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CFPB's Section 1071 Small Business Lending Data Collection Rule: Delayed for Some Lenders*

Dodd-Frank Act Section 1071 amended the Equal Credit Opportunity Act to require financial institutions to compile, report, and maintain specified information regarding small business loan applications received from certain women-owned businesses, minority-owned businesses, and other small businesses, in accordance with regulations issued by the CFPB. After a long wait, on March 30, 2023, the CFPB issued a final rule to implement Section 1071 (the "Final Rule").

Under the Final Rule, lenders subject to the Final Rule are required to begin complying with the data collection requirements over the next one to three years, depending on how many covered credit transactions the lenders originate in calendar years 2022 and 2023. The three compliance dates by which a lender may need to begin complying with the Final Rule are: (i) October 1, 2024; (ii) April 1, 2025; or (iii) January 1, 2026. However, as reported in the May 2023 BCG Newsletter, the Texas Bankers Association ("TBA") and Rio Bank filed a lawsuit against the CFPB to halt implementation of the Final Rule. The American Bankers Association ("ABA") also joined the TBA and Rio Bank as a plaintiff (collectively "Plaintiffs") in the lawsuit. *Texas Bankers Ass'n v. Consumer Fin. Prot. Bureau*, No. 7:23-CV-00144 (July 31, 2023).

On July 31, 2023, the court in the lawsuit granted a preliminary injunction in favor of the Plaintiffs which prevents the CFPB from implementing or enforcing the Final Rule against Rio Bank or any lenders who are members of the ABA or TBA (the "Injunction"). Notably, the Injunction only applies to Rio Bank and other lenders that are members of the TBA or ABA. The court, however, refused to apply the Injunction nationwide. This means that lenders that are not members of the ABA or TBA are still subject to the Final Rule and the Final Rule's compliance dates are still applicable to those lenders. However, the Injunction does currently prevent the CFPB from being able to enforce the Final Rule against any lenders that are members of the ABA or TBA.

That said, the Injunction is only temporary since it only prohibits the CFPB from enforcing the Final Rule until the U.S. Supreme Court reaches a final decision in *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 215 L. Ed. 2d 104, 143 S. Ct. 978 (2023). In *Cmty. Fin. Servs. Ass'n of Am.*, a group of plaintiffs sued the CFPB in 2018 attempting to have the court vacate what remained of the CFPB's Payday Lending Rule on the grounds that the CFPB's funding structure was unconstitutional. The Fifth Circuit Court of Appeals ultimately held that the CFPB's Payday Lending Rule was invalid since it was promulgated by the CFPB under a funding mechanism that was unconstitutional. *Cmty. Fin. Serv. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, No. 21-50826 (5th Cir. 2022). The U.S. Supreme Court has taken the *Cmty. Fin. Servs. Ass'n of Am.* case under review, and it is expected that the Supreme Court will issue a

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decision on the case during the first half of 2024. Thus, BCG members will need to wait until the Supreme Court reaches a final decision on this case to know how long the Injunction may last.

Notably, the Injunction also provides that if the U.S. Supreme Court reverses the lower court's decision in *Cnty. Fin. Servs. Ass'n of Am.*, the CFPB must extend the applicable compliance dates to compensate for the stay of the enforcement provided for by the Injunction. Thus, the CFPB may have to extend the mandatory compliance deadlines for members of the ABA or TBA, even if the U.S. Supreme Court ultimately overturns the Fifth Circuit Court's decision in *Cnty. Fin. Servs. Ass'n of Am.*

Additionally, on August 3, 2023, the ABA and TBA submitted a letter to the CFPB requesting that it apply the delay of the Final Rule's compliance dates to all institutions covered by the Final Rule, and not just those who are members of the ABA or TBA. As a result, it is at least possible that the CFPB may itself decide to apply the delay of the Final Rule's compliance dates to all covered institutions.

Additionally, on July 27, 2023, the Financial Services Committee of the U.S. House of Representatives adopted a resolution to disapprove and completely overturn the Final Rule. H.J. Resolution No. 66. (the "Resolution"). At this point the Resolution has no effect, as it would need to be passed by both chambers of Congress and signed by the President to be effective. However, if passed the Resolution would go much further than the Injunction, as it would repeal the Final Rule in its entirety.

BCG will continue to monitor, track, and report on developments in this area as they arise. If you have any questions on the Final Rule or the developments discussed above, you may contact Joel Cook (JCook@ABLAWYERS.COM) or John Davis (JDavis@ABLAWYERS.COM) at the law firm.