CBA | CONSUMER BANKERS ASSOCIATION

January 6, 2022

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

Re: Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B) - Proposed Rule – Docket No. CFPB-2021-0015

Dear Director Chopra:

The Consumer Bankers Association (CBA)[1] greatly appreciates the opportunity to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") notice of proposed rulemaking for Small Business Lending Data Collection under the Equal Credit Opportunity Act ("Proposal"),[2] concerning the small business lending market pursuant to Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[3]

Moreover, CBA values the Bureau's proposed adoption of many provisions that will make the 1071 data collection more efficient and meaningful. These positive steps include the CFPB's inclusion of a simplified small business definition, limiting data collection to woman- and minority-owned small business, the general ability for lenders to rely on borrowers' representations, and a safe harbor for firewall disclosure. We believe these, and other provisions, will help ensure the success of small business data collection.

As we have maintained since the promulgation of Section 1071, CBA and its member institutions strongly believe that while Section 1071 mandates this rule, it is not as simple as data collection efforts undertaken on other lending products such as residential mortgages. Business lending materially differs from residential mortgage lending and the use of Home Mortgage Disclosure Act ("HMDA")-like reporting for business lending activity may not identify potential discrimination as Congress intended because of these important distinctions.[4]

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[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[2] 86 FR 56356 (October 8, 2021).

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (2010).

[4] Examples include: 1) Residential lending shares the same type of collateral. Business lending may not be secured at all, and when secured, the type of collateral varies tremendously; 2) residential lending has (with rare exceptions) consumers as the applicants, whereas business lending involves loans to all sorts of applicants, ranging from sole proprietors to sophisticated corporate structures; 3) business loans are often renewals rather than new loans and are not akin to refinances in the residential world; 4) business loans have much shorter and varied durations; 5) the appropriate property address for a business loan to use for reporting and analysis can be debated with no easy or right answer; 5) capturing business loan applicants for reporting and analysis can be debated with no easy or right answer given the various ownership and structures; 6) residential

We believe the dissimilar nature of business lending presents increased challenges and, therefore, increased risk of misleading data. Constructing fair lending analysis that will yield meaningful and appropriate conclusions for business lending is likely even more challenging.

CBA and its member institutions cannot stress enough the importance of well-balanced rules under Section 1071 to avoid overly burdensome data collection requirements that could stifle small business lending, greatly increase compliance costs for small business lenders, and open the door to costly litigation. Key to this rulemaking will be the Bureau's allowance for adequate compliance lead time for lenders to develop data collection platforms that will capture and report 1071 data accurately.

Equally as important any final rule will need to be as streamlined as possible with a standardized definition of what will constitute a covered borrower to ensure clear and reliable data collection. This also includes the streamlining of data to be collected and the ability for lenders to address 1071 reporting compliance with already existing reporting systems (e.g., Community Reinvestment Act reporting systems) to ensure as little disruption in the market as possible. These systems will need to be automated and accurate. Adherence to systems already in place will allow lenders to streamline the collection process.

Again, we thank you for your consideration and we look forward working with the CFPB as it assesses the issues surrounding Section 1071 and small business data collection.

Discussion

Compliance Lead Time

Under the Proposal, the CFPB proposes implementing section 1071's requirements as a new subpart B to Regulation B. The existing Regulation B would become subpart A.[5] To address various aspects of the new subpart B, the CFPB would add four new appendices to Regulation B and make numerous amendments to its "Official Interpretations." A final rule implementing section 1071 would be effective 90 days after publication in the Federal Register, with compliance mandated eighteen months after publication.

Given the complexities and the many other challenges presented by the Bureau in the Proposal, it is difficult to say exactly how much lead time lenders will need to implement the regulations without knowing the specific requirements for implementation, which, of course, will only be known when the regulations are final. Due to the highly complex nature of the proposed amendments and the

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mortgage transactions often do not result in ongoing relationships and are much more transactional; 7) residential lending generally involves creditor interactions with only the future homeowners, whereas in business lending, creditor interactions could be with a number of business representatives which may or may not include the principal owners; 8) residential mortgage applications seldom include more than two primary applicants whereas commercial credit applications may involve many equal part business owners; and 9) residential mortgage applicants customarily apply on their own behalf whereas commercial credit applicants may involve an authorized representative with no ownership interest in the business.

[5] The CFPB would also amend the existing provision in Regulation B related to requests for information and associated commentary to expressly permit voluntary collection of minority-owned business status, women-owned business status, and the race, sex, and ethnicity of applicants' principal owners in accordance with the requirements of the new subpart B. In addition, the CFPB would revise certain references to the entire regulation in existing Regulation B to instead refer specifically to subpart A.

implications of not getting the collection of 1071 data right, the proposed eighteen-month compliance timeline will not allow lenders to properly implement any final 1071 rule. It is vitally important lenders have a reasonable amount of time to implement the new requirements. Providing adequate implementation time will allow financial institutions the opportunity to make the changes necessary to achieve the statutory purpose and Bureau's goals for 1071 data collection and reporting. Without the time to properly implement for Section 1071, Lenders may be forced to pause small business lending, which could have significant negative impacts on the most vulnerable business the rule is intended to benefit. Accordingly, we believe an implementation period of no less than thirty-six months would afford adequate time for lenders to properly standup 1071 requirements.[6]

It is important to underscore that lenders will not have a clear starting point until the implementing regulations are final, therefore, allowing them to determine what changes will be necessary in their procedures, forms, policies, and systems, and then to implement those changes. System modifications require not only time for development, but also appropriate testing. Even after the rules are final, clarifications and questions will consume months before requirements can be defined. This means that changes to systems will not receive the full lead time, as the implementation process can only begin after clarifications are received and questions answered. This period could be even more complex with the implementation of additional data points and possible visual observation requirements, neither of which were considered at the SBREFA stage.

The Proposal is broader in scope than what the Bureau presented in the SBREFA outline, which featured a two-year period for implementation. The Bureau asserts that an implementation period of less than two years is preferable given the length of time since the passage of Dodd-Frank.[7] Imposing greater industry burden while affording less time for implementation, does not seem reasonable. The proposed implementation period unjustifiably shifts the time burdens of the delayed rulemaking to covered lenders. However, without the Bureau's 1071 rules, there was no possibility for lenders to get a head start on compliance during the time since Dodd-Frank was passed.[8] To implement an effective 1071 data collection process, lenders will need to build new reporting systems, requiring great time and expense. Moreover, before internal systems can be built, many lenders will need to rely on third parties to develop functionalities that will only add to the time needed due to the need to conduct relevant due diligence reviews of these third-party processes. Ideally, at least 6 months prior to the implementation deadline, lenders would have a version that can be used for integration testing and submission validations is a key step in their internal software development process. Providing that 6-month window will afford the impacted financial institutions the opportunity to complete the necessary testing and due diligence to ensure that production submissions will happen with fewer/no issues.

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[6] The Bureau should clarify that applications submitted before the compliance date which are approved and draws are made after the compliance date are not covered applications.

[7] Many industry stakeholders accepted a 24-month implementation period or said that was the minimum amount of time needed to implement Section 1071 (and some stakeholders requested *more* time), in response to a SBREFA outline that did not require lenders to collect the additional data points included in the Proposal. Additionally, the ten-year delay in the rulemaking does not have any impact on the time necessary for covered financial institutions to implement the rule. Additionally,

To complicate things further, lenders are already well into the process of making 2022 and 2023 technology build decisions, adding to already long queues of technology burdens that must be addressed before 1071 technology builds can begin, greatly delaying the ability for lenders to immediately begin development upon promulgation of a final rule. Lenders estimate that possibly half of all technology build time during implementation will need to be allotted to system modifications required by 1071 rules. This time allotment will be further compounded by existing lender technology "blackout" periods, which halt all technology builds for approximately eight weeks at the end of the calendar year and, depending on the promulgation of a final rule, could add nearly four months of lost time to any 1071 implementation timeline.

