Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—CFPB's Deputy Director continues fight to lead agency, seeks preliminary injunction, (Dec. 8, 2017)

Banking and Finance Law Daily Wrap Up

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By Charles A. Menke, J.D.

Following the denial of her request for a temporary restraining order that would have prevented President Donald Trump's designee, Mick Mulvaney, from becoming acting director of the Consumer Financial Protection Bureau, Leandra English has filed an amended complaint and motion for preliminary injunction. Former CFPB Director Richard Cordray appointed English as Deputy Director, intending that she would become acting director upon his resignation. Trump, however, appointed Mulvaney to the position pursuant to the Federal Vacancies Reform Act. U.S. District Judge Timothy J. Kelley ruled that English 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 (see *Banking and Finance Law Daily*, Nov. 29, 2017).

Relief sought. In her amended complaint and motion, which are supported by a memorandum and affidavit, English generally seeks the same relief as previously demanded in her request for temporary restraining order. According to English, Mulvaney's appointment by Trump violates the Dodd-Frank Act's mandatory succession plan and independence requirement, as well as the Separation of Powers and the Appointments clause of the U.S. Constitution. English asserts that any actions undertaken by Mulvaney as Acting Director are therefore unlawful, and seeks to set aside these actions and compel action unlawfully withheld or unreasonably delayed pursuant to the Administrative Procedure Act. English also asserts she is entitled to declaratory and equitable relief.

Appointments Clause. While renewing the arguments proffered when seeking the temporary restraining order, English argues 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." As a result, there is no statutory basis for Mulvaney's appointment and the appointment therefore violates the Appointments Clause.

Independence requirements. English additionally argues 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.

Briefing schedule, hearing. Defendants have until Dec. 18, 2017, to file their opposition to English's motion. 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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