NCRC
National Community Reinvestment Coalition

January 4, 2022

RE: Docket No. CFPB-2021-0015, Section 1071 Small Business Lending Data Collection

To Whom it May Concern:

The National Community Reinvestment Coalition (NCRC) appreciates this opportunity to comment on the proposed rule for reporting and disseminating small business loan data required by Section 1071 of the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd Frank Act). NCRC is an association of 600 community-based nonprofit organizations dedicated to increasing access to credit and capital for underserved communities. Our efforts range from advocacy to counseling homebuyers and small business owners. NCRC and our members have viewed data as integral to the mission of increasing access to responsible credit.

Section 1071 requires the Consumer Financial Protection Bureau (CFPB) to enhance publicly available small business data to include the race and gender of small businesses applying for credit. Its purpose is to "facilitate enforcement of the fair lending laws and enable communities, government entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[1]

As users of small business loan data, NCRC and our members believe that data effectuates the purpose of Section 1071 by improving the efficiency and equity of lending markets. Data analysis identifies credit needs and gaps for different types of small businesses and therefore directs attention to further understanding and remedying these gaps. The CFPB's proposed rule will effectively facilitate community needs and fair lending analysis by requiring comprehensive and robust data. As with any proposed rule, there are areas that could be improved which are discussed below.

Congress has had a longstanding interest in instituting data reporting requirements because increased transparency in lending markets will increase access to credit for underserved populations. Perhaps the seminal fair lending data disclosure law is the Home Mortgage Disclosure Act (HMDA) that Congress passed in 1975 and improved via the Dodd Frank Act. Likewise, Congressional interest in small business data disclosure pre-dates the Dodd Frank Act with prior versions of Section 1071 being parts of Community Reinvestment Act (CRA) modernization acts.[2] Because of the consistent Congressional attention to data disclosure, the CFPB has appropriately developed a robust rule that faithfully executes Congressional intent and seriousness.

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[1] Section 1071 – Small Business Data Collection, Public Law 111–203—July 21, 2010, Dodd-Frank Wall Street Reform and Consumer Protection Act.

[2] NCRC worked with members of Congress on these CRA modernization bills. See H.R. 865 – Community Reinvestment Modernization Act of 2001, Section 1071, https://www.congress.gov/bill/107th-congress/house-bill/865/text and H.R.1479 - Community Reinvestment Modernization Act of 2009, see Section 105, Small business loan collection, https://www.congress.gov/bill/111th-congress/house-bill/1479/text?r=32&s=1

As the CFPB recognizes, "research indicates that minority-owned small businesses face particular obstacles, as do those that are women-owned, but the current lack of comprehensive, quantitative data has made it difficult to understand the extent of these obstacles and address them with responsive policy. By shining a light on lending practices, in this area, the Bureau believes that the 1071 data would not only foster a culture of compliance but bring particular attention to the underserved parts of the small business market that have traditionally faced the greatest obstacles to success. In this way, the proposed rule is intended to help small businesses drive inclusive and equitable growth."[3]

In this comment NCRC will:

- Describe the rationale for Section 1071 data and how the data must be comprehensive to achieve its purpose of transparency and equity.
- Respond to the wide variety of CFPB questions and discuss the major subject areas of the rule including small business characteristics and loan terms and conditions to be captured by the data.
- Assert that the CFPB's balancing test regarding privacy and its cost-benefit analysis justify a robust and comprehensive database.
- Maintain that the data must be easily accessible to the public in order to make sure that lending institutions are held accountable.

The public accountability of data motivates increases in lending to underserved businesses

Data is a great motivator for changing behavior. Data illuminates which financial institutions are effectively lending to traditionally underserved small businesses and which institutions lag their peers in serving these small businesses. It therefore motivates some leaders to maintain their lead in the small business lending market and the laggards to improve their performance. Publicly available data stimulates self-improvement efforts but when those efforts are not sufficient, data also enables public agencies to enforce fair lending laws in the cases of lending institutions that engage in discrimination and/or unfair and deceptive lending practices.

