



## CFPB's Final Rule on Final Rules\*

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In late December, the Consumer Financial Protection Bureau (CFPB) promulgated an unusual rule establishing the date for determining when the agency's rules are officially "issued."<sup>1</sup> This article examines the rule and discusses its implications.

### What the Rule Is

The rule is denominated a "procedural rule" and therefore not subject to the Administrative Procedure Act's requirement for prior notice and comment. It is effective immediately. The new rule states that, going forward, a CFPB rule will be deemed "issued" by the agency upon the earlier of: (1) when the final rule is posted on the CFPB's website; or (2) when the final rule is published in the Federal Register. Usually, a rule is deemed "issued" when it is published in the Federal Register, although, as the CFPB notes, agencies may determine a different definition for its purposes.

### What the Rule Means

Given the timing of the rule, that it was not subject to any comments, and the rule details, it seems that the main purpose of the rule was to clarify a technical question for the rulemakings under Title XIV of the Dodd-Frank Act.

Specifically, under section 1400 of the Dodd-Frank Act, if the CFPB does not issue rules implementing Title XIV by January 21, 2013, the statutory

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<sup>1</sup>77 Fed. Reg. 76353 (Dec 28, 2012).

provisions become effective without the benefit of regulatory interpretation.<sup>2</sup> In other words, if rules under Title XIV are not issued by January 21, 2013, that title becomes effective without implementing rules. CFPB staff has been working diligently to ensure the rules are finalized by that deadline to avoid that consequence. As one CFPB staffer explained it to me — we will throw ourselves in front of a bus before we miss that January 21 deadline.

If “issued” meant publication of the final rule in the Federal Register, the CFPB would have to finalize the rules much earlier to ensure they would actually be published in the Federal Register. Given that several comment deadlines for the proposed rules were not closed until October and early November, CFPB staff did not have time to finalize the rules in December. This new “procedural rule” gives the CFPB a little more time to finalize the rules while still meeting the January 21 deadline.

However, the rule also starts the clock for the effective dates of the Title XIV regulations. Under section 1400, required rules must be implemented no later than twelve months after the “issuance” of the final rule. For example, on January 10, 2013, the CFPB issued final rules on ability to repay/qualified mortgage and HOEPA thresholds, and the effective date for these rules is January 10, 2014.

In its explanation, the Bureau did not indicate any other reasons for the rule, only that it would eliminate uncertainty in when the CFPB has issued rules.

## **What the Implications of the Rule are for APA Requirements**

In addition to the requirement that rules become effective within one year of issuance, the Administrative Procedure Act (APA) also mandates that final substantive rules must be published in the Federal Register “not less than 30 days before the effective date...”<sup>3</sup> Our firm has confirmed with CFPB staff that this rule does not conflict with the APA publication requirement. Agency staff assures us that final rules will comply with the 30-day “post-publication” time requirement even if the rule is considered to be “issued”

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<sup>2</sup> January 21, 2013 is eighteen months after the “designated transfer date” when consumer financial protection authority was transferred from the banking agencies to the CFPB.

<sup>3</sup> 5 U.S.C. §553(c) and (d). Under certain circumstances the 30 day delay prior to a rule being effective may be waived, for example, due to emergency situations.

before actual publication.

Thus, when a rule is “issued” by the CFPB, meaning it is put on the CFPB’s website, it may start the clock for the “outer limit” of when effective dates may be delayed, but it does not override the minimum limit of having to wait at least 30 days following publication in the Federal Register.

## Remaining Questions

The CFPB’s rule only defines “issued” for purposes of final rulemakings, but it does not define “prescribed,” which may be necessary. Before stating the effective date limit for rules “issued” by the CFPB, and the effective date of the statutory provisions if no rules are “issued” by January 21, 2013, section 1400 requires that “regulations required to be prescribed under this title...shall be *prescribed* in final form” by January 21, 2013. (emphasis added). The CFPB’s rule does not indicate that “prescribed” is the same as “issued,” and without a clarification, it would likely be assumed that the two terms have different meanings, since, if Congress wanted them to have the same meaning, they would have used the same word. In reality though, it may not matter.

The CFPB’s rule seems to focus on ensuring that statutory provisions of Title XIV do not go into effect without the necessary rules to implement them. Separately, the statute requires the CFPB to prescribe rules by January 21, 2013. If “prescribed” means published in the Federal Register, and the CFPB does not meet that deadline, there are not any true consequences. With the multitude of rulemakings required by the Dodd-Frank Act, several agencies have missed statutory deadlines for these rules. Congress could call hearings or issue letters to the agencies about these missed deadlines, but statutory deadlines are considered to be more like guidelines than true requirements.

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