No. 15-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation,

Petitioners,

v.

Consumer Financial Protection Bureau,

Respondent.

On Petition for Review of an Order of
the Consumer Financial Protection Bureau

MOTION OF PETITIONERS FOR STAY PENDING JUDICIAL REVIEW

Mitchel H. Kider
David M. Souders
Sandra B. Vipond
Michael S. Trabon
WEINER BRODSKY KIDER PC
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Thomas M. Hefferon
William M. Jay
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for Petitioners PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Rule 18(a)(4), Petitioners certify as follows:

A. Parties

The parties that appeared before the Consumer Financial Protection Bureau ("CFPB") are PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation. These parties appear now as Petitioners before this Court. The CFPB appears as Respondent before this Court.

B. Ruling Under Review

The ruling under review is the final agency action of the CFPB, captioned *In the Matter of PHH Corporation, et al.*, Decision of the Director, Docket No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015), and Final Order, Docket No. 2014-CFPB-0002, Dkt. 227 (June 4, 2015).

C. Related Cases

This matter has not previously been before this Court. Counsel is aware of no related cases currently pending in this Court or in any other court.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provision

Statutes

Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

GLOSSARY

ALJ	Administrative Law Judge
Atrium	Petitioners Atrium Insurance Corporation and Atrium Reinsurance Corporation
CFPA	Consumer Financial Protection Act
CFPB	Consumer Financial Protection Bureau
Confirmation Letter	Letter from J. Kennedy, Assoc. Gen. Counsel for Fin. & Regulatory Compliance, HUD, to J. Maher, Am. Land Title Ass'n. (Aug. 12, 2004) (Ex. D)
Dec.	*In the Matter of PHH Corporation, et al.*, Decision of the Director, Docket No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015) (Ex. A)
HUD	United States Department of Housing and Urban Development
HUD Letter	Letter from N. Retsinas, Ass't Sec'y for Hous.–Fed. Hous. Comm'r, HUD, to S. Samuels, Countrywide Funding Corp. (Aug. 6. 1997) (Ex. C)
Order	*In the Matter of PHH Corporation, et al.*, Final Order, Docket No. 2014-CFPB-0002, Dkt. 227 (June 4, 2015) (Ex. B)
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974

INTRODUCTION

Petitioners PHH Corporation, PHH Mortgage Corporation, and PHH Home Loans, LLC ("PHH"), and Atrium Insurance Corporation and Atrium Reinsurance Corporation ("Atrium") respectfully seek a stay of final action of the Consumer Financial Protection Bureau ("CFPB")[1] scheduled to take effect on August 5, 2015.

Affiliated mortgage reinsurance programs have been explicitly approved by federal and state regulators since the 1970s. The CFPB nonetheless announced—for the first time in the decision on appeal—a radical new interpretation of the Real Estate Settlement Procedures Act ("RESPA") that would ban those programs *per se*, and applied that novel construction retroactively to conduct that Petitioners engaged in years ago in reliance on prior agency precedent. In another dramatic departure from precedent, the CFPB concluded that each mortgage reinsurance payment received—rather than each mortgage settled—constituted a separate statutory violation, and applied that new standard retroactively too.

Consequently, the CFPB increased by a *multiple of 18* the "disgorgement" recommended by the Administrative Law Judge ("ALJ")—from $6 million to $109 million. The CFPB also imposed open-ended and burdensome injunctive relief that, among other things, vaguely orders Petitioners to obey the law and requires

[1] *In the Matter of PHH Corporation, et al.*, Decision of the Director, Docket No. 2014-CFPB-0002, Dkt. 226 (June 4, 2015) ("Dec.") (Ex. A), and Final Order, Docket No. 2014-CFPB-0002, Dkt. 227 (June 4, 2015) ("Order") (Ex. B).

Petitioners to record the receipt of *any* "thing of value" received by *any* of them from *any* real estate settlement provider to which *any* of them have referred borrowers since July 21, 2008, and for the next 15 years.

