

**UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU**

**ADMINISTRATIVE PROCEEDING  
File No. 2014-CFPB-0002**

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**In the Matter of:** )  
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**PHH CORPORATION,** )  
**PHH MORTGAGE CORPORATION,** )  
**PHH HOME LOANS LLC,** )  
**ATRIUM INSURANCE CORPORATION,** )  
**and ATRIUM REINSURANCE** )  
**CORPORATION** )  
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**ENFORCEMENT COUNSEL'S RESPONSE IN OPPOSITION TO  
RESPONDENTS' MOTION FOR STAY**

### **Summary**

PHH seeks the extraordinary remedy of a stay of a final administrative order that already contains within it all the relief to which a litigant is normally due: an option to place the funds it owes into escrow – in effect, a supersedeas bond. PHH also seeks to stay the non-money provisions of the order. As justification, PHH claims that its appeal is likely to succeed – under a standard of review deferential to the Bureau – purely on the basis of re-urged arguments each of which has failed multiple times before the ALJ and the Director in this proceeding. PHH is equally unpersuasive in suggesting that an escrow payment or various forms of injunctive relief rise to the level of “irrevocable harm” to itself, and it has the public interest precisely backward. Since all of the factors for a stay thus weigh against PHH here, no stay is warranted.

### **Background**

The Bureau’s final decision and order in this matter were issued on June 4, 2105. Docs. 226, 227. Respondents, PHH Corporation and certain of its affiliates (PHH), were found liable and ordered 1) to cease and desist from violating § 8 of the Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(a) (§ 8 bar), 2) to cease and desist for fifteen years from entering into any captive reinsurance arrangement (captive bar), 3) to cease and desist for fifteen years from referring any borrower to a real estate settlement service provider if the provider has agreed to purchase or pay for any service from Respondents, which purchase or payment is triggered by the referrals (quid pro quo bar), 4) to maintain records for fifteen years of all things of value received from any real estate settlement service provider to whom any Respondent has referred business since July 21, 2008, where the thing of value was received within 24 months of the referral, and make the records available to the Bureau on request (monitoring requirement), and

5) to pay disgorgement of \$109,188,618, or, if Respondents appeal, they may place that amount in escrow (disgorgement).

On June 16, 2015, Respondents filed the present motion to stay the final order pending resolution of a petition to the court of appeals.

### **Argument**

#### **The legal standard**

Under the Bureau's Rules on Adjudication, a motion for stay "shall address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest." 12 C.F.R. § 1081.407(c). These factors mirror those applied by courts in considering requests for a stay pending appeal. *E.g., Humane Soc'y of U.S. v. Johanns*, No. CIV A 06-265 CKK, 2007 WL 1120404, at \*5 (D.D.C. Apr. 13, 2007) (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)). They are also similar to the factors courts consider in weighing a preliminary injunction. *See, e.g., Davis v. Billington*, No. CV 10-0036 (RBW), 2014 WL 7204782, at \*2 (D.D.C. Dec. 19, 2014) (citing *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

"A strong presumption of regularity supports any order of an administrative agency; a stay pending judicial review is a rare event and depends on a demonstration that the administrative process has misfired." *Busboom Grain Co. v. I.C.C.*, 830 F.2d 74, 75 (7th Cir. 1987) (citing *Coleman v. PACCAR, Inc.*, 424 U.S. 1301 (1976) (Rehnquist, Circuit Justice)). Generally in the D.C. Circuit, there are "stringent standards required for a stay pending appeal," *Spirit of Sage Council v. Norton*, No. 03-5345, 2004 WL 2810103, at \*1 (D.C. Cir. Dec. 7, 2004) (citing *Wash. Metro. Area Transit Comm'n v.*

*Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir.1977)); *D.C. Circuit Handbook of Practice and Internal Procedures* 33 (2002)), and such a stay is an “extraordinary remedy,” *Shays v. Fed. Election Comm’n*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

Even where a stay is warranted, the posting of “a full supersedeas bond should be the requirement in normal circumstances....” *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 23 (D.D.C. 2006) (quotations omitted). By permitting the disgorgement amount to be paid into escrow, the final order here has in effect already made this “normal” mechanism available to PHH, and “there is nothing unusual about these circumstances that would warrant departure from the ordinary requirement of a supersedeas bond,” *Godfrey v. Iverson*, No. CIV.A. 05-2044, 2007 WL 3001426, at \*1 (D.D.C. Oct. 16, 2007) (internal quotations omitted).

There has been no “misfire[]” here, and PHH has made no showing of “unusual” circumstances, as it must, to warrant a stay. We address the four factors from Rule 407(c) in turn.

