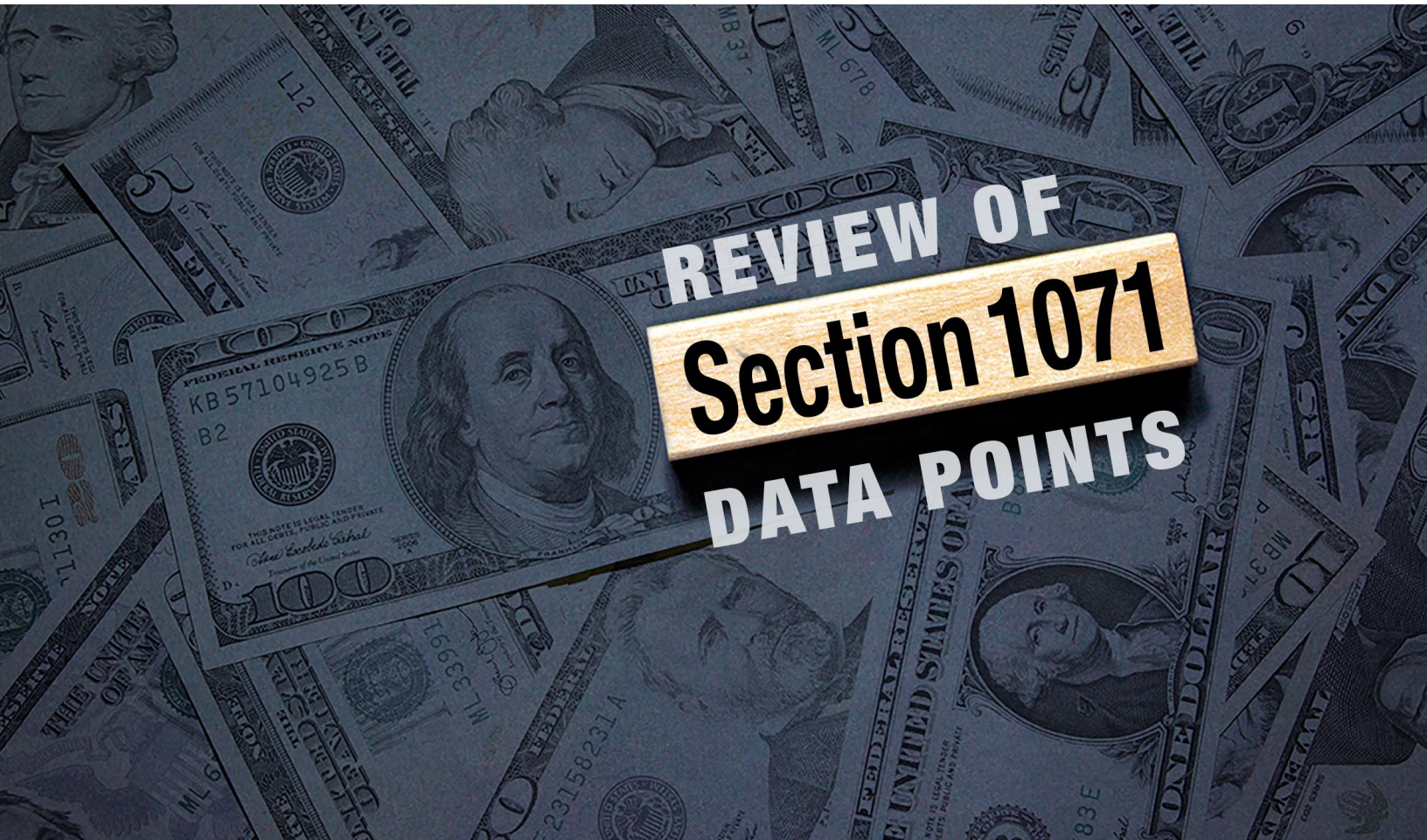


Review of Section 1071 Data Points

Published: May 2023

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About NCRC

NCRC and its grassroots member organizations create opportunities for people to build wealth. We work with community leaders, policymakers and financial institutions to champion fairness in banking, housing and business.

Our members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority and women-owned business associations, and social service providers from across the nation.

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In late March of 2023, the Consumer Financial Protection Bureau (CFPB) finalized a rule implementing Section 1071, a provision of the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010, that mandates lenders collecting and disclosing data on small business and small farm lending. The data includes the race and ethnicity of the small business and small farm owners along with other characteristics of the companies.

This document summarizes the data elements of the final rule.¹ The review identifies the data elements, indicates how the information is to be collected for each data element and offers commentary on whether the CFPB's choice of collection is effective for each data element or whether improvements need to be made. The commentary, in some cases, compares the final rule's choices with the proposed rule.

