

August 18, 2023

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 20552

Re: Section 1071 of the Dodd-Frank Act
Texas Bankers Association, et al. vs. Consumer Financial Protection Bureau

Dear Director Chopra,

The American Financial Services Association (AFSA),¹ Consumer Bankers Association (CBA),² CRE Finance Council (CREFC),³ Equipment Leasing and Finance Association (ELFA),⁴ Mortgage Bankers Association (MBA),⁵ National Association of Federally-Insured Credit Unions (NAFCU),⁶ Truck Renting and Leasing Association (TRALA),⁷ and the U.S. Chamber of Commerce (Chamber)⁸ (together, the “Trades”) write to urge action by the CFPB to address the current disparity that exists for financial institutions working to implement the CFPB’s Small Business Lending Data Collection Rule (the “1071 Rule”). Some of these trade associations have also written to you individually.

As described more fully below, the current situation considering the decision in *Texas Bankers Association et al v. Consumer Financial Protection Bureau et al*⁹ poses serious compliance challenges for the membership of the Trades, as institutions that are identically subject to the 1071 Rule are now effectively subject to different compliance and implementation dates. This situation is harmful to all stakeholders, and in order to preserve equity for covered financial institutions, the CFPB should act to establish new effective dates and compliance dates for all institutions subject to the 1071 Rule. Failure to bring cohesion to the group of institutions subject to the 1071 Rule will only lead them to explore judicial remedies, which will be highly inefficient.

As the CFPB is no doubt aware, litigants in the U.S. District Court in the Southern District of Texas have been granted a preliminary injunction in their suit challenging the validity of the 1071 Rule.¹⁰ This injunction prohibits “all implementation or enforcement of the Final Rule against Plaintiffs and their members.”¹¹ Further, for the specified plaintiffs and their members, the court has ordered that all deadlines for compliance with the 1071 Rule are stayed.¹²

The unfortunate effect of this decision is to create disparity for financial institutions subject to the 1071 Rule. For the plaintiffs in *Texas Bankers Association* and their memberships, no implementation or enforcement of the 1071 Rule is allowed. The participants in the lawsuit have been granted a reprieve from the difficult and burdensome tasks associated with implementing the 1071 Rule. But for everyone else, the timelines in the 1071 Rule are unaffected.

When Congress established the CFPB, the purpose of the Bureau was enacted as:

to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.¹³

Further, the legislation establishing the CFPP provides:

The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—

- ... (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition; and
- (5) markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.¹⁴

The effect of one set of effective dates and implementation dates for the 1071 Rule for similarly situated financial institutions based on their participation in a lawsuit is a clear example of disparate treatment of covered financial institutions. The current state leads to laws being enforced inconsistently, which is contrary to the statutory objectives of the CFPB.

In addition, the disparity of treatment of various financial institutions causes harm to the carefully crafted implementation scheme of the 1071 Rule. Because the 1071 Rule contains novel information collection, management, and reporting obligations the CFPB thought that it would be more difficult for small institutions to implement. Therefore, the CFPB established staggered compliance dates. Larger institutions, the CFPB wrote, would be more likely to have more financial and technical resources and are also likely to be familiar with similar information collection and reporting schemes (such as the Home Mortgage Disclosure Act) had the earliest compliance date. As a result, smaller institutions were granted more time to develop their tools and systems.

Further, the disparity of treatment of the covered financial institution will result in differing credit application processes for otherwise similarly situation covered financial institutions. Plainly stated this will result in otherwise similarly situation covered financial institutions, which serve identical markets, asking for different information during the application process. One group will have a more traditional application process and the other's application process would include asking the applicant for highly sensitive and private personal information required under Subpart B. This would cause irreparable harm to the group having to ask for this additional information and will result in perceived discrimination by applicants all of which is contrary to the statutory objectives of the CFPB.

The decision in *Texas Bankers Association* has upended the implementation schedule by granting many of the largest institutions an injunction. Because those institutions are granted additional time, the market for technological solutions and tools to aid in 1071 Rule compliance has been disrupted. The entire range of institutions subject to the 1071 Rule will be exploring systems and tools to help achieve and maintain compliance with the 1071 Rule, but with the largest clients for those services temporarily or possibly permanently out of the market for compliance tools, those tools are not being developed for the benefit of the affected institutions. In this manner the disparate treatment of financial institutions is harming everyone.

With these considerations in mind, the Trades request that the CFPB take steps to re-establish equity among all financial institutions subject to the 1071 Rule, regardless of whether the institution is participating in litigation. The CFPB should pause the 1071 Rule's effective date and tiered compliance dates until the various legal challenges are resolved, which is currently expected to be at the end of the 2023-2024 U.S. Supreme Court term expected in July 2024. If the CFPB does not act to restore parity among institutions subject to the 1071 Rule, many of those institutions will consider alternative sources of relief, including judicial relief. Managing more litigation is not the most efficient use of anyone's

resources when the CFPB has the ability to provide uniform treatment to all covered institutions subject to the 1071 Rule.

The Trades would be pleased to meet with you and your staff to discuss how to address the unusual circumstances affecting covered financial institutions regarding the 1071 Rule. Thank you for your attention to this matter.

Sincerely,

AFSA
CBA
CREFC
ELFA
MBA
NAFCU
TRALA
U.S. Chamber

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² CBA is the only national trade association focused exclusively on retail banking. Established in 1919, the CBA is a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

³ The CREFC is the trade association for the commercial real estate finance industry. Member firms include balance sheet and securitized lenders, loan and bond investors, private equity firms, servicers and rating agencies, among others. CREFC members play a critical role in the financing of office buildings, industrial and warehouse properties, multifamily housing, retail facilities, hotels, and other types of commercial real estate that help form the backbone of the American economy.”

⁴ ELFA is the trade association that represents companies in the \$1 trillion equipment finance sector, which includes financial services companies and manufacturers engaged in financing capital goods. ELFA members are a driving force behind the growth in the commercial equipment finance market and contribute to capital formation in the U.S. and abroad. ELFA’s nearly 600 members include independent and captive leasing and finance companies, banks, financial services corporations, brokers, investment banks, manufacturers, and service providers.

⁵ The MBA represents more than 2,200 member companies in the real estate finance industry, including federally-chartered banks and savings associations. The MBA works to ensure the continued strength of the nation’s residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing for all Americans.

⁶ NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 137 million consumers with personal and small business financial services products.

⁷ TRALA is a national trade association of companies whose members rent and lease vehicles in interstate commerce. Headquartered in Alexandria, Virginia, TRALA serves as the unified and focused voice for the interests of the truck renting and leasing industry. Its mission is to foster a positive legislative and regulatory climate within which companies engaged in leasing and renting vehicles and trailers, and related businesses, can compete fairly in the North American marketplace.

⁸ The Chamber is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country.

⁹ 2023 WL 4872398.

¹⁰ *Id.*

¹¹ *Id.* at ___.

¹² *Id.* at ___.

¹³ 12 U.S.C. 5511(a).

¹⁴ 12 U.S.C. 5511(b).