#### **I. PHH has failed to establish a likelihood of success on appeal**

PHH has previously availed itself of multiple opportunities to present each of the arguments it puts forth here to show a likelihood of success, always without success. In fact, PHH has shown a reflexive propensity in this proceeding to move for reconsideration or reopening the record while doing no more than standing on its prior arguments and presenting no intervening authority.<sup>1</sup> Here again, PHH simply “repeats

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<sup>1</sup> Compare, e.g., Resps’ Renewed Mot. to Dismiss, Doc. 101 (Apr. 18, 2014), with Order on Dispositive Motions, Doc. 152 (May 22, 2014), at 2 (“The Dismiss Motion also seeks to revisit certain issues I have already resolved, and to that extent it is properly construed as a motion for reconsideration”), at 3 (“Respondents point to no intervening legal authority, newly available evidence, clear error, or manifest injustice, and I will not reconsider these holdings”). See also, e.g., Motion to Reconsider Disqualification of

the arguments that have been twice considered (by the Administrative Law Judge and by [the Director]) and twice rejected.” Order, In re *Saberi*, 2005 WL 956618, at \*1 (C.F.T.C. Apr. 26, 2005) (denying stay under similar rule). PHH offers nothing to demonstrate or even suggest that it is likely prevail on appeal.

PHH makes much of the Director’s disagreement with possible implications of portions of the 1997 HUD letter, and of his interpretation of § 8(c)(2) of RESPA. But the final order does not rest on these parts of the opinion, since the ALJ, too, found PHH liable, in the absence of these holdings.<sup>2</sup> While the Director’s holding is compelled by the plain language of RESPA, and PHH is unlikely to prevail on appeal, even if it were to do so, it would not make any likelier the possibility that PHH would escape liability, or that the relief ordered would be limited or set aside.<sup>3</sup>

Moreover, as PHH has now suggested to the Court of Appeals,<sup>4</sup> any appeal of the order and decision will be decided under a deferential “arbitrary and capricious” and “abuse of discretion” standard, as set forth in the Administrative Procedure Act. *See* 5 U.S.C. § 706. Such a deferential standard suggests that PHH’s likelihood of success

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Schnader Harrison Segal & Lewis, Doc. 155, May 27, 2014, Resps. Renewed Objection to the Orders Taking Official Notice, Doc. 199, Oct. 31, 2014, Resps. Mot. for Leave to Submit Additional Evidence into the Record, Doc. 211, Jan. 9, 2015.

<sup>2</sup> The ALJ’s recommended decision (RD) assumes, for instance – contrary to the final decision – that RESPA § 8(c)(2) constitutes a defense to liability under §§ 8(a) and 8(b), but nevertheless held that the evidence did not support such a defense. Similarly, the ALJ, while correctly noting that the HUD letter is “not legally binding,” followed its informal guidance. RD at 41.

<sup>3</sup> PHH’s argument that it was entitled to rely on the HUD letter, even assuming (incorrectly) that such reliance would offer it refuge from liability here, is directly in tension with its prior assertion to a court that the HUD letter “doesn’t constitute formal agency guidance ..., ... is not entitled to any deference[,]” and should not be relied upon to evaluate liability under RESPA § 8. Def.’s Objections to Magistrate Judge’s Findings and Recommendations, *Munoz v. PHH Corp.*, No. 108cv00759 (E.D. Cal. May 30, 2013), ECF No. 233, at \*17-18.

<sup>4</sup> *See* PHH Petition for Review, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Jun. 19, 2015), at unnumbered 3.

before the court of appeals is less, not greater, than it was before the Bureau itself.

Accordingly, PHH has made no showing that there is even a reasonable chance – much less a substantial likelihood – that it will prevail on appeal, and this factor weighs against any stay.

## **II. PHH will not be irreparably harmed in the absence of a stay**

PHH claims that it will suffer irreparable harm, in several respects, absent a stay. “Irreparability of injury is a very high standard” to which “demanding scrutiny must be applied...” *Bristol-Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 220 (D.D.C. 1996). PHH cannot meet this standard, as shown below, so this factor weighs against a stay.

### **A. Paying disgorgement into escrow is a minimal, not irreparable, harm, functionally identical to the normal requirement of a supersedeas bond**

PHH asserts that if a stay is not granted, during the pendency of its appeal it will irrevocably lose an amount equal to \$1.125 million annually – or approximately 1% of the disgorgement it has been ordered to pay. At minimum, this likely exaggerates the harm, since, although PHH does not address it, such a “loss” would be recoverable to the extent of any interest earned while in escrow: in the event PHH’s appeal were successful, that interest would accrue to PHH’s benefit. But even if PHH’s figure were correct, this 1% “loss” falls far short of irreparable harm that weighs in favor of a stay.

