

PUBLICATION

Will Actions of the CFPB Be Deemed Invalid?

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A recent decision of the United States Court of Appeals for the District of Columbia Circuit has brought into question the validity of actions taken by the Consumer Financial Protection Bureau (CFPB). The case in question, *Noel Canning v. National Labor Relations Board*, arose out of a labor dispute at a soft drink bottler. After an administrative law judge and a panel of the National Labor Relations Board (NLRB) ruled against it, Noel Canning took its dispute to the courts. Noel Canning challenged the validity of the NLRB's decision by arguing that three of the five members of the NLRB had not been validly appointed to the board and therefore it lacked the quorum necessary to render a valid decision.

The three NLRB members had assumed their positions through recess appointments made by President Obama on January 4, 2012. The Court of Appeals agreed with Noel Canning, holding that recess appointments could only be made during "the Recess" between sessions of the Senate and not at any time the Senate is in recess. The Court of Appeals held that the appointments of the three NLRB members were invalid because the Senate was holding pro-forma sessions at the time they were appointed.

President Obama made one other recess appointment on January 4, 2012, that of Richard Cordray to be director of the CFPB. The appointment of Mr. Cordray can be challenged on the same basis as the appointments of the NLRB members. Such a challenge is already pending in the U.S. District Court for the District of Columbia, in which the *Noel Canning* decision will be controlling precedent.

The *Noel Canning* decision brings into question the validity of actions taken by the CFPB following the recess appointment of Mr. Cordray. This is due to the wording of the Dodd-Frank Act. Some of the powers of the CFPB were transferred to it from other agencies. The Act gave interim authority to exercise those powers to the Secretary of the Treasury until a director of CFPB was appointed. However, other powers of the CFPB were newly created by the Dodd-Frank Act, and the Act is silent about authority to exercise those powers before a director of CFPB is appointed. A court could rule that the CFPB lacked authority to exercise those powers if it did not have a validly-appointed director, meaning that any regulations issued or enforcement actions taken by the CFPB pursuant to a power created by Dodd-Frank in the last year could be void.

We will continue to monitor this situation and will issue further alerts when appropriate.