

CFPB Leadership Dispute: Impacts and Next Steps – An Update

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On January 10, 2018, a federal judge denied Consumer Financial Protection Bureau (CFPB or Bureau) Deputy Director Leandra English's motion for a preliminary injunction to prevent (1) Mick Mulvaney from serving as CFPB Acting Director and (2) President Trump from nominating another to fill that role temporarily under the Federal Vacancies Reform Act (Vacancies Act). On January 12, English filed a notice of appeal to the DC Circuit Court of Appeals (DC Circuit). This decision, which follows Judge Kelly's November 2017 denial of a temporary restraining order (TRO) on similar grounds, preserves Mulvaney's Acting Directorship, pending review by the DC Circuit. While English's appeal plays out in court, Judge Kelly's order maintains the apparent status quo at the Bureau and reinforces Mulvaney's authority, including current reform efforts at the Bureau focused on—among other things—the review of pending rulemakings, investigations, and key policy issues.

Background

As discussed in our last alert, [CFPB Leadership Dispute: Impacts and Next Steps](#), on November 28, 2017, DC District Court Judge Timothy Kelly denied English's request for a TRO to prevent Mulvaney from serving as Acting Director and President Trump from nominating another Acting Director under the Vacancies Act.¹ On December 6, 2017, English requested a preliminary injunction on similar grounds and sought a declaration that she, rather than Mulvaney, is the rightful CFPB Acting Director under Section 1011 of the Dodd-Frank Act (Section 1011) until President Trump nominates, and the Senate confirms, a new Director.² Judge Kelly's January 10, 2018, ruling follows substantial briefing and oral arguments from both sides as well as interested third parties, and preserves Mulvaney's Acting Directorship pending review by the DC Circuit.³ On January 12, English filed a notice of appeal seeking expedited appellate review of the January 10 decision.⁴ In addition, a parallel lawsuit has been filed on similar grounds.⁵

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English’s position

In her motion for preliminary injunction, English raised arguments similar to those in her TRO motion,⁶ supplementing them in two ways. First, she asserted that the Vacancies Act does not cover the CFPB Director because (s)he serves *ex officio* as a member of the Federal Deposit Insurance Corporation’s (FDIC) board of directors.⁷ Second, English claimed that the President violated the Appointments Clause of the US Constitution.⁸

Amicus briefs filed by scholars and Democratic lawmakers⁹ largely mirrored English’s main argument that Section 1011 controls the appointment of an Acting Director when there is a vacancy,¹⁰ while consumer advocacy groups emphasized the public’s interest in preserving the Bureau’s independent status.¹¹

Timeline

11/28/17	<ul style="list-style-type: none">Judge Kelly denies English’s request for a TRO
12/05/17	<ul style="list-style-type: none">Federal credit union files suit in SDNY challenging Mulvaney’s appointment and relying on similar arguments that English has made
12/06/17	<ul style="list-style-type: none">English files amended complaint and files motion for preliminary injunction
12/18/17	<ul style="list-style-type: none">Government files response in opposition to preliminary injunction
12/22/17	<ul style="list-style-type: none">Judge Kelly hears oral arguments
01/10/18	<ul style="list-style-type: none">Judge Kelly denies English’s request for a preliminary injunction
01/12/18	<ul style="list-style-type: none">English files notice of appeal of the January 10 decision to the DC Circuit and requests expedited review¹²

The Administration’s position

The Administration maintained that the Vacancies Act supplements the Dodd-Frank Act,¹³ and that the President may appoint an Acting Director, even when the Vacancies Act is not the “exclusive” means to select one.¹⁴ The Administration addressed the new arguments English raised in her motion by countering that: (1) because the CFPB Director is not appointed to the FDIC board of directors, but rather serves *ex officio*,¹⁵ the CFPB directorship is firmly within the scope of the Vacancies Act¹⁶; (2) the Appointments Clause does not apply to temporary appointments¹⁷; (3) English does not have a valid cause of action¹⁸; and (4) even if the Vacancies Act does not allow the President to appoint the Bureau’s Acting Director, the court lacks the authority to enjoin the President of the United States.¹⁹

Likewise, amicus briefs filed by certain Republican state attorneys general and industry groups outlined similar arguments,²⁰ but those amici emphasized that insulating the appointment of the Director from the President would only exacerbate the debate concerning the constitutionality of the Bureau’s leadership structure, currently under review before the DC Circuit.²¹