Neither the liability determination nor the sanctions can survive judicial review. The CFPB's conceded "reject[ion]" (Dec. 17) of well-settled precedent is "precisely the kind of 'unfair surprise'" against which the Supreme Court and this Court "have long warned." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (citation omitted); *see Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1331-32 (D.C. Cir. 1995). The sanctions are invalid too: the injunctive provisions are vague and overbroad, and RESPA does not authorize a disgorgement remedy.

Absent a stay, the Order will cause irreparable harm. The violation of the due process-based right to fair notice is *per se* irreparable. Petitioners will also suffer lost business opportunities and reputational damage, and be forced to operate at a substantial competitive disadvantage; the monitoring directive and disgorgement order will result in equally irremediable harm.

The balance of equities weighs heavily in favor of a stay. The disgorgement is payable not to any consumer but to the government, which claims no immediate need for the money. And because Petitioners have not entered into any affiliated mortgage reinsurance agreement since 2009, and stopped receiving premiums from such agreements in 2013, there can be no possible harm in staying the Order.

FACTUAL AND PROCEDURAL BACKGROUND

Mortgage lenders typically require borrowers with less than a 20% down payment to obtain insurance coverage that protects the lender in the event of default. Dec. 3. The borrower pays premiums to a mortgage insurer; if the borrower defaults, the insurer covers part of the loss suffered by the lender. An insurer may, in turn, obtain mortgage *reinsurance* from a reinsurer, which shares some of the risk the insurer would otherwise bear. *Id.* A mortgage reinsurer typically insures entire blocks of loans originated over the course of a given "book year." *Id.*

In 1974, Congress enacted RESPA, which prohibits kickbacks and unearned fees in connection with mortgage-related services, including payments from mortgage insurers to lenders in exchange for referrals. *See* 12 U.S.C. § 2607. Section 8(c)(2), however, provides: "Nothing in this section shall be construed as prohibiting . . . the payment to any person of . . . bona fide . . . compensation . . . for services actually performed." *Id.* § 2607(c)(2).

In 1997, the Department of Housing and Urban Development ("HUD")—then charged with enforcing RESPA—clarified how the statute would apply to an affiliated-reinsurance relationship:

> [HUD's] view of captive reinsurance is that the arrangements are permissible under RESPA if the payments to the reinsurer: (1) are for reinsurance services "actually furnished or for services performed" and (2) are bona fide compensation that does not exceed the value of such services.

Letter from N. Retsinas, Ass't Sec'y for Hous.–Fed. Hous. Comm'r, HUD, to S. Samuels, Countrywide Funding 3 (Aug. 6. 1997) ("HUD Letter") (Ex. C).[2] In 2004, HUD reiterated that the "legality of captive mortgage reinsurance agreements" turned on the two-factor test that it articulated in the "1997 guidance." Letter from J. Kennedy, Assoc. Gen. Counsel for Fin. & Regulatory Compliance, HUD, to J. Maher, Am. Land Title Ass'n, at 1 (Aug. 12, 2004) ("Confirmation Letter") (Ex. D).

On July 21, 2011, HUD's responsibilities under RESPA were transferred to the CFPB in the Consumer Financial Protection Act ("CFPA"). *See* Dec. 6. That same day, the CFPB announced that "the official commentary, guidance, and policy statements issued prior to July 21, 2011, by a transferor agency with exclusive rulemaking authority for the law in question . . . will be applied by the CFPB pending further CFPB action." Identification of Enforceable Rules and Orders, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011).