By way of comparison, changes to the already existing HMDA reporting system made by the Dodd-Frank Act[9] and the Economic Growth, Regulatory Relief, and Consumer Protection Act (The 2018 Act)[10] took the CFPB three years to implement. In October 2015, the CFPB issued a HMDA Rule implementing the Dodd-Frank Act amendments to Regulation C.[11] The 2015 HMDA Rule modified the types of institutions and transactions subject to Regulation C, the types of data that institutions are required to collect, and the processes for reporting and disclosing the required data.[12] On August 24, 2017, the CFPB issued another rule to further amend Regulation C to make technical corrections and clarify and amend certain requirements adopted by the 2015 HMDA Rule.[13] The 2018 Act amended HMDA by adding partial exemptions from HMDA's requirements for certain transactions made by certain insured depository institutions. As such, amendments to HMDA reporting, arguably a much more streamlined and established process, took years to develop and implement following the promulgation of the initial rulemaking. It is also worth noting the CFPB provided slightly more than 2 years for implementation of these changes.

Another apt comparison is the U.S. Treasury Department's Financial Crimes Enforcement Network's ("FinCEN") Customer Due Diligence Requirements for Financial Institutions Rule issued in May of 2016 ("CDD Rule").[14] Under the CDD Rule, "covered financial institutions" are required to establish procedures to:

- Identify each natural person that directly or indirectly owns 25% or more of the equity interests of a "legal entity customer" (the "ownership prong");
- Identify one natural person with "significant responsibility to control, manage or direct" a legal entity customer, including an executive officer or senior manager (*e.g.*, a Chief Executive Officer, Chief Financial Officer, Chief Operating Officer, Managing Member, General Partner, President, Vice President or Treasurer); or any other individual who regularly performs similar functions (the "control prong"), which may be a person reported under the ownership prong; and
- Verify the identities of those persons according to risk-based procedures, which procedures must include the elements currently required under the Customer Identification Rule (the "CIP Rule") at a minimum.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376, 2097-2101 (2010).
[10] Public Law, No. 115-174, 132 Stat. 1296 (2018). The President signed the Economic Growth, Regulatory Relief, and Consumer Protection Act into law on May 24, 2018.
[11] Home Mortgage Disclosure (Regulation C), 80 FR 66128 (Oct. 28, 2015) (2015 HMDA Rule).
[12] 80 FR 66128-29 (2015).
[13] Home Mortgage Disclosure (Regulation C), 82 FR 43088 (Sept. 13, 2017).
[14] 81 FR 29398 (May 11, 2016).

Despite these far fewer compliance requirements of the CDD Rule, as compared to the Proposal, FinCEN provided lenders with a two-year implementation period with a compliance date of May 2018.

Accordingly, CBA believes that due to the complexity of the Proposal and the importance of getting 1071 data collection right, lenders will need at least three calendar years for implementation following the Bureau's issuance of a final 1071 rule. We also recommend, due to the complexity of Section 1071 implementation, that the transitional period be similarly extended so lenders will have adequate time to implement, test, and if necessary, modify its application and data collection processes and systems and review the data before the Compliance Date to ensure compliance with the rule. The transitional period should not require lenders to cram at the end of the compliance period. We believe this timeline would provide for loan processing and management vendors to adjust their products and services to accommodate 1071 requirements, and for lenders to make the changes necessary to meet the new 1071 data collection and reporting requirements. In addition, as the information is to be submitted annually, any implementation date would need to take this into account and a start date of January 1st would be most appropriate.

Moreover, CBA recommends that the Bureau provide a one-year safe harbor from penalties following implementation, as it provided for the 2017 HMDA final rule.

Covered Financial Institutions

The data collection and reporting requirements of the Proposal would apply to any "covered financial institution," which the proposed rule would define as a "financial institution" that originated at least 25 "covered credit transactions" for small businesses in each of the two preceding years.[15] The CFPB would define "financial institution" consistent with section 1071 to include "any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity."[16] The CFPB does not propose an asset-based exemption threshold or any other general exemptions for particular categories of financial institutions.

A covered financial institution that is a subsidiary of another covered financial institution would be required to maintain its own separate small business lending data and would be permitted to report its data to the CFPB either directly or through its parent. If multiple financial institutions are involved in an origination, the proposed rule would require only the covered financial institution that makes the final approval decision to report the loan as an origination. If no origination is made, any covered financial institution that made a credit decision would be permitted to report the application. [17]

CBA agrees with the CFPB's approach to exemptions (25 or less) and supports the agency's efforts to minimize any exemptions to ensure an equal regulatory playing field and a comprehensive view of the small business credit landscape. We are supportive of an activities-based exemption and not an asset-based exemption, which has been exploited in the past by market disruptors partnering with exempted institutions to create an uneven regulatory playing field.

[15] 86 FR 56356 at 56357.
[16] *See* 15 U.S.C. 1691c-2(h)(1).
[17] 86 FR 56356 at 56423.

Additionally, while banks are typically the first place small businesses consider when seeking a loan, the landscape for business lending has changed substantially in recent years, with alternative banking options gaining significant credibility. Nonbank alternatives come in a variety of forms, from peer-to-peer lenders like Prosper and Lending Tree and business-to-business lenders like Fundera or OnDeck to rewards-based crowdfunding like KickStarter and equity-based crowdfunding such as OfferBoard. Most of these sources are online-based and sought for their convenience and the ease/speed of obtaining the funds. Despite their small scale, the technology used by these alternative players is fundamentally changing many of the ways in which small businesses access capital and create efficiencies, adding to greater competition in the small business market. Accordingly, we believe all lenders should be covered by any final 1071 rule in order to ensure a level regulatory playing field and a complete picture of the entire small-business lending market.

Additionally, due to the extraordinary growth in the nonbank market, we urge the CFPB to pay close attention to nonbank lenders to ensure compliance across the entire small business lending market. While estimates vary in range, we believe that roughly 30% of the current market is serviced through nonbank providers and not currently subjected to the Bureau's supervision. This sizable piece of today's lending market may be ripe for a larger participant rule pursuit to the Bureau's authority under Dodd-Frank granting the Bureau authority to supervise nonbank covered persons for compliance with Federal consumer financial law.[18]

Covered Borrowers – Definition of Small Business

The Proposal would require financial institutions to collect and report section 1071 data regarding all "covered applications" from "small businesses." Small business would be defined by reference to the Fair Lending and Small Businesses September 10, 2021 definitions of "business concern" and "small business concern" in the Small Business Act[19] and the implementing regulations of the Small Business Administration ("SBA"),[20] which is consistent with the approach specified in section 1071.[21] The CFPB would not, however, employ the SBA's size standards for defining a small business concern, which vary based on a business's six-digit North American Industry Classification System ("NAICS") code. Instead, the CFPB would look to whether the business—regardless of NAICS code—had $5 million or less in gross annual revenue for its preceding fiscal year.[22] Any business that is at or under the $5 million threshold would be a "small business" for purposes of the proposed rule. CBA strongly agrees with the Bureau's application of a revenue-based approach to the definition of a small business. However, we believe a $5 million gross annual revenue threshold is too high and would obscure the intent of section 1071 – the collection and analysis of data on the nation's truly small businesses.[23]

As acknowledged in the Proposal, most of the small entity representatives convened for the 1071 SBREFA analysis commented that most of their small business customers were under $1 million in

[18] 12 U.S.C. 5514.
[19] 15 U.S.C. 631 et seq.
[20] 86 FR 56356 at 789.
[21] *See* 15 U.S.C. 1691c-2(h)(2).
[22] 86 FR 56356 at 789 - The Bureau is seeking SBA approval for this alternate small business size standard as required under the Small Business Act.
[23] We also suggest the Bureau clarify that the annual revenue of affiliates should also be included when calculating the revenue of a Covered Entity as small affiliates or subsidiaries of larger companies should not be included as in scope businesses.

annual revenue.[24] We believe this is true and companies that fall above a $1 million threshold often offer different structures, are more sophisticated, and data collection would bleed into separate commercial banking operations with different systems, processes, and platforms, increasing the cost of collection, while offering little insight into actual small business lending.

