

Congress of the United States
Washington, DC 20515

July 29, 2014

The Honorable Richard Cordray
Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Dear Director Cordray,

We write to you today regarding the recent United States Supreme Court decision in National Labor Relations Board (“NLRB”) v. Noel Canning,¹ a unanimous decision striking down President Obama’s use of the Recess Appointment Clause² to appoint individuals to independent agency positions. On January 4, 2012, the President gave you a recess appointment to be Director of the Consumer Financial Protection Bureau (“CFPB” or “Bureau”). This action was taken on the same day and in the same manner as the NLRB nominees in Canning.³ Further, the CFPB, like the NLRB, is as an independent agency of the Federal government. For these reasons, the Supreme Court’s decision in Canning could determine the outcome of decisions made by you during your 2012-2013 tenure at the CFPB.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203) transferred primary consumer financial protection authority historically held by Federal banking regulators to the CFPB. Specifically, it transferred authority over 18 consumer financial laws and supervisory powers over large insured depository institutions. However, Dodd-Frank also bestowed upon the CFPB newly established powers such as supervision over non-bank entities,⁴ research and market monitoring authority,⁵ and authority to prevent unfair, deceptive, or abusive acts or practices.⁶ Since its creation, the CFPB has been very active in exercising both its transferred and newly established powers. As a result of the Canning decision, two primary legal questions now exist regarding the authority used to carry out many of these actions.

¹ National Labor Relations Board v. Noel Canning, 573 U.S. __ (2014).

² U.S. Const., art. II, § 2, cl. 3.

³ See “President Obama announces recess appointments to key administration posts”, White House Press Release (January 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>.

⁴ See Dodd-Frank Sec. 1024.

⁵ See Dodd-Frank Sec. 1013(b)(1).

⁶ See Dodd-Frank Sec. 1031.

First, CFPB actions taken during the time of your unconstitutional recess appointment may be invalid. The Constitution's Recess Appointment Clause authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate." Such appointments allow the President to temporarily fill key subordinate positions when the Senate is not in session to ensure the proper functioning of government. In your case, if a constitutional recess appointment was made then you would have been authorized to utilize all CFPB powers until the end of the next session of the Senate, nomination by the President, or confirmation by the Senate. In Canning, the Court held that President Obama violated the Constitution's Recess Appointment Clause when he made three recess appointments to the NLRB board when the Senate was not in recess.⁷ As noted above, your recess appointment was made on the same day and in the same manner as the NLRB appointees in Canning. The Court's decision raises questions as to whether you had authority to exercise CFPB powers as a recess appointee between January 4, 2012 and July 16, 2013.

Second, your ratification of past CFPB actions taken during your 2011-2013⁸ tenure also may be invalid. The Senate confirmed you as CFPB Director on July 16, 2013. On August 30, 2013 you published a Notice of Ratification in the Federal Register.⁹ However, it remains unclear whether you had ratification authority. In Federal Election Com'n v. NRA Political Victory Fund, the Supreme Court noted that in order to exercise ratification authority "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."¹⁰ In 2010, Congress vested the Bureau with power to regulate, supervise, and enforce activities in the consumer financial market place. These authorities could be exercised by a Senate-confirmed director, a constitutional recess appointee, or the Treasury Secretary or his designee exercising narrow interim authority. At no time between July 17, 2011 and July 16, 2013 did you serve as a Senate-confirmed director, a constitutional recess appointee, or an official designee of the Treasury Secretary.^{11,12,13} As a result, there remains serious doubt as to your authority to ratify actions that took place during that time period.

⁷ Noel Canning, 573 U.S. at 41. "[...] the Recess Appointments Clause does not give the President constitutional authority to make the appointments here at issue."

⁸ You were nominated to be CFPB Director on July 17, 2011.

⁹ Notice of Ratification, 79 Fed. Reg. 53734 (2013).

¹⁰ See Federal Election Com'n v. NRA Political Victory Fund, 513 U.S. 88, 98 (1994) (quoting Cook v. Tullis, 18 Wall. 332, 338 (1874)).

