

## [Banking and Finance Law Daily Wrap Up, TOP STORY—CFPB's Deputy Director sues President Trump, Mulvaney over Bureau leadership, \(Nov. 27, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [Thomas G. Wolfe, J.D.](#).

In response to President Trump's designation of Mick Mulvaney, Director of the Office of Management and Budget, as "Acting Director" of the Consumer Financial Protection Bureau, Leandra English, the CFPB's Deputy Director, has filed a complaint seeking declaratory and injunctive relief while simultaneously requesting an emergency temporary restraining order against Trump and Mulvaney, maintaining that she became the Bureau's Acting Director by operation of law at midnight on Nov. 24, 2017, when former CFPB director Richard Cordray's resignation took effect. In support of her lawsuit, which was filed Nov. 26, 2017, in federal district court for the District of Columbia (*English v. Trump*, Dkt No. 1:17-cv-02534), English contends that the Dodd-Frank Act calls for the Deputy Director of the CFPB to serve as Acting Director until the President appoints and the Senate confirms a new director. In contrast, in a memorandum favoring Trump's and Mulvaney's stance on the issue, the Department of Justice's Office of Legal Counsel points to the Federal Vacancies Reform Act as supporting Mulvaney's leadership of the Bureau until a permanent director is later nominated and confirmed.

On Nov. 24, commenting on Trump's designation of Mick Mulvaney as Acting Director of the CFPB, the White House [stated](#) that "[t]he President looks forward to seeing Director Mulvaney take a common sense approach to leading the CFPB's dedicated staff, an approach that will empower consumers to make their own financial decisions and facilitate investment in our communities." That same day, the CFPB [declared](#) that Leandra English was the newly named Deputy Director of the Bureau who would take the reins of the CFPB as Acting Director immediately after Cordray's official departure. Prior to being named Deputy Director, English served as the Bureau's chief of staff.

**DOJ memorandum.** On Nov. 25, the Department of Justice's Office of Legal Counsel issued a written [memorandum](#) for the President's counsel concerning the designation of an Acting Director of the CFPB. In the memorandum authored by Assistant Attorney General Steven Engel, the DOJ concluded that the President is authorized to designate an Acting Director of the CFPB because both the "Federal Vacancies Reform Act and the office-specific statute are available to fill a vacancy in that office on an acting basis."

Although the memorandum acknowledges that the office-specific statute is covered by the Dodd-Frank Act and that an Acting Director may serve under that law (12 U.S.C. §5491(b)), the memorandum ultimately determines that the Dodd-Frank provision "does not displace the President's authority under the [Federal] Vacancies Reform Act" (5 U.S.C. §3345 *et seq.*).

**Complaint.** In juxtaposition to the DOJ memorandum, English's [complaint](#) against Trump and Mulvaney, asserts that English became the agency's Acting Director "by operation of law" because the Dodd-Frank Act (12 U.S.C. §5491(b)) provides that the Deputy Director "shall ... serve as the Acting Director in the absence or unavailability of the Director." According to the complaint, by enacting this Dodd-Frank Act provision, "Congress ensured that the President could not circumvent the need for Senate confirmation by naming a temporary replacement for a Director who leaves before the expiration of his or her term."

Moreover, English's complaint contends that the Federal Vacancies Reform Act, "by its own terms, does not control where, as with the Dodd-Frank Act, 'a statutory provision expressly ... designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity'."

In a Nov. 26, 2017, release, Deepak Gupta of Gupta Wessler PLLC, counsel for English, [stated](#), "The President's attempt to install a White House official at the head of an independent agency—while allowing that official to simultaneously serve in the White House—is unprecedented."

**TRO sought.** In her Nov. 26, 2017, [motion](#) for a temporary restraining order against Trump and Mulvaney, English maintains that President Trump's attempt to "bypass" the Dodd-Frank Act's statutory provision for appointment of an Acting Director directly violates the Act. Accordingly, the motion asks the court to grant English a TRO prohibiting Trump from appointing or recognizing a new Acting Director of the CFPB, and prohibiting Mulvaney from holding the Acting Director position or exercising the Bureau's authority until the court hears from both sides and considers the merits.

In a [memorandum](#) in support of her motion for a TRO, English argues that a TRO is appropriate because: (1) English currently holds the position of CFPB Acting Director; (2) President Trump lacks the authority he claims to have under the Federal Vacancies Reform Act to replace English; (3) Trump's appointment of a "still-serving White House official" would violate the legal requirement that the CFPB be an "independent agency;" and (4) equitable considerations favor "maintaining the status quo and avoiding the confusion and irreparable harm that would follow from allowing the parties' conflicting claims to go unsettled."

**Reactions.** In a Nov. 25, 2017, release, Rep. Jeb Hensarling (R-Texas), Chairman of the House Financial Services Committee, [commended](#) President Trump for appointing Mulvaney as Acting Director of the CFPB. Hensarling indicated that he could "think of no one better to lead the CFPB" than Mulvaney. "In anticipation of the nomination and confirmation of a permanent Director, I further look forward to working with Director Mulvaney to restore true accountability and due process of law to an agency that desperately needs it," he said.

Meanwhile, Rep. Maxine Waters (D-Calif), Ranking Member of the House Financial Services Committee, [stated](#), "Ms. English should be allowed to serve as Acting Director until a Director is confirmed by the full Senate, consistent with the process articulated in the law that created the Consumer Bureau." Characterizing Mulvaney as "an unacceptable candidate to lead the Consumer Bureau," Waters maintained that he exhibited "clear hostility to consumer protection" and that it would be "inappropriate for Trump's sitting Director of the Office of Management and Budget to simultaneously lead the Consumer Bureau, which is an independent agency. The Consumer Bureau's Director also sits on the Board of the Federal Deposit Insurance Corporation and the Financial Stability Oversight Council, meaning that the White House would have an alarming degree of direct control over financial regulation, supervision, and enforcement."

Similarly contending that the law is clear that Deputy Director Leandra English should be recognized as Acting Director of the CFPB until a new director is confirmed by the Senate, House Minority Leader Nancy Pelosi (D-Calif) [commented](#) that Americans should be "deeply concerned about the White House's cynical decision to flout the law and attempt to put the ringleader of its dangerous, anti-consumer protection policies in charge of the CFPB."

The Consumer Federation of America, in a November 27 release, emphasized that President Trump has created "financial uncertainty" with his designation of Mulvaney as Acting Director. Commending the work of the CFPB, Rachel Weintraub, CFA's Legislative Director and General Counsel, [stated](#) that the actions of the White House "are creating major market uncertainty, which will now be decided by the Court."

Attorneys: Deepak Gupta, Daniel Townsend, and Matthew Wessler (Gupta Wessler PLLC) for Leandra English. Steven A. Engel, Assistant Attorney General of the U.S. Department of Justice Office of Legal Counsel.

Companies: Consumer Federation of America

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