Data analyses from some of our member banks also supports this notion. One such analysis found businesses with $1 million to $5 million in revenue much more closely resembled large businesses than those with $1 million or less. These institutions are much less likely to be a sole proprietorship, have five or more employees, and have multiple authorized officers who can act on the business' behalf. Additional member observations include:

- 39% of businesses with revenue under $1 million are reported as sole proprietorships as compared to 16% with revenue from $1million to $5 million and 10% for those with revenue over $10 million.
- 54% of businesses with revenue under $1 million have employees counts less than or equal to 5 as compared to 34% for those with revenue from $1 million to $5 million and 21% for those with revenue over $10 million.
- 34% of businesses with revenue under $1 million have only one authorized officer on file as compared to 22% for those with revenue from $1 million-$5 million and 12% for those with revenue over $10 million.

Setting a revenue threshold at $5 million or less would also add complexity and unnecessary costs to institutions who currently lend to a broad range of business revenues. In moving from $1m to $5m lenders start to get into commercial lending and often run into more complex ownership scenarios which becomes more cumbersome. Lenders also have different underwriting processes potentially (scored loans vs full documentation loans) for larger dollar loans. This may include other technology components which can double a lender's efforts in this space. Requiring institutions to collect 1071 information for revenue as high as $5 million would mean that lenders would have to build processes to collect 1071 data for their commercial-based lending products even though a substantial majority of those applications would fall outside the $5 million revenue threshold. This would lead to additional expenses and regulatory burden to oversee a process where the result will lead to a very low volume of reportable information under 1071. Complexity is increased by the fact that while small business lending applications often come via self-serviced online applications, commercial card applications have a much higher rate of being taken through sales-assisted or phone channels.

Additionally, a $5 million threshold does not allow banks to leverage Community Reinvestment Act ("CRA") reporting for 1071 data and would force the creation of independent reporting systems. CRA has been a critical resource that facilitates private capital flow into underinvested communities and businesses. Section 1071 rules should align with CRA regulations as much as possible to ensure that financial institutions covered by the CRA continue to meet the credit and community development needs of small businesses, particularly women-owned and minority-owned enterprises. Different thresholds will force many financial institutions to have to report very much the same data to the regulators but based on different revenue sizes and platforms, not allowing them to leverage the requirements currently in place. If the threshold were set at $1 million in previous year's gross annual revenues, much of the data could be gathered and generated quicker as it is already required for CRA reporting.

[24] 86 FR 56356 at 56429.

CBA encourages the Bureau to specifically consider existing data collection obligations under CRA and to coordinate with the CRA regulatory agencies of the Office of Comptroller of the Currency (“OCC”), Federal Reserve Board (“FRB”), and Federal Deposit Insurance Corporation (“FDIC”).

Limiting Data Collection to Small Woman- and Minority-Owned Businesses

As the CFPB noted in its 1071 SBREFA Outline, a strict reading of the statutory language would mandate lenders to collect information for all entities, large or small, that are at least 51% owned by women and/or minorities and for all small businesses, regardless of ownership characteristics. This strict interpretation, of course, would pose many issues with the scope of the proposed data collection and the logistical burden it would require. What’s more, it is reasonable to assume Congress did not intend to have lenders collect this type of information on large companies.

In light of the comprehensive coverage of women-owned and minority-owned businesses within the scope of small businesses, the Bureau has proposed the data collection and reporting requirements of a final 1071 rule would apply to any application to a covered financial institution for credit only for small businesses. The Bureau is concerned that a requirement to collect and report 1071 data on applications for women-owned and minority-owned businesses that are not small businesses could affect all aspects of financial institutions’ commercial lending operations while resulting in limited information beyond what would already be collected and reported about women-owned and minority-owned small businesses.[25]

CBA strongly supports the Bureau’s position and agrees the scope of the statute should be limited to small businesses, rather than all commercial loan applicants. Including large women or minority-owned businesses would substantially increase regulatory burden of 1071 without providing additional insight into small business financing practices or meaningful tools for determining discrimination because loans to larger businesses are more heterogeneous and therefore less comparable.

Covered Credit Transactions and Covered Applications

A “covered credit transaction” would be defined as a transaction that meets the definition of “business credit” under Regulation B, but would exclude trade credit, public utilities credit, securities credit, and incidental credit, as those terms are defined in Regulation B.[26] Accordingly, loans, lines of credit, credit

[25] *Id.* at 56386.

[26] The Bureau should consider clarifying the distinction between covered business credit transactions and consumer credit transactions that are not covered by the rule. Several questions are raised by the definitions of these terms under the proposed rule and existing Regulation B. 1) Since the current definition of “consumer credit” in Regulation B is “credit extended to a natural person primarily for personal, family or household purposes,” can credit extended to a business entity as sole borrower or to both a natural person and a business entity as co-borrowers still qualify as consumer credit if it is designated as such by the applicant or financial institution? 2) The CFPB proposed interpretation to the rule uses an example of combined business and personal credit that it says, “is not business credit for the purpose of subpart B of this part unless the financial institution designated or intended for the primary purpose of the account to be business-related.” How is the designation or intention to be evidenced? 3) The current CFPB commentary to the Regulation B definition of business credit says that a “creditor may rely on an applicant’s statement of the purpose for the credit requested.” Will this be sufficient under the proposed rule for the credit to be excluded as “consumer-designated credit.” What if the applicant designates the credit for consumer purposes, but

card accounts, and merchant cash advances would be covered. The CFPB has also indicated that it would interpret "covered credit transaction" as not encompassing factoring, leases, consumer-designated credit used for business purposes, and credit secured by certain investment properties. Any request for a "covered credit transaction" made in accordance with the institution's procedures for the type of credit requested would be a "covered application" under the Proposal. Although otherwise generally consistent with the existing Regulation B definition of "application," the proposed rule would exclude reevaluation requests, extension requests, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. Also excluded would be inquiries and prequalification requests, both of which are existing concepts in Regulation B. [27]

CBA agrees with the list of inclusions and exclusions as laid out in the Proposal. However, there are unique situations in which we believe certain credit products should be exempt from the provisions of 1071 or, at a minimum, receive special consideration. These include:

<u>Credit Line Increases</u>

Traditionally requesting credit line increases ("CLI") is a streamlined process. Businesses may need to quickly access additional credit where time is of the essence and the Bureau should consider ways to minimize burden on applicants making such requests. We urge the Bureau to exclude CLIs from the Section 1071 data.

<u>Multiple loan facilities</u>

It is not unusual for business loan customers to have multiple loan facilities with their lenders. For example, the business may require a real estate loan to purchase its business premises, a term loan to purchase needed equipment, or a working capital line of credit. These may be obtained at once as part of one closing transaction, and as a result of one application process, or they may occur over a period of time resulting in multiple applications. It would seem appropriate, therefore, to have special rules for the recurring application situations.

