

Hurdle for Challengers to CFPB Recess Appointment
Consumer Bureau Had Full Power With or Without a Director

February 2012

A misunderstanding became conventional wisdom: that the Consumer Financial Protection Bureau (CFPB) would not have all of its powers, especially over nonbanks, until a director was in place. Now that President Barack Obama has made a recess appointment of Richard Cordray to be director, the issue would seem moot. But it could make a big difference to debt collectors, payday lenders, and others who attempt to avoid the CFPB's scrutiny by challenging Cordray's appointment. Courts may be reluctant to even hear their arguments about the legality of the recess appointment if the challengers are subject to the CFPB with or without a director.

The CFPB played it safe and did not attempt to exercise its powers over nonbanks, or to challenge the conventional wisdom, before Cordray's appointment. But the legal analysis underlying the view that the Bureau did not have full power earlier was sorely lacking.

The misunderstanding stems from Section 1066, buried in the 100th page of the 158-page Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010:

The Secretary [of Treasury] is authorized to perform the functions of the Bureau under this subtitle [Subtitle F] until the director of the Bureau is confirmed by the Senate in accordance with section 1011.

Congress expected this provision to give the Secretary interim authority to exercise *all* of the Bureau's functions. But after passage of the Act, those who read Section 1066 in isolation left to the conclusion that it limits the Secretary's authority to a subset of powers, those in Subtitle F.

A more careful analysis shows that Congress authorized Treasury to perform all of the Bureau's powers, as they became effective, until a director was appointed. That is the only interpretation that makes sense of the entire statute and does not create conflicts with other provisions. The statute specifies clear effective dates for the Bureau's powers in other subtitles, with no conditions, and some went into effect immediately, before there could have been a director. Congress imposed deadlines not contingent on a director. The legislative history is also consistent with the view that Section 1066 gives the Treasury Secretary full interim powers.

Properly read in the context of the statute as a whole, **the phrase "under this subtitle" in Section 1066 modifies "authorized" or "perform" rather than "functions," so that the provision reads "authorized ... under this subtitle" or "perform ... under this subtitle" rather than "functions ... under this subtitle."** The word "subtitle" could also be viewed as a typographical error that should have read "title," encompassing the entire CFPB statute. Throughout that statute, the Bureau's specific powers were all made effective on or before July 21, 2011 with no qualifications. **Notably, nowhere in the statute is the Secretary or the Bureau prohibited from exercising any of its powers before a director is appointed.** Any prohibition arises only from an indirect implication derived from Section 1066 that creates conflicts with the rest of the statute, makes no sense in the context of the statute as a whole, and contradicts Congress's understanding of the law it passed.

Why the Scope of the CFPB's Pre-Recess Appointment Powers Matters

Under Section 2 of Article III of the Constitution, federal courts are empowered to hear “Cases” and “Controversies.” That section has been interpreted to mean that federal courts can only consider cases brought by plaintiffs who have sustained an injury. This concept is called having “standing.” Courts will generally reject a case for lack of standing without even considering the arguments if the case is brought by one who has merely an ideological position to assert without any personal stake in the issue.

For this reason, not just anyone would have standing to bring a lawsuit challenging the recess appointment. The most likely party to overcome the standing hurdle would be a debt collector, payday lender or other nonbank that was being pursued by the CFPB and could argue that the CFPB would not have authority to do so without a director. But if the CFPB had authority regardless whether a director was in place, the court may question the plaintiff's standing to pursue the case. And if the plaintiff gets past the standing hurdle, a successful *ej ctu* g to the recess appointment might not help a payday lender or debt collector avoid the CFPB's scrutiny.

Why the CFPB Got Full Power on July 21, 2011

Analysis on several levels¹ shows that the CFPB obtained all of its powers on July 21, 2011 and did not need to await a director:

- The statute clearly and specifically spells out when particular subtitles become effective and *none of the effective dates is conditioned on having a director*.
 - To read the statute to imply a limit on interim authority creates internal conflicts.
 - Some provisions, including authority over nonbanks, were made *immediately effective on the date of enactment*, when there could have been no director.
 - Congress imposed several *deadlines for action on studies and rules* and did not condition those on a director.
- Section 1066 grants interim authority but *does not limit that authority* to Subtitle F. Nowhere does the statute directly prohibit any interim authorities.
- *Congressional history* shows that Congress understood Section 1066 to grant interim authority under the entire statute.

1. The Statute Specifically Spells Out Effective Dates and Does Not Condition Those Dates on Having a director

The Consumer Financial Protection Bureau is created by Title X of the Dodd-Frank Act. Title X, in turn, consists of the title, a set of definitions, and 8 subtitles, A through H. Each of those subtitles has its own specific effective date and, in one case, more than one effective date. None of those effective dates is conditioned on a director or by provisions elsewhere in the statute.

