

# Total Stay Of CFPB Small Biz Data Rule Is Boon To Lenders

By **Timothy Butler, Matthew White and Tessa Cierny** (November 17, 2023)

On Oct. 26, the U.S. District Court for the Southern District of Texas issued a nationwide injunction prohibiting the Consumer Financial Protection Bureau 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.[1]

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 small businesses owned by minorities, women and LGBTQI+ people. It also creates the first comprehensive database of small business credit applications in the United States.

The Southern District of Texas previously issued a narrower injunction, this July, in *Texas Bankers Association v. Consumer Financial Protection Bureau*. This first injunction 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.[2]

After the district court issued the July injunction, several other covered financial institutions filed unopposed motions to intervene in the case, then asked the court to expand the injunction's scope.

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. The balance of the harms and the public interest factors also weighed in favor of granting the requested injunction, because, as the court wrote, the "the public interest 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. The court also found that the statute underlying the rule, the Equal Credit Opportunity Act, was itself intended to require uniform application of the law: "Its very



Timothy Butler



Matthew White



Tessa Cierny

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 the pending case of CFPB v. Community Financial Services Association of America. In early October, the Supreme Court heard oral argument in that case, which involves a thus-far successful challenge to the CFPB's payday lending rule.

### **Key Takeaways**

The Southern District of Texas' nationwide injunction is a win for small business lenders. While other courts — including this district court and the U.S. District Court for the Eastern District of Kentucky — had issued narrower injunctions, Southern Texas' nationwide injunction is the first order that broadly prohibits the CFPB from implementing or enforcing its small business lending rule on covered financial institutions.

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.

If the Supreme Court affirms the Fifth Circuit's holding without crafting an alternative funding mechanism for the CFPB, Congress will be forced to either appropriate funds to the CFPB or, in a much less likely scenario, repeal the CFPB-specific portions of the Dodd-Frank Act.

Congress could also at the same time ratify the rules, including the small business lending rule, that the CFPB has issued via its prior rulemaking efforts.

But it is unlikely that Congress would ratify the small business lending rule. Indeed, on Oct. 18, the U.S. Senate voted 53-44 in support of a Congressional Review Act resolution of disapproval.

Sen. John Kennedy, R-La., who sponsored the resolution, cited concerns about consumer privacy and the nature of the data financial institutions would be required to report:

The bank has to ask the small-business person if that small-business person is gay. What a private American does with another private, adult American in the privacy of their bedroom — we are free, so long as it doesn't break any laws, to express our sexuality however we want to, and it's none of the CFPB's business.

In any event, small business lenders will now 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.

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*Timothy A. Butler is a shareholder, and Matthew M. White and Tessa L. Cierny are associates, at Greenberg Traurig LLP.*

*Greenberg Traurig resident associate Zeba Pirani contributed to this article.*

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[1] <https://texasbankers.informz.net/texasbankers/data/images/Nationwide%20Injunction%20Granted.pdf>.

[2] [https://files.consumerfinance.gov/f/documents/cfpb\\_pi\\_order\\_texas\\_bankers.pdf/](https://files.consumerfinance.gov/f/documents/cfpb_pi_order_texas_bankers.pdf/).