- With respect to any of the information required to be gathered/recorded under Section 1071 that a lender does not normally gather with each application, we recommend that lenders be permitted the option to use the answers provided by an applicant for up to three years from the date of an application for which the information was gathered, rather than being required to re-ask the questions for each application.[28] Under this scenario, the lender would not be required to repeatedly collect the race, sex or ethnicity of the principal owners of a Covered Entity and, instead, would be entitled to use the information on record from the previous inquiry for a three year period. Additionally, if a lender does not re-ask for the gross annual income for a new credit application because it is relying on its records from a previous transaction, the lender would not be required to re-ask for that information.

a co-borrower or the sole borrower is a business entity? Would the applicant's statement override other evidence to the contrary?

[27] *Id.* at 56357.

[28] Banks are currently allowed to use revenues that are as much as three years old for CRA reporting.

- It is also common for business customers to have multiple loans with different lenders. Lenders should not be held accountable for inconsistencies that would exist in information provided to different lenders.
- It is also common for business customers to have multiple loans with the same lender. Lender should not be held accountable where applicant provides inconsistent answers on the same data points for different applications.

Secondary Market Transactions

We agree with the Bureau that secondary market transactions, where a purchaser acquires a loan after it is closed by the original creditor should be exempt from the application of Section 1071. In these scenarios, at no time does the lender solicit or even interact with the small business borrower. Moreover, auto dealers are explicitly exempt from the CFPB's rulemaking jurisdiction under section 1029(f)(2) of the Dodd-Frank Act. The final rule should make explicit that auto dealers should not be required to collect and report Section 1071 data.

We believe indirect auto lending transactions should also be excluded from Section 1071 data collection. In the case of indirect auto lending, lenders may be involved in the credit decision prior to closing, however, these situations would also present difficult 1071 compliance issues. Here, much like with secondary market transactions, the lender does not have direct access to the borrower and will not be able to collect the pertinent information effectively. Also, a violation of ECOA is likely as the dealer would be prohibited under the law from asking the business owner for race, ethnicity, and sex. Accordingly, we ask that any indirect auto-lending transactions be excluded from a final rule.

Private Label Credit

CBA urges the Bureau to reconsider the application of the Proposal to credit offered to commercial and business customers in the form of private label or cobranded credit cards, or other types of credit originated at or facilitated through retailers, such as revolving lines of credit, installment loans, etc. Federal regulators have historically recognized the unique nature of certain private label credit products (e.g., point of sale credit) by excluding it from general requirements of other regulations (e.g., FinCEN's beneficial owner rule; the Bureau's own Regulation P data sharing opt-out requirements). We believe there are ways the Bureau could address the aforementioned concerns without sacrificing the integrity of its 1071 data collection, including exempting these credit applications originated at or facilitated through retailers.

The requirements of the Proposal would create significant disincentives for retailers, merchants, and other vendors to offer private label commercial credit, unnecessarily inhibiting small business lending at point of sale. Not only would the Proposal make merchants less likely to offer (or actively promote) private label commercial credit, but the lengthy and awkward application process would discourage applicants from applying as part of their retail experience. As we discuss below, the impact of the Proposal on the availability of small business private label credit would not be outweighed by the value of any information gleaned from private label lenders.

Retailers partner with financial institutions to offer private label or co-branded credit because it facilitates sales, meets the needs of and reinforces the relationship with their customers. However, retailers are also interested in swift point-of-sale interactions and efficient store operations. Lenders partner with retailers to offer store-brand credit in a manner that meets all these objectives. As the Bureau is likely aware, it is relatively simple to apply for store-brand credit at retail locations, even as part of a point-of-sale check out process. This is due to the hard work of retailers and lenders to streamline the application process through the use of automation and the elimination of extraneous questions and data fields. In fact, retailers continue to push lenders to reduce friction in the application process to encourage more applications and reduce the time and effort required.

The Proposal would add many new data fields unnecessary to the credit decision at hand, leading to significant increases in time to fill out an application. Merchants will have to also deal with questions about the application's detailed inquiries into race and gender, even if the applicant happens to read the disclosure about the voluntary nature of the data request. Store associates are likely not the personnel that should be tasked with managing these types of questions, nor will retailers appreciate questions or allegations —sometimes quite public or loud—of discrimination based on race or gender if a credit decision is pending or an application is denied. This is not what retailers want in their store, and it is likely to depress a retailer's willingness to offer or promote commercial private label account applications in their store.

The Proposal is also likely to depress the willingness of commercial customers to apply for credit. Retailers are not the only ones who value speed and efficiency, and a potential commercial applicant is likely to think twice before embarking on the application envisioned by the Proposal. Even if the applicant feels up to the task, he or she may not have all the requested information at hand or may not be willing to address issues of race and gender in a public place, possibly in view of coworkers or employees. We commend the Bureau for recognizing that much of the requested information would be voluntary, but applicants may or may not be aware of that fact (despite disclosures to the contrary) or may believe that their application will be less favorably reviewed if such information is not provided.

We believe it is vital to balance the Bureau's objective of the Proposal with the anticipated impact to the private label and co-branded credit offered to commercial and business customers via retail partners. The data that is collected through commercial private label credit applications is likely to be of reduced quality due to the fact that applicants may not be principals of the entity seeking credit, nor would the data be collected in an environment conducive to the collection of detailed information about the commercial entity and its owners. CBA also notes that the data is reflective not of the bank's lending policies or outreach, but rather the clientele of the retailer offering private label credit. Lenders are not in a position to influence those who shop at their partners' stores or buy their partners' wares, yet there is a risk that the Bureau or (more likely) someone else attempts to hold the lender accountable for an application base it cannot influence.

We also note that the Bureau should take extra caution regarding the publication of the data pertaining to commercial private label lending. As we note above, a lender's data will be heavily dependent on the business of its retail partners. It is also notable that these creditors or lenders offering private label and co-brand credit do not have a say in the geographic footprint of their retail partners. Data published by the Bureau should allow the public to recognize this fact and compare private label data across various private label lenders. Said differently, private label data will be sufficiently unique and idiosyncratic as to be difficult to interpret outside of a set of similarly situated peers. Furthermore, data pertaining to individual private label portfolios is commercially sensitive and retailers and lenders go to great lengths to treat it as such. Therefore, the Bureau should be mindful about how it discloses data around commercial private label lenders such that, for example, Retailer A cannot glean competitive information by looking at the filings of Lender B's portfolio for Retailer C. That may, in fact, be the quickest way to discourage retailers from offering commercial private label credit by providing a treasure trove of data to their competitors every year.

In sum, the goal of Section 1071 is to be able to accurately assess the state of small business lending in the United States and ensure that credit is being extended fairly across all demographics. That goal will be mired with bad data if point-of-sale continues to be included in in this rulemaking. For this reason, we believe point-of-sale should be fully exempted from the 1071 rulemaking. However, if the CFPB insists on its inclusion in the final rule, we believe that for credit lines below $50,000, there should be an exception from the requirement to obtain principal owners' ethnicity, race, and sex information, as suggested in the proposed rule.

Loans Made to Unknown Owner

Many small business loans are made to organizations where ascertaining the identity of the an "owner" difficult or impossible because there is not an owner. For purposes of 1071, we recommend the CFPB create a list of exemptions for these organizations. Some considerations include:

- Commercial loans are sometimes made to trusts. The trust may be a single purpose trust, such as a land trust that is established only to hold specific real estate, a traditional estate planning vehicle or, though more infrequently, a business trust. We recommend that loan applications by trusts be excepted from the coverage of Section 1071. Including trusts within the Section 1071 regulations could raise difficult issues regarding who should be considered for data collection purposes - the settlors, beneficiaries, trustees or some combination thereof, what is the "net profit or loss" of the trust, as well as who is entitled to that net profit or loss. Under these circumstances, the burdens associated with involving trusts within Section 1071 coverage would not be justified by the minimal information that would be generated with respect to loans to trusts.
- Nonprofit organizations also appear to require special treatment, at a minimum, under the final regulations. By definition, a non-profit does not have "net profit or loss" that accrues to individuals, and generally does not have owners. Consequently, it would be difficult, if not impossible, to determine if a nonprofit is a minority-owned or women-owned business. Depending on the ultimate definition of a small business, it may also be difficult to apply that definition to a nonprofit. For these reasons, we recommend that loan applications from nonprofit organizations also be exempted from the coverage of Section 1071.
- Non-operating entities, such as special purpose vehicles, pass-through entities, and other non-operating entities established as wealth management vehicles, in addition to holding companies that are not organized for profit, should be out of scope of 1071 data collection. These vehicles are primarily, if not exclusively, investment vehicles and therefore not appropriately in scope for 1071.
- Public agencies would rarely be considered a small business. Additionally, they have no identifiable individual owners.

