



State of West Virginia
Office of the Attorney General

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November 28, 2017

Via Certified Mail & Email

President Donald J. Trump
The White House
1600 Pennsylvania Ave. NW
Washington, DC 20500

Attorney General Jefferson B. Sessions, III
United States Department of Justice
950 Pennsylvania Ave. NW
Washington, DC 20530

Re: Appointment of the Acting Director of the Consumer Financial Protection Bureau

Dear Mr. President and Mr. Attorney General:

We, the undersigned State Attorneys General, write to express our support for the President's decision to designate John "Mick" Mulvaney Acting Director of the Consumer Financial Protection Bureau ("CFPB"), consistent with the authority granted to him by the Federal Vacancy Reform Act of 1998 ("FVRA"). Even cursory consideration of the regulations adopted over the CFPB's brief history illustrate the sweeping consequences of that agency's actions—and the need for its Acting Director to be selected by a democratically accountable President, not the outgoing agency head.

The "Arbitration Rule," for instance, 82 Fed. Reg. 33,210 (July 19, 2017), was an overreaching, unlawful regulation that would have deprived Americans of a convenient and cost-effective way of resolving disputes through arbitration. Far from advancing the public interest and the protection of consumers as the Dodd-Frank Act requires, the Arbitration Rule ignored the public interest in liberty to contract and undercut efficiency in the markets for financial products and services. Recognizing those concerns, Congress and the President acted earlier this month to nullify the Arbitration Rule and prevent the CFPB from adopting a similar rule in the future. Pub. Law. No. 115-74.

Particularly in light of this action and other actions of the CFPB, it is clear that the Acting Director's role affords significant influence over decisions that affect the day-to-day lives of the people of our States and the country as a whole. We urge the President to quickly nominate the next permanent Director of the CFPB, and for the Senate to act expeditiously to fulfill its role of advising and consenting in the appointment of that individual. Moreover, we support the President's decision to fill the important position of Acting Director while this constitutional process plays out.

The FVRA provides full authority for the President to designate an Acting Director for the CFPB in the wake of the prior Director's resignation. As the CFPB's own General Counsel concluded in a memo released to CFPB staff today, "the President possesses the authority to designate an Acting Director for the Bureau under the FVRA, notwithstanding § 5491(b)(5) [of the Dodd-Frank Act]."¹ The FVRA is the "exclusive means" by which the President can temporarily appoint an individual to "perform the functions and duties of an Executive agency . . . for which appointment is required to be made by the President . . . with advice and consent of the Senate" while the Senate is in session, unless another statutory provision "expressly" provides otherwise. 5 U.S.C. § 3347(a). Although the Dodd-Frank Act contains a provision providing that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director," 12 U.S.C. § 5491(b)(5), this provision simply provides an additional *option* for designating an Acting Director—it does not displace the President's authority under the FVRA to choose to make the decision directly.

The statutory language, legislative purpose, and prior opinions of the Office of Legal Counsel and Department of Justice confirm this straightforward textual reading.² A federal appellate court has agreed as well, concluding that even where another statute (there, the National Labor Relations Act) specified a means of designating an acting official, the President nonetheless "is permitted to elect" to use the power conferred under the FVRA. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 555-56 (9th Cir. 2016).

Beyond this statutory analysis, principles of executive oversight and democratic accountability also support the President's decision to designate an Acting Director. In the ordinary course, only "inferior officers" may be appointed without the approval of Congress and

¹ Memorandum from Mary E. McLeod, General Counsel, to Senior Leadership Team, CFPB, at 3 (Nov. 25, 2017) ("McLeod Memorandum"), <https://assets.documentcloud.org/documents/4310651/McLeod-Memo-CFPB.pdf>; *Exclusive: U.S. consumer finance agency lawyer sides with Trump over succession*, REUTERS (Nov. 26, 2017).

² See Memorandum for Donald F. McGahn II, Counsel to the President from U.S. Department of Justice, Office of Legal Counsel, *Re: Designating an Acting Director of the Bureau of Consumer Financial Protection*, at 3-6 (Nov. 25, 2017); McLeod Memorandum, at 2.

the President, and those officers must in turn be “directed and supervised at some level by others who were appointed by Presidential nomination with the Senate’s advice and consent.” *Edmond v. United States*, 520 U.S. 651, 660, 663 (1997). Here, however, without a permanent CFPB Director (who will be subject to the ordinary appointment process, 12 U.S.C. § 5491(b)(2)), there would be no appointed and confirmed officer to “direct[] and supervise[]” the Acting Director. This means that the FVRA process the President invoked serves the important interest of making the Acting Director even more democratically accountable than would be the case under the Dodd-Frank provision. Further, in the somewhat analogous—and similarly exigent—context of recess appointments, the Constitution gives the President authority to make temporary appointments without congressional approval when the Senate is in recess. This process strikes a delicate balance between the separation of powers and individual liberty concerns on the one side, and the President’s need for the assistance of subordinates to carry out the work of an executive agency on the other, that animate the ordinary, dual-branch appointment process. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). The FVRA process enacted by Congress respects this same balance in the context of temporary designations made when the Senate is in session.

In short, where two statutes provide permissible routes by which a temporary vacancy can be filled, any ambiguity should be interpreted consistent with these principles. The need for efficient administration within the Executive Branch—particularly for an agency like the CFPB whose actions have significant, national consequences—strongly weighs in favor of an interpretation that gives the President authority to designate a temporary Acting Director of the CFPB consistent with the statutory limitations established by Congress in the FVRA. Indeed, the opposite result would allow an unelected outgoing agency director to choose a temporary successor who may be at odds with the Executive Branch’s understanding of the agency’s mission and statutory mandate—and thereby continue the CFPB’s practice of overreaching regulation that harms the interests of consumers and small financial institutions.

We support President Trump’s decisive action to designate an Acting Director of the CFPB who will safeguard the interests of the American people while the permanent appointment process continues to run its course.

Sincerely,



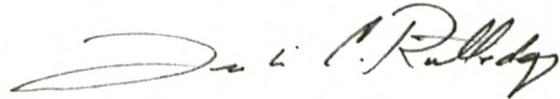
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West Virginia Attorney General



Ken Paxton
Texas Attorney General



Steve Marshall
Alabama Attorney General



Leslie Rutledge
Arkansas Attorney General



Pam Bondi
Florida Attorney General



Mike Hunter
Oklahoma Attorney General

cc: The Honorable Mitch McConnell
The Honorable Chuck Schumer
John "Mick" Mulvaney, CFPB
Leandra English, CFPB
Mary McLeod, CFPB