

CFPB'S SECTION 1071 FINAL RULE: WHAT HAS HAPPENED FOLLOWING ENFORCEMENT SUSPENSION IN TEXAS

On July 31, 2023, United States Judge Randy Crane issued a preliminary injunction in *Texas Bankers Association v. Consumer Financial Protection Bureau*, S.D. Tex., No. 7:23-cv-00144, enjoining the Consumer Financial Protection Bureau (CFPB) from enforcing a final rule against the plaintiffs in the case (Texas Bankers Association, American Bankers Association and Rio Bank) until the U.S. Supreme Court issues an order in *CFSA v. Consumer Financial Protection Bureau* (51 F.4th 616 (5th Cir. 2022)). The rule at issue was finalized by the CFPB on March 30, 2023, and requires covered financial institutions to collect and report information about the small business credit applications they receive, including geographic and demographic data, lending decisions and the price of credit. Judge Randy Crane denied the plaintiffs' request to apply the injunctive relief nationwide, stating that such relief would only cause further confusion.

The order sparked a flurry of legal filings by several financial institutions pursuing the temporary safety net granted to the plaintiffs in the case.

Following its July 31 order, the court granted a motion by the Independent Community Bankers of America (ICBA), Independent Bankers Association of Texas (IBAT) and Texas First Bank (TFB) to intervene in the action. The court also granted a motion by the Credit Union National Association (CUNA), Cornerstone Credit Union League (CCUL) and Rally Credit Union (RCU) to intervene in the action.

On Aug. 15, 2023, ICBA, IBAT and TFB filed an Emergency Motion for Preliminary Injunction, requesting the court grant them the same injunctive relief previously granted to the plaintiffs in the case. ICBA, IBAT and TFB also requested the court reconsider its denial to grant injunctive relief to financial institutions nationwide, claiming such relief will ensure applicants are receiving the same experience from bank to bank and that lending needs will be assessed consistently by banks across the country.

On Aug. 16, 2023, CUNA, CCUL and RCU filed a motion to join ICBA, IBAT and TFB's motion, requesting that the injunction apply to credit unions as well as all

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financial institutions subject to the requirements under the rule.

Judge Crane has yet to rule on these motions.

In a new lawsuit filed in Kentucky – *The Monticello Banking Company, et al., v. Consumer Financial Protection Bureau and Rohit Chopra*, E.D. Kentucky, No. 6:23-cv-00148 – seven Kentucky state-chartered banks, one national bank and the Kentucky Bankers Association requested an almost identical preliminary injunction, alleging the enormous cost to comply with the final rule would cause irreparable injury to financial institutions. The Kentucky plaintiffs argued the public interest would be served if a preliminary injunction was issued because the increased regulatory burden would only widen the equity gap between small and large banks, and would force small banks to face unabsorbable compliance costs, forcing mergers and acquisitions, and ultimately decreasing services to smaller communities. They further alleged the final rule was generated using an unconstitutional funding mechanism (mirroring the argument made in *CFSA v. Consumer Financial Protection Bureau, as well as Texas Bankers Association*).

On Sept. 14, 2023, Judge Karen Caldwell granted the preliminary injunction in the Kentucky case, mandating that the CFPB stay enforcement of the final rule against the plaintiffs until the Supreme Court issues its ruling in *CFSA v. Consumer Financial Protection Bureau*. Judge Caldwell reasoned that the temporary injunction will not harm the CFPB because the Supreme Court must issue its opinion no later than June 2024 and the final rule doesn't go into effect until October 2024. However, plaintiff banks are incurring needless expenses that will be unrecoverable if the Supreme Court rules against the CFPB. [See Opinion and Order](#) regarding Plaintiff's Motion for Preliminary Injunction, *The Monticello Banking Company, et al., v. Consumer Financial Protection Bureau and Rohit Chopra*, E.D. Kentucky, No. 6:23-cv-00148.

As of today, it is unknown whether the CFPB will stay enforcement of the rule against all other financial institutions or whether financial institutions will comply with the final rule. The situation is fluid and rapidly evolving, making it a challenging and dynamic environment for all involved.

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.