PHH implies that *any* unrecoverable economic loss, no matter its scale or the circumstances, constitutes such harm. This is not the law. In fact, “[t]he District of Columbia Circuit has resoundingly rejected the notion that economic loss constitutes irreparable harm, unless the plaintiff can show that the economic loss ‘threatens the very existence of the [plaintiff]’s business,’” *Mott Thoroughbred Stables, Inc. v. Rodriguez*, -- F. Supp. 3d --, No. CV 15-333 (RBW), 2015 WL 1570167, at \*7 (D.D.C. Apr.

8, 2015) (quoting *Wis. Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)) (internal citations omitted; brackets in original) (preliminary injunction).

Thus, in *Shalala*, the loss of **\$97 million** was deemed insufficient to establish an irreparable injury, where that amount was less than 1% of the corporate movant's total sales. 923 F. Supp. at 220. The stringency of this standard is illustrated by the fact that even an unemployed individual's unrecoverable loss of health insurance benefits does not rise to the level of irreparable harm, unless the movant "additionally alleges a critical need for healthcare, as opposed to a *mere financial hardship*...." *Carabillo v. ULLICO Inc. Pension Plan & Trust*, 355 F. Supp. 2d 49, 54 (D.D.C. 2004) (emphasis added) (collecting cases) *aff'd sub nom. Carabillo v. Ullico Inc*, 198 F. App'x 1 (D.C. Cir. 2006).

This is because "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough' to demonstrate 'irreparable injury.'" *Id.* (quoting *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958)). Rather, to weigh in favor of a stay, "the injury must be both certain *and great*." *Wis. Gas. Co.*, 758 F.2d at 674 (emphasis added). In short, irreparable harm in the DC Circuit must be "*substantial* unrecoverable economic harm...." *Humane Soc'y of U.S. v. Johanns*, No. CIV A 06-265 CKK, 2007 WL 1120404, at \*10 (D.D.C. Apr. 13, 2007) (emphasis added; citations omitted). *See also Cmte. of 100 on Fed. City v. Foxx*, -- F. Supp. 3d --, No. 1:14-cv-01903(CRC), 2015 WL 1567902, at \* 8 (D.D.C. Apr. 7, 2015) (in preliminary injunction proceeding, to be "irreparable," damage must be "severe," as well as irreversible).

PHH Corporation and its subsidiaries reaped net revenues of \$261 million for the three months ended March 31, 2015, with assets of \$4.3 billion.<sup>5</sup> In 2013 and 2014, PHH netted income of \$135 million and \$81 million, respectively.<sup>6</sup> The losses that PHH predicts – which are in the vicinity of 1% of these annual earnings – are not “great relative to the size of [its] business,” *Johanns*, 2007 WL 1120404, at \*11 (citing *Lightfoot v. District of Columbia*, Civ. No. 01–1484, 2006 WL 175222 at \*7, 8 (D.D.C. Jan. 24, 2006)), do not therefore meet the standard of “irreparable harm,” and weigh against – rather than for – the granting of a stay.

**B. The non-money injunctive relief will not cause irreparable harm, and PHH’s contention that it is unlawful is both plainly wrong and irrelevant to this factor**

As the final decision carefully elucidates, for over sixty years courts have consistently adhered to the Supreme Court’s command that a federal agency has the power to order “fencing-in” relief under statutory cease-and-desist authority similar to the Bureau’s own authority.<sup>7</sup> *See* Decision at 32-33; *see also, e.g., United States Dep’t of Justice v. Daniel Chapter One*, -- F. Supp. 3d --, No. CV 10-1362 (EGS), 2015 WL 1502137, at \*6 (D.D.C. Mar. 31, 2015) (the agency “cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.”) (quoting *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473 (1952)).

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<sup>5</sup> PHH Corporation, S.E.C. Form 10-Q, May 7, 2015, at 3, 5.

<sup>6</sup> PHH Corporation, S.E.C. Form 10-K, Feb. 27, 2015 at 73.

<sup>7</sup> *See* 15 U.S.C. § 45(b) (F.T.C. Act) (“...the [F.T.C.] ... shall issue ... an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.”), 12 U.S.C. § 5563(b)(1)(D) (C.F.P.A.) (“Such order [of the Bureau] may ... require the covered person or service provider to cease and desist from the subject activity, and to take affirmative action to correct the conditions resulting from any such violation.”).