Data Elements of Final Rule

Characteristics of the Small Business

Small Business

A small business is defined as a business having gross annual during year preceding an application of up \$5 million. The threshold will be adjusted every five years depending on trends in inflation or deflation as measured by the Consumer Price Index.² The CFPB reported that a \$5 million threshold is a common industry benchmark for determining a small business and that this threshold makes it easier than alternative definitions for lenders to determine whether an applicant is a small business.³

Commentary: It is critical that the Section 1071 data captures the experiences of all small businesses and farms so that it can be effective for its community development and fair lending purposes. The CFPB, supplementing its research with that of the FDIC, estimated that a \$1 million revenue threshold proposed by some commentators would underestimate the number of small businesses. In contrast, a higher threshold such as \$8 million would overestimate the number of agricultural small businesses.⁴

Minority Owned Business

Data is to be collected regarding whether the small business is owned or controlled by people of color. A business is a minority-owned business if the following two conditions

¹ Consumer Financial Protection Bureau, 12 CFR Part 1002, Docket No. CFPB-2021-0015, RIN 3170-AA09, Final Rule, Small Business Lending under the Equal Credit Opportunity Act (Regulation B) , https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf

² CFPB, Final Rule, p. 233

³ CFPB, Final Rule, p. 242

⁴ CFPB, Final Rule, pp. 255-256

are met “(A) more than 50 percent of the ownership or control is held by one or more minority individuals, and (B) more than 50 percent of the net profit or loss accrues to one or more minority individuals.”⁵ A minority individual is one that is American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander and/or Hispanic or Latino. A lender is required to rely on an applicant’s representation of demographic data and cannot report this data on any other basis than the applicant’s representation of this information.⁶

The CFPB stated, “The Bureau agrees with commenters that the statutorily required collection of detailed ethnicity, race, and sex information about small business applicants’ principal owners will facilitate the stated purposes of section 1071 to assist in the enforcement of fair lending laws and enable communities, governmental entities, and creditors to understand and identify needs and opportunities of women-owned, minority-owned, and small businesses.”⁷

The final aggregate and disaggregated racial and ethnic categories are:

Hispanic or Latino

- Cuban
- Mexican
- Puerto Rican
- Other Hispanic or Latino (for example, Argentinean, Columbian, Dominican, Nicaraguan, Salvadoran, Spaniard). A free form field is provided to the applicant for a response.

American Indian or Alaskan Native

- Indicate name of enrolled tribe in a separate free form field

Asian

- Asian Indian
- Chinese
- Filipino
- Japanese
- Korean
- Vietnamese
- Other Asian (example includes Cambodian, Hmong, Laotian, Pakistani, Thai). A free form field is provided for the applicant’s response.

⁵ CFPB, Final Rule, p. 109

⁶ CFPB, Final Rule, p. 425

⁷ CFPB, Final Rule, p. 423

Black or African American

- African American
- Ethiopian
- Haitian
- Jamaican
- Nigerian
- Somali
- Other Black or African American (example includes Barbadian, Ghanaian, South African). A free form field is provided for the applicant's response.

Native Hawaiian or other Pacific Islander

- Guamanian or Chamorro
- Native Hawaiian
- Samoan
- Other Pacific Islander (example includes Fijian, Tongan). A free form field is provided for the applicant's response.

White

I do not wish to provide my race⁸

Commentary: The applicant informs the lender that the business is minority-owned instead of the lender making that determination. The lender can assist (but is not required to) an applicant in determining whether the business meets the definition of minority-owned.⁹ The CFPB decided to make the aggregate racial and ethnic categories in Section 1071 conform with those in the Home Mortgage Disclosure Act (HMDA) data in order to ease compliance with both statutes.¹⁰ Applicants have the right to decline to provide demographic information and lenders must inform applicants that lenders cannot discriminate.¹¹ Lenders must inform applicants that they are required by Federal law to collect the demographic information.¹²

Unlike the case when collecting Home Mortgage Disclosure Act (HMDA) data, lenders are prohibited from visually observing and recording the race and ethnicity of the applicant when the applicant refuses to provide this information.¹³ While there are legitimate points on either side of the debate about the HMDA requirement, the HMDA requirement has been in effect for several years. The CFPB's decision not to require visual observation will reduce the number of loans with race and ethnicity information in the Section 1071 database. If on the other hand, the CBPB had required the use of visual observation when necessary,

⁸ CFPB, Final Rule, p. 812

⁹ CFPB, Final Rule, p. 113

¹⁰ CFPB, Final Rule, p. 114

¹¹ CFPB, Final Rule, p. 407

¹² CFPB, Final Rule, p. 408

¹³ CFPB, Final Rule, p. 422 and pp. 470-471

the database could have included a field about whether the lender used visual observation which would have enabled data users to determine whether to use data collected via visual observation.

It is unclear the extent to which eliminating the visual observation requirement will reduce the amount of data on race and gender. Small Business Administration (SBA) data from the first and second rounds of Paycheck Protection Program (PPP) loans, where demographic information was voluntary in the application, revealed that about 75% of loan applications did not contain demographic data.¹⁴

Recent changes to HMDA data revealed examples of applicants being more comfortable with providing demographic data. A 2018 revision to HMDA allowed applicants who were Latinx, Asian, Hawaiian or Pacific Islanders to report more precisely on their country or place of origin. Among eligible 2021 applicants, over 60% utilized these optional fields to specify their identity.¹⁵ This is a much better response rate than with the PPP, but 40% would still be a high percentage of 1071 data without demographic information. The CFPB should monitor the amount of missing demographic data and revisit its decision if necessary.

The CFPB opted not to include another category for Middle Eastern or North African as the agency had contemplated in its proposal.¹⁶ NCRC urges reconsideration since parts of the country include sizable Middle Eastern or North African populations.

