

CFPB Announces Implementation Timeline for Dodd-Frank Section 1071 Reporting Rule, Days after Hosting Small Business Lending Symposium

December 20, 2019 | Anne L. Smith

Just days after hosting a November 6, 2019 symposium on Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), the Consumer Financial Protection Bureau revealed in a brief filed in the United States District Court for the Northern District of California that it "intends to complete its internal policymaking process in the next six months," and by November 2020, it "expects to release a detailed outline of the proposals under consideration."

Background on Section 1071

Section 1071 of Dodd-Frank amends the Equal Credit Opportunity Act by requiring financial institutions to compile, maintain, and submit to the Bureau certain information concerning credit applications by women-owned, minority-owned, and small businesses. In the more than eight years since Dodd-Frank became effective, industry representatives and consumer advocates have debated many aspects of the implementation of Section 1071. Consumer advocates have expressed frustration about the Bureau's failure to jump-start the rulemaking process. In May 2017, the Bureau issued a white paper and a Request for Information on small business lending for the purpose of informing its rulemaking. Subsequently, the Bureau's Fall 2018 agenda reclassified the Section 1071 rulemaking from a "current rulemaking" to a long-term action item, before restoring it to current rulemaking status in its Spring 2019 Agenda. Industry representatives, however, have expressed concerns about the eventual rule, which Director Kathleen Kraninger has echoed by referencing concerns about imposing "unnecessary and undue costs" on lenders that could be borne by women and minority small business owners.

Director Kraninger's Remarks

The symposium provided a public forum for various perspectives on the implementation of Section 1071 and the small business lending marketplace. Director Kraninger, who is nearing her first anniversary as head of the Bureau, opened with remarks underscoring the importance of small businesses as "critical engines for economic growth," and added that small businesses "need access to credit to smooth out business cash flows and to enable entrepreneurial investments." Estimating the small business financing market at

roughly \$1.4 trillion, she described the credit market for small businesses as "vast and complex." At the same time, Director Kraninger stressed the importance of collecting relevant data without imposing costs that could limit access to credit from existing market participants or discourage new entrants into the market.

Panel Discussions

Two panel discussions featured viewpoints from leading academic, think tank, consumer advocate, industry, and government experts in the small business lending arena. The panelists explored the definition of "small business," which data points will be important to collect, and what information lenders currently use to evaluate credit to small businesses.

The first panel assessed the current state of and future outlook for the small business lending marketplace. Moderated by Grady Hedgespeth, CFPB's Assistant Director for the Office of Small Business Lending Markets, the panel discussed various policy issues related to small business lending, including new business models, delivery mechanisms, regulatory burden, new types of partnerships, and the general availability of credit and potential consumer harm, as well as emerging concerns in the marketplace.

The second panel focused on the implementation of Section 1071. Moderated by Elena Babinecz, CFPB's Managing Counsel for Research, Markets, and Regulations, the panel reflected on practical solutions surrounding the implementation of Section 1071, including issues raised in response to the Bureau's Request for Information.

Delving into the more technical aspects of reporting, the second panel debated how to define "small business," what types of credit transactions should be considered "small business loans," which categories of financial institutions should be included in the Section 1071 rulemaking, what data points should be collected, and whether the data should be made accessible to the public.

Though not discussed at length, LendingClub's Richard Neiman stated that the CFPB should require merchant cash advance providers to report under the rule. Mr. Neiman further advocated for all entities covered by the rule to report APR, so that the data would shed light on the quality of credit as well as access to credit, citing the prevalence of high interest rate products marketed to women and minority small business owners. The panelists did not delve into the debate of how to disclose an APR on a short-term daily-pay product with no fixed term and adjustable payments without deceiving the business owner.

Panelists also touched on the Bureau's authority, with some suggesting that small business owners should be treated more like consumers, which could open the door to the Bureau's increased involvement in this arena.

Bank of Tampa's Maureen Busch noted the redundancy of reporting requirements under existing laws such as the Home Mortgage Disclosure Act (HMDA) and the Community Reinvestment Act (CRA), adding that inconsistencies in official definitions of certain data fields already caused confusion for institutions required to comply.

The Cato Institute's Diego Zuluaga deliberated on consumers' privacy rights with respect to collected data, even raising concerns about maintaining the data's integrity and the consequences of potential data breaches. Addressing the possibility that data may be released to the public, panelists weighed the pros and cons of releasing aggregated data - which some worry could be subject to misinterpretation by the media - versus loan-level reporting, which provides more details on individual applications.

Many of the panelists touched on issues related to efficiencies of reporting (and re-reporting) and arriving at consistent definitions for key terms. However, no consensus was reached as to the most suitable reporting model, the types of entities that should be required to comply, or how to make ideal use of the data ultimately to be collected.

Next Steps

The Bureau indicated in the symposium that it could take "a number of years" to release the final rule detailing implementation. It appears the Bureau has already taken a step toward this goal by stating it plans to release an "outline of proposals" for rules by November 2020. The Bureau made this disclosure in response to an amended complaint filed this past May that alleged the Bureau's failure to issue regulations violates the Administrative Procedure Act (APA). Seeking relief under APA sections 706(1) and (2), the plaintiffs asked the United States District Court for the Northern District of California to compel the Bureau to impose a six-month deadline for the agency to write the final regulations, which they claimed were unlawfully withheld or unreasonably delayed when the Bureau pushed Section 1071 rulemaking to the back burner in Fall 2018. In a brief filed with its cross-motion for summary judgment, the Bureau contended the court-ordered deadlines were unwarranted, given the Bureau's other pressing tasks on its agenda. The Bureau urged the court that "six months would not be enough time to complete this work, let alone to complete these critical tasks in a thoughtful way that produces a workable rule that can benefit plaintiffs, the Bureau and all other affected stakeholders."

Before the rule can be implemented, the Bureau needs to work on creating the reporting technology and user interface for data collection, which could potentially be built off the HMDA reporting platform. Even if the Bureau goes this route, the process could be delayed for years by the Bureau's need to contract out the technical development of the data collection platform.

Along with the technological aspects, the Small Business Regulatory Enforcement Fairness Act (SBREFA) requires the Bureau to form a Small Business Review Panel to seek input directly from small financial service providers for any proposed rule that could have a significant economic impact on a substantial number of small providers. As part of the SBREFA consultation process, the panel must issue a report, which will become part of the rulemaking record to be considered by the Bureau's decisionmakers. After the SBREFA is concluded, the Bureau claims it could take another three to twelve months to draft a proposed rule to issue for public comment. Once the Bureau formally commences the rulemaking process by issuing a Notice of Proposed Rule Making (NPRM), the public will have another opportunity to submit comments. Both the comments and proposed rule will form the basis for the final rule, which could take at least nine months after

receiving comments to finalize.

Currently, the Bureau lists Section 1071 rulemaking under its "active rulemaking plans" in the "prerule stage." According to the Bureau's just-released Fall 2019 Regulatory Agenda, the "prerule activity" date now shows action commencing in November 2019 rather than January 2020, which may signify further urgency on agency's part.

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7037 Ridge Road, Suite 300, Hanover, Maryland 21076
410.684.3200

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