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A SPECIAL FINANCIAL SERVICES LEGISLATIVE AND REGULATORY UPDATE

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As you doubtless are aware, today, the White House announced that President Obama will bypass Congress and use the recess appointment to name Richard Cordray to be the first Director of the Consumer Financial Protection Bureau (CFPB).

With the appointment of Cordray, the CFPB will come into its full scope of powers including regulation of the nonbank financial services industry such as mortgage originators, payday lenders and check cashing firms. Since the Bureau's July 21, 2011 effective date, the agency has only had the authority to supervise and regulate deposit-taking banks.

The appointment will undoubtedly draw legal challenges; either from Republicans or the first business to hit by a rule under the expanded authority of the CFPB, as questions abound about the Constitutional authority of the President to make such an appointment. Congress currently goes into *pro forma* sessions every three days and has not formally recessed, nor has either chamber passed an adjournment resolution, in an effort specifically designed to prevent such a recess appointment. Despite this, the White House came out hard against the use of what it called *pro forma* "gimmicks," and the White House blog post cited advice given to former President George Bush as part of the justification for the legal basis of the Cordray appointment.

As expected, the outrage from Republican lawmakers quickly followed the announcement. In a statement on the appointment, Senate Minority Leader Mitch McConnell said President Obama had "arrogantly circumvented" precedent, landing the Bureau "in uncertain legal territory, threaten[ing] the confirmation process and fundamentally endanger[ing] the Congress's role in providing a check on the excesses of the executive branch." Additionally, Representative Patrick McHenry (R-NC), summoned Mr. Cordray to appear before his Oversight Subcommittee on January 24th.

Although the conventional wisdom is that Cordray will be able to stay in his appointed position pending any judicial action, this maneuver almost certainly guarantees that he will not be re-confirmed once this session of Congress expires. It will be very interesting to see how the CFPB acts in the time it has a Director in place – especially if a judicial stay is invoked – and what regulations and enforcement actions the Bureau will be able to engage in during that time.

We will continue to follow these developments and will return with the weekly Financial Services and Legislative and Regulatory Update when the Congressional recess concludes. Should you have any questions, or require any additional information, please do not hesitate to contact me, or my colleague Abby Matousek (AMatousek@mlstrategies.com).