Women Owned Business

Similar to the definition of a minority owned business, women-owned business are those that satisfy both of these conditions: “(A) more than 50 percent of the ownership or control is held by one or more women, and (B) more than 50 percent of the net profits or losses accrue to one or more women.”¹⁷

LGBTQI+ Business

Data is to be collected regarding whether the small business is lesbian, gay, bisexual, transgender, or queer plus (LGBTQI+). The CFPB is defining a business as LGBTQI+ as “a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.”¹⁸

¹⁴ SBA, [Paycheck Protection Program \(PPP\) Loan Data – Key Aspects – Updated August 20, 2020](#).

¹⁵ Seema Agnani and Jason Richardson, [Mortgage Lending in the Asian American and Pacific Islander Community](#). NCRC, August 6, 2020.

¹⁶ CFPB, Final Rule, p. 443

¹⁷ CFPB, Final Rule, p. 121

¹⁸ CFPB, Final Rule, p. 107

In the final rule, lenders are to ask applicants to respond to an open-ended question about their sex/gender. For example, if applying online or filling out a paper questionnaire, applicants will be asked to fill in their gender and/or sexual orientation in a free form text box.¹⁹

Commentary: The CFPB is finalizing this definition that is similar to its proposed definition. A change involves adding “I” that refers to intersex individuals. This data point is critical for fair lending purposes. A survey revealed that 46% of LGBTQI+ businesses reported not receiving credit requested compared with 35% of non-LGBTQI+ businesses.²⁰

NCRC had asked for a two-part question to cover gender and sexual orientation. For gender, one possibility could be:

- Male
- Female
- Transgender
- Do not identify as female, male, or transgender

For sexual orientation, one possibility is:

- Straight
- Gay or lesbian
- Bisexual
- Transsexual, or gender non-conforming

Instead, an open-ended question as mandated by the final rule with just one text box runs the risk of incomplete responses for gender and sexual orientation that are not fully informative for data analysis. Also, coding and creating a database with a free form text box will be more difficult than creating a database generated by applicants choosing from one of a few choices for gender and sexual orientation.

The CFPB could have provided a text box accompanying choices for gender and sexual orientation in cases for which the choices were not adequate for the applicant.

Principal Owner

A principal owner is one that owns 25% or more of the equity interests of the business.²¹ Using this definition results in no more than four principal owners of a small business or farm.

Commentary: This CFPB decision in the final rule is reasonable and will effectively differentiate businesses based on their complexity and number of owners.

¹⁹ CFPB, Final Rule, p. 459

²⁰ CFPB, Final Rule, p. 409

²¹ CFPB, Final Rule, p. 117

Gross Annual Revenue

The CFPB required the reporting of a specific number in dollars for gross annual revenue, instead of reporting in ranges. The revenue will be for the preceding fiscal year.²² Lenders will rely on the information provided by the applicant for gross annual revenue.²³ Collection of revenue information from any affiliates of the small business will be optional.²⁴ The CFPB has not yet determined how revenue will be reported in the publicly available dataset – whether it will be a specific number or reported in ranges.

Commentary: Lenders were concerned that the CFPB would require them to verify applicant income or conduct labor intensive inquiries about income. The CFPB responded to this concern by allowing the lenders to use applicant representations concerning their income. The CFPB should monitor the quality of gross revenue data and make any necessary adjustments in future years. Also, including affiliate income will be an optional reporting item. It is possible that most small businesses will not have affiliates, but the CFPB should conduct focus groups and consult data user groups in order to collect more information about these issues in future years.

North America Industry Classification System (NAICs) Code

The CFPB required collecting the three-digit NAICs code for applicants.²⁵ The CFPB allowed lenders to rely on information provided by applicants regarding NAICs codes without verifying the information.²⁶

Commentary: The Bureau asserted that a three-digit code would identify the subsector of the business, allowing fair lending and community needs analysis to compare the credit experiences of similarly situated businesses.²⁷

Number of workers

The CFPB required the reporting of the number of workers in ranges rather than specific numbers. Lenders will rely on representations made by applicants.²⁸

Commentary: This data point is valuable for the community development purpose of the statute and will help determine the extent to which credit availability supports job creation and retention. According to research cited by the CFPB, small businesses are generally more likely

²² CFPB, Final Rule, p. 377

²³ CFPB, Final Rule, p. 378

²⁴ CFPB, Final Rule, p. 380

²⁵ CFPB, Final Rule, p. 387

²⁶ CFPB, Final Rule, p. 388

²⁷ CFPB, Final Rule, p. 388

²⁸ CFPB, Final Rule, p. 392

to hire or retain workers if they can secure loans.²⁹ With this data point, analyses can assess whether this relationship remains; that is, whether businesses securing loans are more likely to have employees. In addition, the number of workers data point aids fair lending analysis by allowing data users to better control for the size and complexity of small businesses differing by race or gender.

