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United States Senate

COMMITTEE ON BANKING, HOUSING, AND
URBAN AFFAIRS

WASHINGTON, DC 20510-6075

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August 14, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Kraninger:

I write to request that the Consumer Financial Protection Bureau (CFPB or Bureau) implement the “payment” provisions of the 2017 Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule (Payday Rule) by the scheduled August 19, 2019, compliance date. The Bureau has not initiated a rulemaking to delay or rescind this portion of the Payday Rule. As the Bureau argued in court filings, there is no legal basis to delay the scheduled August 19, 2019, compliance date.

The Payday Rule generally prohibits two types of unfair and abusive lender practices. First, the Payday Rule makes it an unfair and abusive practice for a lender to make certain loans without determining that the consumer has the ability to repay the loans.¹ Second, the Payday Rule prohibits lenders from attempting to withdraw payments from consumers’ accounts for certain loans after two prior attempts to withdraw funds failed due to a lack of funds.²

The Payday Rule that the Bureau issued on October 5, 2017, would have provided substantial and much needed protections to consumers from predatory payday lenders. But just three months after finalizing the Payday Rule, the Bureau—under then Acting Director Mick Mulvaney—sided with industry and began efforts to repeal the Rule. In January 2018, the Bureau announced that it would initiate a rulemaking process to reconsider the Payday Rule.³ In April 2018, Bureau political appointees met with an industry trade group for payday lenders to discuss a lawsuit or potential repeal of the Payday Rule.⁴ A few days later, payday lenders filed their lawsuit against the Bureau challenging the Payday Rule.⁵

¹ 12 C.F.R. § 1041.4.

² 12 C.F.R. 1041.7.

³ See Jan. 16, 2018 CFPB Statement on Payday Rule, *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-statement-payday-rule/>.

⁴ See <https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html>.

⁵ *Cnty. Fin. Svcs. Ass’n v. CFPB*, Case No. 1:18-cv-295 (W.D. Tex. Apr. 9, 2018).

From the outset, the Bureau has been joined at the hip with the payday lender plaintiffs to delay the implementation of the Payday Rule. On May 31, 2018, the Bureau and the payday lender plaintiffs submitted a joint filing asking the court to stay the litigation *and* the August 19, 2019 compliance date for the Payday Rule. The Court initially stayed the litigation, but refused to stay the August 19, 2019, compliance date.

On October 26, 2018, the Bureau announced that it would initiate a rulemaking to delay the compliance date and revisit the mandatory underwriting provisions, but not the payment provisions, of the Payday Rule.⁷ Based on the proposed rulemaking, on November 6, 2018, the court also stayed the compliance date for the Payday Rule.⁸ On February 14, 2019, the Bureau initiated a rulemaking to rescind the mandatory underwriting provisions of the Payday Rule and delay the compliance date for these provisions to November 19, 2020.⁹ The Bureau's rulemaking did not seek to delay the compliance date or repeal the payment provisions of the Payday Rule.

On March 8, 2019, the Bureau and the payday lender plaintiffs filed a joint update with the court. The payday lender plaintiffs argued that the court should continue to stay the compliance date for both the mandatory underwriting provisions and the payment provisions of the Payday Rule, even though the Bureau's rulemaking only sought to delay and repeal the mandatory underwriting provisions.¹⁰ The Bureau disagreed:

[T]he possibility that the Bureau may revise the payments provisions does not justify continuing to stay the compliance date of those provisions And, in any event, even definitive plans to undertake a rulemaking process do not by themselves justify staying the *compliance date* of a rule (as opposed to litigation over a rule). Rather, a stay of a compliance date is warranted only if the plaintiff can show various factors, including a likelihood of success on the merits, or at least a "substantial case on the merits" Plaintiffs have not attempted to make that showing in asking the Court to keep the compliance date for the payments provisions stayed until the Bureau completes its rulemakings that address the separate underwriting provisions.¹¹

In sum, the Bureau argued that there is no legal basis to stay the compliance date for the payment provisions. But the Bureau then decided that it would not seek to lift the stay.¹² Since then,

⁷ Oct. 26, 2018 CFPB Statement on Payday Rule, *available at* <https://www.consumerfinance.gov/about-us/newsroom/public-statement-regarding-payday-rule-reconsideration-and-delay-compliance-date/>.

⁸ *CFSA v. CFPB*, Nov. 6, 2018 Order (Doc. 53).

⁹ *See* 84 Fed. Reg. 4252, 4298.

¹⁰ *CFSA v. CFPB*, Mar. 8, 2019 Joint Status Report at 3-5 (Doc. 57).

¹¹ *Id.* at 7 (emphasis in original).

¹² The court captured the absurdity in its order. According to the Bureau, the plaintiff payday lenders "would only be entitled to a stay if Plaintiffs can show various factors, including a likelihood of success on the merits, or at least a 'substantial case on the merits.'" *CFSA v. CFPB*, Mar. 19 2019 Order at 2-3

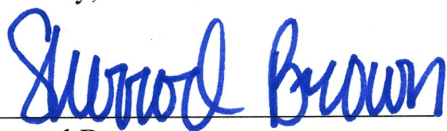
including in its most recent court filing on August 2, 2019, the Bureau has continued to refuse to request that the court lift the stay of the compliance date for the payment provisions of the Payday Rule.¹³

The Bureau's refusal to request to lift the stay of the compliance date for the payment provisions makes no sense and exposes consumers to continued withdrawal requests, resulting in unnecessary fees. On the one hand, the Bureau argues there is no legal basis to stay the compliance date for the payment provisions. On the other hand, the Bureau is not challenging the stay. The Bureau's inaction is also contrary to the plain language of the Administrative Procedures Act, which provides that a court may only postpone the effective date of an agency action "to the extent necessary to prevent irreparable injury" or "to preserve status or rights pending conclusion of review proceedings."¹⁴ Here, as the Bureau itself argued, the payday lender plaintiffs have not even attempted to show that they would be irreparably harmed by the implementation of the payment provisions.

I strongly urge you to immediately request that the court lift the stay of the August 19, 2019, compliance date for the payment provisions of the Payday Rule. As the Bureau explained—there is no legal basis for a stay. Implementing this provision would protect consumers by reducing the fees they are charged and other harms they suffer from lenders' unsuccessful attempts to withdraw funds from their accounts.¹⁵ Consumers should not have to wait any longer for these important protections.

Please respond by August 19, 2019—the scheduled compliance date for the payment provisions of the Payday Rule—if the Bureau will lift the stay and implement the payment provisions of the Payday Rule. If so, please provide a timeline for implementation. If the Bureau will not request that the court lift the stay, please explain the legal basis for the decision.

Sincerely,



Sherrod Brown
United States Senator

(Doc. 58). But, the court noted, "no party is seeking to lift the compliance-date stay for the payment provisions." *Id.*

¹³ *CFSA v. CFPB*, Jun. 10, 2019 Joint Status Report (Doc. 62); Aug. 2, 2019 Joint Status Report (Doc. 63).

¹⁴ 5 U.S.C. § 705; *see also Scripp-Howard Radio v. FCC*, 316 U.S. 4, 10 (1942) (a court can only stay agency action pending court review to "prevent irreparable injury to the parties or to the public resulting from premature enforcement of a determination that may later be found to have been wrong").

¹⁵ 82 Fed. Reg. 54,847-48.