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Recent Developments in Section 1071: CFPB Issues Frequently Asked Questions for Section 1071 Small Business Lending Rule, and Court Issues Limited Injunction

Over the last several weeks, there have been two significant developments involving Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. First, on June 28, 2023, the Consumer Financial Protection Bureau issued a comprehensive set of Frequently Asked Questions to assist small business lenders and finance companies with complying with a final rule mandated by Section 1071. As we noted in a previous alert, the rule has staggered compliance dates. The earliest compliance date for small business lenders is October 1, 2024 if they originated at least 2,500 covered originations in each of 2022 and 2023. The FAQs provide guidance on two topics important for determining a financial institution's compliance date: (i) institutional coverage and (ii) covered credit transactions and small businesses.

The FAQs are considered a “compliance aid” by the CFPB. Materials with this designation are intended to present requirements in a useful way for compliance professionals, other industry stakeholders, and the public, but a compliance aid is not binding on regulated entities. In other words, reading the FAQs alone may not be sufficient, and a small business lender must still follow the text of the rule. Helpfully, the FAQs includes citations to the specific sections of the rule that are discussed.

On the same day as publishing the FAQs, the CFPB held a RegCast presentation on the rule and posted the slide deck for a RegCast presentation on its website. The RegCast presentation addresses topics to assist with the determination of whether a financial institution must comply with the rule.

The topics include the origination threshold for coverage by the rule, determining if a transaction is a covered origination, the types of covered credit transactions included and excluded from the rule, and determining whether a business meets the definition of “small business.” The slides contain high level overviews of the main topics covered, including graphics to assist in making determinations on what is considered a covered origination and which financial institution is responsible for reporting a covered credit transaction.

Finally, the CFPB has added all of these resources to a small business lending collection and reporting requirements page on its website for easy access to materials that financial institutions can reference when implementing the rule.

More recently, a federal judge in Texas granted a limited injunction temporarily blocking enforcement of the rule. This injunction comes in response to a request from the American Bankers Association (ABA), the Texas Bankers Association (TBA), and Rio Bank, who are challenging the rule in court. Although not a full nationwide injunction, the ruling provides temporary relief to ABA and TBA member banks across the country, allowing them to limit their Section 1071 implementation costs while the Supreme Court hears a challenge to the constitutionality of the CFPB's funding structure. Note, however, that non-depository lenders, merchant cash advance companies, and banks who are not members of the ABA and the TBA do not appear to be covered by this injunction.

Contact us

Our team is available to advise small business lenders, finance companies, and their vendors on the implementation of and compliance with the rule. We have attorneys with experience in Home Mortgage Disclosure Act (HMDA) data collection who can share best practices for complying with a similar data collection scheme under the rule. If you need assistance with any aspect of Section 1071 and its implementing rule, please contact Chris Friedman, Maureen Clark, or your Husch Blackwell attorney.