During the relevant period, PHH was an originator of home mortgage loans and, like other mortgage lenders, required certain borrowers to obtain mortgage insurance. Dec. 2. In 1994, PHH created Atrium Insurance Company as a wholly-

[2] As the ALJ acknowledged, the HUD Letter is a "specific example of the more general principle articulated in [HUD's] implementing Regulation X: 'if the payment of a thing of value bears no reasonable relationship to the market value of the goods or services provided, then the excess is not for services or goods actually performed or provided.'" Dkt. 152 (quoting 24 C.F.R. § 3500.14(g)(2)); *see also* Clarification of Statement Regarding Lender Payments to Mortgage Brokers, 66 Fed. Reg. 53,052, 53,054 (Oct. 18, 2001).

owned subsidiary to provide reinsurance services to mortgage insurers. *See id.* The subsidiary's functions were transferred to Atrium Reinsurance Corporation in 2009. *Id.* Atrium provided reinsurance only for mortgages originated by PHH or underwritten to its guidelines—thus, it was an affiliated or "captive" reinsurer.

On January 19, 2014, the CFPB filed a notice of charges against Petitioners, alleging violations of Sections 8(a) and 8(b) of RESPA under the legal standard set forth in the HUD Letter. Notice of Charges, Dkt. 1, at 17 ¶ 96. The notice charged that the RESPA violations "commenced in 1995 (at the latest) and continued until at least May of 2013." *Id.* at 18 ¶ 103.

In a pre-trial order, the ALJ acknowledged that the HUD Letter was a "straightforward application of Regulation X to captive reinsurance." Dkt. 152. Expressly relying on the HUD Letter and HUD's other "regulations and interpretive guidance," the ALJ concluded that "captive reinsurance is permissible under RESPA if the payments to the reinsurer are for reinsurance services actually furnished or for services performed, and are bona fide compensation that does not exceed the value of such services." *Id.* The ALJ also determined that the CFPB could not pursue any alleged violations that HUD could not have asserted before the CFPB's creation on July 21, 2011, thus barring any claims arising before July 21, 2008, under the three-year statute of limitations then applicable to HUD. *Id.* at 10. Accordingly, the ALJ only considered book years that included loans closed

on or after July 21, 2008. Dec. 21.[3] At the hearing, Petitioners presented evidence that they satisfied the HUD Letter's test because Atrium performed actual reinsurance services (*i.e.*, insurance "risk transfer" from the insurers) and received bona fide compensation for those services (*i.e.*, "price commensurability").[4]

On November 25, 2014, the ALJ issued a recommended decision finding that Petitioners violated Sections 8(a) and 8(b). Dkt. 205. Applying the HUD Letter, the ALJ found that Petitioners could not rely on Section 8(c)(2)'s "safe harbor" because "the evidence does not establish . . . that Atrium's premiums in their entirety were bona fide." *Id.* at 75. The ALJ recommended injunctive relief and disgorgement of $6,442,399. *Id.* at 102. Consistent with his finding regarding the statute of limitations, the ALJ calculated the disgorgement amount based on premiums paid in connection with loans closed after July 21, 2008. *Id*. at 88-93.

Petitioners and the CFPB's Enforcement Counsel appealed to CFPB Director Richard Cordray. Dec. 9. On June 4, 2015, the Director upheld the Recommended Decision in part, and reversed in part to impose additional injunctive relief

---

[3] As of January 1, 2010, all reinsurance agreements involving Atrium were in "run-off" (*i.e.*, Atrium continued to receive premiums from insurers on existing loans but originated no new loans subject to reinsurance). Dkt. 205, at 28-31. As of May 2013, the last such agreements were "commuted" (*i.e.*, Atrium and the insurer agreed to a final payment to terminate their relationship). *Id.*

[4] For example, they presented evidence that Milliman, an actuarial consulting firm, had evaluated "risk transfer and price commensurability with risk" for several of the book years at issue. Dkt. 205, at 41.

and dramatically increase the amount of disgorgement. *Id.* at 38. The Director expressly "reject[ed]" the HUD Letter and held that Section 8(c)(2) is not a "substantive exemption" from liability but becomes relevant only "if there is a question as to whether the parties actually did enter into an agreement to refer settlement service business." *Id.* at 16-17. The Director thus concluded that Petitioners violated Section 8(a); he declined to address Section 8(b). *Id.* at 14, 17.