The Court’s ruling

In denying English’s motion, Judge Kelly explained principally that English failed to demonstrate a likelihood of success on the merits. In essence, the Court explained that “[g]ranted English an injunction would not bring about more clarity; it would only serve to muddy the waters.”²² Judge Kelly reasoned that the Vacancies Act is the more specific statute, as it expressly provides for “vacanc[ies]” of federal officers.²³ He also noted that the Vacancies Act’s exception for multi-member bodies does not cover the CFPB Director’s *ex officio* membership on the FDIC board of directors.²⁴ Judge Kelly further asserted that, because the Dodd-Frank Act is silent regarding the President’s ability to appoint the Acting Director, Section 1011 does not displace, but rather supplements, the Vacancies Act.²⁵ As a result, Section 1011 must be read “harmoniously” with the Vacancies Act.²⁶

Although the Court did not need to reach English’s constitutional arguments, Judge Kelly nevertheless observed that enjoining the President would seriously impair the President’s constitutional powers under the Take Care Clause,²⁷ as it would allow anyone to serve as the Bureau’s Acting Director, provided that such person was named Deputy Director before the Director resigned.²⁸ Judge Kelly also determined that nothing in

the Dodd-Frank Act disqualifies Mulvaney, as OMB Director, from simultaneously serving as the CFPB's Acting Director: although the Dodd-Frank Act excludes certain officials from serving as Acting Director, it does not exclude the OMB Director.²⁹ Judge Kelly also noted that the "particular policies or priorities that English or Mulvaney might pursue as the CFPB's [A]cting Director are irrelevant to the Court's analysis."³⁰

Judge Kelly further explained that English would not suffer irreparable harm absent an injunction, principally because the Court concluded that English's constitutional and statutory rights have not been violated. In addition, he also determined that the balance of equities and the public interest did not favor her.³¹ He did not, however, decide whether English failed to assert a valid cause of action.³²

English has promptly appealed the January 10 decision to the DC Circuit and has sought expedited review,³³ which is generally available for considerations of preliminary injunctions.³⁴

Implications

In the short term, Mulvaney is still Acting Director of the CFPB

The dispute has not prevented Mulvaney from implementing policy changes at the Bureau. In addition to his original 30-day freeze concerning hiring and rulemaking and hold on new enforcement cases pending his review—both, now expired³⁵— as well as halting payments generated through CFPB enforcement actions,³⁶ he has also changed the CFPB's mission statement (to include deregulation)³⁷ and taken steps, including, but not limited to:

- Announcing that the CFPB would amend the prepaid card rule and extend its compliance date, allowing more time for card issuers to implement the rule's new requirements.³⁸
- Mulvaney intends to revise the Bureau's approach to the Home Mortgage Disclosure Act (HMDA): despite increased regulatory reporting requirements for mortgage lenders that became effective on January 1, 2018, the CFPB will only bring enforcement actions for material errors in data collected in 2018 and reported in 2019.³⁹
- Cancelling a planned study of the debt collection market that was designed to assess consumers' understanding of debt collection disclosure forms.⁴⁰
- Signaling potential changes to the Bureau's approach to its amicus program, No-Action Letter policies, overdraft fees, and consumer complaint portal.⁴¹ In addition, the CFPB is expected to moderate its approach to enforcement actions in 2018, and reduce penalties for all but the most serious violations.⁴²
- Stating that he plans to appoint political staffers to work alongside existing Bureau senior staff.⁴³

Mulvaney also is likely to re-examine and retool other Bureau policy initiatives. For instance, although the new CFPB payday lending rule was finalized in October 2017 under former CFPB Director Cordray, the payday industry sees an opportunity to delay, or possibly revamp, the new regulation.⁴⁴

Independence revisited?

English v. Trump continues

Appeal expected. English has filed a notice of appeal to the DC Circuit, requesting an expedited review of her case.⁴⁵ Her appeal will be reviewed by the DC Circuit under an abuse of discretion standard.⁴⁶ This standard is not advantageous for English as it is highly deferential to Judge Kelly's discretionary power to issue injunctive relief.⁴⁷

Motion practice expected to continue. At the same time, parties can proceed to motion practice where jurisdiction and other issues relating to the adequacy of the amended complaint will likely be addressed. In the event that her amended complaint is dismissed, English would be entitled to a *de novo* review of that decision, a standard more favorable for English that does not require the DC Circuit to accord any deference to Judge Kelly's underlying ruling.⁴⁸

Split ruling on appeal possible. In light of the constitutional issues English has raised, a split ruling by the DC Circuit is possible, whereby the Court would uphold the Administration's interpretation of the Vacancies Act, while disqualifying Mulvaney as Acting Director of the CFPB in order to safeguard the Bureau's independent status.

