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

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., and CONSUMER SERVICE ALLIANCE OF TEXAS, *Plaintiffs,* v. CONSUMER FINANCIAL PROTECTION BUREAU and KATHLEEN KRANINGER, in her official capacity as Director, Consumer Financial Protection Bureau, *Defendants.*	Civil Action No. 1:18-cv-295

DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In their latest brief, Plaintiffs double down on constitutional arguments that have been rejected by every court of appeals to have considered them. These courts have unanimously held that ratification of a prior agency action can cure an initial Article II defect with that action. This rule has been applied to so-called "structural" separation-of-powers problems as well as to agency rulemakings. With respect to the statutory removal provision at issue here, every court to have considered a ratification by the Bureau after that provision was held invalid in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), has agreed that ratification provided an appropriate remedy. Plaintiffs' attempts to prove otherwise boil down to the made-to-measure claim that ratification is available in a wide range of situations—just not the exact circumstances here.

Plaintiffs' claim that the ratification here is arbitrary and capricious fares no better. Again relying on arguments that have been repeatedly rejected, they say the Bureau was required to provide an explanation of the ratification separate and apart from its reasoned explanation for the ratified rule itself. But this erroneously "conflate[s] ratification doctrine with APA requirements prior to agency action." *Moose Jooce v. FDA*, No. 18-cv-203, 2020 WL 680143, at *6 (D.D.C. Feb. 11, 2020), *aff'd*, No. 20-5048, 2020 WL 7034417 (D.C. Cir. Dec. 1, 2020). The APA does not require agencies to explain the same action twice. In any event, Plaintiffs' claimed "unexplained inconsistencies" between the ratification and the Payment Provisions it ratified are not inconsistencies at all—they rely on misunderstandings of the rulemaking record and reiterate claims this Court has already rejected.

Plaintiffs' attempts to challenge the Payment Provisions themselves are similarly unavailing. In their latest brief, Plaintiffs largely abandon their prior arguments about the Bureau "fail[ing] to consider … important aspect[s] of the problem," such as the differences between payment types. *See* Pls.' Mot. for Summ. J. at 25 ("Pls.' Mot.") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), ECF No. 80. Faced with the evidence that the Bureau *did* in fact consider these issues, Plaintiffs now reframe their arguments as challenges to the sufficiency of the evidence the Bureau relied upon or the comprehensiveness of the Bureau's analysis. But the record does not support these claims, either. The Payment Provisions amply explain the bases for the selected policy choices, and Plaintiffs do not point to any obvious policy options that the Bureau failed to consider. Likewise, the rulemaking record's reasonable treatment of the differences between payment types, along with the Bureau's busy rulemaking agenda, justified the denial of Advance Financial's rulemaking petition.

The Court should deny Plaintiffs' motion for summary judgment, grant the Bureau's cross-motion, and in short order vacate the stay of the Payment Provisions.

ARGUMENT

I. Plaintiffs' Constitutional Objection to the Payment Provisions Has Been Resolved.

The Bureau's cross-motion explained that the review and ratification of the Payment Provisions by a Director fully accountable to the President remedied any Article II defect in the initial adoption of those provisions. As courts have long recognized, ratification remedies such problems, including in rulemaking and including with respect to separation-of-powers issues that could be labeled "structural." Just in the few weeks since the Bureau filed its cross-motion, several more court decisions have confirmed these points. *See Moose Jooce*, 2020 WL 7034417, at *2-4 (ratification of agency regulation cured Article II problem at time rule was issued); *CFPB v. Citizens Bank, N.A.*, No. 1:20-cv-0044, 2020 WL 7042251, at *7-11 (D.R.I. Dec. 1, 2020) (Bureau's ratification after *Seila Law* cured any initial Article II defect caused by statutory removal provision); *CFPB v. Fair Collections & Outsourcing, Inc.*, No. 8:19-cv-02817, 2020

WL 7043847, at *5-7 (D. Md. Nov. 30, 2020) (same). The Court should reject Plaintiffs' request to set aside the Payment Provisions because of a constitutional issue that has now been resolved.

A. The Bureau's valid ratification remedied any Article II defect in the adoption of the Payment Provisions.

As the Bureau explained in its cross-motion, case after case confirms that consideration and ratification of a prior agency action can cure an initial Article II defect with that action. *See* Defs.' Cross-Mot. for Summ. J. at 10-11, 16 ("Cross-Mot."), ECF No. 82. Plaintiffs try to minimize the heavy weight of authority against them as "a smattering of lower court cases." Pls.' Combined Opp'n and Reply at 5 ("Response"), ECF No. 84. In fact, that "smattering" includes the unanimous view of the courts of appeals that have considered the issue. *See, e.g.*, *Moose Jooce*, 2020 WL 7034417, at *2-4 (D.C. Cir. 2020); *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338-39 (6th Cir. 2017); *CFPB v. Gordon*, 819 F.3d 1179, 1190-92 (9th Cir. 2016); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016).

These cases have emphasized that an Article II problem calling into question the exercise of authority by an agency official (such as the Director's former insulation from removal) does not deprive the agency itself of the authorities given it by statute. *See Gordon*, 819 F.3d at 1192. They have concluded that ratification provides an "adequate remedy" even for so-called "structural" separation-of-powers problems. *See FEC v. Legi-Tech, Inc.,* 75 F.3d 704, 708-09 (D.C. Cir. 1996). They have approved ratifications of agency rulemakings, *see Moose Jooce*, 2020 WL 7034417, at *2-4, as well as other kinds of actions involving certain required procedures, *see Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998) (administrative enforcement proceeding). In general, they have recognized that ratification in this context is an "equitable remedy" that courts should "appl[y] flexibly." *Advanced Disposal*, 820 F.3d at 602-03.

