IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., *et al.*, *Plaintiffs,* v. CONSUMER FINANCIAL PROTECTION BUREAU, *et al.*, *Defendants.*	Civil Action No. 1:18-cv-295

MOTION TO LIFT STAY OF COMPLIANCE DATE

Last July, Defendants advised the Court that they intended to file a motion to lift the stay of the compliance date for the Payment Provisions (the only provisions that remain of the rule that Plaintiffs challenge in this case), on the ground that staying the compliance date was no longer warranted in light of recent developments. ECF No. 71 at 3. The Court requested that the parties instead file cross-motions for summary judgment so that the case could proceed expeditiously to final resolution. ECF No. 72; *see* ECF No. 73 at 1-2. The parties filed those motions, and briefing concluded on December 18, 2020. Last week, Plaintiffs notified the court about "potentially relevant" cases pending before the Fifth Circuit, implying that this Court should defer decision on summary judgment until the Fifth Circuit rules in those cases. ECF No. 93. As Defendants explain in a response filed concurrently with this motion, those cases do not warrant delay here.

If, however, the Court wishes to defer final judgment until those cases are decided, Defendants respectfully suggest that the Court should at a minimum lift the stay of the

compliance date for the Payment Provisions in the meantime. The parties only ever offered one reason why those provisions should be stayed—because Plaintiffs had a "substantial case on the merits" of their claim that the Rule was promulgated by a Bureau Director who was unconstitutionally insulated from removal by the President. That reason is no longer valid under Supreme Court precedent. The Court should therefore lift the stay of the compliance date so that the Payment Provisions' important and reasonable consumer-protection measures can finally take effect.[1]

BACKGROUND

Plaintiffs Community Financial Services Association of America, Ltd., and Consumer Service Alliance of Texas brought this suit to challenge the Consumer Financial Protection Bureau's 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans rule (2017 Payday Rule or 2017 Rule). That Rule contained two primary components—(1) underwriting provisions requiring lenders to assess borrowers' ability to repay before making covered loans (Underwriting Provisions) and (2) payment provisions governing lenders' withdrawing payments for covered loans from consumers' bank accounts (Payment Provisions). The Payment Provisions will provide two main protections for borrowers of covered loans. First, they will require lenders to provide consumers with advance notice about certain upcoming withdrawals from their accounts that consumers may not expect. 12 C.F.R. § 1041.9. Second, they will prohibit lenders from continuing to attempt to withdraw payment directly from a consumer's account in circumstances where the attempt would likely result in substantial fees for the (likely already financially distressed) consumer, without much chance of resulting in payment for the

[1] Counsel for Defendants conferred with counsel for Plaintiffs. Plaintiffs oppose this motion because they do not agree to the relief requested.

lender. *See id.* § 1041.8. As initially promulgated, the Rule established August 19, 2019, as the compliance date for the entire Rule. 82 Fed. Reg. 54472, 54472 (Nov. 17, 2017).

Stay of Compliance Date. In May 2018, the parties jointly moved the Court to stay the litigation and to stay the compliance date for the entire Rule. ECF No. 16. The parties stated that they agreed that "Plaintiffs have presented 'a substantial case on the merits' on at least some of their claims," but did not provide further explanation and instead offered to provide briefing on the topic if helpful. *Id.* at 5. The Court denied this request to stay the Rule's compliance date, but it stayed the litigation in light of the Bureau's plans to conduct a new rulemaking revisiting the Rule. ECF No. 29.

In response, Plaintiffs filed an unopposed motion for reconsideration. ECF No. 30. Plaintiffs' motion provided no further explanation of why Plaintiffs had a likelihood of success on the merits or met any of the other factors required for a compliance-date stay.

The Bureau supported that request for reconsideration with a separate brief. ECF No. 34. In its filing, the Bureau offered two reasons why Plaintiffs had established a substantial case on the merits that could justify a stay—one reason that applied only to the (since-revoked) Underwriting Provisions and one that applied to the entire Rule. *See id.* at 9-19. As for the challenge to the entire Rule, the Bureau acknowledged that Plaintiffs may have established a substantial case on the merits of their separation-of-powers claim that the entire Rule must be set aside because it was promulgated by an agency whose Director was unconstitutionally insulated from presidential removal. *See id.* at 11 n.4. That was the sole reason either party ever gave for staying the Payment Provisions.

The Court ultimately stayed the entire Rule on November 6, 2018. ECF No. 53.