- Foreign owned entities - Foreign nationals and foreign entities may have privacy laws that may conflict with 1071's requirements.

Trade Credit by Financial Institutions

The Proposal generally excludes trade credit from the definition of a covered credit transaction. The Proposal defines trade credit as a "financing arrangement wherein a business acquires goods or services from another business without making immediate payment to the business providing the goods or services." Proposed § 1002.104(b)(1). The Proposal further states that "an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit." Proposed § 1002.104(b)(1) Comment 1.

All forms of trade credit, not just in-house trade credit, should be exempt from the Proposal's data collection and reporting requirements. Trade credit extended by financial institutions facilitates the very same agreements between the very same businesses. Trade credit offered by financial institutions allows more suppliers to offer trade credit programs, and as a result provides more opportunities for credit access to small businesses. Both forms of trade credit deserve consistent regulatory treatment. This will prevent the creation of an unlevel regulatory playing field that discourages competitive services to develop around the issuance of trade credit.

Uneven regulatory treatment will likely force suppliers to move toward "in-house" solutions in order to accommodate the preference of purchasers who are not accustomed to or amenable to providing this type of information for trade credit. By drawing an arbitrary line between these two forms of trade credit, the Proposal forces more business transactions to a less regulated environment without the oversight offered by financial institutions. Not all suppliers, however, will be able to create an in-house program. Afterall, suppliers are not experts in trade credit and provide these programs as a service for their customers. Additionally, an in-house trade credit program can impact a supplier's cash flow, tying up funds it might otherwise need. When in-house solutions prove too challenging to develop and trade credit offered by financial institutions (accompanied by 1071 data reporting) proves unattractive to would-be purchasers, suppliers will find themselves out of options and the result will likely be a reduction in trade credit access to small businesses.

Additionally, the uneven treatment of trade credit will competitively disadvantage trade credit programs offered by financial institutions. It will allow in-house trade credit providers to offer a lower friction experience for purchasers that will not require 1071 data reporting. Meanwhile, trade credit programs offered by financial institutions that provide the very same service will need to implement changes required by this Proposal that purchasers will find unfamiliar and unwelcome.

Finally, the data gathered from only the trade credit programs offered by financial institutions will be less valuable to the Bureau, given that most trade credit is extended "in-house" and will not be subject to the Proposal's data collection and reporting requirements. The partial and incomplete data gathered on trade credit will not offer meaningful insights into that market and will not advance the statutory purposes that underlie Section 1071.

Data Collection and Reporting

Under the Proposal, covered financial institutions would be required to collect and report three categories of data: (1) data generated primarily from specific requests by the institution; (2) data that may be provided by the applicant or discerned from information provided by the applicant or a third party; and (3) data that the institution itself generates. These three categories are made up of a total of twenty-one data points in the Proposal.[29] Covered financial institutions would be permitted to rely on statements made by an applicant or information provided by an applicant when collecting and reporting data, but, where verification is permitted and the financial institution chooses to do so, a financial institution may be required to report verified information.[30] Covered financial institutions would be required to collect data on a calendar-year basis and report that data, along with certain identifying information about the institution, to the CFPB by June 1 of the following year.[31] Covered financial institutions would be permitted to reuse certain data points if the data were collected within the same calendar year as the current covered application and the institution has no reason to believe the data are inaccurate.[32]

As discussed in detail below, CBA strongly supports the provisions in the Proposal that limit the obligation of lenders to make any of their own determinations or observations concerning whether applicants are Covered Entities, the ability for lenders to rely on the accuracy of the response of applicants' representatives, and the affirmation that lenders do not need to continually ask if applicants are not responsive.[33] However, as proposed, in the case of race and ethnicity (but not gender) of an applicants' principal owners, the Bureau proposes for the information to be collected on the basis of observation. More specifically, if an applicant does not provide at least one principal owner's ethnicity, race, or sex information and the financial institution meets with any principal owners in person or by video, the financial institution would be required to collect such information via visual observation or surname.[34]

Although visual observation and surname are used by lenders to collect and report HMDA data, Section 1071 should be viewed very differently from the HMDA process, which involves circumstances in which bankers are more likely to be able to make certain observations concerning the applicant, because the business banker may not have the opportunity to make a visual observation of the owner of the business. As previously discussed, in many cases, the person making the inquiry may not be the owner, but instead an employee of the company. Additionally, the majority of small business lending will be composed of credit card and other digital products with digital application processing providing no opportunity for visual observation, making such observations skewed toward certain loan types, which may be received by applicants with higher revenues on average. Given that most small business credit applications are digital, including a visual observation requirement will not significantly increase the demographic data collected. If the Bureau's aim is to significantly increase the data collected and reported, CBA suggests providing additional protections on applicant privacy and details on the Bureau's plan to publish 1071 data. Further, if financial institutions are required to estimate demographic data using surname, the Bureau must provide guidance for mapping surnames, otherwise, there will be no consistency between institutions and, therefore, integrity issues with the data.

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[29] 86 FR 56356 at 56551.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 56578.
[33] Id. At 56468 - Under the Proposal, minority-owned business status or women-owned business status could only be collected and reported on the basis of information provided by the applicant for purposes of section 1071.[33] Financial institutions would not be permitted to collect or report such data based on any other basis (e.g., observation).
[34] *Id.* at 56358.

The CFPB should consider that business banking relationships have much more frequent ongoing contact than those of mortgage borrowers. A homeowner may never have to interact with the mortgage banker that may have caused offense by an incorrect visual observation, but a business owner or representative will likely have ongoing interactions with a business banker, making the offense more detrimental to the individual. As such, applicants who choose not to provide information on race or ethnicity should have their privacy preferences fully respected without fear that their financial institutions will be required to respond to race or ethnicity inquiries based on visual observation or surname. Accordingly, the Bureau should honor the "right to refuse" provision of Section 1071, which Congress expressly included to avoid lender overstep.[35] Visual observation requirements are inconsistent with this provision.

Lenders' Obligation to Inquire During Application Process – Covered Entities

Section 1071 of the Dodd-Frank Act imposes on lenders the obligation to inquire whether a loan applicant is a women-owned, minority-owned, or small business ("Covered Entity"). Applicants are provided with the right to decline to respond to a lender's inquiry under the statute.

The statutory requirement that lenders "inquire" of the applicant if it is a Covered Entity, recognizes that lenders will generally not be in a position to know at the time of application, and possibly not at any point in the loan underwriting process, whether or not an applicant is a Covered Entity. Additionally, in many situations, lenders will not have the ability to make their own determinations, by observation or otherwise. For example, many, probably most, businesses have more than one owner or personnel with authority to apply for credit on behalf of the Covered Entity. When a banker takes a business loan application, the banker will likely be speaking with one representative of the business, who may or may not be an owner. Consequently, the banker may not know or be able to observe whether the applicant is a women-owned or minority-owned small business and will be dependent on the answers of the representative completing the loan application. If the Covered Entity is a corporation or structured legally to distinguish the entity from the individual employees, the individual completing the application may not understand how to complete the monitoring information. The banker may also not have sufficient information to determine the size of the applicant if, for example, the applicant has not provided information concerning its size, and the application becomes withdrawn, closed for incompleteness, or declined.