Time in Business

The CFPB is using its discretionary authority granted under the statute to require reporting time in business.³⁰ The CFPB provided flexibility regarding collecting this data point including relying on the applicant’s representation of time in business. In addition, the lender can report whether the business was in operation less than two years or more than two years.³¹

Commentary: This data point furthers the fair lending and community development purposes of the statute. Newer businesses tend to have more difficulty accessing credit. The collection of this data point will help ascertain to what extent this remains the case and helps analysts control for time in business when assessing whether fair lending concerns arise. The flexibility offered by the CFPB may result in different reporting methods by lenders and thus a need to increase standardization of reporting in future years.

Census tract

The CFPB required the reporting of the census tract location of the small business. The agency also adopted a “waterfall” approach that asks a lender to identify the location in which the proceeds of the loan would be applied. If that location is not known, the lender should use the business’ headquarters address. If the headquarters’ location is unknown, the lender is then to use another address associated with the small business.³²

Commentary: Information on the census tract location of the small business and farm is critical information for determining whether underserved businesses in low- and moderate-income (LMI) or minority tracts are receiving credit. Banks have been reporting census tract location for decades as part of CRA compliance. It should not cause undue burden and the CFPB’s waterfall approach is a reasonable technique for determining location when it is not immediately apparent.

²⁹ CFPB, Final Rule, p. 20.

³⁰ CFPB, Final Rule, p. 398

³¹ CFPB, Final Rule, pp. 398-401

³² CFPB, Final Rule, p. 362

Financial institutions required to report and their characteristics

Covered financial institutions

The statutory definition of a covered financial institution is “any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.”³³ Since the statutory definition is broad, it applied to a range of institutions including banks, credit unions, on-line lenders, Community Development Financial Institutions (CDFIs) and non-banks.³⁴ To determine which institutions report data, the CFPB adopted an activity threshold of 100 loan originations to small businesses or farms in each of the last two years. The agency did not adopt any categorical exemptions.³⁵

Commentary: NCRC urged the CFPB to adopt its proposed threshold of 25 loans instead of the 100-loan threshold. The CFPB estimated that coverage of the number of depository institutions reporting data would decrease from about 63% under a 25-loan threshold to 29% under a 100-loan threshold. Likewise, the number of loans would decrease from about 98% to 94%.³⁶ Although the decrease in the percentage of loans covered is relatively small, the decrease in coverage of institutions is large.

CRA and data disclosure laws are designed to ensure that all lenders of all sizes are accountable to offering credit fairly and without discrimination. A broad exemption endangers these statutory purposes since there will be no data available to observe lending patterns for several lenders. Moreover, a lender offering close to 100 loans could be a sizable lender in a rural county or small town. Data for this lender must be publicly available as well as readily available to CRA examiners.

The CFPB reasoned that raising the threshold to 100 loans addressed concerns expressed by smaller volume lenders about high compliance costs and their potential exit from the small business market. The industry regularly expresses these overblown concerns, which are not supported by rigorous data analysis. In our comments, NCRC examined the number of HMDA reporters over several years and did not notice any sudden and deep decrease due to enhanced reporting requirements, such as those in the late 1990s. Decreases occurred after the exit of subprime lenders who failed due to their unsafe and unsound lending.³⁷

³³ CFPB, Final Rule, p. 211

³⁴ CFPB, Final Rule, p. 211

³⁵ CFPB, Final Rule, p. 213 and p. 227

³⁶ CFPB, Final Rule, p. 231

³⁷ NCRC Comment on Proposed Section 1071 Small Business Lending Data Collection, January 5, 2022, p. 70, <https://ncrc.org/ncrc-comment-on-proposed-section-1071-small-business-lending-data-collection/>

The CFPB stated that the 100-loan threshold “massively expands data availability relative to the status quo.”³⁸ Yet, the final rule did not contain in-depth analysis for depository lenders regarding whether fewer of them would report data. For example, the public needs to know whether the number of banks reporting Section 1071 data would be the same, more or less after Section 1071 data replaces the current data collected under CRA and used on CRA exams. If fewer banks end up reporting data, the final rule would have decreased accountability.

Reporting characteristics of the financial institution

The CFPB finalized instructions for reporting details of lending institution characteristics. This will assist data users in identifying lenders and any parent institutions for purposes of assessing their fair lending and community development records.³⁹ Along with lenders’ names and addresses, information required to be reported include their tax identification numbers, their federal prudential regulators (if applicable), their legal identity identifiers (LEI), identification information for the immediate parent and top holding parent entity (if applicable) and whether the lenders are voluntarily reporting data. In certain circumstances, the CFPB will allow a lender to voluntarily report even if the lender is below the 100 annual loan threshold (if a lender had been a reporter for five years or if a lender made 100 loans in one year and thinks it might be above 100 in the second year).⁴⁰

A lending institution will also choose from a list of descriptions regarding its type. The list includes these choices: (i) bank or savings association, (ii) minority depository institution, (iii) credit union, (iv) nondepository institution, (v) CDFI, (vi) other nonprofit financial institution, (vii) Farm Credit System institution, (viii) government lender, (ix) commercial finance company, (x) equipment finance company, (xi) industrial loan company, (xii) online lender and (xiii) other.⁴¹

Commentary: These are important data points for assessing the community development and fair lending records of financial institutions. Identifying whether a lender has an immediate parent and a top holding parent aids enforcement efforts. In addition, data on the type of institution will assist data users identify if any particular type of lender such as a bank or a nonprofit organization is more or less effective in reaching traditionally underserved businesses.

