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Locke Lord QuickStudy: Texas and American Bankers ?Associations Sue CFPB to Invalidate ?Final Rule Amending the ?ECOA, Seek Preliminary Injunction

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On May 14, 2023, the American Bankers Association joined a lawsuit filed by the Texas Bankers Association and a Texas bank, suing the Consumer Financial Protection Bureau to obtain a declaratory judgment invalidating the CFPB's recent Final Rule regarding data collection for commercial lenders.[1] Plaintiffs have now sought a preliminary injunction that would suspend the Final Rule.?[2]

The lawsuit is aimed at a Final Rule that the CFPB issued under section 1071 of the Dodd-Frank Act, which amended the Equal Credit Opportunity Act to require commercial lenders to collect data from loan applications.[3] The statutory amendment sought to facilitate enforcement of fair-lending laws by requiring lenders to determine if the business is women-owned, minority-owned, or a small business, and to compile and report to the CFPB 13 data points about the business and the loan.[4]

The CFPB's Final Rule dramatically expanded the statutory requirement to 81 data points that a lender must collect and submit to the CFPB.[5] The data points that lenders must collect and report include the following:

- The lender's unique identifier for the application;
- Application date;
- Application method;
- Application recipient;
- Credit type (including credit product, guarantees, and loan term);
- Credit purpose;
- Amount applied for;
- Amount approved or originated;
- Action taken (the result of the application);
- Action taken date;
- Denial reasons;
- Pricing information;
- Census tract;
- Gross annual revenue;
- NAICS code;
- Number of workers (non-owners);
- Time in business;
- Minority-owned statuses;

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- Ethnicity, race, and sex of principal owners;
- Number of principal owners.[6]

The lawsuit seeks to invalidate the CFPB's Final Rule for four reasons:

- First, it argues that the Final Rule is invalid because the CFPB's funding structure is unconstitutional, relying heavily on the Fifth Circuit's *Community Financial* decision holding as much.[7] We've discussed the status of litigation challenging the CFPB's funding structure in a QuickStudy titled Second Circuit Decides CFPB Funding ?Structure Is Constitutional, Setting up Circuit Split for ?Supreme ?Court.

- Second, the lawsuit asserts that the Final Rule exceeds the statutory scope of section 1071 because it expanded the 13 data points listed in the statute to 81 items in the Final Rule.[8]

- Third, the lawsuit avers that the Final Rule is arbitrary and capricious because it did not consider comments relevant to the statute's purpose.[9] The Administrative Procedure Act? requires that federal agencies respond to significant issues raised by interested parties.[10] The lawsuit alleges that the CFPB did not explain how to reconcile the "alarming costs that would be imposed on the small to mid-sized banks if the Final Rule were to expand the statutory categories at issue" with the statutory purpose of encouraging additional lending.[11]

- Fourth, the plaintiffs argue that the Final Rule is arbitrary and capricious because the CFPB did not engage in a proper cost/benefit analysis.[12] The lawsuit asserts that the CFPB considered only the costs associated with collecting the 13 statutory data points without also considering the additional costs associated with collecting the 81 data points required by the Final Rule.[13] The lawsuit also argues that the CFPB did not properly consider the Final Rule's disproportionate cost on small banks.[14]

The lawsuit seeks a preliminary and permanent injunction setting aside the Final Rule. On May 26, 2023, the plaintiffs moved for a preliminary injunction.?[15]? They argue they will suffer irreparable harm if the Final ?Rule is not stayed, and they ask the Court to leave the injunction in place until the Supreme Court ?issues a ruling in the *Community Financial* case relating to the CFPB's funding structure.?[16]

The Final Rule remains operative at this time. Its earliest compliance date (for covered financial institutions that originated at least 2,500 covered credit transactions in each of the calendar years 2022 and 2023) is October 1, 2024.[17]

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[1] *Texas Bankers Ass'n v. CFPB*, 7:23 cv 00144 (S.D. Tex. Apr. 26, 2023), Dkt. No. 1.

[2] *Id.*, Dkt. No. 13.

[3] 124 STAT. 2056 PUBLIC LAW 111–203—JULY 21, 2010.

[4] *Id.*

[5] Consumer Financial Protection Bureau, 12 CFR Part 1002 §1002.107.

[6] *Id.*; *see also* the CFPB's Data Points Chart for the Final Rule·

[7] *Texas Bankers Association*, 7:23 cv 00144, Dkt. No. 12 ¶¶ 78-83. The United States Supreme Court granted certiorari to review the Fifth Circuit decision, *Community Financial Services Association of America v. CFPB*,? 51 F.4th 616 (5th Cir. 2022), on February 27, 2023, and that case is currently being briefed. On March 23, 2023, the Second Circuit disagreed with *Community Financial* and created a circuit split on the issue. *CFPB v. Law Offices of Crystal Moroney*, PC, 63 F.4th 174 (2d Cir. 2023).

[8] *Texas Bankers Ass'n*, 7:23 cv 00144, Dkt. No. 12 ¶¶ 84-91.

[9] *Id.* ¶ 96.

[10] *Id.* ¶ 93.

[11] *Id.* ¶¶ 95-98.

[12] *Id.* ¶¶ 100-10.

[13] *Id.* ¶ 104.

[14] *Id.* ¶ 105.

[15] *Texas Bankers Ass'n*, 7:23 cv 00144, Dkt. No. 13.

[16] *Id.*

[17] Consumer Financial Protection Bureau, 12 CFR Part 1002 § 1002.114.

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