With respect to the scope of liability, the Director once again departed drastically from precedent. Relying on *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356 (5th Cir. 2003), the ALJ had determined that Petitioners violated Section 8 at the moment each mortgage loan closed, *see* Dec. 22. The Director disagreed, determining that *each payment* to Petitioners by the mortgage insurers amounted to a separate RESPA violation, whether or not the underlying loan closed before July 21, 2008. *Id.* Thus, while the Director agreed with the ALJ that the CFPB could not pursue claims for RESPA violations that occurred before July 21, 2008, *see id.* at 11-12, he nonetheless reached back to book years for which any payment was made on or after July 21, 2008, even when the relevant loan closed before that date. On the basis of these novel (and erroneous) interpretations of RESPA, the Director ordered Petitioners to disgorge $109,188,618. Order at 2 ("Provision V").

As additional sanctions, the Director enjoined Petitioners "from violating Section 8" of RESPA, Order at 1 ("Provision I"); from entering into any affiliated

reinsurance agreement for the next 15 years, *id.* ("Provision II"); and from "referring any borrower to any provider of a real estate settlement service if that provider has agreed to purchase or pay for any service" from Petitioners and "the provider's purchase of or payment for that service is triggered by those referrals," *id.* at 2 ("Provision III"). He also ordered Petitioners to "maintain records of all things of value that [Petitioners] receiv[e] or ha[ve] received from any real estate settlement service provider to which [Petitioners] ha[ve] referred borrowers since July 21, 2008, and for the next 15 years," and to make them available to the CFPB "upon request." *Id.* ("Provision IV").

On June 19, 2015, Petitioners filed a petition for review of the CFPB's Decision and Order. Petitioners sought a stay pending judicial review from the CFPB on June 16, 2015. On June 24, 2015, the CFPB denied that request on grounds of irreparable harm.

ARGUMENT

Petitioners are likely to succeed on the merits, a stay would avoid irremediable harm, and maintenance of the status quo will not harm the public interest. A stay pending appeal is warranted. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008).[5]

[5] At a minimum, this case involves at least one "serious legal question," and the balance of harms tips decidedly in Petitioners' favor. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843, 844 (D.C. Cir. 1977). If the Court determines that a stay is not warranted, it should expedite this case. *See* D.C. Cir. Handbook § VIII(B).

I. Petitioners Are Likely To Prevail On The Merits.

A. The Liability Determination Cannot Survive Judicial Review.

1. As a matter of due process, *see* U.S. Const. amend. V, "an agency should not change an interpretation in an adjudicative proceeding where doing so would impose 'new liability . . . on individuals for past actions which were taken in good-faith reliance on [agency] pronouncements' or in a case involving 'fines or damages.'" *Christopher*, 132 S. Ct. at 2167 (citation omitted); *see also FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317-18 (2012); *Gen. Elec.*, 53 F.3d at 1331-32. This "fair notice" requirement is crucial for statutes, like RESPA, that impose criminal as well as civil liability. *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013).

The CFPB violated this "bedrock principle of American law," *id.* at 727, by imposing massive, nine-figure liability on Petitioners based on two sweeping new constructions of RESPA that abruptly depart from, and indeed openly contradict, almost two decades of agency and court interpretation and application.

First, the Director concluded that affiliated reinsurance violates Section 8(a) even when the reinsurance coverage was provided at a "commensurate rate." Dec. 20. This position is contrary to the previously well-settled rule that, in light of Section 8(c)(2), Section 8(a) does not prohibit affiliated-reinsurance relationships so long as the affiliated reinsurer received only "bona fide compensation" for "ser-

vices performed" "that does not exceed the value of such services." HUD Letter at 3 (emphasis omitted); *see also supra* at 3-4. The HUD Letter "has been relied upon by mortgage insurers, lender-owned reinsurers and courts alike to evaluate a captive reinsurance arrangement's compliance with Section 8." *Munoz v. PHH Corp.*, No. 08-cv-759, 2013 WL 2146925, at *5 (E.D. Cal. May 15, 2013).[6] The decision thus punishes activity that regulated entities and courts have understood for years to be legal.