¹¹ See "President Obama names Elizabeth Warren Assistant to the President and Special Advisor to the Secretary of the Treasury on the Consumer Financial Protection Bureau", White House Press Release (September 17, 2010), available at <http://www.whitehouse.gov/the-press-office/2010/09/17/president-obama-names-elizabeth-warren-assistant-president-and-special-a>.

¹² See "Treasury Department announces plans for leadership transition at the Consumer Financial Protection Bureau" Treasury Press Release (July 26, 2011), available at <http://www.treasury.gov/press-center/press-releases/Pages/tg1258.aspx>.

¹³ Between July 17, 2011 and July 16, 2013, Secretary Geithner never officially authorized Richard Cordray to act on his behalf, or otherwise serve as a representative of the Treasury Department.

In the absence of a confirmed director or a constitutional recess appointee, some have suggested that the Treasury Secretary or his designee was authorized to take action for the CFPB. Congress contemplated a potential delay in the nomination and confirmation of a new director. Sec. 1066 of the Dodd-Frank Act grants the Treasury Secretary interim authority to perform functions of the Bureau in the event that a director has not been confirmed by the Senate. However, Sec. 1066(a) expressly limits the functions the Treasury Secretary may perform to those powers enumerated in Subtitle F of Dodd-Frank, Title X. Subtitle F concerns those powers transferred from the seven “transfer” agencies.¹⁴ Sec. 1066 does not authorize the Treasury Secretary to perform actions under the Bureau’s newly established powers. For example, on July 17, 2012, the Bureau filed its first enforcement action alleging violation of Dodd-Frank Sec. 1031, which prohibits unfair, deceptive, or abusive acts or practices. Sec. 1031 is a newly established authority and would not be enforceable by the Treasury Secretary, or his designee. As a result, all Bureau actions taken by the Treasury Secretary, or his designees, between July 21, 2010¹⁵ and July 16, 2013 that are not derivative of Dodd-Frank, Title X, Subtitle F authorities also may be invalid.

As the Chairman and Ranking Member of the Committees of jurisdiction, it is incumbent upon us to get a complete and proper accounting of the CFPB’s exposure to legal challenges. Further, it is necessary to understand how past Bureau regulations and actions may be affected by the Canning decision. For these reasons, we respectfully request the following:

- A full accounting of all CFPB actions taken between January 4, 2012 and July 16, 2013 that are not derivative of Dodd-Frank, Title X, Subtitle F authorities.
- Any and all documents, communications and analyses, undertaken by CFPB officials and/or outside counsel related to the validity or standing of CFPB actions taken between January 4, 2012 and July 16, 2013 that are not derivative of Dodd-Frank, Title X, Subtitle F authorities.
- Any and all documents, communications and analyses, undertaken by CFPB officials and/or outside counsel authorities justifying the CFPB’s authority and your standing to ratify past Bureau actions.
- Any and all documents, communications and analyses, undertaken by CFPB officials and/or outside counsel related to the impact of Canning on the effective dates for all regulations promulgated by the CFPB between January 4, 2012 and July 16, 2013.

¹⁴ See CRS Report R75700, *Limitations on the Secretary of the Treasury’s Authority to Exercise the Powers of the Bureau of Consumer Financial Protection*, by David H. Carpenter, pp. 3-5.

¹⁵ The Treasury Secretary’s Sec. 1066 authority became effective on Dodd-Frank’s date of enactment.

Please submit all responsive documents and materials to our Committees by Monday, September 1, 2014. Should you have any questions, please contact Brian Johnson from Chairman Hensarling's staff at (202) 226-3806, or Jared Sawyer from Ranking Member Crapo's staff at (202) 224-9209.

Sincerely,



Jeb Hensarling
Chairman
House Committee on Financial Services



Mike Crapo
Ranking Member
Senate Committee on Banking,
Housing, and Urban Affairs

Cc: The Honorable Tim Johnson, Chairman, Senate Committee on Banking, Housing, and Urban Affairs

The Honorable Maxine Waters, Ranking Member, House Committee on Financial Services