Moot when a new CFPB Director is confirmed. As *English v. Trump* plays out in court, the dispute will become largely moot as soon as the President appoints, and the Senate confirms, a permanent Director. Further, even if Mulvaney's actions are held unlawful, they can easily be ratified by his successor. In contrast, English's actions, should she take any, would unlikely be ratified, even if she prevails in court. The President has not announced his nominee for CFPB Director, though a number of individuals are reportedly under consideration.⁴⁹ A divide appears to have emerged over what role the CFPB should play: although Republican critics of the Bureau are pushing for new leadership that will re-evaluate and repeal certain regulations, the financial services industry seeks to decrease its regulatory burden and preserve rules that it views as necessary to ensure market stability (having already invested significant resources to comply with these regulations).⁵⁰

Future of the CFPB

English v. Trump may ultimately help prompt the DC Circuit to rule on the *PHH* case, which will decide whether the CFPB may remain an independent agency with a single director who is removable by the President only for cause.⁵¹ Decades ago, the Supreme Court ruled that the Federal Trade Commission's structure as an independent agency with commissioners, each only removable for cause, was constitutional.⁵² In the *PHH* case, a three-judge panel declined the CFPB's invitation to extend this precedent to the CFPB's single-director structure. An appeal of that panel's decision is currently before the DC Circuit sitting *en banc*. English has repeatedly underscored that an at-will White House employee cannot lead an agency that is required by statute to be independent, relying on this precedent. In doing so, she has implicitly supported the CFPB's original position in the *PHH* case that its current structure does not violate the US Constitution.⁵³ Judge Kelly's decision does not address the constitutionality of the Bureau's structure, rather, it defers to the constitutional challenge currently before the DC Circuit.⁵⁴ The *en banc* ruling could potentially recast the CFPB as an "executive agency" subject to regulatory review by OMB's Office of Information and Regulatory Affairs.⁵⁵ It could also impel Congress to reconstitute the CFPB as an independent, bipartisan, multi-member commission. In addition, the ruling could have further effects on other federal agencies with similar independent structures, such as the Federal Housing Finance Agency.

If, however, the *PHH* case maintains the CFPB's current independent status, the DC Circuit could still find that Judge Kelly did not abuse his discretion in denying English's motion for preliminary injunction, even if a protracted case concerning statutory interpretation is ultimately appealed during motion practice, and even if English ultimately prevails.

Additional Impacts

Board membership. Because Mulvaney sits on the FDIC board of directors and the Financial Stability Oversight Council, and plans to be an "active participant,"⁵⁶ his interim appointment may affect their agendas. As a voting member, Mulvaney's influence may extend beyond consumer protection issues, and may impact other financial regulators.

Appointment of a permanent CFPB Director. Although the Administration is expected to select a nominee to serve as permanent Director of the Bureau, Judge Kelly's decision may have the effect of relieving some of the immediacy behind that decision and will afford Mulvaney additional time to continue to recalibrate the Bureau.⁵⁷

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¹ *English v. Trump*, No. 1:17-cv-02534-TJK (D.D.C. Nov. 26, 2017 (“*English v. Trump*”). For further details, please refer to our November 29, 2017, Client Alert, [CFPB Leadership Dispute: Impacts and Next Steps](#).

² English also filed an amended complaint on December 6, 2017, a topic for a forthcoming alert. The amended complaint seeks the same declaratory relief and references the new arguments made in her request for preliminary injunction. See page 2 *supra*.

³ Doc. No. 47.

⁴ Doc. No. 48.