Subsequent Rulemaking. In February 2019, The Bureau issued a notice of proposed rulemaking that proposed to rescind the Rule's Underwriting Provisions. 84 Fed. Reg. 4252 (Feb. 14, 2019). That notice explicitly stated that "[t]he Bureau is not proposing to reconsider the Payment Provisions of the 2017 Final Rule," and that if the Bureau later determined that action was warranted on those provisions, it would "commence a separate rulemaking initiative." *Id.* at 4253.[2]

On July 7, 2020, the Bureau issued a final rule revoking the Underwriting Provisions of the 2017 Payday Rule. 85 Fed. Reg. 44,382 (July 22, 2020). Consistent with the proposal, the final rule did not amend the Payment Provisions in any way. *See id.* at 44388. The same day, the Bureau issued a notice announcing that it was "affirm[ing] and ratify[ing] the payment provisions of the 2017 Final Rule." 85 Fed. Reg. 41095, 41905 (July 13, 2020).

This Litigation Resumes. After the Bureau issued the rule revoking the Underwriting Provisions, the parties jointly moved to lift the stay of this litigation. ECF No. 71. The Bureau stated that it intended to move to lift the stay of the compliance date promptly after the stay of the litigation was lifted. ECF No. 71 at 3. In response, the Court held a telephonic conference with the parties on August 5, 2020. ECF No. 72. During that conference, the Court indicated that it preferred to reach a final judgment quickly rather than ruling on an interlocutory motion to lift the stay. Following that guidance, the Bureau did not move to lift the compliance-date stay at

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[2] By then, companies had already been on notice for several months that the Bureau did not intend to revisit the Payment Provisions. The Bureau had announced on October 26, 2018, that it planned for its rulemaking to address only the Underwriting Provisions, not the Payment Provisions, of the Rule. CFPB, *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/.

that time, and the parties instead filed cross-motions for summary judgment. Briefing on those motions concluded on December 18, 2020.

ARGUMENT

In considering whether to stay a compliance date, courts consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Texas v. EPA*, 829 F.3d 405, 424, 435 (5th Cir. 2016) (quoting *Nken v. Holder*, 556 U.S. 418 (2009)). If—and only if—"there is a serious legal question involved and the balance of equities heavily favors a stay," a party "only needs to present a substantial case on the merits" in order to satisfy the first stay factor. *Weingarten Realty Investors v. Miller*, 661 F.3d 904, 910 (5th Cir. 2011). These factors no longer support a stay in this case.

A. Plaintiffs Have Not Established a Likelihood of Success or Substantial Case on the Merits

The less stringent "substantial case on the merits" standard no longer applies here,[3] but a stay is no longer warranted even under that standard. The only basis either party ever gave for why Plaintiffs had established a substantial enough case on the merits to support a stay of the Payment Provisions' compliance date was that the Rule was promulgated by a Bureau Director who was protected by a statutory provision that purported to limit the President's ability to remove him. ECF No. 34 at 11 n.4. That reasoning is no longer valid. The Supreme Court has since made clear that the statutory removal restriction was unconstitutional, but that that constitutional problem does not make the Bureau's actions invalid.

[3] For the reasons explained in section B below, the equities no longer favor a stay at all, let alone "heavily."

In June 2020, the Supreme Court held in *Seila Law, LLC v. CFPB*, that the Bureau's "leadership by a single individual removable only for inefficiency, neglect, or malfeasance" unconstitutionally impeded the President's Article II power to execute the law. 140 S. Ct. 2183, 2197 (2020). The Court "limit[ed] the solution to the problem," however, and held that the unconstitutional removal restriction was severable from the remainder of the Bureau's organic statute. *Id.* 2209. Following that decision, the Bureau's Director—by then subject to the President's plenary supervision—ratified the Payment Provisions of the Rule. 85 Fed. Reg. at 41905-06. With that ratification by a Director removable at will, any cause to complain that the Payment Provisions were adopted without adequate presidential oversight disappeared.

Collins v. Yellen, 141 S. Ct. 1761 (2021), confirms that Plaintiffs cannot obtain relief based on the unconstitutional removal provision. Following *Seila Law*, *Collins* held unconstitutional a statutory provision purporting to limit the President's power to remove the single director of the Federal Housing Finance Agency violated the separation of powers. *Id.* at 1783-84. But, the Court held, that did not mean that actions taken by the agency were "void *ab initio* and must be undone." *Id.* at 1788 n.24; *see also id.* 1787-88. It rejected that view—the very view that Plaintiffs advance here—as "neither logical nor supported by precedent." *Id.* at 1787 (rejecting argument that unconstitutionally insulated directors' "actions were … void *ab initio*"); *cf.* First Am. Compl. ¶ 95 (ECF No. 76) (claiming that "Rule was void *ab initio*" because of the unconstitutional removal provision).

