

CA Reinvestment Coalition sues CFPB for delaying Section 1071 implementation

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The California Reinvestment Coalition has filed a lawsuit against the CFPB in a California federal district court seeking a declaration that the CFPB's failure to issue regulations implementing Section 1071 of the Dodd-Frank Act violates the Administrative Procedure Act and requiring the CFPB to promptly issue such regulations.

Section 1071 amended the ECOA to require financial institutions to collect and maintain certain data in connection with credit applications made by women- or minority-owned businesses and small businesses. Such data includes the race, sex, and ethnicity of the principal owners of the business. In April 2011, the CFPB issued [guidance](#) indicating that it would not enforce Section 1071 until it issued implementing regulations. In May 2017, the CFPB issued a RFI and a white paper on small business lending in conjunction with a field hearing on small business lending. The RFI was intended to inform the CFPB's Section 1071 rulemaking. While previously classified in the Bureau's semi-annual rulemaking agendas as a current rulemaking, the Bureau's Fall 2018 agenda reclassified the Section 1071 rulemaking as a long-term action item. In the Fall 2018 agenda's preamble, the CFPB attributed the rulemaking's new status to the Bureau's need to focus additional resources on various HMDA initiatives.

[In its complaint](#), the CRC claims that the Bureau's current HMDA activities, unlike Section 1071 rulemaking, were not mandated by Congress and are "directed at discretionary amendments to the 2015 final [HMDA] rule." According to CRC, "CFPB has chosen to prioritize its discretionary policy preferences over an explicit congressional mandate that it has now failed to implement for more than eight years." CRC alleges that the CFPB's failure to implement Section 1071 harms CRC and the small businesses and communities it serves by inhibiting CRC's "ability to advocate, educate and issue reports about access to credit; to advise economic development organizations working with women-owned, minority-owned, and small businesses on getting loans; and to work with lenders to arrange investment in low-income communities and communities of color." CRC further alleges that the "small business lenders and community development financial institutions, and organizations that work directly to ensure equal access to capital" that are among CRC's members are directly harmed by the CFPB's failure to implement Section 1071 because they are "hindered in their efforts to provide and secure loans for members of the impacted communities." CRC claims that without the data mandated by Section 1071, such members "have to expend additional organizational resources—and in some respects are entirely unable—to identify particular needs and opportunities."

In seeking relief under the APA, CRC cites 5 U.S.C. section 706(1) and (2) which, respectively, allow a court to "compel agency action unlawfully withheld or unreasonably delayed and "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." CRC claims that by failing to implement Section 1071, the CFPB has "unlawfully withheld and unreasonably delayed agency action." It also claims that by "countermand[ing] Congress's requirements by informing financial institutions not to [comply with the requirements of Section 1071 to make inquiries, compile, maintain and submit data]" and "set[ting] aside the explicit requirements that Congress directly imposed on financial institutions in Section 1071," the CFPB has "acted arbitrarily and capriciously, not in accordance with law, and in excess of statutory authority."

In claiming that CRC has countermanded the requirements of Section 1071 by informing financial institutions not to comply, CRC is implicitly claiming that such requirements are currently effective despite the absence of

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implementing regulations. That suggestion is inconsistent with the express language of Section 1071 which requires financial institutions to compile and maintain records of the information required to be obtained pursuant to Section 1071 “in accordance with regulations of the Bureau.” It also ignores that elsewhere in Dodd-Frank, specifically in various mortgage-related provisions of Title XIV for which the Bureau was also directed to issue implementing regulations, Congress expressly provided that the requirements set forth in those provisions would become effective on a specified date if the Bureau had not issued implementing regulations with an earlier effective date. Congress did not include similar language in Section 1071 making the requirements set forth in Section 1071 effective before the effective date of implementing regulations.

Somewhat ironically, in the CFPB’s Spring 2019 rulemaking agenda that was released today on the Bureau’s website, the Section 1071 rulemaking has been restored to current rulemaking status, with January 2020 indicated as the date for pre-rule activity. In the agenda’s [preamble](#), the CFPB states that it “intends to recommence work later this year to develop rules to implement section 1071 of the Dodd-Frank Act.” It also states that it “delayed rulemaking to implement this provision pending implementation of the Dodd-Frank Act amendments to HMDA and started work on the project after the HMDA rules were issued in 2015. The Bureau decided to pause work on section 1071 in 2018 in light of resource constraints and the priority accorded to various HMDA initiatives. The Bureau expects that it will be able to resume pre-rulemaking activities on the section 1071 project within this next year.”

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