⁵ See *Lower East Side People’s Federal Credit Union v. Trump et al*, No. 1:17-cv-09536 (S.D.N.Y. Dec. 5, 2017). Consumer finance scholars, lawmakers and organizations have also filed amicus briefs in support of the credit union. See Doc. No. 16; Doc. No. 19; Doc. No. 21; Doc. No. 22. An amicus brief in favor of Mulvaney was also filed. See Doc. No. 27. On December 22, 2017, the government moved to dismiss for lack of standing and raised similar arguments as in *English v. Trump*. See Doc. No. 31 (Motion to Dismiss) and Doc. No. 45 (Reply in Support of Motion to Dismiss); the credit union answered, arguing that Mulvaney’s decision to pause HMDA-related enforcement actions results in concrete harm to it. See Doc. No. 37. Oral arguments on the government’s motion to dismiss were heard in New York on January 12. Briefings will close on January 24, 2018, and a ruling is expected thereafter. If not dismissed, this lawsuit could also be transferred to Judge Kelly under 28 U.S.C. § 1404 (providing for such transfers in the interest of judicial economy and efficiency).

⁶ English relied on Section 1011 of the Dodd-Frank Act, which she argues is the more recent and specific statute, and therefore, supersedes the Vacancies Act. In addition, English renewed her TRO argument that Mulvaney’s role is incompatible with the requirement that the CFPB be “an independent bureau” because, as member of the President’s cabinet, he is an at-will employee of the Administration, removable without cause by the President. See 12 U.S.C. § 5491(a).

⁷ Under 5 U.S.C. § 3349c(1), the President’s authority to use the Vacancies Act to fill vacancies does not apply to positions held by “any member who is appointed by the President, by and with the advice and consent of the Senate to any board, commission, or similar entity that—(A) is composed of multiple members; and (B) governs an independent establishment or Government corporation.” See Doc. No. 25 at 16.

⁸ See Doc. No. 25 at 17–18. See also US Const. Art. II, § 2, Cl. 2. Under the Appointments Clause, the President has two means of appointing officers: with the advice and consent of the Senate, or pursuant to a statute. English argues that (1) Mulvaney’s Senate confirmation for the office of OMB Director does not extend to his appointment as CFPB Director, and (2) the absence of any clear statement in the Vacancies Act displacing Section 1011, mandatory succession provision precludes the President from relying on the Vacancies Act as a valid statutory basis to appoint the CFPB’s Director.

⁹ Among the current and former Democratic Senators and Representatives who filed in support of English were Charles Schumer, Elizabeth Warren, Christopher Dodd, Barney Frank and Nancy Pelosi.

¹⁰ See Doc. No. 32; Doc. No. 34; Doc. No. 35.

¹¹ Doc. No. 36.

¹² See 28 U.S.C. § 1657(a) and D.C. USCS Ct App D.C. Cir. Rule 47.2(a) (providing for expedited appellate review when extraordinary circumstances so warrant, including cases concerning preliminary injunctions).

¹³ The government argued principally that Section 1011 only refers to the Director’s temporary “absence” or “unavailability,” not a permanent “vacancy,” and that both statutes should be read concurrently, as Section 1011 “supplements,” rather than “supplants” the Vacancies Act. See Doc. No. 41 at 14, 19–20.

¹⁴ Doc. No. 41 at 14–17.

¹⁵ 12 U.S.C. § 1812(a)(1)(B) (“The management of the Corporation shall be vested in a Board of Directors consisting of 5 members—(B) 1 of whom shall be the Director of the Consumer Financial Protection Bureau”) and 12 U.S.C. § 1812(d)(2) (“In the event of a vacancy in the office of . . . Director of the Consumer Financial Protection Bureau and pending the appointment of a successor . . . the acting Director of the Consumer Financial Protection Bureau . . . shall be a member of the Board of Directors in the place of the . . . Director”).

¹⁶ Doc. No. 41 at 12.

¹⁷ *Id.* at 30–31.

¹⁸ *Id.* at 32. See D.C. Code § 16-3501 (*quo warranto*). A *quo warranto* action provides for a civil action against any person who, within the District of Columbia, unlawfully performs the duties of a public officer. The Administration contends this is the “sole means” for English to bring an action against Mulvaney. In her reply, English argues that she has standing to collaterally challenge Mulvaney’s appointment, and is therefore not barred by the *quo warranto* statute. See Doc. No. 44 at 11–12. Judge Kelly did not need to reach this argument. See Doc. No. 47 at 39 fn 6.

¹⁹ *Id.* at 34. English claims this argument relies on a mistaken precedent, and also argues that the court does not lack the authority to enjoin Mulvaney. See Doc. No. 44 at 12–13.