Similar consensus exists about the specific issue with the CFPA's removal provision: Every court to have considered a ratification by the Bureau following the decision in *Seila Law* has agreed that ratification provides an appropriate remedy. *See Citizens Bank*, 2020 WL 7042251, at *7-11; *Fair Collections*, 2020 WL 7043847, at *5-7; *CFPB v. Chou Team Realty LLC*, No. 8:20-cv-00043, 2020 WL 5540179, at *3 (C.D. Cal. Aug. 21, 2020); *CFPB v. Law Offices of Crystal Moroney, P.C.*, No. 7:20-cv-03240 (S.D.N.Y. Aug. 19, 2020), ECF Nos. 29 (order), 34-5 (hearing transcript).[1]

These decisions are correct. Even in cases implicating constitutional concerns, "courts must provide a remedy tailored to the defect at issue." *Fair Collections*, 2020 WL 7043847, at *4 (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981), for the "general rule that remedies should be tailored to the injury suffered from the constitutional violation"); *see also Citizens Bank*, 2020 WL 7042251, at *9 ("'Constitutional litigation is not a game of gotcha against Congress' or the CFPB.") (quoting *Barr v. Am. Ass'n. of Political Consultants, Inc.*, 140 S. Ct. 2335, 2351 (2020)).

Here, ratification provides Plaintiffs with a remedy exactly tailored to the scope of their objections. Plaintiffs complain that the Bureau might not have chosen to adopt the Payment Provisions if it had been led by an official fully accountable to the President. That objection has been remedied by the Director's decision—while she was indisputably removable at will—to formally ratify the Payment Provisions. *See Moose Jooce*, 2020 WL 7034417, at *4 (ratification

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[1] Plaintiffs rely on a different case holding that an earlier ratification of a Bureau enforcement action by the Bureau's then-Acting Director was ineffective. *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784-85 (S.D.N.Y. 2018). In fact, this is the *sole* case Plaintiffs offer in which a timely ratification was found not to provide an adequate remedy. Plaintiffs fail to mention, however, that the judgment in that case has been vacated and the case remanded for consideration of Director Kraninger's post-*Seila* ratification. 828 F. App'x 68 (2d Cir. 2020).

of agency regulation provided "adequate remedy" for any Article II problem at time rule was issued). That ratification has retroactive effect: It "operates upon the act ratified in the same manner *as though the authority of the agent to do the act existed originally*." *Marsh v. Fulton Cnty.*, 77 U.S. 676, 684 (1870) (emphasis added); *accord Advanced Disposal*, 820 F.3d at 602 ("[T]he general rule [is] that the ratification of an act purported to be done for a principal by an agent is treated as effective at the time the act was done. In other words, … the ratification 'relates back' in time to the date of the act by the agent.").

Ratification is also a remedy appropriately tailored to take into account the other interests at stake, including the government's interest in addressing unfair and abusive practices in the consumer financial marketplace and the interests of consumers harmed by such practices. *Cf. Am. Ass'n of Political Consultants*, 140 S. Ct. at 2355-56 (rejecting challenger's request for broader remedy that "would end up harming a different and far larger set of strangers to this suit" than the narrower approach the Court did adopt); *Morrison*, 449 U.S. at 364 (remedies for constitutional violations "should not unnecessarily infringe on competing interests"). In contrast, simply discarding the Payment Provisions, as Plaintiffs urge, would harm these important interests. It could also sow significant uncertainty in the broader financial market by calling into question the validity of other Bureau rules and actions that the Director ratified after *Seila Law*. *See Citizens Bank*, 2020 WL 7042251, at *8 ("Condemning all past … CFPB actions, without the possibility of ratification" would "trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena.").[2]

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[2] This is not a case in which a more draconian remedy is needed to deter some type of bad conduct on the part of the Bureau. In crafting the Payment Provisions' common-sense requirements, "[n]either the Director nor the CFPB engaged in nefarious behavior; rather, they plugged away at the mission entrusted to them by Congress, making the best of a flawed statutory scheme. Their hands are clean." *See Citizens Bank*, 2020 WL 7042251, at *9.

At the same time, setting aside the Payment Provisions after they have been ratified by an executive branch official fully accountable to the President would undermine the very Article II authority that the Supreme Court sought to safeguard in holding invalid the removal provision. The Fifth Circuit reached a similar conclusion in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), *cert. granted*, Nos. 19-422, 19-563, in which the court declined to set aside an action taken by an agency headed by a single director who the court held was unconstitutionally insulated from the President. Undoing that action, the court explained, "would wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency; how does that make sense? … We should not invalidate those Presidents' executive actions by invoking their need to exercise executive authority." *Id.* at 594. The same logic applies to the Payment Provisions, which the Bureau promulgated under the leadership of a Director appointed by President Obama and then ratified under the leadership of a Director appointed by (and, after *Seila Law*, indisputably removable at will by) President Trump. *See Citizens Bank*, 2020 WL 7042251, at *10 (drawing the same lesson from *Collins*).

B. Plaintiffs' objections to the ratification are without merit.

Plaintiffs dispute the ratification on two main fronts. First, they claim that invalidation is the only available remedy for a potential defect in government agency action at the time the action is taken. Second, they concede that ratification might be an appropriate remedy in some cases, just not in the exact circumstances here. Both approaches fall short.

First, Plaintiffs claim that because the CFPA's removal provision rendered the Director insufficiently accountable to the President, the Bureau "was itself unconstitutional" and thus "all its acts" prior to *Seila Law* were "null and void." Resp. at 2-5, 12-14. The only option now, in Plaintiffs' view, is to set aside the Payment Provisions.

As an initial matter, that proposition is not supported by the cases Plaintiffs pile up on pages 3-4 of their Response, none of which addressed ratification, and some of which were actually followed by related decisions *approving* ratifications. *Compare, e.g.*, *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (Silberman, J.) (dismissing FEC enforcement action filed when agency's structure violated constitutional separation of powers and that had not been ratified) (cited in Resp. at 3), *with Legi-Tech*, 75 F.3d at 708-09 (Silberman, J.) (holding that "dismissal is neither necessary nor appropriate" for action that *had* been ratified); *see also* Cross-Mot. at 11 n.2 (addressing same mistake in Plaintiffs' opening brief).