The Director dismissed the HUD Letter as not "binding." Dec. 17. But HUD plainly intended to provide guidance to regulated entities and to govern its application of RESPA: the letter "detail[ed]" "how [HUD] will scrutinize these arrangements to determine whether any specific captive reinsurance program is permissible under RESPA." HUD Letter at 1. HUD confirmed as much by emphasizing that the HUD Letter would be "useful" in "evaluat[ing]" the "legality of captive mortgage reinsurance agreements under RESPA." Confirmation Letter at 1. The CFPB pronounced that it would adhere to such guidance documents. 76 Fed. Reg. at 43,570. The consistent interpretation of RESPA by HUD, other federal regulators, courts, and regulated entities makes clear that Petitioners had no

[6] Courts that have addressed the issue have uniformly relied on the HUD Letter's two-step inquiry to identify RESPA's legal standard. *See McCarn v. HSBC USA, Inc.*, No. 12-cv-375, 2012 WL 7018363, at *1 (E.D. Cal. May 29, 2012); *Kay v. Wells Fargo & Co.*, 247 F.R.D. 572, 575 (N.D. Cal. 2007).

"fair notice" of the Director's conflicting interpretation at the time they engaged in the conduct at issue. Even the ALJ believed that the HUD Letter provided the proper framework for decisions under Section 8: *the entire hearing was conducted on that basis*. The notice of charges assumed this as well.

Second, until the Director's ruling, no governmental decision-maker had ever held that Section 8(a) violations occur every time a monthly reinsurance payment is received. To the contrary, courts have consistently found that a RESPA violation occurs (if at all) when a loan closes. *See Snow*, 332 F.3d at 359-60; *see also*, *e.g.*, *Mullinax v. Radian Guar.*, 199 F. Supp. 2d 311, 325 (M.D.N.C. 2002).

If the Director wishes to "reject," Dec. 17, the long-established and widely accepted interpretation of RESPA, even assuming his new construction is legally permissible, he cannot apply that construction to conduct that predates its announcement, *Gen. Elec.*, 53 F.3d at 1330—regardless of whether that conduct is mortgages settled *or* reinsurance premiums received, all of which ended in 2013.

2. This brazen disregard for judicial authority, agency precedent, and fair notice is a symptom of the larger constitutional problems here. The CFPB places legislative, executive, and judicial power all "in the same hands" of a *single person*—what James Madison called "the very definition of tyranny." *The Federalist No. 47*, at 298 (Clinton Rossiter ed. 1961). And the Director is not answerable to the President (he is removable only for cause) or Congress (he has sole power to

fund his agency from the Federal Reserve System's operating expenses). *See* 12 U.S.C. §§ 5491(c)(3), 5497(a)(1); *see also id.* § 5497(a)(2)(C) (prohibiting congressional review of Director's budget determinations).

These unprecedented structural features of the CFPB violate the separation of powers, *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). The President's removal power may be limited only "under certain circumstances," *id.* at 483, such as a multimember "body of experts," *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), or inferior officers with limited tenure and a narrow scope of powers, *Morrison v. Olson*, 487 U.S. 654, 671-73, 695-97 (1988). Never before has so much authority been consolidated in the hands of one individual shielded from the President's control *and* Congress's power of the purse.

3. The Director's new interpretations of RESPA contravene the plain text of the statute. Because they represent an abrupt rejection of prior statutory interpretations that "engendered serious reliance interests," "the APA requires [the CFPB] to provide more substantial justification" for the change. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015).

First, Section 8(a) makes clear that a RESPA violation is a *singular* event. *See* 12 U.S.C. § 2614. To hold otherwise is to adopt a theory of continuing violations, in which an (alleged) violation of Section 8(a) at closing is multiplied again and again by any subsequent reinsurance premiums. Although the Director cor-

rectly rejected a continuing-violation theory of RESPA, *see* Dec. 9, he resurrected that theory with his convenient reading of when a violation accrues.