³⁸ CFPB, Final Rule, p. 232

³⁹ CFPB, Final Rule, p. 806

⁴⁰ CFPB, Final Rule, pp. 94-95

⁴¹ CFPB, Final Rule, p. 547

Loans reported and their terms and conditions

Application

An application is a “an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested.”⁴²

The CFPB ruled that the following are not applications: “reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests.”⁴³ In the case of when the borrower requests additional amounts, only the additional amount, not the previous amount, will be reported as new credit.⁴⁴ Refinances will also be reportable.⁴⁵

Commentary: NCRC had pointed out that renewal requests that involved additional credit amounts was important for CRA purposes and for determining the demand for credit in communities.⁴⁶ The CFPB agreed, stating that capturing additional amounts requested furthers the community development purpose of Section 1071.⁴⁷

Loans, line of credit and credit cards

The CFPB included loans, lines of credit and credit cards in the final rule as types of credit that must be reported. A lender must indicate whether the card is private label or non-private label.⁴⁸ The CFPB excluded trade credit, public utilities credit, securities credit, incidental credit and HMDA reportable transactions from coverage.⁴⁹ The CFPB also excluded leases and consumer loans that are also used to finance small businesses.⁵⁰ The CFPB excluded loan purchases and purchases of an interest in a pool of loans.⁵¹

Commentary: NCRC had argued that credit cards, just like loans and lines of credit, were important to include.⁵² The Section 1071 database needed to track the use of credit cards because Federal Reserve surveys found that minority-owned businesses had greater reliance on credit cards, which typically had higher interest rates than traditional loans. The CFPB

⁴² CFPB, Final Rule, p. 125

⁴³ CFPB, Final Rule, p. 142

⁴⁴ CFPB, Final Rule, p. 144

⁴⁵ CFPB, Final Rule, pp. 144-145

⁴⁶ CFPB, Final Rule, p. 140

⁴⁷ CFPB, Final Rule, p.143

⁴⁸ CFPB, Final Rule, p. 835. A private label credit card is one associated with a particular store such as Target.

⁴⁹ CFPB, Final Rule, pp. 168-169

⁵⁰ CFPB, Final Rule, p.193 and p. 197

⁵¹ CFPB, Final Rule, p. 201

⁵² CFPB, Final Rule, p. 151

agreed and did not accept the argument from credit union trade associations that including credit cards would compel smaller credit unions to report data even if they offer just one credit card small business product.⁵³ The CFPB reasoned that its higher reporting threshold of 100 loans would help allay the concerns of smaller lenders. As discussed, elsewhere, NCRC believes that the 100-loan threshold is too high because a lender that makes 100 loans has a significant market presence, particularly in smaller towns and rural areas and should thus be publicly accountable for fair lending via data disclosure.

NCRC is concerned about the CFPB’s decision to exclude consumer loans in instances in which portions of consumer loans are used to finance businesses. NCRC suggested asking borrowers if they plan to use one half or more of the dollar amount of consumer loans they received to finance their businesses. If one half or more was used for small business finance, NCRC recommended that the consumer loan would be a Section 1071 reported loan. The CFPB acknowledged this recommendation but opted against including all consumer loans, citing possible inconsistencies in reporting and logistical difficulties in reporting.⁵⁴ While NCRC understands these issues, we nevertheless ask the CFPB to monitor the amount of Section 1071 reported loans and if they drop significantly in future years to assess whether lenders are evading the rule by classifying more loans as consumer loans.

Loan terms and conditions – guarantees, collateral, loan terms

The final rule required reporting the type of guarantee, whether the loan is secured by collateral or unsecured and loan terms in months.⁵⁵ Guarantees are either a personal guarantee or various types of government guarantees such as those made by the Small Business Administration (SBA).⁵⁶

Commentary: Just as with HMDA data, information on loan terms and guarantees aids fair lending analysis, allowing data analysts to control for loan terms and guarantees when comparing loan pricing to similarly situated businesses that may differ by race or gender.

Merchant Cash Advance

The final rule requires lenders to report merchant cash advances (MCA).⁵⁷ Under a MCA agreement, a borrower will repay a lender the amount of the loan plus a fixed amount (the total could be 1.2 or 1.5 of the loan). The borrower could agree to pay the lender a fixed percentage or a dollar amount of daily receipts.⁵⁸

53 CFPB, Final Rule, pp. 151-152

54 CFPB, Final Rule, p. 197

55 CFPB, Final Rule, pp. 301-302

56 CFPB, Final Rule, p. 836

57 CFPB, Final Rule, p. 159

58 CFPB, Final Rule, p. 153

Commentary: MCAs can be high-cost forms of credit. MCAs are growing in volume and are disproportionately used by minority-owned firms.⁵⁹ The CFPB cited court settlements with MCA providers including unfair and deceptive practices as well as high delinquency and default rates. The CFPB correctly concluded that including MCAs in the Section 1071 data furthers the fair lending purposes of the statute.