For the same reasons as noted above, it would also be impractical to require lenders to attempt to confirm the accuracy of applicants' responses. Such a requirement would delay the credit decision and have a negative impact on the small business applicants, who have an interest in prompt credit decision making, and would be inconsistent with the statute which contemplates that the information should come from the applicant on a voluntary basis.

Consequently, we support the proposed inclusion of provisions that lenders are only obligated to pose 1071-applicability questions to the representative submitting the application for an applicant business, that lenders may rely upon the answers provided by the representative of the applicant making the application (including a refusal to provide the information under Section 704B(c)), and that lenders have no duty to make and record any of their own observations or determinations. We believe clear guidance

[35] "Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit."

on the obligations and duties of the lender are important because, although the information is being provided by applicants, lenders will be responsible for reporting the information as provided under Section 1071. For example, it is not clear from the Proposal if the obligation to provide demographic data is triggered if *anyone* from the bank meets in person with a principal owner, outside of the context of the credit application. In addition, there will be instances where a centralized, automated application process culminates in an applicant coming in person to sign documents at closing. Is the bank obligated to collect the demographic data because of that meeting?

Lenders will also need clarity under the regulations as to when their obligation to make these inquiries is fully satisfied. If an applicant is non-responsive, lenders should not be placed in the awkward position of having to repeatedly present questions that may be sensitive for the applicant, and lenders' loan application processes should not be delayed by an obligation to continually seek responses. Rather, after having asked the questions once, lenders should only be required to record the applicant's answers. For example, if the representative of the business that is making the application believes s/he should check with the other owners before sharing whether the applicant is a Covered Entity, the lender should be able to record that the applicant did not answer and should not have to ask again. If the applicant subsequently volunteers an answer prior to a denial or closing of the loan, as applicable, the lender could update its records.

<u>Lender's Duty to Inquire – Additional Information Concerning Covered Entities</u>

New Subsection 704B(e)(2) of ECOA, contained in Section 1071, requires lenders to compile and maintain certain information about Covered Entities and their principal owners. Some of this information will be available to lenders from their own records, such as the application number and application date. However, for some of the information required by this Subsection, lenders will again be entirely dependent on the individual completing the application. Lenders will be dependent on the individual to provide information concerning the Covered Entities' gross annual revenue, and the sex, race, and ethnicity of the principal owners.

For example, when a business banker takes an application, some of the principal owners of the business may not be present and the representative of the business making the application may not know the race, gender, or ethnicity of the principal owners, or s/he may not feel comfortable sharing the information if s/he does not know that the principal owners wish to provide it. Consequently, s/he may decline to provide the information, in which case the lender would record the declination. Or the representative may explain that s/he will have to check with the principal owner(s) not present; under these circumstances, what information is the lender to report if (a) the application is withdrawn or declined before the representative provides the information or advises that s/he will not be providing the information;[36] or, (b) the application is approved and the loan is closed, but neither the representative nor any of the other owners provide the lender with the information or advise the bank that they will not be providing the information?

Similarly, there will be circumstances in which the applicant has not provided the lender with the applicant's gross annual revenue before the application is withdrawn or declined. Consequently, lenders

[36] It is common for small businesses to look at obtaining a loan from multiple lenders simultaneously. In the lending arena, borrowers may apply to many lenders to get the best deal and pull through a loan with just one. This apply-and-withdrawal process would greatly skew the industry's data about lending rates.

should not be held responsible if the information is not available because the applicant does not provide it, nor can lenders be responsible for the accuracy of the information.

These examples raise a few points of concern, which we request clarification in the CFPB's regulations:

- Similar to the inquiry concerning whether the applicant is a Covered Entity, lenders should only have to request the information under Subsection 704B(e)(2) once, and lenders should be able to rely on the responses of the applicants' representatives without any obligation to make their own determinations or observations (further discussed below under "Visual Observations"), or to otherwise check or correct those responses. In a circumstance in which an applicant has identified itself as a Covered Entity and does provide the lender with its gross annual revenue, the lender may verify that information as part of its normal underwriting process which requires such documentation through, for example, the review of tax returns. Although we do not believe lenders should have the obligation to check the accuracy of applicants' responses, we suggest that if it is the lender's practice to revise the application information in its system to reflect what it believes to be a verified number, the lender should be permitted to report the verified number retained in its system, rather than requiring the lender to maintain both numbers in its system. In any event, the lender's verification of revenue should not result in the lender being required to change the applicant's self-classification as being a small business or not being a small business, e.g., a Covered Entity. As noted, we believe the information that Section 1071 is intending to capture needs to be requested at the time of application, this is especially so for instances in which the application is declined and there would be little if any opportunity to obtain the information subsequently. Consequently, the determination of whether or not an applicant is a "small business" needs to be made by the applicant at the time of application so the lender knows whether to ask for the additional information and, for consistency and so as to not place excessive burdens on lenders' application processes, lenders should not be changing the applicant's self-characterization later in the process and then be required to make an additional inquiry of the applicant for purposes of Section 1071.
- We believe it is important that the reporting requirements allow for entries that can address circumstances such as those described above. We would recommend "Declined to Answer" if the applicant declined, and "Not Available" for all other circumstances in which the applicant did not provide the information notwithstanding the lender's inquiry, such as a withdrawn application or non-responsiveness on the part of the applicant. We recommend the CFPB create a business-specific information form to gather information from the applying business and that the lender only be required to faithfully report what is provided on the form. Optional use of such a form should be clarified as many loan applications are taken verbally and without the customer completing anything.
- Subsection 704B(e)(2)(E) requires financial institutions to record the census tract of the applicant's principal place of business. This raises the question of the appropriate definition of the "principal place of business." Generally, lenders use the address the applicant provides during the application process for their records. That address may be the physical address where the main local operations are located and may be used for site visit purposes but may not necessarily be the business' headquarters. It will reduce the information-technology burden of compliance with Section 1071 if a lender is able to use as the applicant's "principal place of business" the address provided by the applicant as part of the lender's normal application process, rather than requiring lenders to also collect and record a different address based on a specific definition in the regulation – such as the state of organization, location with majority of principal officers, location generating the most business for the applicant, headquarters, or

some other criteria. Another alternative would be to incorporate the address required under CRA, which is the address where the proceeds of the funds will primarily be used. We think it may be helpful to align the definition with the one currently used under CRA and would appreciate the CFPB to consider conforming definitions to those presently used in the industry to avoid confusion.

<u>1071 and HMDA Data Sync</u>

The Bureau should exclude all transactions where financial institutions have collected and reported data to the CFPB pursuant to Regulation C. If the Bureau narrowly-tailored the exception to applicants that are reported under HMDA, then institutions not subject to the HMDA reporting regime would still have to report HMDA-eligible applications under section 1071 because they would not actually report such applications under HMDA. The fact that these transactions are being captured by either HMDA or Section 1071 should still facilitate the enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify whether all communities are being served with respect to these credit transactions.

Additionally, the Bureau should consider several difficulties involving the differences in collection and reporting of the ethnicity, race, and sex fields. Due to variations in Government Monitoring Information ("GMI") data specifications, application systems receiving both HMDA and 1071 reporting will be required to have different screens for collecting and tables for retaining the GMI of the applicants. The Proposal indicates that the financial institution must report "ALL" of the aggregated and disaggregated ethnicity and race values indicated by each applicant with 25% or more ownership.[37] For example, unlike HMDA where there are five ethnicity fields and five race fields reported, the Proposal's requirement for "ALL" categories indicated by the applicant will require a reported field for every aggregated and disaggregated value available to be selected. Even when a value is not selected it will have to be reported for data consistency purposes.

