

Alert | Financial Regulatory & Compliance



October 2023

Court Issues Nationwide Stay of CFPB's Section 1071 Small Business Lending Rule

Go-To Guide:

- A federal district court issued a nationwide injunction prohibiting the Consumer Financial Protection Bureau (CFPB) from implementing or enforcing its Small Business Lending Rule, which was crafted to implement Section 1071 of the Dodd-Frank Act.
- As issued by the CFPB, the Small Business Lending Rule requires covered financial institutions to collect and report data on small business loan applications, including applications from minority-owned, women-owned, and LGBTQI+-owned small businesses.
- The district court's nationwide injunction will dissolve if the U.S. Supreme Court sides with the CFPB in a pending case styled *CFPB v. Community Financial Services Association of America* (CFSA) (Docket No. 22-448), which raises the question of whether the CFPB's funding structure violates the U.S. Constitution's Appropriations Clause. The Supreme Court will issue a decision in that case before the end of its term in June 2024.
- While other courts (including the Southern District of Texas) have issued narrower injunctions, the district court's nationwide injunction is the first order that broadly prohibits the CFPB from implementing or enforcing its Small Business Lending Rule as to any covered financial institution.

On Oct. 26, 2023, the U.S. District Court for the Southern District of Texas issued a [nationwide injunction](#) prohibiting the Consumer Financial Protection Bureau (CFPB) from implementing or enforcing its Small Business Lending Rule, which was crafted to implement Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

As issued, the CFPB's Small Business Lending Rule requires covered financial institutions to collect and report data on small business loan applications, including applications from minority-owned, women-owned, and LGBTQI+-owned small businesses. It also creates the first comprehensive database of small business credit applications in the United States.

We discussed the requirements of the Small Business Lending Rule in detail in our April 13, 2023 Alert: [“Small Business Lenders: CFPB Issues Final Rule on Small Business Lending.”](#) As we noted then, the Small Business Lending Rule creates significant new compliance obligations and requires lenders to make substantial operational changes, to the extent they have not already done so.

The district court had previously issued a [narrower injunction](#) that only prohibited the CFPB from implementing or enforcing the Small Business Lending Rule against the named plaintiffs in the case—that is, against the Texas Bankers Association and its members, the American Bankers Association and its members, and Rio Bank.

But after the district court issued that narrower injunction, several other covered financial institutions filed unopposed motions to intervene in the case, and then asked the court to expand the scope of its previously issued injunction.

In response, the district court found that the intervenors were likely to succeed on the merits of their challenge to the Small Business Lending Rule for the same reason that the original plaintiffs were likely to succeed—because the Fifth Circuit has held that the CFPB's funding structure, by which it requests and receives funding directly from the Federal Reserve rather than via a congressional appropriation, violates the U.S. Constitution's Appropriations Clause and its structural separation of powers.

The court then found that the intervenors faced a substantial threat of irreparable harms, because they would not be able to recover the compliance costs they are presently incurring, and that the balance of the harms and the public interest factors also weighed in favor of granting the requested injunction, because the “the public interested is served, not harmed, by maintaining our constitutional structure.”

The court issued a nationwide injunction, rather than a narrower injunction protecting only the intervenors, after reconsidering the logic of its earlier ruling granting narrower relief to the original plaintiffs.

It noted that after it issued its original injunction “multiple, additional parties” had intervened requesting relief. And that the statute underlying the rule—the Equal Credit Opportunity Act—was itself intended to require uniform application of the law: “[I]ts very purpose is the equal application of lending laws to all credit applicants to avoid disparate outcomes, and it presumes uniform application to all covered financial institutions absent exemption by the Bureau.” Relying largely on that logic, the court found that to “limit the injunction would be to undermine the goals of preventing inequality in lending and harm to the constitutional structure pending U.S. Supreme Court review of the question at issue.”

The district court's nationwide injunction will dissolve if the U.S. Supreme Court rejects the Fifth Circuit's holding that the CFPB's funding structure is unconstitutional, which it could do in a pending case styled *CFPB v. Community Financial Services Association of America* (CFSA) (Docket No. 22-448). The

Supreme Court heard oral argument in that case earlier this month, which we covered in detail in our October 23, 2023 Blog: “[Supreme Court Hears Oral Argument on Constitutionality of CFPB’s Funding.](#)”

Key Takeaways

The district court’s nationwide injunction is a win for small business lenders. While other courts (including this district court) had issued narrower injunctions, the district court’s nationwide injunction is the first order that broadly prohibits the CFPB from implementing or enforcing its Small Business Lending Rule as to any covered financial institution.

If the Supreme Court rejects the Fifth Circuit’s holding that the CFPB’s funding structure is unconstitutional, the CFPB will be required to extend all compliance deadlines for the Small Business Lending Rule “to compensate for the period” in which its implementation and enforcement of the rule was stayed by the district court. Given that, small business lenders should have substantially more time to develop programs to facilitate compliance with the rule—additional time they should use wisely, given the significant new compliance obligations and substantial operational changes the rule requires.

Authors

This GT Alert was prepared by:

- [Timothy A. Butler](#) | +1 678.553.2326 | Tim.Butler@gtlaw.com
- [Matthew M. White](#) | +1 678.553.2111 | Matthew.White@gtlaw.com
- [Tessa L. Cierny](#) | +1 678.553.2130 | Tessa.Cierny@gtlaw.com
- [Zeba Pirani](#) ~ | Law Clerk/JD | Atlanta

~ Not admitted to the practice of law.

Albany. Amsterdam. Atlanta. Austin. Berlin.→ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Kingdom of Saudi Arabia.« Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Singapore.™ Tallahassee. Tampa. Tel Aviv.^ Tokyo.‡ United Arab Emirates.< Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. →Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. «Khalid Al-Thebity Law Firm in affiliation with Greenberg Traurig, P.A. is applying to register a joint venture in Saudi Arabia. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig’s Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ™Greenberg Traurig’s Singapore office is operated by Greenberg Traurig Singapore LLP which is licensed as a foreign law practice in Singapore. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ‡Greenberg Traurig’s Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. <Greenberg Traurig’s United Arab Emirates office is operated by Greenberg Traurig Limited. ~Greenberg Traurig’s Warsaw office is operated by GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in GREENBERG TRAUIG Nowakowska-Zimoch Wysokiński sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2023 Greenberg Traurig, LLP. All rights reserved.*