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March 24, 2023

Via Electronic Mail

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

RE: Petition to Stay the Effective Date of the 1071 Rule

Dear Director Chopra:

In light of the U.S. Court of Appeals for the Fifth Circuit’s October 2022 decision that the Bureau’s funding structure¹ violates the Appropriations Clause of the U.S. Constitution,² and given the Supreme Court’s recent grant of certiorari to review the Fifth Circuit’s decision, ICBA respectfully requests that the Bureau stay the effective date of its Section 1071 rule, pending the Supreme Court’s final decision on the matter. Granting a stay will preserve the *status quo* until the Supreme Court can provide small businesses and community banks with more certainty as to the final disposition and validity of the Section 1071 rule.

Background

The CFPB entered into a stipulated settlement agreement with the California Reinvestment Coalition (“CRC”) in March 2020, in response to the CRC’s lawsuit against the Bureau, which argued that the Bureau’s failure to promulgate a 1071 rule violated the Administrative Procedure Act (“APA”). Among other matters, the stipulated settlement agreement set forth a mutually agreed upon timeline for the Bureau to promulgate 1071, including the periodic

¹ As authorized under 12 U.S.C. 5497.

² Under U.S. Const. Art. I, section 9, Cl. 7.

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setting of deadlines for the convening of a SBREFA panel, publication of a proposed rule, and finalization of the rule.

Pursuant to that agreement, the Bureau is expected to finalize its 1071 rule no later than March 31, 2023. Compliance with the finalized rule may be required as soon as 18 months after its effective date, approximately October 2024, depending on publication in the Federal Register.

Separately, the Community Financial Services Association of America (“CFSA”) challenged the Bureau’s ability to promulgate the payday lending rule, arguing, in part, that the Bureau is unconstitutionally funded. Ultimately, the 5th Circuit agreed with CFSA’s argument and issued an opinion in October 2022 that vacated the CFPB’s payday lending rule as the result of its unconstitutional funding structure.

Soon after, the CFPB filed a certiorari petition with the Supreme Court, seeking a review of the 5th Circuit’s decision. The Supreme Court granted the Bureau’s petition for certiorari and has agreed to hear the case in its next term. Due to the complexity and wide sweeping implications of the matter, it is likely that the Court will issue an opinion later in its next term, approximately in May or June 2024.

Maintaining the *status quo* pending the Supreme Court decision

So long as the validity of this rulemaking is called into question, pending the Supreme Court’s review – and decidedly so for community banks in the 5th Circuit, ICBA believes that the Bureau should retain the *status quo*. Declining to do so would give rise to a number of undesirable consequences.

1. *Irreparable harm from immediate efforts to comply with a rule that might ultimately be vacated*

Although the final rule is expected to provide community banks at least 18 months to adequately train staff and establish systems to comply with the rule, ICBA contends that it will take several years for community banks to set up systems and train staff to comply with 1071 requirements. Given the complexity of the rule and the long period of time needed to establish the system, this multi-year effort will commence in earnest as soon as the rule is final and effective.

If the effective date is not stayed, one likely scenario is that thousands of community banks will begin efforts to comply with the rule immediately upon finalization, on or

around March 31, 2023. Should the Supreme Court affirm the 5th Circuit’s decision, thousands of community banks and millions of their small business customers will have suffered irreparable harm if the Supreme Court rules 14 months later that the Bureau’s funding structure is unconstitutional.

2. *Portions of the Country under conflicting obligations*

If the Bureau declines to stay the effective date of this rule, another scenario will create an environment where marketplace confusion would be exacerbated. As the Bureau noted in its petition for certiorari, "new challenges to the Bureau’s rules and other actions can be expected to multiply in the weeks and months to come."³

For example, if a challenge to the 1071 is filed in the fifth circuit, as the Bureau’s petition suggests, then the court will be bound to the precedent in the CFSA case and will vacate the 1071 rule. This would result in large portions of the country following one set of rules while other parts would not.

Justice requires certainty

These unprecedented and extremely disruptive scenarios are the primary reasons why the Bureau sought the Court to hear the case this term – to instill certainty in the marketplace. Unfortunately, the Court will not issue its opinion on this matter until Spring 2024. However, the Bureau has an avenue under the Administrative Procedure Act (“APA”) to alleviate this disruption, independent of a court mandate.

Under Section 705 of the APA, agencies may issue a stay on action while judicial review is pending if “justice so requires.” Here, ICBA believes that “justice so requires” a stay to provide certainty. The purpose of a stay is not meant to amend or repeal a rule, but “to maintain the status quo to allow judicial review of the underlying regulation to proceed in a ‘just’ manner.”⁴ District courts have generally allowed agencies to invoke Section 705 only to postpone rules that are not yet in effect, rather than compliance dates after the rule’s effective date.⁵

³ Petition for Writ of Certiorari, *Consumer Financial Protection Bureau et al. v. Consumer Financial Services Association of America, Limited, et al.*, No. 22-448, at 29.

⁴ *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106-07 (D.D.C. 2018).

⁵ *Becerra v. U.S. Department of the Interior*, 276 F. Supp. 3d 953, 965 (N.D. Cal. 2017) (holding that Department of Interior could not delay oil and gas valuation rule’s compliance deadlines after effective date had passed); *California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1121 (N.D. Cal. 2017) (discussing *Becerra*, and noting that “[e]ffective and compliance dates have distinct meanings”); *Nat. Res. Def. Council v. U.S. Department of Energy*, 362 F. Supp. 3d 126, 151 (S.D.N.Y. 2019).

Conclusion

ICBA is not asking the Bureau to cease enforcement of existing rules, suspend supervision of major market participants, or even pause ongoing promulgation of other rules. But given the uniqueness of the current situation and the number of uncertainties, we ask the Bureau to maintain a status quo as a meaningful way to inject certainty and confidence until the Supreme Court can come to its decision. If you would like to discuss this further, please contact me.

Sincerely,

/s/

Rebeca Romero Rainey
President and CEO

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