The Court held that it was "possible" that the challengers could obtain some type of relief, but only if they could show that the unconstitutional removal restriction itself actually caused "harm." *Collins*, 141 S. Ct. at 1788-89; *see also id.* at 1789 (Thomas, J., concurring) ("The Government does not necessarily act unlawfully even if a removal restriction is unlawful

in the abstract.”). Here, Plaintiffs can show no harm that would entitle them to the relief they seek: invalidation of the Payment Provisions. They argue at length that the removal restriction prevented President Trump from removing Director Cordray (President Obama’s appointee who led the Bureau when it promulgated the 2017 Rule). But even if that were true, Plaintiffs cannot show that it caused them the harm they seek to avoid—their (future) obligation to comply with the Payment Provisions. *See Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part) (“agree[ing]” with majority that relief is available only where the removal restriction “affected *the complained-of decision*” (emphasis added)). It did not. Regardless of whether President Trump would have fired Director Cordray, President Trump’s own appointee expressly ratified those Provisions *after* the removal provision was held invalid, at a time when the President Trump indisputably had the power to remove the Bureau’s Director at will. 85 Fed. Reg. 41905 (July 13, 2020). That approval by a Director subject to the President’s plenary supervision conclusively shows that the President had adequate oversight over the Payment Provisions and that the prior restriction on his removal power provides no basis to invalidate them.

B. The Balance of Equities Does Not Support a Stay.

The equities do not support staying the Payment Provisions any longer.[4] The Payment Provisions impose only modest requirements on lenders: They must provide certain disclosures, and they must obtain additional authorization before making certain attempts to withdraw payment that would not likely succeed anyway. Plaintiffs have never established that their

[4] At the outset of this case—when Plaintiffs were challenging the whole of the original Rule and the Bureau planned to reconsider it—the Bureau agreed that the balance of equities favored a stay. The (since-revoked) Underwriting Provisions would have dramatically reduced loan volume and lender revenue and caused many businesses to shut down. At the same time, the Bureau and the public faced no significant harm from staying the Rule given that the Bureau intended to reconsider it (and had not yet decided to leave the Payment Provisions unchanged). Those factors are no longer present.

compliance costs would be significant. And, at this point—nearly four years after the Provisions were first promulgated, nearly three years after the Bureau announced it did not plan to revisit them, and over a year since a Director fully accountable to the President ratified them—Plaintiffs could not credibly claim that their members have not had adequate time to prepare to comply. Indeed, in their summary judgment briefing, Plaintiffs concede that 286 days would give them a "reasonable" implementation period. ECF No. 84 at 18. The only basis for the compliance-date that either party has ever offered disappeared well over 286 days ago when the Bureau, with the approval of a Director fully accountable to the President, ratified the Payment Provisions—and Plaintiffs have now had more than 370 days since that ratification to prepare for compliance.

On the other side of the balance, continuing to stay the Payment Provisions would harm the Bureau's and the public's interest in having those provisions' important protections take effect. Those provisions guarantee consumers advance notice about upcoming account withdrawals that they may not expect and protect consumers from substantial fees and other harms that can result from repeated unsuccessful attempts to withdraw payments from their accounts. Plaintiffs cannot show that they face any harm that would outweigh the public's interest in gaining these important protections.

CONCLUSION

For the foregoing reasons, the Court should lift the stay of the compliance date for the Payment Provisions of the Rule.

Dated: July 22, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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[PROPOSED] ORDER

Before the court in the above styled and numbered case is Defendants' Motion to Lift Stay of Compliance Date. Having considered the motion, the case file, and the applicable law,

IT IS ORDERED that Defendants' motion to lift stay of compliance date is **GRANTED**. By order entered on November 6, 2018, this Court stayed, pending further order of the Court, the August 19, 2019, compliance date of the "Payday, Vehicle Title, and Certain High-Cost Installment Loans" rule published by the Bureau of Consumer Financial Protection in the Federal Register on November 17, 2017, 82 Fed. Reg. 54472. ECF No. 53. It is hereby **ORDERED** that that stay is **LIFTED**.

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SIGNED this _____ day of __________.

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THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE