

CFPB'S SECTION 1071 FINAL RULE: WHAT HAPPENS FOLLOWING ENFORCEMENT SUSPENSION IN TEXAS?

On March 30, 2023, the Consumer Financial Protection Bureau (CFPB) issued a final rule, set to take effect Aug. 29, 2023, amending Regulation B to implement changes to the Equal Credit Opportunity Act, made by section 1071 of the Dodd-Frank Act. The goal of this change is to “increase transparency in small business lending, promote economic development, and combat unlawful discrimination.”

To comply with this change, covered financial institutions must collect and report information about the small business credit applications they receive, including geographic and demographic data, lending decisions and the price of credit. The rule addresses further data points that must be collected and reported by covered financial institutions for covered applications from small businesses. Congress granted the CFPB express authority in 704B(e)(2)(H) to require financial institutions to compile and maintain, along with enumerated data points, a record of “any additional data that the Bureau determines would aid in fulfilling the purposes” of section 1071.

According to the final rule, a “covered financial institution” is defined as a financial institution that originated at least 100 covered credit transactions (rather than 25, as originally proposed) for small businesses in each of the two preceding calendar years. A “covered credit transaction” is one that meets the definition of business credit under existing Regulation B, with certain exceptions. A covered financial institution that originates at least 2,500 small business loans annually will be required to collect data starting Oct. 1, 2024. A covered financial institution that originates at least 500 loans annually will be required to collect data starting April 1, 2025. A covered financial institution that originates at least 100 loans annually will be required to collect data starting Jan. 1, 2026.

A lawsuit filed in the Southern District of Texas by the Texas Bankers Association, American Bankers Association and Rio Bank challenges the final rule, arguing the CFPB has required banks to develop and implement new software and compliance mechanisms to address over 80 reporting requirements (*Texas Bankers Association v. Consumer Financial Protection*

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Bureau, S.D. Tex., No. 7:23-cv-00144). The Plaintiffs contend the cost of complying with the rule will be anywhere from \$100,000 to over \$250,000 per bank, which will force several banks out of small business lending, and in turn, decrease funding to the groups the Dodd-Frank Act sets out to protect: women-owned and minority-owned small businesses.

On May 26, 2023, the Plaintiffs requested a nationwide preliminary injunction be issued against the CFPB's enforcement of its final rule. On July 31, 2023, Judge Randy Crane issued an order enjoining the CFPB from enforcing the final rule against the Plaintiffs and their members but denied the Plaintiffs' request for a nationwide injunction, holding that a nationwide injunction would only lead to more confusion. The injunction is to remain in place until the U.S. Supreme Court issues an order in the *CFS v. Consumer Financial Protection Bureau* case (51 F.4th 616 (5th Cir. 2022)), in which the Fifth Circuit held that Congress funded the Bureau directly from the Federal Reserve, which is funding that contradicts the Constitution's Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and a rule promulgated by the Bureau is invalid when it harms a plaintiff through its improper use of unappropriated funds to engage in rulemaking. If the U.S. Supreme Court overturns the Fifth Circuit decision, the injunction would be eliminated but the Plaintiffs would be granted an extended deadline to comply with the final rule. If the U.S. Supreme Court upholds the Fifth Circuit decision, then it is likely the final rule will be eliminated.

On Aug. 2, 2023, the American Bankers Association and Texas Bankers Association sent a letter to CFPB Director Rohit Chopra, requesting that the CFPB extend the stay outlined in the court's July 31, 2023, order to all FDIC-insured banks. In its letter, the American Bankers Association and Texas Bankers Association explain that extending the relief to all FDIC-insured banks would be prudent, ameliorate confusion and reduce further lawsuits by those not covered by the court's injunction. As of today, it doesn't appear the CFPB has responded to the letter.

Until further clarity filters in, banks that are not the plaintiffs, members of the plaintiffs or non-bank small business lenders should continue to comply, or prepare to comply, with the final rule. The U.S. Supreme Court is set to hear and issue an order in the *CFS* case in its 2023-2024 term, which means there will be uncertainty related to this issue and the obligation of banks to comply until then.

Armstrong Teasdale's Financial Services and Banking lawyers continue to monitor for developments in these matters and will share additional insight as the cases progress. Please contact your regular AT lawyer or one of the authors with questions specific to your bank or organization's compliance.



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