On the merits, Plaintiffs' argument suffers a number of fatal flaws, beginning with the fact that the Supreme Court appears to have rejected it in *Seila Law*. In that case, Seila Law urged that if the Court found the removal provision unconstitutional, the "proper remedy" would be to "order the denial of the CFPB's petition for enforcement" of the administrative subpoena at issue there—in other words, simply hold invalid the challenged action. Br. for Pet'r at 35, *Seila Law*, 2019 WL 6727093 (U.S.); *see also id.* at 36 (claiming that the removal provision means "any exercise of executive power by the agency is void" and citing many of the same cases Plaintiffs do on pages 3-4 of their Response). The Court disagreed. It declined to set aside the subpoena as void and instead remanded for consideration of whether the subpoena "was validly ratified." 140 S. Ct. at 2211. That result would make little sense if Plaintiffs were right that the Bureau's past actions are void from the start and cannot be ratified. "If dismissal were absolutely required, [the Court] would not have remanded … as doing so would have been 'futile.'" *Fair Collections*, 2020 WL 7043847, at *2 (quoting *Seila Law*, 140 S. Ct. at 2208).

Nor does *Seila Law* otherwise support Plaintiffs' argument. Plaintiffs claim (at 12-14) that the Bureau lacked authority to issue the Payment Provisions initially and so cannot ratify them now. They focus on *Seila Law*'s occasional references to the Bureau's "structure"—*i.e.*, the combination of a removal protection and a single Director—and say this means that the Supreme Court found that the whole of the Bureau was unconstitutional. But that is not what the Court said. Instead, it reasoned that the Director's protection from removal rendered *the Director* insufficiently accountable to the President and thus called into question her exercises of executive authority. As other courts have correctly recognized, "[t]he problem was the Director, and that problem was severable, leaving the agency and its authority intact." *Fair Collections*, 2020 WL 7043847, at *6; *see also id*. ("The holding in *Seila Law* did not affect the CFPB's authority—only that of its Director."); *accord Citizens Bank*, 2020 WL 7042251, at *8 ("This Court … interprets the Supreme Court's use of the word 'structure' to refer to attributes of the CFPB's top brass, not deeper issues with the authority or makeup of the Bureau as a whole.").

The Supreme Court confirmed as much when it explained that Seila Law had been "aggrieved by *an official's* exercise of executive power" and thus, under the Court's precedents, it could seek "to challenge *the official's authority* to wield that power while insulated from removal by the President." *Seila Law*, 140 S. Ct. at 2196 (emphasis added). Similarly, the Court noted that "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties *remain* fully operative without the offending tenure restriction." *Id.* at 2209 (emphasis added). *Seila Law* did not find a problem with the authority of the Bureau itself.

Plaintiffs' argument is also foreclosed by the Fifth Circuit's en banc decision in *Collins*. In that case, the court held the Federal Housing Finance Agency's "structure" unconstitutional because the agency is led by a single director removable only for cause. 938 F.3d at 587-88. The court nonetheless concluded that it need not invalidate the FHFA action under review. *Id.* at 591-95. The court explained that the President had "adequate oversight" of the challenged action through means other than removal of the official who initially oversaw the action. *Id.* at 594. And it noted that "subsequent Presidents have picked their own FHFA directors, allaying concerns that the removal restriction prevented them from installing someone who would carry out their policy vision." *Id.* As noted above, the same reasoning applies to the Payment Provisions, which the Bureau issued and ratified under two Directors appointed by two different Presidents (the second of whom was removable at will when she ratified the Provisions).

Plaintiffs' attempts to distinguish *Collins* (Resp. at 5 n.3) are to no avail. Plaintiffs note that *Collins* "did not address ratification." But the fact that the Fifth Circuit declined to invalidate an action even though it had not been ratified cuts *against* Plaintiffs' position that invalidation is necessary here. Plaintiffs also say that *Collins* "involved unusual facts." But they do not explain what facts in *Collins* were so "unusual" as to require a different result here. None do. Finally, Plaintiffs say *Collins* did not purport to dictate what remedy would be appropriate in all circumstances. But what matters here is that *Collins* held that the remedy Plaintiffs seek—invalidation—is inappropriate in circumstances like these. 938 F.3d at 593-94.

Second, Plaintiffs attempt to distinguish the many cases that have upheld ratifications in similar circumstances, but they offer no principled basis why the result should be different here. Plaintiffs argue, for example, (at 6-7) that ratification may be possible for enforcement actions but not for regulations because rulemakings typically involve more elaborate procedural requirements than do enforcement actions. But as the Bureau previously explained, courts have upheld ratifications of agency actions that required agencies to follow detailed procedures beforehand. *See* Cross-Mot. at 16-17. Plaintiffs' argument also misses the point that ratification operates *retroactively*, meaning that once an agency action is properly ratified, it is "as though the authority of the agent to do the act existed originally," *Marsh*, 77 U.S. at 684, including throughout any intermediate steps the agency had to follow.[3]

Moreover, the D.C. Circuit recently and persuasively rejected exactly the distinction that Plaintiffs propose here, affirming that ratification of an agency regulation "cured any potential Appointments Clause defect" at the time the agency issued the rule. *Moose Jooce*, 2020 WL 7034417, at *4. (The D.C. Circuit thus agreed with the multiple district court decisions the Bureau previously cited that also approved ratifications of rules. *See* Cross-Mot. at 16.) The D.C. Circuit correctly saw no grounds for distinguishing its decisions upholding ratifications of enforcement suits, rather than regulations, and found that those decisions controlled. *Moose Jooce*, 2020 WL 7034417, at *3 (citing *Legi-Tech* and *Doolin*).[4]

Plaintiffs get no further arguing (at 8-9, 10-11) that ratification is an adequate remedy when the ratifying official is the same person who authorized the action, but it is *not* an adequate remedy when a different official considers the action and chooses to ratify it. Why would that be? If anything, consideration by a different official would seem to provide challengers with more relief, not less. Plaintiffs cite no case holding, and give no reason to think, that invalidation is required in those circumstances but is not required where it is the same official who authorizes