The CFPB is created in the first section of the first subtitle, Section 1011 of Subtitle A. Subtitle A was made effective immediately on July 21, 2010.² Subtitle A sets out various executive and administrative powers, including the power to hire personnel, the establishment of various offices, requirements for reports to Congress, and the funding of the Bureau. Clearly, Congress intended what it said: that Subtitle A would go into effect immediately, before a director could have been in place.

The CFPB's core powers are defined in Subtitles B (general powers), C (specific authorities), and E (enforcement powers).³ Three subsections of Subtitle B were made effective immediately, on the July 21, 2010 date of enactment:

- § 1022 (general rulemaking authority)
- § 1024 (supervision of nondepository covered persons)
- § 1025(e) (coordination between the CFPB and prudential regulators of examinations of large banks).⁴

This careful selection of a few discrete provisions to be immediately effective, before a director was in place, was also clearly intentional. The CFPB needed its general rulemaking authority to get up and running, before beginning substantive rules. For example, the CFPB has already issued rules on investigations, adjudications, and disclosure of records and information.⁵

Similarly, Congress made Section 1024 immediately effective to permit the CFPB to get a head start on setting up the new infrastructure to supervise nonbank mortgage lenders (and other nonbanks), blamed for much of the economic crisis. Because the authority was new, there was no need to wait for an orderly transition from another agency. For that very reason, authority over nonbanks is not an authority discussed under Subtitle F, which deals with transfer of existing authority.

Congress also had clear reasons for deliberately making Section 1025(e) effective immediately. The CFPB needed to begin coordinating with the prudential regulators in order to prepare for the transfer and coordination of consumer protection examinations.

The rest of Subtitle B, and all of Subtitles C and E, went into effect on July 21, 2011.⁶ Here again, there is no qualification of the effective dates.

Subtitle G, which makes substantive changes to several statutes and requires the Bureau to issue several rules and reports, also went into effect on that date. Indeed, Congress imposed deadlines for those rules and reports and made them absolute; it did not make them contingent on having a director. A narrow reading of Subtitle F creates conflicts with those provisions. For example, Congress required the CFPB, by July 21, 2011, to issue reports on the sale of credit scores and on the use of remittance data in credit reports.⁷ The Bureau is also required under Subtitle G to issue new rules on remittances by January 21, 2012.⁸

Subtitle H primarily makes conforming amendments to several statutes that went into effect on July 21, 2011. However, Congress made two sections go into effect immediately: Section 1081,

which gives the Inspector General of the Federal Reserve Board power to act as IG for the CFPB, and Section 1082, which extends the Privacy Act of 1974 to the CFPB. Once again, Congress thought carefully about effective dates and was clear about when it wanted which sections to go into effect.

If Congress intended certain provisions to become effective only when a director was appointed, then it would not have made them effective immediately or on other dates with no qualifications. Congress could easily have said that each provision became effective “upon confirmation of a director” or that each effective date was “subject to Section 1066.” It did not. Congress made the effective dates unqualified.

2. Section 1066 Does Not Limit Interim Authority to Subtitle F

Subtitle F is titled “Transfer of Functions and personnel; Transitional Provisions.” That subtitle contains the following provisions:

- § 1061 governs the transfer of functions from the other federal agencies to the CFPB;
- § 1062 directs the Treasury Secretary to designate the transfer date;
- § 1063 contains a savings clause that ensures that the transfer does not disrupt any pending litigation, orders or other rights and duties of the United States;
- § 1064 governs transfer of certain personnel;
- § 1065 permits certain incidental transfers of assets and liabilities within the agencies;
- § 1066 gives the Treasury Secretary interim authority until a director is appointed;
- § 1067 requires the CFPB to submit reports to Congress to ensure transition oversight.

Deep in Subtitle F, which itself is deep in the statute, Section 1066 reads in full:

SEC. 1066. INTERIM AUTHORITY OF THE SECRETARY.

(a) IN GENERAL.—The Secretary is authorized to perform the functions of the Bureau under this subtitle until the director of the Bureau is confirmed by the Senate in accordance with section 1011.

(b) INTERIM ADMINISTRATIVE SERVICES BY THE DEPARTMENT OF THE TREASURY.—The Department of the Treasury may provide administrative services necessary to support the Bureau before the designated transfer date.

A quick reading of paragraph (a), in isolation, might yield the interpretation that the Secretary is authorized to perform “the functions ... under this subtitle” – that is, Subtitle F. A further leap from that interpretation is required to imply (because it is nowhere stated directly) that the Secretary cannot perform other functions.