²⁰ See Doc. No. 38; Doc. No. 39; Doc. No. 40. Attorneys general of the states of Alabama, Arkansas, Arizona, Florida, Georgia, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, South Carolina, Texas and West Virginia sided with the Administration.

- ²¹ See Doc. No. 38 at 12–14 (citing to *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* 2017 U.S. App. LEXIS 2733, 2017 WL 631740 (Feb. 16, 2017) (referred to herein as the *PHH* case)); Doc. No. 39 at 14 (explaining that the Dodd-Frank Act already raises concerns as to the constitutionality of the CFPB’s structure because it insulates the Bureau’s Director “from presidential accountability to an unprecedented degree, by: (1) making the Director the sole head of the Bureau . . . ; (2) giving the Director a five-year term that will often span Presidential administrations; [and] (3) making the Director removable only for cause . . .” and ruling in English’s favor would only accentuate such concerns) (citations omitted).
- ²² Doc. No. 47 at 46.
- ²³ Doc. No. 47 at 15 (“The Court concludes that a fair reading of the entirety of these statutes . . . does not result in an unavoidable conflict. Instead, the two statutes can, and therefore must, be read harmoniously.”); Doc. No. 47 at 26 (“Moreover . . . it is not clear that Dodd-Frank is ‘more specific’ than the FVRA as applied to these facts . . . the FVRA explicitly applies where [an office requiring Presidential appointment and Senate confirmation] becomes ‘vacant’ because the officer ‘resigns,’ . . . the precise scenario at issue here.”).
- ²⁴ *Id.* at 12–13 (“Of course, this exception does not directly apply to the CFPB Director, because the CFPB is not a multi-member body.”).
- ²⁵ *Id.* at 36 (The “best reading is that the FVRA remains available to the President here”).
- ²⁶ *Id.* at 15 (“The Court concludes that a fair reading of the entirety of these statutes . . . does not result in an unavoidable conflict. Instead, the two statutes can, and therefore must, be read harmoniously.”).
- ²⁷ US Const. Art. II, § 2, Cl 3 (“[.] [The President] shall take care that the Laws be faithfully executed [.]”).
- ²⁸ Doc. No. 47 at 31 (“Under English interpretation, however, Cordray could have named *anyone* the CFPB’s Deputy Director, and the President would be virtually powerless to replace that person upon ascension to acting Director—no matter how unqualified that person might be.”).
- ²⁹ See 12 U.S.C. § 5491(d) (“No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.”).
- ³⁰ Doc. No. 47 at 2.
- ³¹ See Doc. No. 47 at 39–45. The Court did not need to reach the remaining balancing factors for a preliminary injunction.
- ³² Doc. No. 47 at 39 fn 6.
- ³³ Doc. No. 48.
- ³⁴ See D.C. USCS Ct App D.C. Cir. Rule 47.2(a).
- ³⁵ C. Ryan Barber, “Federal Judge, For Second Time, Won’t Yank Mulvaney From CFPB Director’s Chair”, *The National Law Journal* (Jan. 11, 2018), available at: <https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/10/federal-judge-for-second-time-wont-yank-mulvaney-from-cfpb-directors-chair/>.
- ³⁶ Mark Moore, “Mulvaney Begins at CFPB With Immediate Freeze on Regulations”, *The New York Post* (Nov. 27, 2017), available at: <https://nypost.com/2017/11/27/mulvaney-begins-at-cfpb-with-immediate-freeze-on-regulations/>. Mulvaney has also imposed a freeze on the Bureau’s collection of personally identifiable information (PII) until its data security system is upgraded. Mulvaney’s critics view this freeze as another attempt to hinder the CFPB’s supervisory functions, which rely on PII data collection to investigate consumer complaints and detect unlawful activity. See John Heltman, “Warren Grills CFPB Head Over Data Collection Freeze”, *American Banker* (Jan. 8, 2018), available at: <https://www.americanbanker.com/news/warren-grills-cfpb-head-over-data-collection-freeze>; see also Letter from Senator E. Warren (D-MA) to Leandra English and Mick Mulvaney (Jan. 4, 2018), available at: <https://www.americanbanker.com/news/warren-grills-cfpb-head-over-data-collection-freeze>.
- ³⁷ The new mission statement used in public documents by the CFPB now reads (emphasis added): “The Consumer Financial Protection Bureau is a 21st century agency that helps consumer finance markets work *by regularly identifying and addressing outdated, unnecessary, or unduly burdensome regulations*, by making rules more effective, by consistently enforcing federal consumer financial law, and by empowering consumers to take more control over their economic lives.” See, e.g., CFPB Press Release, *Report on the State of the Credit Card Market* (Dec. 27, 2017), available at: <https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-report-state-credit-card-market/>. The original mission statement, however, still appears on the CFPB’s website, in the About Us section.
- ³⁸ Evan Weinberger, “CFPB Delays Prepaid Card Regulation’s Effective Date”, *Law360* (Dec. 21, 2017), available at: https://www.law360.com/consumerprotection/articles/997622/cfpb-delays-prepaid-card-regulation-s-effective-date?nl_pk=bc8e924d-96a6-4626-8ece-3424b675c0be&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection. The rule was originally scheduled to take effect in April 2018, and requires prepaid card issuers to provide consumers with credit-card like protections, such as strict fees disclosure, extended debt repayment delays, and limits on losses on unauthorized transactions. The CFPB announced it will postpone implementation until June 2018.
- ³⁹ Evan Weinberger, “CFPB Plans To Reopen Mortgage Disclosure Rulemaking”, *Law360* (Dec. 21, 2017), available at: https://www.law360.com/consumerprotection/articles/997518/cfpb-plans-to-reopen-mortgage-disclosure-rulemaking?nl_pk=bc8e924d-96a6-4626-8ece-3424b675c0be&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection. The 2015 HMDA