Factoring

The CFPB did not include factoring as transactions subject to Section 1071 data disclosure. Under a factoring arrangement, a small business “sells” its unpaid invoices to a third party, usually a non-depository lender. The third party then collects on the invoices, contacting the small businesses’ clients and requesting payment. The third party then deducts fees before forwarding collected amounts to the small business.⁶⁰ The CFPB reasoned that factoring is not credit in that a lender is not agreeing to accept deferred payments from a borrower. However, if credit is offered in conjunction with factoring, a situation that does occur on occasion, the credit transaction would be covered by Section 1071.⁶¹

Commentary: The CFPB estimated that factoring is about 8% of the small business loan market and that factoring’s share has not increased in recent years.⁶² While 8% may not seem like a high market share, a possible difficulty with the CFPB’s decision to exclude factoring is that institutions may opt to decrease their traditional credit offerings and increase their use of factoring in order to evade Section 1071 reporting requirements. The CFPB should monitor whether evasion of this sort is occurring, and if it is, reconsider its decision in a future rulemaking.

Agricultural purpose credit or small farm loans

Agricultural purpose credit will be reportable under Section 1071.⁶³ The CFPB asserted that including small farm lending furthers the statutory purposes of Section 1071.⁶⁴

Commentary: Reporting small farm loans is essential. CRA exams have used data on small farm lending for three decades in order to assess bank responsiveness to credit needs of smaller farmers. The CFPB reported that of the 3.4 million farmers in the United States, smaller family farms with revenues of \$350,000 or less accounted for about 90% of all farms.⁶⁵ In addition to monitoring credit access for small farms, the Section 1071 data will be

⁵⁹ CFPB, Final Rule, p. 154

⁶⁰ CFPB, Final Rule, p. 184

⁶¹ CFPB, Final Rule, p. 188 and p. 304

⁶² CFPB, Final Rule, p. 185

⁶³ CFPB, Final Rule, p. 165

⁶⁴ CFPB, Final Rule, p. 166

⁶⁵ CFPB, Final Rule, p. 161

critical to ensuring that discrimination does not continue against minority-owned farmers as described by several commenters.⁶⁶

Credit Purpose

The CFPB finalized a list of several credit purposes. The data will help stakeholders determine whether the needs for various purposes of credit is being satisfied.

The loans purposes include purchase or repair/improvements of buildings, purchase or repair of motor vehicles, purchase or repair of equipment, working capital (includes inventory or floor planning), business start-up, business expansion, or business acquisition, line of credit increase, refinance existing debt and overdraft.⁶⁷ Agricultural purposes are not listed; instead the NAICs code will indicate if the borrower is an agricultural business.⁶⁸ A lender can choose up to three credit purposes.⁶⁹

Commentary: This list is vital for assessing whether lenders are meeting needs for a variety of purposes. For example, if some localities have fewer loans for certain purposes, CRA exams should assess whether banks are overlooking these needs. If they are, the exams should adjust their ratings in these localities.

Pricing information

The CFPB required data reporting on pricing elements for “credit transactions that are originated or approved by the financial institution but not accepted by the applicant.” The pricing elements include “interest rate; total origination charges; broker fees; the total amount of all non-interest charges that are scheduled to be imposed over the first annual period; for a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid; and information about any applicable prepayment penalties.”⁷⁰

The pricing information to be collected is limited to approved applications and originations.⁷¹

If a loan has an adjustable interest rate, the CFPB required the reporting of the initial rate, the introductory rate time period expressed in months, the margin, the index value, the index name and the interest rate after the initial rate (for loans that with introductory rates of 12 months or less).⁷²

66 CFPB, Final Rule, p. 164.

67 CFPB, Final Rule, p. 310 and pp. 837-838

68 CFPB, Final Rule, p. 311

69 CFPB, Final Rule, p. 311

70 CFPB, Final Rule, p. 339

71 CFPB, Final Rule, p. 343

72 CFPB, Final Rule, pp. 344, 346 and 845.

Total origination charges are those that are payable by the borrower and charged directly or indirectly by the lending institution.⁷³ Prepayment penalties include any balloon payments that must be paid if a borrower pays off a loan before its term has expired.⁷⁴

Commentary: Pricing information is critical to determine if vulnerable businesses are receiving discriminatory, unfair or expensive loans. The CFPB stated that the majority of small businesses are owned by one person, including those that are unfamiliar with lending institutions or the loan process. In addition, minority-owned small businesses often receive higher-interest rate loans.⁷⁵ The CFPB stated that separate disclosure of pricing components such as interest rates and fees enables data users to more accurately identify which component might pose possible pricing disparities or discrimination as opposed to a single pricing metric that might hide the component of pricing that is driving the disparities.⁷⁶

The CFPB decided against requiring the reporting of an Annual Percentage Rate (APR), which NCRC and others had urged them to require.⁷⁷ The CFPB stated it will continue to monitor developments in the marketplace. We hope the CFPB reconsiders since an APR is an effective way to compare pricing across lenders. In lieu of an APR, the CFPB noted that for merchant cash advances, the loan term will be reported, enabling data users to consider pricing over the time period of the merchant cash advance, an important part of a pricing analysis.⁷⁸

Total origination charges allow for an examination of trade-offs between origination charges and interest rates. For example, borrowers sometimes agree to higher interest rates in return for origination charges lowered by a lender's credit.⁷⁹