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[3] Plaintiffs agree that "ratification operates retroactively," Resp. at 14, but misunderstand what this means. Contrary to Plaintiffs' view, ratification of the Payment Provisions does not make those provisions *apply* retroactively, *i.e.*, to conduct occurring before the rule's compliance date—the concern at issue in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[4] Plaintiffs claim (Resp. at 7 n.4) that as a result of the decision in *Seila Law*, Bureau rulemakings must now follow additional procedures under Executive Order 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993). But Plaintiffs "cannot use the review provisions of the APA to enforce an Executive Order [such as 12,866] that is not subject to judicial review." *Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 121 (D.D.C. 2011); *see also* Exec. Order. 12,866, § 10 ("This Executive Order … does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, [or] its agencies … ."). Moreover, Plaintiffs admit that the relevant provisions of that order do not apply to the agencies listed as "independent regulatory agenc[ies]" in 44 U.S.C. § 3502 and that the Bureau is such an agency.

an action and later ratifies it. *See also Moose Jooce*, 2020 WL 7034417, at *2-4 (approving ratification by different official); *Doolin*, 139 F.3d at 214 (same).[5]

Plaintiffs' constitutional objection has been resolved by *Seila Law* and the Bureau's ratification of the Payment Provisions. It provides no grounds for simply throwing out the Payment Provisions' important and reasonable consumer-protection measures.

II. The Ratification and the Underlying Payment Provisions Are Reasonable.

Plaintiffs' challenges to the reasonableness of the ratification, and the Payment Provisions it ratified, fare no better than their constitutional claim.

A. Plaintiffs fail to show that the ratification is arbitrary and capricious.

The preamble to the 2017 Rule thoroughly explained why the Bureau was issuing the Payment Provisions, and that issuance was affirmed by the 2020 ratification. The APA requires nothing more, and Plaintiffs do not show otherwise. The explanation contained in the 2017 Rule's preamble is sufficient because, as explained above, ratification has retroactive effect, meaning that once an agency action is properly ratified, it is "as though the authority of the agent to do the act existed originally," *Marsh*, 77 U.S. at 684, including throughout any intermediate steps the agency had to follow. Plaintiffs do not point to a single case requiring an agency to

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[5] Plaintiffs' Response (at 13 n.9) adds nothing new to their argument about the Bureau's funding—an argument that two more courts recently rejected. *See Fair Collections*, 2020 WL 7043847, at *7-9 ("[T]he CFPB's funding structure complies with the Appropriations Clause's mandate."); *Citizens Bank*, 2020 WL 7042251, *13 ("The CFPB's funding does not violate the Appropriations Clause."); *see also* Cross-Mot. at 37 n.14 (compiling previous cases). Plaintiffs simply have no explanation how the statutory provisions setting the Bureau's funding could violate the Appropriations Clause's dictate that "the payment of money from the Treasury … be authorized by a statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990).

Similarly, Plaintiffs merely repeat (Resp. at 23 n.13) their unfounded claim that the Bureau's authority to promulgate rules prohibiting "unfair" and "abusive" financial practices violates the non-delegation doctrine. Plaintiffs do not even attempt to address the points in the Bureau's Cross-Motion (at 38-39), including that this claim is foreclosed by Supreme Court precedent.

provide an explanation for a ratification separate and apart from the explanation the agency already provided for the ratified rule. And they wholly ignore the case law demonstrating that no such explanation is necessary. As the Bureau noted in its opening brief, the argument that an agency had to consider new developments between the issuance of a rule and its ratification has been soundly rejected. Cross-Mot. at 20. This is because requiring consideration of post-promulgation developments would erroneously "conflate ratification doctrine with APA requirements prior to agency action." *Moose Jooce*, 2020 WL 680143, at *6. The D.C. Circuit recently affirmed this conclusion, reiterating that it is not "arbitrary and capricious for [the agency] to ratify" a rule "without considering … new evidence" presented after the closing of the original rulemaking record for the rule. *Moose Jooce*, 2020 WL 7034417, at *3.

Plaintiffs' claim that the Bureau's ratification of the Payment Provisions nevertheless required further explanation fails at the outset because it mischaracterizes this ratification as being "similar" to a ratification of a "since-rejected policy." Resp. at 15. While Plaintiffs rely on the APA doctrine requiring explanation of "abrupt 'change[s] from agency practice," no such "change" occurred here. In ratifying the Payment Provisions the Bureau did not revert to a "since-rejected policy"—it merely, through a constitutionally accountable Director, *affirmed* the Payment Provisions that the Bureau had promulgated in 2017, and had never revoked.[6]

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[6] Plaintiffs offer no support for their implied argument that an agency cannot, without further explanation, ratify a rule where post-promulgation developments may have modified some background conditions. They make only the broader argument that additional explanation is required where "agency action *A* bans a certain practice, action *B revokes that ban* … , and then action *C* 'ratifies' action *A*." Resp. at 15 (emphasis added). This is irrelevant to this case, in which no such "action *B*" revoked the Payment Provisions before the Bureau ratified them.

Even if the Bureau were required to provide any explanation of the ratification beyond the explanation in the Payment Provisions themselves, Plaintiffs' claims should still be rejected because the three "unexplained inconsistencies" they point to are not inconsistencies at all.

1. As the Bureau explained in its opening brief (at 22-23), the 2020 repeal of the Underwriting Provisions did not give rise to an "inconsistency" in the 2017 Rule's discussion of the Payment Provisions' benefits and costs. While the 2017 Rule observed that the Underwriting Provisions would lessen certain impacts of the Payment Provisions, its detailed examination of the Payment Provisions' benefits and costs did not rely on that observation. *See* 82 Fed. Reg. 54472, 54847-50 (Nov. 17, 2017). And it considered those benefits and costs as compared to a baseline in which the Underwriting Provisions did not exist. *Id.* at 54815. Plaintiffs respond by simply repeating their claim that the "point about mitigation" "clearly played a role in the Bureau's cost-benefit analysis in 2017." Resp. at 16. Again, that is not what the analysis itself said. Furthermore, the 2017 Rule was explicit that the Payment Provisions should remain in effect even without the Underwriting Provisions, explaining that the two parts "are entirely separate, based on separate identified unfair and abusive practices, and thus, if either should fall, the other should remain intact and continue to operate." 82 Fed. Reg. at 54813.[7]

[7] Notably, the only cases Plaintiffs cite to support their claim that the Ratification requires "a new cost-benefit analysis" have nothing to do with ratification. *See* Resp. at 16; *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011) (evaluating petition for review of an SEC rule); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (reviewing EPA rule amendment). They offer the uncontroverted position that a rule's cost-benefit analysis must address evidence presented to the agency during the rulemaking process. *See Bus. Roundtable*, 647 F.3d at 1153-54. But this is irrelevant to the instant situation, where the rulemaking related to the Payment Provisions closed in 2017 and the Bureau's ratification of those payments need not address any subsequent evidence. *See Moose Jooce*, 2020 WL 7034417, at *3 (where "the rulemaking record closed in 2016 … [the agency] had no … obligation to consider new evidence in 2019" and "it was not arbitrary and capricious for [the agency's commissioner] to ratify the … Rule without considering the new evidence").