The experience of updating the Home Mortgage Disclosure Act (HMDA) data illustrates how enhancing the publicly available small business data will boost lending to underserved borrowers. After Congress updated HMDA data in 1989 to require information on the demographics of applicants, lending to minorities climbed in the 1990s before the advent of high-cost and abusive lending. For instance, from 1993 through 1995, conventional (non-government insured) home mortgage lending to African-Americans and Hispanics surged 70 percent and 48 percent, respectively. In contrast, the increase was just 12 percent for whites.[4]

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[3] Bureau of Consumer Financial Protection, 12 CFR Part 1002, Docket No. CFPB-2021-0015, RIN 3170-AA09 *Small Business Lending Data Collection under the Equal Credit Opportunity Act (Regulation B), Notice of Proposed Rule (NPR), Request for Public Comment*, https://files.consumerfinance.gov/f/documents/cfpb_section-1071_nprm_2021-09.pdf, pp. 4-5.

[4] NCRC, *Home Loans to Minorities and Low- and Moderate-Income Borrowers Increase in the 1990s, but then Fall in 2001: A Review of National Data Trends from 1993 to 2001*. Available upon request.

While public databases are often empowering and hold lenders accountable to increasing lending in underserved communities, their usefulness becomes limited over time if they lack key data on loan pricing and terms and conditions. In the years preceding the financial crisis, unscrupulous institutions dramatically increased their high-cost and abusive lending because detailed information about loan prices and characteristics were hidden and not available in HMDA data or other public databases. NCRC testified to Congress about this deficiency in HMDA data as early as 2007.[5] The lack of data was one reason the surge of abusive lending could not be stopped by regulatory agencies or detected by the public at large.[6] The CFPB has learned from this experience and has from the inception of Section 1071 data proposed robust information on loan pricing and terms and conditions.

The community development purpose of Section 1071 requires robust data

Periodic surveys, mostly on a national level, suggest that women-owned businesses and those owned by people of color significantly contribute to economic growth but that their growth and that of the economy as a whole remains impeded in part by inadequate access to credit. Small businesses drive economic growth and job creation in the United States. Small businesses are the prime source of employment for most of the workers in the United States and create approximately two out of every three jobs.[7]

Women-owned businesses with employees account for about 20% of all employer businesses, number approximately 1.1 million and generate $1.8 trillion in revenue annually.[8] The CFPB estimated that an additional 10 million women-owned firms do not have employees.[9] Firms owned by people of color are about one third of all businesses, total about 8 million businesses and employ 7.1 million people.[10]

While these figures seem impressive, the full economic potential of women-owned firms and those owned by people of color is not realized if they experience disadvantages in the economy, including unequal access to credit. The Federal Reserve Bank of Kansas City reported that 41% of African American female business owners were discouraged from applying for credit in

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[5] Testimony of John Taylor, President and CEO of NCRC, before the Oversight and Investigations Subcommittee of the House Financial Services Committee, *Rooting Out Discrimination in Mortgage Lending: Using HMDA as a Tool for Fair Lending Enforcement*, July 25, 2007, https://ncrc.org/wp-content/uploads/2007/07/ncrc_test_reg_oversight_hearing_finsvs_july_07(2).pdf
[6] Adam J. Levitin and Susan M. Wachter, *The Great American Housing Bubble*, Harvard University Press, 2020, pp. 189-190.
[7] NPR, p. 13 and Mills, Karen Gordon and McCarthy, Brayden, Harvard Business School, *The State of Small Business Lending: Credit Access During the Recovery and How Technology May Change The Game*, p. 4, July 2014.
[8] Andrew Hait, *Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018*, United States Census Bureau, March 2021, https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html
[9] Consumer Financial Protection Bureau (CFPB), *Key Dimensions of the Small Business Lending Landscape*, 13, May 2017, https://www.consumerfinance.gov/data-research/research-reports/key-dimensions-small-business-lending-landscape/
[10] NPR, p. 20 and CFPB, *Key Dimensions*, 15.

contrast to 16% of white female business owners.[11] In addition, the average annual sales revenue for African American female business owners was $27,752 in contrast to $170,587 for white female business owners.[12]

The Minority Business Development Administration (MBDA) found that businesses owned by people of color received lower loan amounts than white-owned firms. This finding remained even after controlling for the sales level of firms. The average loan received by high-sales firms owned by people of color was $363,000 compared to $592,000 for white-owned firms.[13]

