Articles + Publications | May 17, 2024

Locke Lord QuickStudy: Updated: CFPB Extends Sec. 1071 Compliance Deadlines After Surviving *Community Financial*

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UPDATE: Minutes after the below QuickStudy was published, the CFPB declared that it will issue an interim final rule to extend compliance deadlines for the Final Rule. The earliest compliance date will be extended from October 1, 2024, to July 18, 2025. The earliest filing deadline for lenders has been reset to June 1, 2026. The CFPB's alert discussing the remaining compliance and filing dates can be found here.

Below is the original QuickStudy on the *Community Financial* decision and the remaining issues lenders face under section 1071. As discussed below, there remain two cases challenging the Final Rule for reasons beyond the CFPB's funding structure. So, a court may still strike down the Final Rule. And the plaintiffs in those cases may renew their request for a preliminary injunction that stays all enforcement pending a ruling on their challenges. Such an injunction could further delay enforcement deadlines even if the Final Rule survives the two challenges. We will continue to monitor this litigation.

Original QuickStudy

The CFPB's Final Rule under section 1071 of the Dodd-Frank Act—which requires commercial lenders to collect and report data about small-business loan applications—has been on hold since last October while the U.S. Supreme Court considered whether the CFPB's funding structure is constitutional. The Court decided the structure is constitutional. *CFPB v. Cmty. Fin. Servs. Ass'n. of Am., Ltd.*, 2024 WL 2193873. That decision could terminate the preliminary injunction against enforcing the Final Rule, but several arguments against the Final Rule remain in two cases challenging the Rule. The courts considering those challenges will need to determine in the coming weeks whether to continue the injunction against enforcement pending resolution of the remaining challenges. If not, the courts will also need to determine the new deadline for compliance with the Rule. The compliance deadline (originally set to begin on October 1, 2024) was extended for some unknown period of time, but clarity is needed as to whether and when small-business lenders must begin compliance.

Industry groups challenged enforceability of the Final Rule based on *Community Financial* and other issues.

The CFPB issued the Final Rule on March 30, 2023 under section 1071 of the Dodd-Frank Act. The Rule requires small-business lenders to collect and report data on loan applications (similar to HMDA requirements for mortgage

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loans). The Rule requires lenders to collect and report 81 loan-application data points, including: credit type and purpose; amount applied for; action taken; amount approved; the number of applicant owners and employees; and the race, sex, and ethnicity of the principal owners.[1]

In April 2023, lenders and industry groups challenged the Final Rule in *Texas Bankers Ass'n v. CFPB*,[2] arguing the Rule is invalid for four reasons: (1) the CFPB's funding structure is unconstitutional;[3] (2) the Rule exceeds the statutory scope of section 1071 because it expanded the 13 data points listed in the statute to 81 data points;[4] (3) the Rule is arbitrary and capricious because it did not consider comments relevant to the statute's purpose;[5] and (4) the Rule is arbitrary and capricious because the CFPB did not engage in a proper cost/benefit analysis.[6] A similar case challenging the Final Rule was brought in Kentucky in *The Monticello Banking Co. v. CFPB*.[7]

Enforcement of the final rule was stayed pending a decision in *Community Financial.*

After injunctions preventing enforcement of the Final Rule as to the parties, the Texas federal court entered a nationwide preliminary injunction against enforcement of the Rule on October 26, 2023.[8] We previously wrote about that decision here. The Kentucky federal court also enjoined enforcement.[9] Both injunctions were entered pending a ruling in *Community Financial*. The Kentucky case was stayed, but briefing on the parties' cross motions for summary judgment in *Texas Bankers* continued while the injunction was entered and is scheduled to be completed on June 7, 2024.[10]

The U.S. Supreme Court affirmed the constitutionality of the CFPB's funding structure.

On May 16, 2024, the U.S. Supreme Court held (7-2) that the CFPB's funding structure is constitutional.[11] The Court held that structure—which permits the CFPB to draw from the Federal Reserve System without yearly appropriations from Congress—complied with the Appropriations Clause.[12] The Court explained that the Appropriations Clause simply directs that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress",[13] and the CFPB's funding mechanism met that requirement.[14] The Supreme Court concluded that although "there may be other constitutional checks on Congress' authority to create and fund an administrative agency, specifying the source and purpose is all the control the Appropriations Clause requires."[15] Thus, the CFPB survived the constitutional threat posed by *Community Financial*.

Challenges to the Final Rule continue, though compliance obligations are currently unclear.

The plaintiffs challenging the Final Rule have multiple independent arguments remaining despite the decision in *Community Financial.* Although the decision eliminates the original basis for the existing injunctions, the plaintiffs could seek to renew the injunctions based on those remaining arguments.

If the Texas and Kentucky courts do not extend the injunctions pending resolution of the remaining challenges, the deadline for compliance with the Final Rule is unclear. The Rule's earliest effective date was originally October 1, 2024, for institutions that originated at least 2,500 covered credit transactions for small businesses in 2022 and 2023.[16] When the Texas federal court issued its nationwide preliminary injunction, it ordered that if the Final Rule survived the Supreme Court's decision, the CFPB must extend all compliance deadlines "to compensate for the period stayed."[17] What "compensate for" means is unclear. One interpretation is a day-for-day extension based on the length of the preliminary injunction. If so, the nationwide injunction was in place for exactly 29 weeks before

the decision, meaning the earliest deadline for compliance with the Final Rule would be April 22, 2025. But the court's order is unclear on this. Thus, small-business lenders should continue to monitor the ongoing litigation to see how this issue unfolds in the coming weeks.

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[1] Consumer Financial Protection Bureau, 12 CFR Part 1002 §1002.107; *see also* the CFPB's Data Points Chart for the Final Rule.

[2] 7:23 cv 00144 (S.D. Tex. Apr. 26, 2023).

[3] *Texas Bankers Ass'n*, 7:23 cv 00144, Dkt. No. 12 ¶¶ 78-83.

[4] *Id.* ¶¶ 84-91.

[5] *Id.* ¶ 96.

[6] *Id.* ¶¶ 100-10.

[7] 6:23 cv 148-KKC (E.D. Ky. Aug. 11, 2023), Dkt. No. 1.

[8] *Texas Bankers Ass'n*, 7:23 cv 00144 (S.D. Tex. Apr. 26, 2023), Dkt. No. 69.

[9] *The Monticello Banking Co.*, 6:23 cv 148-KKC, Dkt. No. 23.

[10] *Texas Bankers Ass'n*, 7:23 cv 00144, Dkt. Nos. 76, 79, 90, 91, 95, 96.

[11] *Consumer Fin. Protection Bureau v. Community Fin. Servs. Ass'n of Am., Ltd.*, No. 22-448, 2024 WL 2193873, at *3 (U.S.S.C. May 16, 2024).

[12] *Id.*

[13] *Id.* at *5.

[14] *Id.*

[15] *Id.* at *12.

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

[17] *Texas Bankers Ass'n*, 7:23 cv 00144 (S.D. Tex. Apr. 26, 2023), Dkt. No. 69 at 7-8.

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