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CFPB Files Motion to Lift Stay of Payment Provisions in 2017 Payday Rule

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The Consumer Financial Protection Bureau (CFPB) recently filed a **motion to lift the stay** of the compliance date for the "payment provisions" in the **Payday, Vehicle Title, and Certain High-Cost Installment Loans Rule** (CFPB Payday Rule) first issued in November 2017. The CFPB Payday Rule contains two main types of provisions: ability-to-repay provisions and payment provisions.

The payment provisions prevent lenders from attempting to withdraw funds from a customer's account without customer consent after two failed consecutive withdrawal attempts. They also require lenders to provide written notice to a customer before making the first attempt to withdraw payments from the account, and before additional attempts that would involve different dates, amounts or payment channels.

History of litigation

The CFPB Payday Rule has a litigious history. In April 2018, two trade groups filed a lawsuit that challenged the rule. In relevant part, they argued that the CFPB Payday Rule was invalid because the CFPB was unconstitutionally structured when it promulgated the CFPB Payday Rule, given that the president could remove the CFPB's single- director only for cause. In June 2018, a Texas federal district court granted an order to stay the lawsuit. In November 2018, the court entered an order staying the compliance date for the entire CFPB Payday Rule, given the CFPB's plan to revisit aspects of it in a formal rulemaking.

In June 2020, the United States Supreme Court decided *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), holding that the CFPB's single-director structure violated the separation of powers and invalidating the statutory restriction on the president's power to remove the director. After the decision in *Seila Law LLC*, the CFPB issued a notice on July 7, 2020, announcing that the CFPB's director had affirmed and ratified the CFPB Payday Rule's payment provisions. On the same day, the CFPB issued a **final rule**, which rescinded the CFPB Payday Rule's ability-to-repay provisions, but left intact the payment provisions.

After the issuance of the final rule, both parties jointly moved to lift the stay of the lawsuit challenging the CFPB Payday Rule. The court entered an order in August 2020 lifting the stay on litigation. Thereafter, both parties cross-moved for summary judgment. In July 2021, the trade groups filed a **Notice of Potentially Relevant Appellate Proceedings** in which they informed the court of "potentially relevant" cases before the United States Court of Appeals for the Fifth Circuit that present the question of the proper remedy for acts taken by an agency "when its director was unconstitutionally insulated from removal by the President." The notice suggested that the court should defer its decision on the parties' summary judgment motions, but didn't specifically request that the court do so.

The CFPB's motion

In its recent motion, the CFPB asserts that the trade groups' notice fails to warrant a delay of the court's decision on the cross-motions for summary judgment, namely because the trade groups do not have a "'substantial case on the merits' of their claim that the [Rule] was promulgated by a [CFPB] Director who was unconstitutionally insulated from removal by the President." The CFPB asserts that although in *Seila Law LLC* the Supreme Court held invalid the statutory restriction on the president's ability to remove the CFPB's director, that determination does not invalidate the payment provisions because "a Director fully accountable to the President" has already ratified them. The CFPB requests that even if the court defers its ruling on the payment provisions until the resolution of the Fifth Circuit cases, the court should lift the stay of the compliance date for the payment provisions in the interim. In support of this request, the CFPB argues that whereas the payment provisions "impose only modest requirements on lenders," the plaintiffs have had more than a year to prepare for compliance since the director's ratification of the provisions. The CFPB further argues that a continued stay "would harm the [CFPB's] and the public's interest" in having the payment provisions take effect.

Under the Biden administration, the CFPB has resumed a more active role in enforcing consumer protection. The motion signals the CFPB's readiness for a resolution to the lawsuit and a desire to move forward with implementation of the payment provisions.

Key Contacts

Elyse Moyer Washington, DC	emoyer@cooley.com +1 202 776 2113
Obrea Poindexter Washington, DC	opoindexter@cooley.com +1 202 776 2997
Robby L.R. Saldaña Washington, DC	rsaldana@cooley.com +1 202 776 2109