Second, RESPA does not prohibit all referrals, but only *paying* for referrals by charging more than the market value of the services provided. In this regard, Congress's intent is obvious: "Nothing in this section shall be construed as prohibiting . . . the payment to any person of . . . bona fide . . . compensation . . . for services actually performed." 12 U.S.C. § 2607(c)(2). There is no textual basis for the Director's position that Section 8(c) applies only "if there is a question whether the parties actually did enter into an agreement to refer settlement service business." Dec. 17. "Bona fide" does not mean "in the absence of a referral agreement," and without such an agreement there can be no violation of Section 8(a). Instead, as every interested party, agency, and court determined, Section 8(c)(2) exempts *any* arrangement in which "payments to the reinsurer: (1) are for reinsurance services 'actually furnished or for services performed' and (2) are bona fide compensation that does not exceed the value of such services." HUD Letter at 3.

Even if Section 8 were somehow ambiguous on the legality of affiliated reinsurance, Petitioners' interpretation still must prevail. Where a statute carries both criminal and civil penalties, as here, the rule of lenity governs its interpretation in both contexts, and requires the resolution of any ambiguity in favor of defendants. *See Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004); *see also Carter*,

736 F.3d at 727. Indeed, given that "only the *legislature* may define crimes," the CFPB deserves no deference at all in interpreting RESPA. *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting the denial of certiorari).

4. Finally, the Director fundamentally and structurally erred by shifting the burden of proof from the government to Petitioners to prove that their affiliated-reinsurance relationships were exempt from liability. Dec. 20. As numerous courts have held, the plaintiff—not the defendant—bears the burden of proving that the conduct at issue does not fall within Section 8(c)(2).[7] When a statute defines conduct that is not unlawful, it does not set forth an affirmative defense but an element of the offense that the government must prove. *See*, *e.g.*, *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908-09 (1989).[8] The misallocation of the burden of proof renders the liability determination unlawful.

B. The Sanctions Cannot Survive Judicial Review.

The Decision and Order are plainly unlawful for an additional, independent reason. The CFPB may issue "an order to cease and desist" only from "any violation specified in the notice of charges." 12 U.S.C. § 5563(b)(1)(D). But the Or-

[7] *See, e.g.*, *Kiefaber v. HMS Nat., Inc.*, 891 F. Supp. 2d 796, 798 n.2 (E.D. Va. 2012); *Capell v. Pulte Mortg. L.L.C.*, Civ. A. No. 07-1901, 2007 WL 3342389, at *6 (E.D. Pa. Nov. 7, 2007).

[8] In sharp contrast with Section 8(c)(2), Section 8(d)(3) provides an affirmative defense for failure to comply with Section 8(c)(4)(A) and *explicitly* shifts the burden to the defendant to prove that defense. *See* 12 U.S.C. § 2607(d)(3).

der's staggeringly broad and infinitely elastic injunctive provisions cover a wide range of conduct well beyond the notice of charges. And the other "remedy"—disgorgement—is categorically unavailable under RESPA.

1. Provision I enjoins Petitioners from "violating section 8" of RESPA in connection with referrals for mortgage insurance. *Supra* at 8. This is a patently invalid "obey-the-law" injunction that could subject Petitioners to contempt for a virtually limitless range of potential future acts well beyond anything in the notice of charges. *See NLRB v. Express Publ'g Co.*, 312 U.S. 426, 433 (1941) (rejecting "blanket order" enjoining "any act in violation of the statute"). Moreover, Provision I fails to provide Petitioners with notice of the *particular* acts enjoined, violating the "most fundamental postulates of our legal order." *Int'l Longshoremen's Ass'n v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967).

