



April 28, 2023

## RECENT DEVELOPMENTS

### TEXAS BANKERS ASSOCIATION CHALLENGES CFPB SMALL BUSINESS LENDING DATA RULE

The Texas Banker's Association ("TBA") filed suit against the Consumer Financial Protection Bureau ("CFPB") in the U.S. District Court for the Southern District of Texas challenging the CFPB's final rule implementing Section 1071 of the Consumer Financial Protection Act which will require banks collect and report information about small business credit applications. *Texas Bankers Association vs. CFPB*, No. 7:23-cv-00144 (S.D. Tex. Filed Apr. 26, 2023); see our Alert of March 28, 2023.

The TBA's complaint alleges that the CFPB violated the Administrative Procedures Act by abusing its discretion over the issue, turning the 13 data points included in the legislation into a regulation covering 81 data points. The TBA argues that the CFPB has failed to account for the effect the rule will have on small business borrowers and community banks, which will be required to overhaul their systems to support the new, arguably over-expansive, data collection requirements. According to a Texas Tech study, small business loans play a larger role in the portfolios of smaller banks than those of larger institutions, meaning that smaller banks (which are less equipped to overhaul their systems) will bear the brunt of the cost of this regulation. We will continue to monitor the status of the CFPB's rule and this lawsuit.

### DISTRICT COURT ENFORCES ARBITRATION CLAUSE AND DISMISSES "TRUE LENDER" CHALLENGE

A Texas federal district court has dismissed a class action lawsuit against Opportunity Financial, LLC ("OppFi"). See Order on Report and Recommendation, *Michael v. Opportunity Financial, LLC*, No. 1:22-CV-529-LY (W.D. Tex. Jan. 11, 2023). The plaintiff alleged that OppFi operated a "rent-a-bank" scheme to evade Texas law and charge interest at rates above the maximum rate permitted by Texas law. The district court adopted the magistrate judge's report and recommendation, concluding that the arbitration clause in the plaintiff's contract was enforceable, dismissing the complaint with prejudice and compelling arbitration.

### DE NOVO CHARTERING PROCESS NEEDS REVIEW

In remarks at the Wharton Financial Regulation Conference on April 14, 2023, Federal Reserve Governor Michelle

Bowman called for making the chartering process for de novo banks more streamlined and transparent in the U.S. to preserve dynamism and competition in the U.S. banking system, asserting that an unmet need for new charters is reflected by several trends: (i) the ongoing demand for "charter strip" acquisitions [the acquisition of existing banks for divergent new business plans]; (ii) the shift of traditional banking activities out of the banking sector into non-bank financial entities, or the "shadow banking" sector; and (iii) the rising demand for banking-as-a-service partnerships. See <https://www.federalreserve.gov/newsevents/speech/files/bowman20230414a.pdf>.

Among the impediments in the application process that Governor Bowman highlighted are (i) requiring multiple applications to different regulators, (ii) uncertainties surrounding application timelines may compound the difficulty of attracting capable board members, management, and employees and (iii) the demands of raising sufficient capital, as the total amount of capital is based on a forward-looking projection of the bank's expected (but fundamentally uncertain) future size.

Even after approval, Governor Bowman noted, de novo banks remain subject to heightened standards and additional limits for at least three years after commencing operations.

We have helped numerous clients navigate the various obstacles involved in bank chartering, bank acquisition and bank partnerships. Every effort is unique and may require some creative maneuvering to achieve a successful conclusion. If considering entry or access into banking, including the development of so-called "neobanks" or "challenger" banks, let us know how we can help you reach your objectives successfully.

### REGULATORS TO FOCUS ON AUTOMATION IN FINANCIAL SERVICES

The Consumer Financial Protection Bureau, the Federal Trade Commission, the Department of Justice's Civil Rights Division and the Equal Employment Opportunity Commission (EEOC) released a joint statement outlining their commitment to ensuring that the use of automated systems, including artificial intelligence ("AI"), does not violate the rights (or take advantage) of consumers. This is not the first time that regulators have expressed concerns about the use of technology like machine learning and potentially harmful AI applications. See, e.g., our Alert of April 5, 2021. Key concerns

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identified by regulators to date include unrepresentative or imbalanced data sets and “black box” algorithms.

Lina M. Khan, Chair of the FTC, stated: “We already see how AI tools can turbocharge fraud and automate discrimination, and we won’t hesitate to use the full scope of our legal authorities to protect Americans from these threats. ... Technological advances can deliver critical innovation — but claims of innovation must not be cover for lawbreaking. There is no AI exemption to the laws on the books, and the FTC will vigorously enforce the law to combat unfair or deceptive practices or unfair methods of competition.” □

✧ *Mike Tomkies and Mercedes Ramsey*