Action on applications

Amount requested and amount originated

The CFPB required lenders to report both the amount applied for and the amount originated. The agency stated that both data points are required by the statute.⁸⁰ For closed end loans, the reporting is the amount originated, not the amount approved for origination.⁸¹ For open end loans, the amount is credit limit approved.⁸²

⁷³ CFPB, Final Rule, pp. 348-349

⁷⁴ CFPB, Final Rule, p. 361

⁷⁵ CFPB, Final Rule, pp. 339-340

⁷⁶ CFPB, Final Rule, p. 341

⁷⁷ CFPB, Final Rule, p. 343

⁷⁸ CFPB, Final Rule, p. 343

⁷⁹ CFPB, Final Rule, p. 350

⁸⁰ CFPB, Final Rule, pp. 316-317

⁸¹ CFPB, Final Rule, p. 321

⁸² CFPB, Final Rule, p. 320

Commentary: NCRC asked that both the amount requested and originated be reported since a lender could be engaged in discrimination if it consistently originated lower amounts than requested by minority or women-owned small businesses. The CFPB agreed with this reasoning.⁸³

Action taken

The CFPB required reporting of the following action categories: originated, approved but not accepted by the applicant, denied, withdrawn by the applicant, or incomplete.⁸⁴ If a borrower rejects a lender's counteroffer, the lender would report the loan as denied.⁸⁵

Commentary: These action categories are similar to those in HMDA and are necessary to determine if minority-owned and women-owned businesses are being treated as similarly situated businesses that are not minority- or women-owned. The treatment of counteroffers rejected by borrowers is appropriate because the lender may have attached conditions such as higher pricing or lower loan amounts that are quite inconsistent with the borrower's requests in the application.

Denial reasons

The CFPB required lenders to report reasons for loan denials. A lender can indicate up to four reasons for denial.⁸⁶ The denial reasons include credit characteristics of the business, credit characteristics of the principal owners, use of credit proceeds (some lenders do not finance certain uses of loans), insufficient collateral, government criteria (applies to loans that would have received government guarantees), cashflow, time in business, aggregate exposure (too much debt), unverifiable information or other.⁸⁷

Commentary: Reasons for denial are important for fair lending analysis and to assess what steps businesses from a geographical area (including census tract or county) need to take in order to be approved for loans.

Application method

The CFPB will require lenders to indicate whether an application was made in-person, telephone, online or via mail.

Commentary: This is an important data point in that it helps stakeholders understand whether and how applicants have access to credit. For example, the CFPB stated that this

⁸³ CFPB, Final Rule, p. 316

⁸⁴ CFPB, Final Rule, p. 326

⁸⁵ CFPB, Final Rule, p. 327

⁸⁶ CFPB, Final Rule, p. 333

⁸⁷ CFPB, Final Rule, pp. 843-844

data point will assess to what extent applications over the phone were increasing access to credit in areas lacking bank branches. Also, the CFPB suggested that the application method may provide insight into the extent to which demographical information on the applicant is being collected.⁸⁸

Application recipient

The final rule required lenders to report whether the application was submitted “directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party.”⁸⁹

Commentary: This data point helps identify whether retail or wholesale operations (third party brokers) impact access to credit for underserved populations and whether any fair lending concerns including access or pricing are more pressing in retail or wholesale operations.

Timing of requesting data from an applicant

The CFPB provided flexibility to lenders regarding when they could request demographic data and other information required under Section 1071. The CFPB advised, however, that earlier in the application process is usually more effective in generating a response.⁹⁰ The CFPB further instructed lenders not to discourage applicants from providing demographic information by indicating it was not important data. Also, the lender should not make it harder to provide demographic data; for example, providing a virtual option to collect data on creditworthiness but only a snail mail option to collect data on demographics.⁹¹ Finally, the CFPB will monitor for low response rates to requests for demographic information including comparing lending institutions to their peers based on their size or geographical area.⁹²

Commentary: NCRC had urged the agency to require data collection early in the process, ideally when the small business first indicates that it is applying for credit. While flexibility might facilitate data collection, it could also promote evasion. NCRC and other data users will monitor the amount of missing data in future years and ask the agency to ensure that it is employing robust enforcement of the data reporting requirements.

⁸⁸ CFPB, Final Rule, p. 291

⁸⁹ CFPB, Final Rule, p. 294

⁹⁰ CFPB, Final Rule, p. 863

⁹¹ CFPB, Final Rule, p. 864

⁹² CFPB, Final Rule, p. 865 and CFPB, *Statement on Enforcement and Supervisory Practices Relating to the Small Business Lending Rule under the Equal Credit Opportunity Act and Regulation B*, p. 4 https://files.consumerfinance.gov/f/documents/cfpb_1071-enforcement-policy-statement.pdf

Previously collected data

The CFPB allowed lenders to use previous data regarding an applicant up to three years prior to a new application to satisfy Section 1071 reporting. The one exception is that gross annual revenue must be collected within the same year as the covered application.⁹³

Commentary: It was prudent for the agency to require that annual revenue must be collected within the same year when the application is submitted since data collection hinges on whether the business has revenues less than \$5 million. NCRC has concerns that data for other characteristics collected three years prior to a new application might be outdated. We encourage the CFPB to conduct audits concerning data accuracy and make adjustments if the audits indicate reliability issues.