Provision III suffers from similar flaws. It bars Petitioners from making referrals to any provider of a real estate settlement service if that provider has agreed to purchase or pay for any service from Petitioners and the purchase or payment is "triggered" by the referral. *Supra* at 8. Yet the Order does not define the term "triggered," which appears nowhere in RESPA or its implementing regulations, and could encompass a wide range of conduct and would involve an assessment of subjective intent. *See* Sadow Decl. ¶ 10 (Ex. F). Furthermore, Provision III concerns *any* "real estate settlement service," thus reaching conduct that is wholly un-

related to the mortgage-reinsurance issues in this proceeding and conduct expressly *allowed* under RESPA. *See* 12 C.F.R. § 1024.14(g)(1).

Provision II is also overbroad. It enjoins PHH from "entering into *any* captive reinsurance agreement" for the next 15 years. *Supra* at 8 (emphasis added). But affiliated reinsurance is used in a number of different areas outside the mortgage industry, such as life and property insurance. Placing a blanket ban on "any captive reinsurance agreement" absurdly forbids Petitioners from engaging in activities not even covered by RESPA.

Finally, Provision IV imposes massive burdens with no relation to the issues in this proceeding. *Supra* at 8. Its record-keeping and information-collection requirement applies to *anything* that *any* Petitioner received within 24 months of a referral (going back to July 21, 2008, and for the next 15 years) for *any* real-estate-settlement service provided by *any* (and potentially a different) Petitioner. *Id.* This jaw-droppingly broad provision will have overwhelming practical implications. *See* Sadow Decl. ¶ 17. Moreover, like Provision III, this requirement includes any "settlement service provider" and sweeps well beyond this matter.

2. Provision V requires Petitioners to "disgorge" $109,188,618. This is *ultra vires*. Agencies, unlike courts, have no inherent equitable authority. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 708 (D.C. Cir. 2005). RESPA did not give HUD authority to order equitable remedies such as disgorgement. *See* 12 U.S.C.

§ 2607(d)(4) (2006). The CFPA did not override the specific remedial limitations of RESPA, *see*, *e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012); *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 306 (D.C. Cir. 2014), and in any event could not do so for conduct that occurred *before* the CFPB was granted enforcement authority on July 21, 2011.

Finally, the total disgorgement lacks any evidentiary or factual foundation. Of that amount, $102.6 million consists of reinsurance premiums for loans closed before July 21, 2008, *i.e.*, on the books of reinsurance that the ALJ specifically excluded from consideration and as to which there was no material evidence at the hearing—much less any findings as to risk transfer or price commensurability.

II. Petitioners Will Suffer Irreparable Harm Absent A Stay.

1. The violation of the due process-based right to fair notice is *per se* irreparable, requiring no "proof of any injury other than the threatened constitutional deprivation itself." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Moreover, as in the Establishment Clause, due process turns on "an individual's freedom not to have something done to him" and thus "is implicated as soon as the government engages in impermissible action." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006). The structural separation of powers violations are also presumptively irreparable. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009).

2. The injunctive provisions of the Order are vague, overly broad, and extend well beyond anything specified in the notice of charges. If implemented, they will cause immediate and significant harm without "compensatory or other corrective relief . . . available at a later date." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (citation omitted). Because the CFPB is immune from suits for money damages, the substantial economic losses caused by the Order, even if quantifiable, are unrecoverable. *See Odebrecht Constr., Inc. v. Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013).[9]

First, because the injunctive provisions are impermissibly vague, they will chill Petitioners from engaging in a range of lawful activity, resulting in a significant yet unquantifiable loss of business opportunities. *See Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962). Indeed, Provision III, which does not distinguish between different types of referrals and services, covers conduct that is expressly permitted under RESPA, and Provision II covers conduct entirely unrelated to the mortgage industry. Moreover, Petitioners are subject to the intrusive requirements of the Order, while their competitors are not, resulting in a severe competitive disadvantage to Petitioners in the market for mortgage services. Sadow Decl. ¶¶ 11-16.

