the Bureau under this subtitle [F] until the Director of the Bureau is confirmed by the Senate." The Secretary understands that direction

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to mean that he can exercise and implement all the substantive functions transferred to the Bureau from other agencies under that Subtitle, but not any of the newly established authorities elsewhere in the law, until a Director is confirmed.

A close reading of Subtitle F, in light of the text and structure of the DFA, belies any congressional intent to allow the Secretary to assume, for an indefinite period, the authorities, powers, and duties of the Director's office; and if it does, it would be a violation of the Appointments Clause of the Constitution.

The Subtitle F functions referred to in Section 1066(a) deal solely with the identification of the authorities and personnel to be transferred, the oversight and coordination of the organizational setting up process, the timing of the transfers, and all non-substantive and administrative duties. The Secretary is not expressly authorized to perform "the *transferred* functions of the Bureau," only the non-substantive and administrative tasks necessary to affect the transfers. This becomes evident on review of the unique nature of the Director's position. Like all heads of departments and single-headed agencies, all the Bureau's powers are vested in the Director who may delegate them to appropriate subordinates. What sets the Director apart from all other agency heads is the nature and degree of independence the incumbent has from direct presidential and legislative control and influence.

The Director has a five-year term and may be removed from office by the President only for cause; is not subject to legislative clearance for testimony or requests to Congress or to the funding apportionment requirements of the Office of Management and Budget (OMB); is not subject to the control of the Federal Reserve Board (FRB) in which it is located; is not restricted to the compensation limits of Title 31 when setting pay levels for CFPB personnel; the Bureau receives a substantial portion of its funding for operations from the FRB at a statutorily prescribed rate which is not subject to congressional approval or OMB review; and further funding, as the Director deems necessary, by requests to the congressional appropriations committees for authorizations, which must be granted for amounts up to $200 million per year for five years, none of which is deemed appropriated funds. This design for extraordinary political independence from both Congress and the Executive Branch strongly militates against any notion of even temporary, much less indefinite, exercise of the substantive policymaking and implementation functions of the Bureau in the hands of an executive branch official

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subject to at-will removal by the President.

Finally, it may be noted that when Congress was dealing with similar transition situations, it was explicit when it meant to give a "temporary" official the substantive powers of an office until the confirmation process produced a permanent principal officer. Indeed, this was done by the same committee and the same chairman that developed Dodd-Frank: the House Financial Services Committee. In 2008, the Congress enacted the Housing and Economic Recovery Act (HERA), which established the Federal Housing Finance Agency (FHFA). The law abolished the Office of Federal Housing Enterprise Oversight, the agency that had unsuccessfully overseen Fannie Mae and Freddie Mac and established a new agency, the Federal Housing Finance Agency with greatly expanded power and authority over these two enterprises. As with CFPB, the new FHFA Director was given extraordinary independence, presidential and congressional control and influence. There was also a sense of urgency to get the agency up and running in order to help shore up the collapsing housing market. As a transition provision it directed that the Director of the soon to be abolished OFHEO would be the acting director of the new FHFA until a permanent director was appointed and confirmed. The transition provision was quite explicit: "(D)uring the period beginning on the effective date of [HERA], and ending on the date on which the Director is appointed and confirmed, the person serving as the Director of [OFHEO]... shall act for all purposes as, and with the full powers of, the Director [of FHFA]." The absence of that specificity in the CFPB legislation strongly argues that the Treasury Secretary's assumption of the Director's powers is inconsistent with the statute.

But even if it is found to be Congress' intent to allow the Secretary's assumption of the Directors powers, it runs afoul of the Appointments Clause of the Constitution on two grounds; first, by directing the Secretary to assume those powers for an indefinite period Congress has effectively made an appointment of an executive official, which is constitutionally forbidden, and second, even if it is deemed a valid temporary appointment for a perceived exigency, the reasonableness of the time period that a President has to send up a nomination for a vacant position occupied by a temporary assignee has long passed even under the most liberal understandings of court rulings and Department of Justice opinions. In this instance, the constitutional clock started running on the effective date of the DFA when the Secretary began his tenure as the transition executor.

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