Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

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I Hereby Affirm and Ratify*

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Recently, the Director of the Bureau of Consumer Financial Protection, Richard Cordray, formally "ratified" all actions he took while serving as a recess appointee. He did so to "avoid any uncertainty" about the legality of those actions. This ratification, however, may not be binding. The U.S. Supreme Court is considering a case that will have implications on the validity of Director Cordray's recess appointment, and if his appointment is deemed unconstitutional, this ratification of prior actions may have no effect.

Any firm subject to regulation by the CFPB should be interested in the validity of Director Cordray's actions while he was serving as a recess appointee. During that period, he approved several regulations that resolved a number of thorny compliance issues. For example, CFPB's final remittance rule addressed a tax disclosure question that could have greatly inhibited remittance activities. Likewise, the agency's final "ability to pay" or so-called "QM" rule clarified the highly ambiguous safe harbor for lenders that had been crafted by Congress in the Dodd-Frank Act. Regulated firms would face some significant compliance uncertainty if either of these final rules, or other actions taken by Director Cordray, are invalidated.

The ability of a federal regulator to ratify prior acts has been recognized by federal courts. Some of the leading cases occurred in the late 1990's in connection with the Office of Thrift Supervision, which then experienced an unusual amount of turnover in the Director's position. Those cases include *Franklin Savings Association v. OTS* (Franklin challenged a ratification of the appointment of a conservator); and *Doolin Security Savings Bank v. OTS* (Doolin challenged the ratification of a cease and desist order).

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The black letter law set forth in those cases is that the party ratifying an act "must have had authority to do the underlying act both at the time of the original act and at the time of ratification." It is not entirely clear that Director Cordray had the authority to take the original actions he has now ratified. The U.S. Supreme Court has agreed to review the constitutionality of several recess appointments to the National Labor Relations Board (the *Noel Canning* case), and the outcome of that case would have a direct bearing on the validity of Director Cordray's appointment since he was appointed on the same day as the NRLB officials. In other words, if the U.S. Supreme Court finds that the NLRB appointments were unconstitutional, then Director Cordray's recess appointment will be found to be unconstitutional, and he will have lacked the authority to take the original actions that he has ratified.

I hesitate to guess how the Supreme Court will rule in the *Noel Canning* case. However, if Director Cordray's ratification of his prior acts is ineffective, some alternative steps would have to be taken to affirm those prior acts. Several alternatives are possible: Congress could affirm the actions taken by Director Cordray (unlikely); Director Cordray could re-issue the regulations impacted by the decision (cumbersome); a federal court could decline to impose the black letter law and uphold the prior acts as the *Doolin* court did (doubtful); a federal court could apply the de facto officer doctrine and uphold the prior acts in order to avoid undue regulatory disruption (more likely); or there could be some combination of the application of the de facto officer doctrine and the re-issuance of prior actions (also possible).

Bottom line, the outcome of the *Noel Canning* case will have an impact on the validity of the actions taken by Director Cordray during the period in which he was a recess appointee, so stayed tuned.

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