[9] *See also*, *e.g.*, *Smoking Everywhere, Inc. v. FDA*, 680 F. Supp. 2d 62, 77 n.19 (D.D.C. 2010); *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008).

Second, given the high-profile nature of this case, Petitioners would suffer significant and irreparable harm to their "good names" and business reputations. *Armour*, 304 F.2d at 406.[10] If the Order takes effect, Petitioners would officially be stigmatized as RESPA violators, and consumers and potential business partners will be less likely to be willing to do business with Petitioners. Sadow Decl. ¶ 26.

2. To comply with Provision IV's monitoring mandate, Petitioners would have to devote a vast amount of time and resources to the creation of a new compliance system, especially given the large scale of Petitioners' operations. *Id.* ¶¶ 9, 18-25. This will require reaching out to former employees to track past items, training current employees, hiring new employees, and dropping or reducing efforts in many other compliance areas to construct an unprecedented and all-encompassing system. The economic and structural impact would be immediate, severe, and, again, unrecoverable.

3. Provision V requires Petitioners to disgorge $109,188,618 within 30 days, with an escrow option. Even with that option, Petitioners stand to suffer irreparable harm in the form of lost business and unrecoverable economic injury pending review. The size of disgorgement will require Petitioners to reallocate capital to a restricted account from general operations and productive uses, includ-

[10] *See also*, *e.g.*, *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 217 F.3d 8, 13 (1st Cir. 2000); *Patriot, Inc. v. HUD*, 963 F. Supp. 1, 5 (D.D.C. 1997).

ing the origination of residential mortgage loans. Arias Decl. ¶¶ 6-7 (Ex. E). Moreover, Petitioners will be required to borrow funds to originate loans, imposing additional costs of approximately $1,250,000 per year. *Id.* ¶ 8. As with the other injuries that Petitioners stand to suffer, these harms will be irreparable.

III. The Balance Of Harms And The Public Interest Favor Petitioners.

The balance of hardships and the public interest heavily favor a stay. There is no public interest in enforcing an order that violates the fundamental right to fair notice or injunctive provisions that are plainly unlawful. *See Gordon*, 721 F.3d at 653. Moreover, Petitioners stopped placing loans into reinsurance books in 2009, and all reinsurance agreements have been commuted since 2013. *See supra* at 6 n.3. Finally, the CFPB did not establish that Petitioners intend to enter into any new reinsurance agreements. *See* Dec. 32. An injunction that limits Petitioners' ability to engage in such agreements is unnecessary, especially in the short term.

Nor will the public be harmed by a stay of the disgorgement order. Those monies are payable to the government, not any borrowers who were allegedly harmed. *See* Order at 2. And if Petitioners place the funds in escrow, the government will not have access to those funds until the appeal is complete; the CFPB thus would suffer no harm whatsoever from a stay of disgorgement.

CONCLUSION

The Court should grant the requested stay pending judicial review.

Dated: June 26, 2015

Respectfully submitted,

/s/ Theodore B. Olson

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Scott P. Martin
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Mitchel H. Kider
David M. Souders
Sandra B. Vipond
Michael S. Trabon
WEINER BRODSKY KIDER PC
1300 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 628-2000

Thomas M. Hefferon
William M. Jay
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
(202) 346-4000

Counsel for Petitioners PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation

CERTIFICATE OF SERVICE

I hereby certify that, on June 26, 2015, I filed the foregoing Motion for Stay with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel for respondent Consumer Financial Protection Bureau, who are registered CM/ECF users:

Richard Cordray
Director
CONSUMER FINANCIAL
PROTECTION BUREAU
1700 G Street, N.W.
Washington, D.C. 20552

Donald R. Gordon
Kimberly J. Ravener
Navid Vazire
Thomas H. Kim
Larry DeMille-Wagman
Enforcement Attorneys
CONSUMER FINANCIAL
PROTECTION BUREAU
1700 G Street, N.W.
Washington, D.C. 20552

/s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Counsel for Petitioners