That reading is mistaken. Reading Section 1066 to trump the clear, specific and deliberate effective dates elsewhere in the statute, including provisions made immediately effective, would use an obscure, indirect implication in one section to overrule explicit provisions in another. *Nowhere* does Section 1066 or any other provision *prohibit* the Secretary from exercising any of the Bureau’s functions as they become effective.

The more sensible reading of Section 1066, in the context of the entire statute, is that the phrase “under this subtitle” modifies “authorized” or “perform” rather than “functions,” so that the provision reads “authorized ... under this subtitle” or “perform ... under this subtitle” rather than “functions ... under this subtitle.” Although the drafting is less than perfect, the broad reading of Section 1066 makes much more sense and avoids conflicts with the rest of the statute. The word “subtitle” could also be viewed as a typographical error that should have read “title,” an error that a court could correct in order to prevent conflicts with other parts of the statute and give the entire statute full effect, as discussed below.

To read Section 1066 as “functions ... under this subtitle” leads to a very difficult and convoluted attempt to define those functions, because they are not defined in Subtitle F. The Bureau’s functions are all defined elsewhere, primarily in Subtitles B, C and E. Subtitle F deals with the logistical process of transferring employees, rulemakings, orders and other functions from other federal agencies, not with definitions of or limits on the CFPB’s powers. For example, the authority to supervise large banks, transferred from the other banking agencies, is described in Section 1025, which is in Subtitle B. Although Subtitle F does have a definition of “consumer financial protection functions,”⁹ Section 1066 does not use that term; it talks more broadly about the Secretary’s power to exercise “functions of the Bureau,” a broader term that is not defined.

The only way to reconcile a narrow reading of Section 1066 with the rest of the statute is to strain the reading of paragraph(b) of Section 1066 and characterize provisions in other subtitles as “administrative services” that the Treasury Department could perform before the July 21, 2011 transfer date. That term is not defined and does not have cross references to other subtitles. This is a cryptic and indirect way of going about specifying what the Treasury Secretary can and cannot do on an interim basis.¹⁰ Moreover, that reading would leave the Bureau with absolutely no administrative powers after July 21, 2011. It also does not square with the fact that many of the provisions that are effective early – such as required reports on remittances and credit scores – go beyond administrative services.

If Congress actually wanted to limit the CFPB to limited designated powers until a director was in place, while permitting the Bureau to exercise a finite set of start-up powers, it would have said so directly and described specifically what those limits are. It would not have imposed significant limits on the power of a new agency in such an obscure, convoluted and cryptic manner.

3. Congressional History Shows that Congress Understood Interim Authority to Be Broad

A broader interpretation of the CFPB’s interim powers comports with congressional understanding. Reports by both the Senate Banking Committee and the Congressional Research Service (CRS) read Section 1066 to permit the Treasury Secretary to exercise the Bureau’s powers more broadly. The Senate report on that section reads, in its entirety:

Section 1066 provides the Secretary of the Treasury authority to perform the functions of the Bureau under the CFP Act until the director of the Bureau is confirmed by the Senate.¹¹

Thus, members of Congress considering whether to vote on the bill that was reported out of the Senate Banking Committee would have understood that the interim powers extended to the entire Consumer Financial Protection Act – all of Title X of the Dodd-Frank Act with all of its subtitles.

Similarly, the CRS report issued the day the bill was signed states:

Until the director is confirmed, the Secretary of the Treasury will have the power to perform the Bureau's functions.¹²

The report does not indicate that those functions are limited. A separate CRS report nearly a year later takes a different view, discussed below, but the July 2010 report is consistent with the understanding of Section 1066 at the time Congress voted on the bill.

The legislative history is consistent with the view that Section 1066 gave the Treasury Secretary full interim authority to exercise the Bureau's functions as they became effective. There is no history of Congress consciously limiting the interim powers or understanding Section 1066 to impose such limits.

The Inspectors General Letter and CRS Report

Two short analyses of Section 1066 – one in a January 10, 2011 response to Congress from the Treasury and Federal Reserve Inspectors General (IGs)¹³ and one in a May 18, 2011 CRS report¹⁴ – assert that the CFPB had only limited power before a director was in place. But both the letter and the report *assumed* that meaning of Section 1066, with virtually no analysis, without considering other interpretations or conflicts that such a view creates with the rest of the statute.

The IG letter was answering a different question from Congress: when interim powers terminate. In passing, the letter asserted that the Treasury Secretary “is not permitted to perform certain newly-established Bureau authorities if there is no confirmed director by the designated transfer date.”¹⁵ But the only authority for this statement is a footnote asserting, with no further analysis or discussion: “According to the text of the Dodd-Frank Act, the Secretary’s authority under section 1066(a) does not extend to these newly-established authorities.” The bulk of the three pages devoted to interim powers is spent considering which powers are in Subtitle F and which are in other subtitles, not considering whether the interim powers are in fact limited to Subtitle F.