CBA also expects that both collection and reporting regimes could be triggered for financial institutions that extend business purpose term loans secured by multifamily and commercial income producing rental properties. The vast majority of these applicants are legal entities (LLCs, partnerships, corporations) and property ownership is generally owned/vested in a single asset legal entity that is comprised of a manager or general partner and otherwise the equity ownership is by passive real estate mortgage investors; it is not uncommon for the manager/general partner itself to be a legal entity and the passive ownership to be held through one or more pass-through entities and/or trusts. Finally, in most cases we have observed that the business applicant does not have employees. Rather, these are commercial investment structures with a control party and passive investors.

<u>Data Points</u>

<u>Mandatory Data Points</u>

Section 1071(e)(1) requires each FI to compile and maintain a record of certain information provided by any credit applicant pursuant to a request under section 1071(b), and report that information to the

[37] 86 FR 56356 at 56358.

Bureau.[38] The Bureau refers to this information, along with the applicant's responses to the inquiries under 1071(b)(1), as "mandatory data points," which include: (1) whether the applicant is a women-owned, minority-owned, and/or small business, (2) application/loan number, (3) application date, (4) loan/credit type, (5) loan/credit purpose, (6) credit amount/limit applied for, (7) credit amount/limit approved, (8) type of action taken, (9) action taken date, (10) census tract (principal place of business), (11) gross annual revenue, and (12) race, sex, and ethnicity of the applicant's principal owners.

As for the mandatory collection of sex of the principal owners, the Bureau's proposed model data collection form includes a section for collection information relating to the "sex" of the principal owners. The options present in the proposed form include: (1) male; (2) female; (3) I prefer to self-identify as (free form field); and (4) I do not wish to provide this information. Free-form fields, like the one associated with "I prefer to self-identify," have historically posed data integrity issues. For example, an applicant may choose to self-describe as a "man" rather than selecting the existing option for "male" in the data collection form.[39] This diminishes the accuracy and utility of the data because lenders end up reporting fewer applicants in the existing categories than is likely the case. Instead, including a broad third category, such as "non-binary," that could encompass most forms of self-identification outside of "male" and "female" would improve data quality.

Discretionary Data Points

The Bureau has also proposed additional discretionary data points to be collect on top of the above-enumerated mandatory data fields. These include, among others, the collection of data points relating to pricing and NAICS code. CBA has always maintained that the 1071 data collection process will need to be as streamlined as possible in order to produce useful data. As noted above, the process for small business data collection will not be as simple as the process under HMDA for home mortgages and any unnecessary data points will only serve to add distortion to the data mandated under Section 1071.Accordingly, CBA believes the mandatory data points sufficiently capture the information sought under Section 1071 and urge the Bureau to reconsider any additional data points that would be unnecessary and would create more constraints on borrowers and lenders alike.

Pricing Data Point

Pricing rates serve no purpose for small business reporting. Making pricing data, which includes interest rate calculations, public could result in misinterpretations and unjustified fair lending concerns.[40] The collection of pricing data will lead to disclosure of fees and covered lenders should not be put in a position of disclosing rates. More importantly, the collection of this data will contribute to false comparisons and conclusions. For example, some lenders use different pricing indexes, making comparisons likely to lead to false conclusions. Also, as the CFPB well knows, banks employ different risk models – some have higher rates, some lower – and a lender's risk tolerance should not be used to make misleading pricing comparisons.

NAICS Data Point

[38] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 (2010). Section 1071 (e)(1).
[39] This concern is not hypothetical: CBA members have observed that the HMDA free-form field for race and ethnicity is frequently used for responses - such as "Caucasian American" or "Black American" - that plainly fit into an existing category.
[40] It is worth noting once more that at a $5 million and below reporting threshold, the CFPB is going to gather data on commercial lending where pricing is more dynamic and based on several different factors, the inclusion of which will likely create unnecessary distortion in the data.

A primary focus of the 1071 debate has been the ability to simplify the process and allowing lenders and borrowers to report information that will be useful and easily obtained. The requirement for a NAICS code will only serve to complicate the data collection processes as it is very likely that most borrowers will not know which NAICS category applies to their business. We urge the Bureau to reconsider the addition to this data point or, in the alternative, allow for businesses to identify their two-digit code only, of which there are only thirteen to choose from. Additionally, the risk of reidentification is greater with a six-digit NAICS code contributing to the privacy concerns of 1071 data. Should the Bureau require the collection of a two- or six-digit NAICS code, then the Bureau should continue to allow lenders to rely upon applicant statements, or codes obtained through the use of business information products as proposed in §1002.107(a)(15) Comment 3 and 4. Also, the Bureau should continue to allow a safe harbor related to an incorrect NAICS code entry as proposed in §1002.112(c)(2).

Application Date Data Point

Data point for Application Date should be consistent with the Regulation B definition to avoid inconsistent data depending on whether the date is based on the Section 1071 regulation or ECOA.

Amount Applied for Data Point

Many business credit applications include a period of offers, counteroffers and negotiations. The “amount applied for” can change over time. When in the process is the lender required to capture this data?

Publishing of Data and Limitations on Access

Under the Proposal, application-level data submitted by financial institutions would be made publicly available on an annual basis on the CFPB’s website, subject to modifications by the CFPB to advance privacy interests.[41] In exercising its discretion to modify the data, the CFPB proposes to employ a “balancing test” that assesses the risks and benefits of public disclosure.[42] The CFPB also proposes to issue a policy statement regarding its intended data modifications after receiving at least one full year of section 1071 data.[43]

The intention of the Bureau to decide what data will be limited or private after the first year of raw data has been provided, and via “Balancing Test Policy Statement” rather than the rulemaking process is misplaced. The risk of re-identification is higher for small businesses and the Bureau should not make privacy decisions via a policy statement, as it initially did for the 2015 HMDA data. It is critical that the Bureau undertake a notice-and-comment rulemaking to decide the privacy protections for section 1071. Furthermore, we urge the Bureau to provide, within the final rule, the initial privacy standards, then adjust (via notice-and- comment rulemaking) after the initial year of data has been received.

Privacy Considerations Involving Bureau Publication of 1071 Data

[41] 86 FR 56356 at 56512.
[42] *Id.* at 56358.
[43] *Id.*

Under the Proposal, the CFPB's publication of 1071 data would satisfy a financial institution's statutory obligation under section 1071 to make data publicly available upon request, although the institution would also need to publish a statement that the institution's section 1071 data is available on the CFPB's website.[44] The Proposal includes proposed language for use in this statement. The CFPB also proposes, at its discretion, to make aggregate data publicly available.[45] Public reporting should be as unspecific as possible, yet retain a level of usefulness, to prevent borrower re-identification.

Under this approach, data would be modified or deleted if its disclosure in unmodified form would pose risks to privacy interests that are not justified by the benefits of public disclosure in light of the statutory purposes of section 1071. If the risks of disclosing unmodified data outweigh the benefits under the balancing test, the Bureau would determine whether modifications could bring them into balance. The Bureau is considering various approaches that would appropriately advance privacy interests while still providing users with data useful to fulfilling the purposes of section 1071. These approaches could include various statistical disclosure limitation techniques when justified under the balancing test, such as those that mask the precise value of data points to prevent the disclosure of certain data elements.

CBA strongly disagrees with this proposed approach and maintains, for reasons discussed in detail below, the Bureau should issue a clarifying provision for excluding personally identifiable information in compiling and maintaining any record of information from the different stages in the process (e.g., bank systems, regulatory submission file).

