

[Banking and Finance Law Daily Wrap Up, TOP STORY—Mulvaney responds to latest motion to block his appointment to lead Bureau, \(Dec. 19, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [Lisa M. Goolik, J.D.](#)

Responding to a motion for preliminary injunction filed by Consumer Financial Protection Bureau Deputy Director Leandra English, President Donald Trump's designee Mick Mulvaney has renewed his argument that Mulvaney's appointment to succeed former director Richard Cordray was authorized by the Federal Vacancies Reform Act. In his [response](#), Mulvaney argues that English has failed to demonstrate a substantial likelihood that she would prevail on her claim that, as deputy director, she automatically succeeded Cordray pursuant to the Dodd-Frank Act. Moreover, Mulvaney claims, English has not established that, absent a preliminary injunction, she would be irreparably harmed.

English's motion. Following the denial of her request for a temporary restraining order that would have prevented Mulvaney from becoming acting director of the Bureau, English filed an amended complaint and motion for preliminary injunction (see *Banking and Finance Law Daily*, [Dec. 8, 2017](#)). English argued that under the Appointments Clause, the President has only two means of appointing officers—with the advice and consent of the Senate, or pursuant to a statute. English contends that "there is no clear statement in the FVRA that supplants the Dodd-Frank Act's rule of succession." Further, "the FVRA's appointment provision does not apply by its own terms" but, even if it did apply, "it is overridden by mandatory language in Dodd-Frank."

In her motion, English additionally argued that even if the FVRA would apply to the CFPB Acting Director appointment, Mulvaney's appointment is invalid because as CFPB Acting Director, Mulvaney would also be a member of the Federal Deposit Insurance Corporation Board pursuant to the Dodd-Frank Act. As a result, Mulvaney's appointment not only undermines the CFPB's independence from the Office of Management and Budget, but also defeats the intent of Congress to make the Federal Deposit Insurance Corporation independent from the OMB.

No merit to the arguments, no harm to English. In his response, Mulvaney argues again that there is no merit to English's claims that the FVRA did not apply to Mulvaney's appointment. Mulvaney notes that by denying English's TRO, the district court had agreed that English was unlikely to succeed on this claim (see *Banking and Finance Law Daily*, [Nov. 29, 2017](#)). Mulvaney claims the FVRA applies "because the CFPB is an Executive agency; the CFPB Director is a position requiring Senate confirmation; the CFPB Director does not fall within any of the FVRA's carefully defined exceptions; and Mr. Mulvaney, as the Senate-confirmed Director of OMB, is eligible to serve as Acting Director."

Addressing English's additional arguments, Mulvaney also argues that the FVRA exclusion English invokes applies only to persons appointed to the board, not those, like the CFPB Director and the Comptroller of the Currency, who serve on the board by virtue of their appointment to a different office.

Moreover, Mulvaney states that English's motion should be denied because she has failed to demonstrate that she will suffer irreparable harm in the absence of preliminary injunctive relief. "Legally, [English] never acceded to the position of Acting Director, and an alleged loss (or denial) of a position by itself does not amount to irreparable injury. More practically, the President's designation was promptly honored by the senior leadership of the CFPB; Mr. Mulvaney has now been running the agency as its Acting Director for weeks; and CFPB staff (with the exception of [English]) have been acting with the understanding that he is, in fact and in law, the Acting Director."

Briefing schedule, hearing. According to the briefing schedule, English must file a reply in support of her motion by Dec. 20, 2017. A hearing on the motion is scheduled for Dec. 22, 2017.

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