The May 2011 CRS report, devoted to the question of limitations on the Secretary’s interim powers, is similar. It assumes that the powers are limited and focuses on defining those limitations. In a 9-page report, the entire discussion of the meaning of Section 1066 is this two-sentence passage: “Subsection 1066(a) does not authorize the Secretary to exercise the full panoply of the Bureau’s powers. Rather, the scope of the Secretary’s authority under subsection

1066(a) is limited to ‘the functions of the Bureau under this subtitle [F].’¹⁶ Though the report notes the immediate effective date of other subtitles establishing Bureau functions and powers, CRS did not consider how that can be squared with a ban on exercising those functions. The report instead is devoted to two other questions: what powers can be considered “administrative” within the meaning of Section 1066(b) and what powers fall under Subtitle F.

The CFPB had no reason to challenge these interpretations of its limited interim authority in its earliest months. It had plenty of legwork to do to get the Bureau up and running and begin to examine banks, and neither the IGs nor the CRS report told the CFPB that it could not, for example, issue reports on remittances or credit scores, even though the congressional mandate to do so fell outside of Subtitle F and the reports were not administrative services.

Now that a director has been appointed and Treasury agrees that the CFPB has full powers, the casual analysis in the IG letter and the CRS report is of little consequence. If the issue is presented to a court, the court will have to take a much more serious, fresh look at the pre- and post-appointment powers and the meaning of Section 1066 in the context of the statute as a whole.

Conclusion

It would be very strange for Congress to bury an important limitation on the Bureau’s powers deep in the statute, in an indirect and obscure manner that never directly limits those powers or spells out which powers are limited and that conflicts with the careful effective date scheme laid out in the rest of the statute. A narrow reading of the Bureau’s pre- director powers creates anomalies throughout the statute.

It makes more sense to read the statute from front to back rather than from back to front. Each section specifies its own, unqualified effective date, and the Bureau’s powers and their effective dates are all established clearly and unambiguously long before one gets to Subtitle F.

This issue brief was prepared by Lauren Saunders, Managing Attorney, Washington Office, National Consumer Law Center, (202) 452-6252 x 105, lsaunders@nclc.org.

¹ This issue brief is not intended to be a comprehensive analysis. There are other legal arguments beyond those discussed here supporting the view that the Bureau had full interim powers.

² See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1018 (“Dodd-Frank Act”).

³ Subtitle D deals with Preservation of State Law.

⁴ Dodd-Frank Act § 1029A.

⁵ These rules are listed at <http://www.consumerfinance.gov/notice-and-comment/#closed>.

⁶ Dodd-Frank Act §§ 1029A, 1037, 1058.

⁷ See Dodd-Frank Act §§ 1073(e), 1078.

⁸ See Dodd-Frank Act § 1073(a).

⁹ Dodd-Frank Act § 1061(a)(1).

¹⁰ Conversely, under Section 1066(b) the Treasury Department would have continued assisting the Bureau even if a director had been in place before the transfer date. The purpose of paragraph (b) was to permit the Treasury Department to assist the Bureau, not to indirectly and cryptically permit the Bureau to exercise powers in Subtitle A and elsewhere despite the purported limits in paragraph (a).

¹¹ Report on the Restoring American Financial Stability Act of 2010, Sen. Rep. 111–176, 111th Cong., 2d Sess. at 178 (April 30, 2010) (emphasis added). The “CFP Act” is the Consumer Financial Protection Act, Title X of the Dodd-Frank Act.

¹² David H. Carpenter, Legislative Attorney, Congressional Research Service, “The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title X, The Consumer Financial Protection Bureau,” CRS Report 7-5700 at 4 (July 21, 2010).

¹³ Letter from Eric M. Thorson, Inspector General, Department of the Treasury and Elizabeth A. Coleman, Inspector General, Board of Governors of the Federal Reserve System to the Hon. Spencer Bachus and the Hon. Judy Biggert, OIG-CA-11-004, FRB-OIG 2011-01 (Jan. 10, 2011) (“IG Letter”), available at http://www.federalreserve.gov/oig/files/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf.

¹⁴ David H. Carpenter, Legislative Attorney, Congressional Research Service, “Limitations on the Secretary of the Treasury’s

Authority to Exercise the Powers of the Bureau of Consumer Financial Protection,” CRS Report 7-5700 (May 18, 2011) (“CRS Limitations Report”), available at <http://www.llsdc.org/attachments/files/314/CRS-R41839.pdf>.

¹⁵ IG Letter at 6-7.

¹⁶ CRS Limitations Report at 3.