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

PLAINTIFFS' ADDITIONAL BRIEFING ON COMPLIANCE DATE

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Plaintiffs submit this memorandum in response to the Court's request for briefing on the appropriate compliance date if it were to deny Plaintiffs' motion for summary judgment and grant Defendants' motion for summary judgment. As explained in Plaintiffs' opposition to the Bureau's motion to lift the stay, ECF No. 97 ("Stay Opp'n"), any order lifting the stay—whether entered before or in connection with a summary judgment ruling—should set the compliance date no earlier than 445 days (or, at a minimum, 286 days) from the date the Court lifts the stay, reflecting the time left for compliance when the stay was sought (or entered). As the Bureau has conceded, the stay was designed to relieve Plaintiffs' members of the burdens of *implementing* costly, time-consuming, and possibly unnecessary, business changes needed to comply with the payments provisions. The stay, in other words, tolled the compliance period. Plaintiffs' members therefore reasonably relied on the stay to defer the lengthy and costly implementation process. The contrary contention—that Plaintiffs' members should have effectively conceded the merits and voluntarily spent millions to prepare for compliance notwithstanding the stay—is a bait-and-switch that demeans the judicial process and this Court's authority.[1]

I. ANY ORDER LIFTING THE STAY OF THE COMPLIANCE DATE SHOULD RESTORE THE PRE-STAY STATUS QUO.

If the Court grants the Bureau's motion for summary judgement and lifts the stay, it should restore the parties to the pre-stay status quo, providing Plaintiffs' members with the time left for implementation that they had when they sought the stay (445 days) or, alternatively, when the Court entered the stay (286 days). That reflects how stays of this type ordinarily operate, holds the Bureau to its bargain, and avoids making Plaintiffs' members worse off than before the stay.

As originally promulgated, the 2017 Rule gave lenders twenty-one months before

[1] If the Court were to hold that the stay did not toll the compliance period, then it should remand to the agency for notice-and-comment rulemaking to set a new compliance date. In all events, the Court should leave the stay in place pending an appeal of this Court's judgment.

compliance would be required, which the Bureau viewed as necessary to give lenders "enough time for an orderly implementation period" and to "reasonably adjust their practices to come into compliance." 82 Fed. Reg. 54,472, 54,814 (Nov. 17, 2017). The Bureau drew no distinction between the underwriting provisions and the payments provisions. *See id.* at 54,472. The Bureau re-embraced that time frame when the parties jointly moved to stay the compliance date, telling the Court that any stay should "preserve the amount of time for bringing . . . operations into compliance that Plaintiffs' members currently have from the date of this motion to the Payday Rule's current compliance date." Jt. Mot., ECF No. 16, at 5. At that time, the implementation period had over fourteen months (445 days) remaining; *both parties* agreed that such a stay should toll the compliance period—*i.e.*, "preserve th[at] amount of time"—such that Plaintiffs' members would have 445 days *from the date the stay were lifted* to prepare for compliance. *See* Stay Opp'n at 13–14. When the court granted the stay several months later, Plaintiffs' members still had nearly ten months (286 days) to bring their businesses into compliance.

The parties' joint request reflected the conventional understanding of how a stay of agency regulation ordinarily operates. A "temporary stay under 5 U.S.C. § 705" is designed to "preserve the status quo," *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 19 (D.D.C. 2012), so that "judicial review of the underlying regulation [may] proceed in a 'just' manner," *Bauer v. DeVos*, 325 F. Supp. 3d 74, 107 (D.D.C. 2018). Status quo means "[t]he situation that existed before something else (being discussed) occurred." *Status Quo Ante*, Black's Law Dictionary (11th ed. 2019). *This stay* preserved the status quo by freeing Plaintiffs' members from the burdens of *implementation*, as the Bureau conceded when it joined the stay motion. So understood, the § 705 stay *had* to toll the implementation period, or at least the time that had not yet run when the stay was entered.

In analogous cases, courts have recognized that this is how § 705 stays operate to preserve

the status quo. For instance, in lifting the stay of an EPA rule, the D.C. Circuit "restore[d] the status quo preserved by the stay," by setting the compliance date 128 days from the order, giving the parties the time "they had remaining when the stay was imposed." Order, *Michigan v. EPA*, No. 98-1497 (D.C. Cir. June 22, 2000), Doc. 524995 (attached hereto as Exhibit A).