2. The ratification does not change the amount of time companies have to come into compliance with the Payment Provisions. The 2017 Rule gave companies 21 months—until August 19, 2019—to prepare for compliance. 82 Fed. Reg. at 54472, 54813-14. The ratification of the Payment Provisions affirms the August 2019 compliance date along with the other aspects of the Provisions. Plaintiffs do not offer any case law supporting their belief that they are entitled to *another* 21 months *after the ratification* to make whatever remaining adjustments are necessary to comply, even though they have already had three years to prepare.

Nor do they offer here support for their argument that "any reasonable ratification of the 2020 [sic] payments provisions would have left intact the portion of the original implementation period that had not yet run by the time the stay was sought or granted." Resp. at 18. This is a policy disagreement, not a legal one. In any event, this Court has already rejected—no less than three times—the argument that the compliance date for the Payment Provisions should be stayed until 445 days after judgment is rendered in this action. *See* Jun. 12, 2018 Order at 2 (denying motion to stay compliance date until 445 days after final judgment), ECF No. 29; Aug. 8, 2018 at 3 (denying motion to reconsider this point), ECF No. 36; Nov. 6, 2018 Order at 3 (staying compliance date, but again denying request to stay the rule until 445 days after final judgment), ECF No. 53. Plaintiffs offer no reason for the Court to revisit that conclusion, or to find arbitrary and capricious the ratification's treatment of the implementation timeframe.

3. Plaintiffs do not point to any real conflict between the Bureau's interpretation of its authority in the Payment Provisions and in the 2020 Revocation Rule. Plaintiffs focus first on whether consumers "lack … understanding" of the material risks of covered loans such that the prohibited payments practice may be abusive under 12 U.S.C. § 5531(d)(2)(A).

While the 2020 Rule rejected an individualized-risk standard for consumer understanding, that standard was only relevant to the Underwriting Provisions—which were premised in part on a finding that consumers did not understand their own, personal risk of ending up in a costly cycle of debt (even if they understood as a general matter that many consumers have difficulty repaying and suffer adverse consequences as a result). 82 Fed. Reg. at 54597-98. The Payment Provisions were not based on any finding that consumers lack an understanding of their personal risk of facing repeated payment withdrawal attempts, but on the fact that consumers are not aware that the risk of multiple re-presentments exists even as a general matter. *Id.* at 54741 (consumers "lack understanding of material risks, costs, or conditions of the … practice of repeated re-presentments" and "the complexity of payment presentment practices and their effects makes it likely that a significant number of borrowers lack a sufficient understanding of those practices and their effects"). The Bureau explicitly stated that its analysis in the 2017 Rule "rest[ed] on the fact borrowers are not aware of the risks and harms associated with engaging in the identified practice of multiple re-presentments." *Id.*[8]

Plaintiffs' contorted attempt to argue (Resp. at 20) that the Payment Provisions actually "were necessarily based on the more stringent (and since-rejected) idea that ignorance of specific [individualized] risks suffices for 'lack of understanding'" simply misstates the record. First, Plaintiffs rely on a description of the 2016 Notice of Proposed Rulemaking (NPRM), rather than the actual analysis of the 2017 Rule, which, as described above, repeatedly emphasizes that it is

[8] Plaintiffs' argument to the contrary—that the Bureau in 2017, with respect to the Payment Provisions, determined that a person "must have more than a 'general understanding' (or 'generalized understanding') of those risks"—is based on a mash-up of citations to the understanding required in the context of the Underwriting Provisions, *see* Resp. at 19 (citing to 82 Fed. Reg. at 54617, 54597-98), and the *proposed* description of the understanding required. *See id* (citing to 82 Fed. Reg. at 54740).

based on borrowers not being "aware of the risks and harms associated with engaging in the identified practice of multiple re-presentments." 82 Fed. Reg. at 54741. In any event, even the NPRM language acknowledges that while consumers may understand that they might incur fees when they authorize lenders to withdraw payment from their account,[9] this does not constitute the requisite general understanding of the "material risks, costs, or conditions" of the identified practice of repeat re-presentments. *Id.* at 54740 ("consumers are likely to expect these payment withdrawals to operate in a convenient and predictable manner, similar to the way such authorizations operate when they are granted to other types of lenders …" leaving them without understanding that "the lender will continue making payment withdrawal attempts even after the lender should be on notice … of the account's distressed condition").

Plaintiffs similarly fail to show any "reversal" on the meaning of "reasonable avoidability." An injury is not "reasonably avoidable" if the consumer has no "reason to anticipate the impending harm" and thus does not appreciate the need to take steps to avoid it. *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354, 1365-66 & n.15 (11th Cir. 1988).

In 2017, the Bureau explained that consumers could not "reasonably avoid" the injuries that the repeated-withdrawals practice was likely to cause because a host of factors make it very difficult for consumers to revoke a lender's account access or otherwise stop withdrawal attempts. 82 Fed. Reg. at 54737, 54726-28. The Bureau further explained that consumers could

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[9] Plaintiffs seize on the discussion's reference to consumers' "generalized understanding" that they may incur fees when they authorize lenders to withdraw payments. But the use of the word "general" in this discussion of the NPRM—employed to highlight the difference between what consumers understand when they make the authorizations and what they do not, even generally, understand about the specific lender practice of *repeated re-presentments* down the road—does not support plaintiffs' argument that the Bureau in 2017 found "ignorance of specific risks suffices for 'lack of understanding'" in a way that was inconsistent with the 2020 rule. The Bureau did not—as Plaintiffs allege (Resp. at 20)—conclude that consumers do *have* a "general" understanding of the risks of harm of the practice of repeated presentments.

not reasonably avoid injury by simply not taking out the loan in the first place because consumers had no reason to anticipate that they could face repeated withdrawal attempts resulting in significant fees—and so had no reason to decline the loan to avoid that (unknown) risk. *See* Cross-Mot. at 25; 82 Fed. Reg. at 54737.