rule increases the amount of borrower information that lenders must submit to regulators (e.g., loan interest rate, applicant's debt-to-income ratio). The CFPB intends to review the rule's coverage by exempting certain types of transactions and re-evaluating reporting criteria. See also CFPB Public Statement, *Statement with respect to HMDA implementation* (Dec. 21, 2017), available at: http://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.

⁴⁰ Kate Berry, "CFPB's Mulvaney Survey for Debt Collection", *American Banker* (Dec. 19, 2017), available at: <https://www.americanbanker.com/news/cfpbs-mulvaney-scraps-survey-for-debt-collection-plan>.

⁴¹ See Renae Merle and Thomas Heath, "Even Before Court Victory, Trump's Pick to Lead Consumer Watchdog Began Reshaping Agency", *The Washington Post* (Nov. 29, 2017), available at:

https://www.washingtonpost.com/news/business/wp/2017/11/28/while-the-white-house-battles-for-control-heres-whats-at-stake-for-the-cfpb/?utm_term=.8716d2d4473f;

Ian McKendry, "Mulvaney as CFPB Head? Five Things to Know", *American Banker* (Nov. 26, 2017), available at: <https://www.americanbanker.com/slideshow/mulvaney-as-cfpb-head-five-things-to-know>;

Gregory Korte, "What Does Mulvaney's Appointment Mean for the Future of CFPB", *USA Today* (Nov. 28, 2017), available at: <https://www.usatoday.com/story/news/politics/2017/11/28/what-does-mulvaney-s-appointment-mean-future-cfpb/901067001/>;

Evan Weinberger, "Mulvaney Says Pushing Him Out Would Slow Down CFPB", *Law360* (Dec. 18, 2017), available at: https://www.law360.com/consumerprotection/articles/996063/mulvaney-says-pushing-him-out-would-slow-down-cfpb?nl_pk=bc8e924d-96a6-4626-8ece-3424b675c0be&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection.

⁴² Kate Berry, "CFPB 2018 Outlook: More Deregulation, More Upheaval", *American Banker* (Jan. 2, 2018), available at: <https://www.americanbanker.com/news/cfpb-2018-outlook-more-deregulation-more-upheaval>.