Far from preserving the status quo, not tolling the implementation period would put Plaintiffs' members in a far worse position than had they not sought a stay. Having had many months left to comply when the stay was sought and entered, and having reasonably relied on the stay, Plaintiffs' members have refrained from implementing the costly and possibly unnecessary changes necessitated by the payments provisions. *See* Decl. James A. Ovenden Supp. Pls. Opp'n to Defs. Mot. Summ. J., ECF No. 84-1, ¶ 4. As detailed in a declaration submitted with prior briefing, such implementation would entail a complete overhaul of their internal compliance systems and external client communications, necessitating extensive testing, new recordkeeping, re-training of employees, restructuring of outside vendor relationships, and similar burdens. *Id.* ¶¶ 5–9. These changes will take substantial time ("between six and twelve months") to implement. *Id.* ¶ 9. Moreover, the cost and time required to implement necessary changes has exponentially grown due to the COVID-19 pandemic, which was completely unanticipated at the time the original stay went into effect. *Id.* ¶¶ 8–11.

If the Court does not restore the pre-stay status quo and instead shortens the implementation period, Plaintiffs' members will face these heavily burdensome compliance costs multiplied by a greatly accelerated timetable. *Id.* ¶ 10 ("millions of dollars in additional costs" due to shortened implementation period). And members who could not meet the shortened implementation deadline would be forced to stop making loans or face Bureau enforcement actions.

In short, as it was designed to do, the stay has protected Plaintiffs' members from incurring

implementation costs while this litigation was pending. They reasonably and in good faith relied on the stay. If the Court were to "lift the stay," it should restore the pre-stay status quo and hold the Bureau to the bargain it made when the stay was entered.

The most equitable result would be to restore the status quo as of May 31, 2018, the date of the parties' original stay request, by setting the compliance date at 445 days after the stay is lifted. As noted, this would reflect the parties' original bargain. *See* Jt. Mot. at 5 (stay should "preserve the amount of time . . . from the date of this motion"). It would also account for the unusual length of time (five months) between the parties' motion and the Court's grant of the stay via reconsideration of its denial of Plaintiffs' unopposed motion for reconsideration of that original motion. *See* Order, ECF No. 53. At a minimum, the new compliance date can be no earlier than 286 days from when the stay is lifted, reflecting the amount of time left on the implementation clock when the Court entered the stay.

II. REQUIRING IMMEDIATE COMPLIANCE WOULD VIOLATE THE APA.

If the stay did not toll the compliance period, then the Bureau will need to set a new compliance date via notice-and-comment rulemaking. The original compliance date of August 19, 2019, has long since passed. Adoption of a new compliance date constitutes a substantive change of the Rule, which must undergo notice-and-comment rulemaking. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015); Stay Opp'n at 17. That procedure limits the Bureau's ability to impose deadlines by fiat, and ensures that the Bureau will have input from experts, the public, lenders, and other interested parties on what a reasonable implementation period would be.

Additionally, regardless of the procedure required, abruptly altering the compliance period—from the initial 21-month implementation period to no implementation period following a lifting of the stay—is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016); Stay Opp'n at 17–18. The Bureau's apparent proposal for immediate

compliance flatly contradicts its prior positions—from the notice of proposed rulemaking, to the final rule, and down to its previous litigation position. At a minimum, the Bureau must "display awareness that it is changing position," explain its change, and take into account that its prior positions "engendered serious reliance interests." *Encino Motorcars*, 136 S. Ct. at 2126 (cleaned up); *see also Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020) (agency must "weigh" "reliance interests" "against competing policy concerns").

III. THE COURT SHOULD MAINTAIN THE STAY PENDING APPEAL.

If the Court grants summary judgment to Defendants, it should maintain the stay pending appeal. This Court's deliberate and careful consideration of the issues presented herein, combined with the slew of Supreme Court and Fifth Circuit decisions grappling with related vexing merits questions, demonstrates that "the legal questions presented by this case are serious, both to the litigants involved and the public at large, and that a substantial question is presented for" resolution. *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014); *see also Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981). Plaintiffs have made an objectively strong showing on the merits. And the equities weigh heavily in favor of a stay given: (1) the Fifth Circuit's imminent decisions in related cases, (2) the irreparable harm that would result from costly compliance pending appeal, and (3) the Bureau's illusory harm in awaiting a conclusive adjudication of Plaintiffs' challenge.

CONCLUSION

For the foregoing reasons, if the Court were to grant summary judgment for Defendants, it should set the compliance date for the payments provisions at 445 days (or, at a minimum, 286 days) from the date the stay is lifted. Absent returning the parties to the pre-stay status quo, the Court should remand to the agency to set a new compliance date via notice-and-comment rulemaking. In all events, the Court should maintain the stay pending appeal.

Dated: August 6, 2021

Respectfully submitted,

/s/ Laura Jane Durfee

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of August 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: August 6, 2021

/s/ Laura Jane Durfee
Laura Jane Durfee
Counsel for Plaintiffs