Plaintiffs argue (Resp. at 21) that the "premise" of this analysis is "undercut" by the 2020 Rule's determination that the harms related to the Underwriting Provisions are reasonably avoidable because consumers could avoid these harms "by simply opting not to purchase the loans." As explained in the Bureau's opening brief, the 2020 Rule determined that consumers can *sometimes* reasonably avoid injury by declining a product, and that they could do so in connection with avoiding the injuries that result from the distinct practice addressed by the Underwriting Provisions, but that Rule made very clear that this does not mean that any harm would be "reasonably avoidable simply because a consumer can decline a product or service." 85 Fed. Reg. 44382, 44397 (July 22, 2020) (citing *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 977 (D.C. Cir. 1985)). The 2020 Rule's statement that a "finding that consumers lack the means to avoid injury *at a later time* is not generally sufficient [to render the injury 'not reasonably avoidable] if they could do so at an earlier time" does not advance Plaintiffs' argument here because nothing in the 2020 Rule changed the Bureau's 2017 conclusion that consumers could *not*, at an earlier time, avoid the harms identified in the Payment Provisions.[10]

B. The Payment Provisions and Rulemaking Petition Decision are reasonable and consistent with the Bureau's authority.

[10] The Bureau reasonably determined in 2017 that before they take out a loan, consumers have no reason to anticipate they would face repeated withdrawal attempts, and Plaintiffs do not point to anything in the 2020 Rule that undermines this conclusion.

As explained above, in 2017 the Bureau reasonably determined that the proscribed payments-withdrawals practice is unfair and abusive. While Plaintiffs' opening brief attempted to challenge multiple aspects of these determinations as arbitrary and capricious, their latest filing abandons many of these challenges. For example, Plaintiffs appear to have walked away from their argument that the Payment Provisions are arbitrary and capricious because they do not address "substantial injuries that outstrip any associated gains." Pls.' Mot. at 24.[11] Likewise, Plaintiffs no longer seem to be pursuing their claim that the Payment Provisions are arbitrary because some of the evidence relied upon focused on online, but not storefront, payday lenders.[12] Even the claims Plaintiffs continue to pursue, though, are unavailing.

1. *The Payment Provisions are reasonable.*

After the Bureau's opening brief pointed out how the 2017 rulemaking record undercut some of the Plaintiffs' challenges, Plaintiffs' response brief reframes those arguments as challenges to the sufficiency of the evidence the Bureau relied upon or the comprehensiveness of the Bureau's analysis. These fare no better.

For example, Plaintiffs' opening brief claimed that the Payment Provisions do not satisfy a prerequisite for identifying "unfair" practices under the CFPA because consumers can reasonably avoid the relevant injuries. After the Bureau's opening brief pointed out how the

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[11] As the Bureau pointed out in its opening brief, Plaintiffs' argument seemed to be that costs are only "injuries" if they outweigh the benefits to consumers and to competition. Cross-Mot. at 27-28. But this conflates the CFPA's "substantial injury" requirement with a different element of the statutory unfairness test that provides that a practice is only unfair if the relevant injury is not outweighed by countervailing benefits to consumers or competition. *Id*. Plaintiffs' Response offers nothing to rehabilitate their argument about the arbitrariness of the injury discussion.

[12] The Bureau's opening brief pointed out that Plaintiffs offered no reason why failed withdrawal attempts by online lenders would result in different fees or a different risk of account closure, than attempts by storefront lenders. Cross-Mot. at 28. And, in any event, as the Bureau also pointed out in its opening brief, the Payment Provisions in fact also relied on data pertaining to storefront lenders. Plaintiffs' Response does not address these points.

rulemaking record specifically refuted each of Plaintiffs' suggestions for how consumers could reasonably avoid injury, *see* Cross-Mot. at 29, Plaintiffs' latest brief fails to offer any new reason to believe the injuries are reasonably avoidable. And it offers no challenge to the conclusions in the rulemaking record. The only argument it offers in response is that "*in the portion of the 2017 Rule cited* … the Bureau offers no studies or any other evidence on how likely it is that consumers know of the practice and potential costs of withdrawal attempts." Resp. at 23 (citing 82 Fed. Reg. at 54737) (emphasis added). Plaintiffs simply ignore, however, that the Bureau detailed such evidence elsewhere in the rulemaking record. *See, e.g.*, 82 Fed. Reg. at 54741 (describing analysis by major bank that showed "the covered markets have much higher rates of re-presentment" than consumers would reasonably expect based on experiences in other markets); *id.* (because "[e]vidence suggests that lenders in many non-covered markets … do not appear to engage in the practice with any particular frequency," "borrowers do not have experience with the practice, and thus, likely to not understand the specific risks at issue"); *id.* at 54720, 54724 (describing how covered lenders "often take broad, ambiguous payment authorizations … and vary how they use these authorizations, thereby increasing the risk that consumers will be surprised by the amount, timing, or channel of a particular payment").

As another example, Plaintiffs' opening brief alleged that the Bureau "failed to consider" that "lenders do not cause failed-payment fees or bank-account closures—the banks do that." Resp. at 24. After the Bureau pointed out that the Bureau *had expressly* considered this point in the rulemaking, Cross-Mot. at 31, Plaintiffs' response brief does not even attempt to resuscitate the claim about the Bureau *failing to consider* that banks are the cause of injury—it instead argues that the 2017 Rule is unreasonable because "the Bureau does not even suggest that it ever considered" regulating the conduct of the banks that impose the supposedly injurious fees, instead of regulating the lenders' conduct. But the Bureau "need not consider every alternative proposed." *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 339 (D.D.C. 2016). The Bureau explained why regulating lenders was a reasonable approach. 82 Fed. Reg. at 54735. And Plaintiffs fail to explain why it would be "obvious" that the Bureau should consider addressing *lenders*' rapid, successive payment-withdrawal attempts by interfering with the fees structure of banks (which have wide applicability outside the context of the specific lenders implicated here).