<u>1071 Data Presents Particular Privacy and Data Security Concerns</u>

Massive breaches of consumers' private information collected and maintained by companies and government--affecting millions or even tens of millions of consumers—have become commonplace, making information protection and data security a matter of highest priority to our members. Even loan-level 1071 data collected and made available to the public in combination with other publicly available data sources, if provided for all data fields, could easily enable data prospectors, bad actors, and others to "reidentify" individual borrowers' exceedingly confidential data and exploit it for their own purposes. Further, if financial institutions are required to make visual observations or use surnames to estimate race and ethnicity, the data will be inaccurate.

A White House report analyzing Big Data's benefits and challenges ("Big Data Report") defined re-identification as the process where previously de-identified information is re-connected to reveal the identity of the person.[46] It noted a "mosaic effect" is used to infer a person's identity from datasets that do not include personal identifiers.[47] The Big Data Report cautions that, even if information does not include personal identifiers, "it is difficult to predict how technologies to re-identify seemingly anonymized data may evolve. This creates substantial uncertainty about how an individual controls his or her own information and identity, and how he or she disputes decision-making based on data derived from multiple datasets."[48] Consequently, if 1071 data are inadvertently or knowingly released to the public, the harm associated with re-identification would be even greater.

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[44] *Id.* at 56358.
[45] *Id*. at 56499.
[46] The White House, *Big Data: Seizing Opportunities, Preserving Values,* pg. 8 (May 2014) - http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.
[47] *Id.*
[48] *Id*.

As discussed more fully below, CBA strongly urges the CFPB to exercise its exemption authority and not make 1071 data publicly available. If it is, the CFPB must adopt detailed rules for collecting and releasing data and *only* after public notice and comment. Failure to inform the public about the availability of data will have a chilling effect on borrowers voluntarily providing information and could have a chilling effect on small business lending. Publication rules should specifically address the treatment of each 1071 data field subject to release as well as conditions on release outside government for research or other purposes. Similarly, to protect against data breach, we urge the CFPB to detail the types of data security safeguards it will undertake and publish them for public comment. The possibility of a breach of confidential financial data is even more troubling when consumers cannot control distribution of data concerning them, as seems to be the case with 1071.

1071 Data Fields Must be Kept Confidential and Not Released

The public release of loan rates and terms has anticompetitive implications for lenders. For example, small business lending is often relationship-based, with lenders basing rates and structure on often longstanding relationships with small business customers and an in-depth understanding of their business models. In contrast, it is not nearly as common for a mortgage customer to have multiple loans outstanding, and therefore it has a much smaller impact. The release of this information for public consumption will undermine the relationship advantages a lender has with its customers.

It will also be difficult for any individual or group to analyze the data properly and fairly for many reasons - properly identifying a Covered Entity, relying on an individual's representations, etc. HMDA requires the reporting of rather vanilla type information strictly tied to credit transactions for the purchase, refinance, or home improvement of a dwelling. In contrast, the small business segment of lending offers varied products that make it more difficult to produce across the board analyses. Small business lending takes many forms, and the comparison of this data will be infinitely more complex than that used for HMDA reporting. If the expectation is to obtain information that is sufficient to allow regulators to conduct standard fair lending analyses – underwriting, pricing, and redlining – HMDA-like comparisons will be impossible to make. For example, business loans often lack standard pricing information, and it will be difficult to establish an all-in pricing metric that is effective for comparisons. Accordingly, we believe the public reporting of the data will create a substantial and undue burden on lenders to respond to baseless complaints and litigation generated by faulty analyses; however well-intentioned they may be.

Firewall Provisions

The CFPB proposes implementing the statutory limitations on access to data collected under section 1071 by imposing a "firewall" that would prohibit an employee or officer of a covered financial institution (or of its affiliate) involved in decisioning an application from accessing an applicant's responses to inquiries made regarding the applicant's PDI.[49] The prohibition would not apply if the financial institution determines it is not feasible to restrict a particular individual's access, provided the institution provides notice to the applicant regarding that access.[50] Such notice may be provided either to individual applicants or to all applicants.

[49] 86 FR 56356 at 56489.
[50] *Id.*

The language in new subsection 704B(d) reads:

> *Where feasible, no loan underwriter, or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant to a request under subsection (b) in connection with such application.*
>
> *If a financial institution determines that a loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit should have access to any information provided by the applicant pursuant to a request under subsection (b), the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.*

Subsection 704B(d)(1) requires financial institutions to prevent underwriters and others "involved in making any determinations concerning an application for credit" from having access to applicants' responses to the question of whether they are Covered Entities, where preventing such access is "feasible." We believe that this feasibility standard should consider whether preventing such access would require a lender to alter its application and/or underwriting systems. Most lenders' application systems either feed directly into the underwriting system or also serve as the underwriting systems. Consequently, prohibiting underwriters from having access will likely require altering at least one system. We would like to suggest, instead, that each financial institution should be permitted to determine whether such segregation of information is feasible under their existing systems and/or lending operations. If a financial institution deems it not feasible, then the financial institution would provide the notice required by subsection 704B(d)(2) rather than altering any of its systems.[51]

Also, this requirement is likely to be very difficult to implement because the description of the employees that trigger the requirement is vague and subjective. It is not clear what is meant by others "involved in making any determinations concerning an application for credit." The general practice concerning business loans is for a banker to take the application and gather the required information, which is then sent to the underwriting department where the credit decision is made. However, "determinations concerning an application for credit" could be interpreted as including any counseling the banker may provide to the applicant concerning the type of product that would best suit the applicant's credit request, and sometimes the banker (or their manager) may have discussions with the underwriter that may play a role in the decision-making process. Consequently, the banker (or the manager) may be considered as one involved in making determinations concerning an application for credit. This would appear to require a lender to provide the notice required under Section 704(d)(2) in all circumstances. In any event, lenders may determine that it is better to provide the notice in all situations to cover the possibility that, notwithstanding any safeguards established by the lender, an

[51] The statutory language in 704(B)(d)2) states that "if a financial institution determines that a loan underwriter …<u>should</u> have access…." (Emphasis added), suggesting that the underwriter "should" have access whereas it is unclear if the provision includes circumstances in which the underwriter will have access just by the design of the application and the systems. We suggest the CFPB clarify that notice in 704(B)(d)(2) applies in both circumstances.

underwriter or other person involved in making a determination concerning the application inadvertently has access to the information.

Accordingly, we support the CFPB's intention to release a model disclosure with a safe harbor that lenders could provide in any circumstance to cover the possibility that an individual that fits the stated description *may* have access to the subject information, but that does not state that such an individual will have such access. This would alert applicants, as seems to be the intent of the statute, and yet allow lenders to implement a uniform approach that would cover both circumstances where there is such access and where there is not. Additionally, we would request comprehensive guidance on the type of employees that are covered, those that are not, and as to what is or is not "feasible."

Ultimately, the firewall concept will multiply the regulatory burden for all institutions, since it means the data cannot be collected on the application and must be stored in systems or files that the underwriter cannot access. Additionally, even providing disclosure to the applicant that underwriters *may* see the information will lead the borrower to assume the information is being used in decision making. The very collection of the information will lead borrowers to such conclusions Most importantly, the provision is unnecessary, as the very purpose of the rule will be to allow regulators to perform more fair lending analyses.

It is worth noting that lenders, in accordance with HMDA, collect government monitoring information on the Uniform Residential Loan Application, which does not require a firewall. Without evidence to the contrary, the CFPB should consider using its exemption authority and not include this requirement in the implementing regulations for Section 1071.

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CBA greatly appreciates the opportunity to share our suggestions and to work with the Bureau as it considers the regulation regarding Section 1071. Should you need further information please do not hesitate to contact the undersigned directly at 202-552-6368 or dpommerehn@consumerbankers.com.

Sincerely,

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