Excluded data points

- Type of business/entity structure (sole proprietorship, C-corporation, limited liability company, partnership, etc.): The CFPB reasoned that the number of principal owners could be an approximate proxy for this data point. NCRC had advocated for this data point. At the very least, the number of principal owners provides a rough sense of the complexity of the business, which business structure would have indicated.
- Credit score: the CFPB reasoned that this data point would be complex in terms of reporting. HMDA requires reporting credit scores, so NCRC will continue to urge the CFPB to reconsider this decision in the future. Credit score is an important variable for identifying businesses that are similar in creditworthiness but that differ by their racial or gender composition so that data analysis can identify if similarly situated businesses are possibly receiving different treatment.⁹⁴
- Disability status: NCRC had also urged the agency to collect information on the disability status of the business owners. People with disabilities confront higher levels of poverty and are more likely to be unbanked.⁹⁵ The CFPB responded that it did not include this data point because its legal authority to do so was unclear. However, Section 1071 does provide the CFPB with discretionary authority to include more data that would be useful for the purposes of Section 1071. Disability status is an important fair lending variable.

⁹³ CFPB, Final Rule, p. 504

⁹⁴ CFPB, Final Rule, p. 279

⁹⁵ CFPB, Final Rule, p. 281

How to report data

Annual reporting

Section 1071 data must be submitted by June 1 for the previous year, and data will follow a calendar year format.⁹⁶ Lenders will specify an authorized representative with knowledge of the data to certify the accuracy and completeness of the data, similar to HMDA.⁹⁷ The final rule also allows lenders to submit data before June 1st, but this would need to be the complete data for a calendar year, as the rule does not allow lenders to submit data on an ongoing or quarterly basis.⁹⁸

Commentary: This is a reasonable timeline for reporting data and is similar to how HMDA data is reported annually. The CFPB’s decision to set a June 1st deadline for Section 1071 data reduces strain on lenders that have to report their HMDA and CRA data by March 1st.⁹⁹

Reporting by Subsidiaries

Similar to HMDA data, subsidiaries must report Section 1071 data if they meet the 100 loan threshold for the last two years, and can report to the CFPB directly or through their parent institution.¹⁰⁰ Subsidiaries are defined as entities where more than 50 percent of the ownership or control of the first covered financial institution (the subsidiary) is held by the second covered financial institution (the parent institution).¹⁰¹ The CFPB sought comment on whether additional safeguards should be put in place to ensure that lenders do not create subsidiaries in order to avoid Section 1071 compliance, but determined that the costs of setting up subsidiaries, as well as the 100 loan threshold, addresses that concern.¹⁰²

Commentary: The rule for subsidiaries is unlikely to be burdensome for lenders because it is like HMDA rules. The CFPB’s assumption that costs associated with setting up subsidiaries will discourage them from being used to avoid Section 1071 compliance is reasonable, but merits monitoring as Section 1071 is implemented.

⁹⁶ CFPB, Final Rule, p. 527.

⁹⁷ CFPB, Final Rule, p. 528.

⁹⁸ CFPB, Final Rule, p. 527 – 528.

⁹⁹ CFPB, Final Rule, p. 528.

¹⁰⁰ CFPB, Final Rule, p. 529 – 530.

¹⁰¹ CFPB, Final Rule, p. 529.

¹⁰² CFPB, Final Rule, p. 530.

Reporting Obligations Where Multiple Financial Institutions are Involved in a Covered Credit Transaction

Each covered financial institution will report the action that it takes on a covered application, such as originated or denied.¹⁰³ However, in instances where it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction shall report the application.¹⁰⁴ For example, a financial institution that has the authority to modify the total loan amount prior to origination has the last authority for setting the terms of the covered credit transaction and would report whether it chose to originate or deny the application, even if it makes no changes to the total loan amount.¹⁰⁵ This ensures that only one financial institution is required to report on an application, regardless of whether the loan was approved or denied.¹⁰⁶

The CFPB further clarified that purchasers of small business loans do not need to report since purchases are not covered by Section 1071.¹⁰⁷

The CFPB also clarified that auto dealers would not have to report Section 1071 data. Although auto dealers are typically the last institution to set the terms of auto loans, Section 1071 was written to explicitly exclude auto dealers as covered institutions.¹⁰⁸ Finally, the CFPB discussed the example of the SBA's 504 Development Company Loan Program, which requires loans to be financed by both a certified development company (CDC) and a private lender. The CFPB determined that in these instances, because both the CDC and the other lender make their own credit decisions on separate covered applications, they are each responsible for reporting the application covering their portion of the financing.¹⁰⁹

Commentary: The final rule will reduce duplicative reporting in instances where multiple financial institutions are involved in the underwriting decision. In addition, by covering each action of covered institutions with final decision-making authority on applications, it ensures that both approved and denied applications will be included in 1071 data.

103 CFPB, Final Rule, p. 534.

104 CFPB, Final Rule, p. 534.

105 CFPB, Final Rule, p. 536.

106 CFPB, Final Rule, p. 535.

107 CFPB, Final Rule, p. 537.

108 CFPB, Final Rule, p. 538.

109 CFPB, Final Rule, p. 540.