Plaintiffs' claim about the Bureau's treatment of different payment types has also evolved, but even its latest iteration does not entitle Plaintiffs to summary judgment. In their opening brief, Plaintiffs claimed the Bureau "failed to heed" differences among varieties of payment transfers. Pls.' Mot. at 26. After the Bureau pointed out in its opening brief that the Bureau had "specifically consider[ed]" these differences in the rulemaking, Cross-Mot. at 32, Plaintiffs boil their claim (with respect to installment loans) down to a challenge to the sufficiency of the "support" the Bureau offers for its conclusion that attempts to withdraw payment for different installments of a loan raise the same concerns as multiple attempts to withdraw the same payment. But Plaintiffs offer no reason to believe that withdrawal attempts in connection with a new installment do not raise the same concerns. And, in any event, Plaintiffs ignore the Bureau's further reason for not distinguishing these payment types—that "the tailoring of individualized requirements for each discrete payment practice would add considerable complexity to the rule and could still leave consumers vulnerable." 82 Fed. Reg. at 54753.

Similarly, because the rulemaking record shows that the Bureau *did* consider the unique aspects of debit card and pre-paid card payments in deciding to include them within the rule's orbit, Plaintiffs' "failure to consider" allegation has been reduced to a claim that the Bureau "admitted" that "harms underpinning the unfair and abusive practice" "would not occur" with debit card withdrawals because such withdrawal attempts *almost never* result in nonsufficient fund fees. Resp. at 25. But the language Plaintiffs point to (which does not focus on debit card withdrawals but explains why the Bureau is imposing a conditional exclusion for certain lenders that are also the borrower's account holding institution) specifically says that only where lenders "do not charge NSF, overdraft, return payment fees, *or* similar fees, *and* do not close accounts because of failed payment attempts, the harms underpinning the unfair and abusive practice … would not occur." 82 Fed. Reg. at 54746 (emphasis added). Plaintiffs do not even attempt to claim that consumers might not face *any* of these in connection with debit-card or prepaid-card payments. And the Bureau has pointed out (Cross-Mot. at 32) that failed attempts to withdraw payments from debit card accounts can trigger overdraft fees.[13]

Plaintiffs claim for the first time in their response brief (at 25-26) that overdraft fees "fall[ ] outside the scope of UDAAP" because they are "reasonably avoidable," as banks do not charge fees for overdrafts on ATM and most debit card transactions unless consumers have "opted in" to these fees. But Plaintiffs mischaracterize the opt-in framework: Opt-in applies only to certain types of transactions and would *not* be required to charge overdraft fees on "recurring" debit transactions like those for high-cost installment loan payments. *See* 82 Fed. Reg. at 54723 n.942 ("overdraft fees cannot be charged on *one-time* debit card transactions when a borrower does not opt in"); *see also* 12 C.F.R. § 1005.17(b)(1).[14]

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[13] Plaintiffs incorrectly imply that the Bureau's only "express goal" was to prevent NSF fees. The Payment Provisions were also designed to prevent potential account closure, help consumers retain control over their accounts and prevent lender-imposed fees for failed payment attempts. *See, e.g.*, 82 Fed. Reg. at 54746.

[14] Even if consumers could opt out of fees for overdrafts on debit card transactions, Plaintiffs do not allege that consumers would have sufficient information at the time they would need to opt out to make this option a reasonable way for them to avoid harm.

2. *The Bureau's decision on Advance Financial's petition is reasonable.*

Just as it was not arbitrary and capricious for the Bureau to decline to exclude these payment types in the first place, it was not arbitrary and capricious for the Bureau to decline to initiate a new rulemaking to make that exclusion, particularly given that the rulemaking petition did not cite any new facts or changed circumstances that might call the basis for the Bureau's earlier decision into doubt. Plaintiffs' latest brief claims that the Bureau's denial of Advance Financial' s rulemaking petition was arbitrary because it "added nothing" to the Bureau's prior explanation of why it did not exclude debit card transactions from those provisions. Resp. at 26. But nothing more was required, and Plaintiffs ignore that the Bureau also explained that it already had an "'active and busy" agenda. Bureau Appx.41-42 (PAYD-R-18113-14). Plaintiffs offer no reason that their arguments should survive the "extremely limited and highly deferential review" applied to refusals to promulgate rules. *See, e.g.*, *Am. Horse Prot. Ass'n Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987). And they fail to answer the Bureau's point that, even if they could prevail on this claim—which they cannot—the appropriate remedy would only be to order the Bureau to reconsider the petition, not, as Plaintiffs claim (Resp. at 26), to order the Bureau to *grant* the petition. *See, e.g.*, *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738 (D.C. Cir. 2017).

3. *The Payment Provisions comply with all relevant statutory requirements.*

Although Plaintiffs continue to claim (Resp. at 22) that the 2017 Rule "violates the bar on regulations establishing a 'usury limit,'" they have still not presented any case law or other authority supporting their idea that something other than an interest-rate cap can constitute a "usury limit." The CFPA's "usury limit" provision is simply a limit on the Bureau's authority to impose interest rate caps. *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, The DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: TITLE X, THE CONSUMER FINANCIAL

PROTECTION BUREAU 7 (2010) ("The Bureau also does not have authority under the CFP Act to impose interest rate caps (a.k.a., usury limits) on any loan or other extension of credit"). Plaintiffs nevertheless claim that the Payment Provisions impermissibly create a usury limit because they "ban … some loans above a specific interest rate." Resp. at 22 (emphasis omitted). But the Payment Provisions do not "ban" any loans at all. Nor do they restrict the interest rate that lenders may charge. The Payment Provisions were tailored to redress the injury the Bureau had identified, which was concentrated in withdrawal attempts for certain types of expensive loans. *See* 82 Fed. Reg. at 54724 (explaining that payday/payday installment lending industry is an "extreme outlier with regard to the rate of returned items"); *id.* at 54730.

