

Trump Will Struggle To Fire Cordray During DC Circ. Review

By **Evan Weinberger**

Law360, New York (February 16, 2017, 9:20 PM EST) -- Any plans President Donald Trump had of firing Consumer Financial Protection Bureau Richard Cordray became more complicated when the D.C. Circuit vacated and elected to review a court decision giving the president the power to fire Cordray at will rather than for cause, experts say.

In agreeing Thursday to the en banc review, the D.C. Circuit vacated an October ruling that made the CFPB an executive, rather than independent, agency. The decision has made firing Cordray, a move that has been hotly anticipated by the financial services industry and Republicans in Congress, that much more difficult. Until the case is resolved, Trump will not be able to rely on policy disagreements to dismiss the director, according to Alan Kaplinsky of Ballard Spahr LLP.

In the D.C. Circuit case awaiting en banc review, mortgage servicer PHH Corp. argues that the single-director leadership structure did not provide a sufficient check on Cordray's power, making it a violation of the Constitution's separation of powers.

"In light of [Thursday's] ruling, and at least until the PHH case has run its course, I think that Trump is unlikely to try to remove Cordray without 'cause.' He might still try to remove him for cause, but that certainly will engender a separate court fight," Kaplinsky said.

Cordray's future has been among the hottest topics in banking since Trump's surprise win in November. The D.C. Circuit's October ruling would have eliminated the for-cause standard that currently exists under the Dodd-Frank Act. But with that decision stayed, Cordray now has some breathing room.

In October, a split three-judge panel ruled that the CFPB's single-director leadership structure was unconstitutional, and rectified this by transforming the independent agency into an executive agency where the president could fire the CFPB's director at will. The extensiveness of the CFPB director's power has been a common refrain among the financial services industry and the bureau's Republican opponents.

"The president is a check on and accountable for the actions of those executive agencies, and the president now will be a check on and accountable for the actions of the CFPB as well," U.S. Circuit Judge Brett Kavanaugh wrote for the panel in October.

The CFPB filed for an en banc review soon after, staying the decision and leaving a large amount of

ambiguity in place as to what Trump could do with Cordray. There had been speculation that Trump was waiting until the D.C. Circuit made its decision on the en banc review before making a move on Cordray.

Others had speculated that the president wanted to have either his attorney general nominee, Jeff Sessions, or his Treasury secretary nominee, Steven Mnuchin in place, or both, before firing the CFPB director.

Now that the decision is vacated and Cordray and his bureau will have the opportunity to defend itself yet again, the CFPB's director has time on his side, said Phillip Schulman, a partner with Mayer Brown LLP.

"The court is saying they're going to weigh in on the constitutional issue. The initial judgment which found that the CFPB is not constitutionally structured is not on the table," he said.

Because of that, Trump would have to find a cause beyond any sort of policy disagreement in order to fire Cordray. Since the CFPB's director is widely believed to be willing to sue the president if his termination papers come along, that cause would likely have to withstand tough legal scrutiny.

"The whole point of having a for-cause standard for termination is you can't just use policy disagreement to remove an independent officer," said Deepak Gupta, the founding principal of Gupta Wessler PC, and a former CFPB attorney.

The D.C. Circuit has set oral arguments in the case, which was originally launched by PHH in an appeal of a \$109 million disgorgement order Cordray and the CFPB handed down in June 2015, for late May.

A decision will likely not come for months, making it more difficult for Trump to fire Cordray, according to Gupta, who is also representing Citizens for Responsibility and Ethics in Washington in its lawsuit challenging Trump over violations of the Constitution's emoluments clause.

"I think it would be a huge mistake for the White House to take matters into his own hands," he said.

With the administration already reeling from several courts putting a halt to Trump's ban on refugees and other travelers from seven primarily Muslim countries, Trump is facing a judiciary that may be skeptical of the president's willingness to act in good faith, Gupta said.

"I don't think the travel ban is unrelated here," he said.

Cordray's five-year term expires in July 2018.

And with the D.C. Circuit taking a second look at PHH's constitutional challenge, the odds of Cordray riding out his full tenure before Trump can put a new director of his choosing in charge just went up.

--Editing by Pamela Wilkinson and Philip Shea.