

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

REVENUE BASED FINANCE COALITION,

Plaintiff,

v.

CONSUMER FINANCIAL PROTECTION
BUREAU; and ROHIT CHOPRA, in his
official capacity as Director of the Consumer
Financial Protection Bureau,

Defendants.

Civil Action No. 1:23-cv-24882-DSL

**SUPPLEMENTAL BRIEF OF AMICI RESPONSIBLE BUSINESS LENDING
COALITION, COMMUNITY REINVESTMENT ALLIANCE OF FLORIDA, AND
CENTER FOR RESPONSIBLE LENDING IN SUPPORT OF NEITHER PARTY AND IN
OPPOSITION TO PLAINTIFF’S MOTION TO STAY¹**

Amici Responsible Business Lending Coalition, Community Reinvestment Alliance of Florida, and Center for Responsible Lending previously filed an amicus curiae brief in support of Defendants’ Cross-Motion for Summary Judgment and in opposition to Plaintiff’s Motion for Summary Judgment, Dkt. Nos. 28-1, 32, to explain why the collection and reporting of information related to applications for merchant cash advances is essential to the statutory purpose of the Small Business Lending Rule, 88 Fed. Reg. 35150 (May 31, 2023) (codified at 12 C.F.R. pt. 1002). *See also* Dkt. No. 31 (granting motion for leave to file amicus brief). A Magistrate Judge issued a Report and Recommendation (R&R) rejecting Plaintiff’s challenges to the Rule and concluding that Defendants’ Motion should be granted. Dkt. No. 68. Plaintiff’s objection to the R&R is now before the Court. Dkt. No. 74. Amici file this supplemental brief to urge the Court to decide the

¹ No counsel for a party authored this brief in whole or in part, and no entity or person other than *Amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

pending motions for summary judgment and deny the Plaintiff's unopposed motion to stay the rule. Dkt. No. 72. This request is entirely unwarranted. No authority permits a federal agency to stay its own rule without first engaging in notice-and-comment rulemaking. The Court should reject Defendants' attempt to do so here.

The CFPB issued the Small Business Lending Rule following notice and comment, pursuant to the Administrative Procedure Act (APA). *See* 5 U.S.C. § 553. Defendants now state that the CFPB intends to "initiate a new Section 1071 rulemaking," and ask the Court to grant Plaintiff's motion to stay the Small Business Lending Rule's compliance deadlines, Defs.' Resp. to Mot. to Stay 2, Dkt. No. 75, the first of which will take effect on July 18, 2025. The CFPB certainly has "broad discretion" to reconsider the compliance deadlines of the Small Business Lending Rule "at any time." *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017). "To do so, however," the CFPB "must comply with the [APA], including its requirements for notice and comment." *Id.* at 8–9. "[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter [such a rule] without notice and comment." *Id.* (quotations omitted). *See also Clean Water Action v. EPA*, 936 F.3d 308, 314 (5th Cir. 2019) (explaining that "modification of effective dates is itself a rulemaking" that requires compliance with APA procedures); *Open Cmty. All. v. Carson*, 286 F. Supp. 3d 148, 162–63 (D.D.C. 2017) (granting preliminary injunction against agency's stay of its own rule without notice-and-comment rulemaking) (collecting citations). The CFPB therefore cannot "stay" a final rule "while it reconsiders it," *Clean Air Council*, 862 F. 3d at 9, notwithstanding the parties' acquiescence.

Neither Plaintiff nor Defendants provide support for the proposition that a court can circumvent the requirements of the APA and stay the compliance deadlines of a final rule at the parties' request. Although Plaintiff cites to cases in which courts held proceedings in abeyance,

Dkt. No. 72 at 5–6, those are inapposite to this situation. In none of these cases did the court unilaterally stay the compliance deadline of a final rule or effectuate any change to a rule for which notice and comment would be required under the APA. And although Defendants point to recent cases in the Eastern District of Kentucky and within the Fifth Circuit granting unopposed stays of compliance deadlines of CFPB final rules with respect to those plaintiffs, Dkt. No. 75 at 2, none of those courts addressed the question whether the APA permitted them to issue the stay, which it does not.

Nor has Plaintiff established that a stay pursuant to Section 705 of the APA is warranted here. *See* Pl.’s Reply Supp. Mot. Stay 2, Dkt. No. 76. Obtaining a stay, including pursuant to Section 705, requires the movant to make “a strong showing that he is likely to succeed on the merits,” along with the remaining factors courts consider when determining whether to stay a proceeding. *LabMD, Inc. v. Fed. Trade Comm’n*, 678 F. App’x 816, 819 (11th Cir. 2016); *see also Airlines for Am. v. Dep’t of Transp.*, 110 F.4th 672, 674 (5th Cir. 2024) (evaluating request for stay under APA § 705 by applying the four-factor test for a stay). Plaintiff has not made a sufficient showing with respect to any factor. *See Rabassa v. United States*, No. 22-cv-20456, 2024 WL 3327775, at *2 (S.D. Fla. Mar. 11, 2024). In particular, Plaintiff has not shown it is likely to succeed on the merits of its claims. *See generally* Dkt. No. 68. Nor has Plaintiff shown that the public interest favors a stay. *See* Dkt. No. 76 at 3. Plaintiff does not even address the myriad ways in which the Small Business Lending Rule protects small businesses, *see generally* RBLC Amicus Br., Dkt. No. 32; these are the reasons Congress mandated the CFPB issue the Small Business Lending Rule in the first place. Accordingly, the Court has no basis on which to make a conclusion as to the applicability of a Section 705 stay.

Plaintiff asserts that the stay it requests will “simply maintain[] the status quo.” Dkt. No.

76 at 2 (quoting *LabMD, Inc.*, 678 F. App'x at 819). But the opposite is true. In the status quo, the CFPB issued the Small Business Lending Rule, following notice and comment, and the Rule sets forth applicable compliance deadlines which, as Plaintiff acknowledges, the CFPB has previously extended *after* notice and comment. Dkt. No. 72 at 6 (citing 89 Fed. Reg. 55,025 (July 3, 2024)). Granting the stay Plaintiff requests would mean the upcoming July compliance date would come and go without binding regulated entities as would be required absent the stay. As discussed above, the CFPB would need to engage in the notice-and-comment process to change those deadlines. Issuing the stay Plaintiff requests would upset the status quo by substantively modifying a final rule. This Court should not grant such an extraordinary remedy, in violation of the APA.

For the reasons stated above, Amici respectfully urge this Court to deny Plaintiff's Motion to Stay and to decide the pending Motions for Summary Judgment.

Dated: April 11, 2025

Respectfully Submitted,

s/ Rachel L. Fried

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