The Payment Provisions are also consistent with the CFPA's restriction on reliance on "public policy considerations." The statute permits the Bureau to consider "established public policies" as evidence that a practice is unfair so long as those are not the "primary" basis for the unfairness finding. Plaintiffs do not even attempt to argue that the "public policy" "views" that it identifies in the rulemaking documents[15] were the "primary" basis for any unfairness finding, which was based on the extensive evidence showing that repeated withdrawals practice caused substantial injury that consumers could not reasonably avoid.

Finally, the Bureau complied with the CFPA's directive to consider, when prescribing a rule under the Federal consumer financial laws, the potential benefits and costs to consumers and covered persons. 12 U.S.C. § 5512(b)(2)(A). Plaintiffs' Response offers no evidence to the contrary; it merely reiterates arguments that the Bureau has already shown to be flawed. As the Bureau has explained, the 2017 cost-benefit analysis for the Payment Provisions did not rely on

[15] Notably, Plaintiffs' discussion of this issue does not include a single cite to the final 2017 Payment Provisions. *See* Resp. at 22 n.12. It relies exclusively on articles and out-of-context quotes from the 2016 NPRM.

the Underwriting Provisions. Likewise, while Plaintiffs continue to fault the Bureau for insufficiently considering costs that could result from the Payment Provisions sending some loans into collections sooner, Resp. at 26, the Plaintiff who submitted a nearly 100 page comment letter (CFSA) also did not consider such cost to be significant enough to warrant mention in its letter.[16] And finally, Plaintiffs reiterate their erroneous understanding that consumers will accrue additional interest as a result of the Payment Provisions' timing requirements for payment notices. They do not cite to any part of the rulemaking record that supports their understanding of the timing, and ignore the sections of the record that the Bureau has already shown undermine Plaintiffs' understanding. *See* Cross-Mot. at 32 n.13, 35.

The Payment Provisions comply with all applicable statutory provisions, and Plaintiffs' arguments to the contrary are meritless.

III. Plaintiffs are not entitled to a lengthy extension of the compliance-date stay.

Perhaps recognizing the weakness of their claims, Plaintiffs argue (Resp. at 27-29) that if the Court issues a final judgment against them, they are entitled to an additional delay of 445 days (but they would also take 286 days) beyond the date of the judgment before having to comply with the Payment Provisions. The claim that such additional delay is needed at this point—more than three years after the Bureau issued the Payment Provisions, more than two years after the Bureau announced it was not undertaking a rulemaking to amend the Payment Provisions, *see* CFPB, *Public Statement Regarding Payday Rule Reconsideration and Delay of Compliance Date* (Oct. 26, 2018), *available at* https://go.usa.gov/xGeC6, and more than 150 days after the Bureau notified Plaintiffs and this Court that it would seek to promptly lift the stay

[16] Plaintiffs' argument (Resp. at 27) that the 2017 Rule "repeatedly treats collections as a matter of great important" has no bearing on whether the *costs* of some loans being sent into collections sooner are sufficiently important to factor into the cost-benefit analysis.

of the compliance date, *see* Jt. Status Rpt. of July 24, 2020 at 3, ECF No. 71—does not withstand any scrutiny. Plaintiffs members have already had 1,171 days and counting since the rule was issued to make the necessary adjustments. The APA itself requires only 30 days' notice before a rule may take effect. 5 U.S.C. § 553(d). What is more, the Court has already repeatedly rejected Plaintiffs' request for further delay beyond the date of final judgment. *See* ECF Nos. 29, 36, 53.

If anything, the need for such an extended delay is even less now than when Plaintiffs asked before. They initially sought this extension at a time when they had to prepare for compliance with both the Underwriting Provisions (which imposed significant compliance burdens) and the Payment Provisions (which do not). *See* Jt. Mot. for Stay, ECF No. 16; Resp. in Supp. Pls.' Mot. for Recons. at 3, ECF No. 34; 82 Fed. Reg. at 54818. But the Mandatory Underwriting provisions have been revoked, and Plaintiffs make no effort to adjust their estimate of the time needed. Moreover, Plaintiffs have now been on notice for years both that the Bureau had no plans to revisit the Payment Provisions and that the Court was not inclined to grant them the extended extra delay that they now claim to have relied on getting.[17]

Plaintiffs have shown no reason (including in their attached declaration) that this Court should extend the stay of the compliance date for 445 (or 286) days after final judgment. The Bureau, however, would not oppose a limited 30-day extension of the compliance-date stay beyond the date of final judgment. *Cf.* 5 U.S.C. § 553(d); *Bauer v. DeVos*, 332 F. Supp. 3d 181, 183 (D.D.C. 2018) (vacating stay of rule, effective 30 days from court's opinion resolving case).

CONCLUSION

The Court should grant summary judgment to the Bureau on all of Plaintiffs' claims.

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[17] Plaintiffs' characterization of the Bureau's contention as "demean[ing]" (Resp. at 29) is ironic, given their argument that industry basically was entitled to assume the Court would grant them the relief they seek.

Dated: December 18, 2020

Respectfully submitted,

MARY McLEOD
General Counsel

JOHN R. COLEMAN
Deputy General Counsel

STEVEN Y. BRESSLER
Assistant General Counsel

/s/ Kevin E. Friedl
KEVIN E. FRIEDL (NY Bar No. 5240080)
KAREN BLOOM (DC Bar No. 499425)
Senior Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Telephone: (202) 435-9268
Fax: (202) 435-7024
kevin.friedl@cfpb.gov

Counsel for Defendants Consumer Financial Protection Bureau and Kathleen L. Kraninger

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, 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:

Michael A. Carvin
Christian G. Vergonis
Jones Day
51 Louisiana Ave. NW
Washington, DC 20001-2113

Laura Jane Durfee
Jones Day
2727 N. Harwood
Dallas, TX 75201

/s/ Kevin E. Friedl
Kevin E. Friedl
Counsel for Defendants