Such relief will be upheld by courts so long as it “bears a reasonable relation to the unlawful practices found to exist.” *F.T.C. v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014) (quoting *F.T.C. v. Colgate-Palmolive Co.*, 80 U.S. 374, 395 (1965)); see also *Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554, 563-64 (2d Cir. 1984) (where deceptive practices found under F.T.C. Act as to two of respondent’s drugs, it was “appropriate fencing-in” to extend remedial provisions of the order to *all sixty* of its drugs). Each of the provisions of the Bureau’s cease-and-desist order clearly bears such a relation to PHH’s eighteen-year-long scheme to extract kickbacks and fee splits through its mortgage business in violation of RESPA § 8. PHH, for its part, does not contend with this unbroken string of authority, and in fact simply ignores it, preferring instead to cite cases under the more restrictive – and inapplicable – Fed. R. Civ. P. 65. PHH’s argument based on case law applying the ordinary standards for an injunction<sup>8</sup> is therefore wholly irrelevant to the question of whether the Bureau’s order is lawful. Here PHH demonstrates no harm whatsoever, let alone irreparable harm supporting a stay.

PHH’s arguments against the monitoring provision are similarly off-target. Monitoring and compliance provisions are routinely ordered under a government agency’s law enforcement authority, and again, need only bear a “reasonable relation to the unlawful practices.” *Ruberoide*, 343 U.S. at 473. See, e.g., *F.T.C. v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1018 (N.D. Ind. 2000) *aff’d*, 312 F.3d 259 (7th Cir. 2002) (“Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction.”) (collecting cases).

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<sup>8</sup> See, e.g., *S.E.C. v. Wash. Inv. Network*, 475 F.3d 392, 397 (D.C. Cir. 2007) (reviewing grant of an injunction by the district court pursuant to Fed. R. Civ. P. 65, not by the S.E.C. under its statutory cease-and-desist authority).

In addition, PHH's criticism of the word "triggered" as "undefined" and "vague" rings hollow, given the ordinary meaning of that word. The Cambridge Dictionary defines the verb "trigger" as "to cause something to start."<sup>9</sup> This, surely, needs no further clarification.

Finally, PHH suggests, but does not say, that it will not enter into captive arrangements in future – coyly stating that "the unrefuted evidence" shows PHH does not "contemplate the formation" of any new captive arrangements, Mot. at 14. Assuming this implication is correct, it belies any suggestion that immediate imposition of the captive bar will cause any harm at all, much less irreparable harm, to PHH, since under those circumstances it would do no more than maintain the status quo.<sup>10</sup>

### **III. Absent a stay, the public interest will be harmed**

The final two factors – harm to third parties, and the public interest – are "stated separately," but will be considered together here, because Enforcement Counsel "is responsible for representing the public interest by enforcing the law." Order, In re *Daniel Chapter One et al.*, 149 F.T.C. 1589, 2010 WL 9434821, at \*7 (F.T.C. Mar. 22, 2010); *see also, e.g.*, Decision and Order, In re *Frontier State Bank of Ok. City*, 2011 WL 2574394, at \*3 (F.D.I.C. May 11, 2011) ("....harm to other parties and to the public interest ... are considered together because they are interrelated.").

There is a substantial likelihood of harm to the public should the order be stayed. In recommending an injunction against PHH, the ALJ made clear just how damaging to the public a repetition of PHH's RESPA violations is likely to be:

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<sup>9</sup> <http://dictionary.cambridge.org/us/dictionary/american-english/trigger>.

<sup>10</sup> If, on the other hand, the implication is not correct, and PHH may restart its captive arrangements, that likelihood militates strongly in favor of a stay, as discussed next in Section III.

The record demonstrates a likelihood of irreparable injury which cannot be adequately compensated by money damages, and which will likely occur *in the absence of a bar on captive reinsurance* .... If a captive arrangement lasts long enough, and accumulates enough in its trust account, [it] will have an adverse systemic effect on the mortgage insurance industry, and potentially on the housing market. Such loss is likely to be substantial: overall, Atrium collected net premiums totaling over \$430 million .... [T]he public interest weighs heavily in favor of enjoining future captive arrangements.

RD at 99 (emphasis added; citations omitted).

Not only the captive bar, but also the § 8 bar, the quid pro quo bar, and the monitoring requirement all serve to ensure against further violations of RESPA by PHH. All should be implemented immediately. In their absence, the risk to the public of further “kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services” – precisely what Congress meant RESPA to stop – is great. 12 U.S.C. § 2601(b)(2).

This proceeding addresses knowing and reckless conduct by PHH permeating a scheme it operated without interruption for nearly eighteen years, in violation of RESPA, that yielded hundreds of millions of dollars in kickbacks. *See* RD at 95-96 (“Respondents’ conduct was serious and recurrent. Respondents made a great deal of money by violating RESPA.”) In short, the sanctions imposed on PHH by the final order are in the public interest, and any delay in imposing them weighs heavily against that interest.

#### **IV. Conclusion**

For all the reasons shown above, no stay of the final order should be granted.

DATED: June 22, 2015

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on this 22<sup>nd</sup> day of June 2015, I caused a copy of the foregoing “Enforcement Counsel’s Response in Opposition to Respondents’ Motion for Stay” to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service:

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