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Cheat sheet: What happens if CFPB's Cordray leaves early

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If Consumer Financial Protection Bureau Director Richard Cordray leaves soon to run for governor of Ohio — as is widely expected — there are questions about who President Trump could pick to fill the vacancy and whether that choice might delay the enactment of the agency's arbitration rule.

Cordray's term expires in July 2018, but if he is going to join the gubernatorial race, he would likely have to leave by fall at the latest. The guessing game for when he might depart has reached such fever pitch that several media outlets chased an erroneous story two weeks ago that Cordray had already submitted his resignation (he hadn't).

Yet depending on when Cordray leaves (assuming he does), his legacy could be in jeopardy. A rule to ban mandatory arbitration clauses in financial products is due to take effect in March, while the CFPB is expected to release a final rule reining in small-dollar lending ahead of Cordray's departure. Both rules could be in play depending on how fast the Trump administration could act to appoint a successor.

Following is a guide to how the issues may play out.

A vacancy at the CFPB

Under the Dodd-Frank Act, the deputy director of the agency shall serve as acting director "in the absence or unavailability of the director."

As of now, that would mean that if Cordray resigns before the end of his term, the agency's acting deputy director, David Silberman, would automatically succeed Cordray until a new director is nominated and confirmed.

Yet the Trump administration is unlikely to leave Silberman in charge for that long. Most observers agree that Cordray's departure would allow the administration to appoint an acting director under the Federal Vacancies Reform Act of 1998. Consumer groups may protest this move, arguing that the Dodd-Frank language is ambiguous enough that Silberman has to remain acting director until a new head is nominated and confirmed. But those groups are unlikely to win, lawyers said.

"There is no court that is going to invalidate the president's choice," said Jane Luxton, a partner at the law firm Clark Hill. "If there was a vacancy, the Vacancies Act would prevail over a provision of Dodd-Frank."

Yet the Vacancies Act puts some limits on who the administration could appoint.

The first option would be for Trump to appoint someone who has already been confirmed by the Senate. Intriguingly, one of

the possibilities being touted is Treasury Secretary Steven Mnuchin.

"Trump can appoint anybody who has been Senate confirmed," said Joann Needleman, an attorney at Clark Hill. "He could appoint the secretary of energy if he wanted, but there is some logic that Mnuchin would be better than others because he knows the subject matter."

Mnuchin "would be the obvious and logical" choice to replace Cordray as acting director, wrote Alan Kaplinsky, a partner at Ballard Spahr, wrote in a blog last week.

To be sure, Mnuchin would not have to give up his regular duties as Treasury Secretary, but could serve to additionally direct the CFPB until a successor is nominated and confirmed.

"The next question is how would Mnuchin do two jobs, and the answer is just like Cordray does: He doesn't do everything himself, he has other people carry out his direction," Luxton said. "He could be both the CFPB director and the Treasury secretary, but he could bring in the people he trusted and make appointments and hire people to fill any job that is open. So he would have able deputies and lieutenants carrying out his direction."

That said, Mnuchin may not want the role given his busy agenda, including urging Congress to raise the U.S. debt limit and enacting tax reform. In that case, other Senate-confirmed officials, including those at Treasury below Mnuchin, could be eligible.

Trump would also have the option to appoint an acting director from someone of an "equivalent rank" who has served at the CFPB for at least three months.

The arbitration rule

If an acting CFPB director is appointed, the most immediate impact would be on the agency's rule banning mandatory arbitration clauses, which is slated to take effect March 19.

An acting chief — or a Senate-confirmed permanent successor — could attempt to delay or scuttle the rule ahead of its enactment.

But depending on when Cordray leaves, the timing could be challenging. A new CFPB director could file a petition to reconsider the arbitration rulemaking, but they would have to follow all the notice and comment procedures of the Administrative Procedure Act.

Some lawyers said the CFPB would have to build a strong case for reconsidering the arbitration rule. A recent court decision suggests the bar is high.

In July, the D.C. Circuit rejected an effort by Scott Pruitt, the head of the Environmental Protection Agency, who had attempted to delay implementation of an Obama administration rule requiring that oil and gas companies monitor and reduce methane leaks.

In a split decision, a three-judge panel of the D.C. Circuit ordered the EPA to follow the rule, claiming Pruitt lacked the legal authority to delay it from taking effect.

An acting CFPB director would have to make "some kind of allegation that there is something new or something was not properly done" by the agency to revisit the rulemaking, Needleman said.

In addition, the acting director would have to show imminent harm to get a judge to stay the rule, and supporters of the rule would likely challenge those efforts.

Still, there are options a new director could attempt.

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"They could delay the effective date based upon new information, which is something the CFPB did itself with the prepaid card rule," said Richard Eckman, a partner at Pepper Hamilton. "They also could go out with another rulemaking or they could say that upon further review, the underlying study was flawed."

---- Index References ----

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