⁴³ Mulvaney has announced his plan to appoint new staff members who currently work in the Administration, including Eric Blankenstein (attorney with the Office of the US Trade Representative), John Czwartacki (OMB public relations), Emma Doyle (OMB chief of staff), James Galkowski (OMB special assistant), Sheila Greenwood (HUD official), as well as Brian Johnson (House Financial Services Committee staff member). Kirsten Sutton Mork (House Financial Services Committee staff director) has been appointed as new CFPB chief of staff. See Ryan Grim, "Mick Mulvaney Tells CFPB Staff He's Bringing Six Trump Loyalists on Board", *The Intercept* (Dec. 21, 2017), available at:

<https://theintercept.com/2017/12/21/mick-mulvaney-cfpb-staff-trump-loyalists/>;

Kevin Wack, "Mulvaney's Plan to Embed Political Staffers in CFPB Sparks Backlash", *American Banker* (Dec. 5, 2017), available at:

<https://www.americanbanker.com/news/mulvaney-s-plan-to-embed-political-staffers-in-cfpb-sparks-backlash>;

Evan Weinberger, "Hensarling Aide To Take Up CFPB Chief Of Staff", *Law360* (Jan. 5, 2018), available at:

https://www.law360.com/consumerprotection/articles/999318/hensarling-aide-to-take-up-cfpb-chief-of-staff-post?nl_pk=bc8e924d-96a6-4626-8ece-3424b675c0be&utm_source=newsletter&utm_medium=email&utm_campaign=consumerprotection.

⁴⁴ See Kevin Wack, "Payday See New Opportunity at Revamped CFPB", *American Banker* (Dec. 08, 2017), available at: <https://www.americanbanker.com/news/payday-lenders-see-new-opportunity-at-revamped-cfpb?tag=0000156-3312-d808-add7-bfff6c240000>. The new payday loan rule sharply restricts lenders from issuing high-cost consumer loans of 45 days or less, taking effect in July 2019.

⁴⁵ Doc. No. 48.

⁴⁶ See *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam); *Jackson v. Culinary Sch.*, 59 F.3d 254, 256 (D.C. Cir. 1995) ("In the declaratory judgment context . . . appellate courts may review the district court's exercise of this 'wise judicial administration' only for abuse of discretion") (citation omitted).

⁴⁷ See *Nat'l Wildlife Fed'n v. Burford*, 835 F.2d 305, 319 (D.C. Cir. 1987) ("We [the appellate court] owe the district court deference. We are most deferential to the court's balancing of the four injunction factors.").

⁴⁸ See *Neb. HHS v. United States HHS*, 340 F. Supp. 2d 1, 21 (D.D.C. 2004).

⁴⁹ Among potential candidates are House Financial Services Committee Chairman Jeb Hensarling (R-TX), ex-OCC Acting Comptroller Keith Noreika, and law professor Todd Zywicki. Recently, National Credit Union Administration Chairman J. Mark McWatters made the shortlist for next permanent CFPB Director. See Victoria Finkle, "Credit Union Regulator McWatters on Shortlist to Head CFPB", *American Banker* Dec. 28, 2017), available at: <https://www.americanbanker.com/news/credit-union-regulator-mark-mcwatters-on-shortlist-to-head-cfpb>.

⁵⁰ Yuka Hayashi and Kate Davidson, "The Internal Divide Behind Trump's Takeover of Consumer Watchdog", *The Wall Street Journal* (Dec. 21, 2017), available at: <https://www.wsj.com/articles/the-divide-behind-trumps-cfpb-takeover-1513852201>.

⁵¹ See note 21 *supra*. This ruling effectively set the precedent that federal agencies can either (1) be headed by a single director who answers to the president (executive agency) or (2) be headed by an independent regulatory commission which does not (independent agency). This ruling was appealed and is currently under review in the DC Circuit.

⁵² *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

⁵³ See, e.g., Doc. No. 3 at 8; Doc. No. 25 at 21.

⁵⁴ Doc. No. 47 at 33 ("[T]he CFPB remains part of the Federal Reserve System. Its new Director, once appointed by the President and confirmed by the Senate, will have for-cause removal protections (subject to the outcome of pending litigation about the constitutionality of those protections.)") (citation omitted).

⁵⁵ *Executive Order 12866* requires executive agencies to submit proposed and final regulations constituting a “significant regulatory action” to OIRA for review prior to publication in the *Federal Register*.

⁵⁶ Doc. No. 41 Ex. 5 at 7.

⁵⁷ See 5 U.S.C. § 3346(a) (“Except in the case of a vacancy caused by sickness, the person serving as an acting officer . . . may serve in the office—(1) for no longer than 210 days [7 months] beginning on the date the vacancy occurs; or (2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.”). Mulvaney expects to fill the role of CFPB Acting Director for five to seven months. See Doc. No.41 Ex 5 at 14.