Narrowing disparities in business ownership by race through improved access to credit aided by data disclosure would boost community development in economically disadvantaged communities. According to NCRC, there are tremendous gaps in Black and Hispanic business ownership relative to their population size. Although 12.6% of the U.S. population was Black, only 2.1% of small businesses with employees were Black-owned. Hispanics were 16.9% of the population yet owned only 5.6% of businesses.[14]

The Kauffman Foundation found that if people of color owned businesses at the same rate as non-minorities, our country would have one million additional employer businesses and more than 9.5 million additional jobs.[15] Citigroup estimated that over a twenty-year time period, fair access to lending would have enabled African American small businesses to add $13 trillion in revenue and create 6 million jobs.[16] The CFPB reported on a National Small Business Association report finding a relationship between small business access to credit and the ability to hire.[17] By making the small business market more transparent and uncovering missed lending opportunities, Section 1071 is likely to increase lending to small business and thus help create more jobs.

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[11] Dell Gines, *Black Women Business Startups*, Federal Reserve Bank of Kansas City, https://www.kansascityfed.org/community/economic-and-small-business-development/black-women-business-startups/, p. 12.
[12] Gines, p. 9.
[13] Minority Business Development Agency (January 2010). Disparities in Capital Access between Minority and Non-Minority Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs. p. 5, https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf
[14] NCRC, *Disinvestment, Discouragement, and Inequity in Small Business Lending*, Summer 2019, https://ncrc.org/disinvestment/
[15] Kauffman Foundation, *State of Entrepreneurship 2017: Zero Barriers – Three Mega Trends Shaping the Future of Entrepreneurship*, http://www.kauffman.org/~/media/kauffman_org/resources/2017/state_of_entrepreneurship_address_report_2017.pdf
[16] Citigroup, Citi GPS: Global Perspectives & Solutions, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the U.S.*, at 4 (Sept. 2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D.
[17] NPR, pp. 28-29.

Section 1071 data critical to addressing fair lending concerns

In addition to a community development purpose, Section 1071 data is vital to addressing fair lending concerns by helping stakeholders identify and correct possible fair lending violations. Racial disparities are currently stark. In mystery shopping conducted by NCRC in Los Angeles, White testers were given significantly better information about business loan products, particularly information regarding loan fees when white testers were told about what to expect 44% more frequently than Hispanic testers and 35% more frequently than black testers.[18]

NCRC also surveyed more than 900 small businesses that had outstanding loan balances as of March 2020 with the intention of determining whether they had sufficient access to loan modifications during the pandemic. White small business owners who contacted commercial bank institutions received modification approvals at a significantly higher rate (26.7%) than Black (10.9%) and Latino (12%) small business owners who contacted these institutions.[19]

A Federal Reserve-sponsored paper reconfirmed findings by NCRC and others. It revealed that even after controlling for firm characteristics such as profitability and creditworthiness, firms owned by people of color were still more likely to be denied loans than white-owned firms.[20]

Differences by gender would likewise be narrowed by Section 1071 data either through voluntary action by lenders responding to continued gender disparities uncovered by the data or via enforcement actions when necessary. Part of the difficulty women-owned businesses face is a lack of credit and capital. On average, women start their businesses with half as much capital as men ($75,000 compared to $135,000). Also, just 5.5 percent of female-owned businesses used bank loans to start their businesses, compared to 11.4 percent of male-owned businesses.[21] The Section 1071 data would be a more comprehensive and regular data source to monitor these disparities on an annual level.

CFPB correctly opted for a comprehensive database capturing critical factors influencing credit access: Section 1071 should be the standard database used by government agencies and the public

In order for a dataset to be effective in achieving community development and fair lending purposes, it needs to be comprehensive in its coverage of lenders and must capture important

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[18] NCRC, *Disinvestment, Discouragement, and Inequity in Small Business Lending*, Summer 2019, https://ncrc.org/disinvestment/

[19] Anneliese Lederer and Sara Oros, Are Loan Modifications For Small Businesses A Possibility In The COVID-19 Pandemic?, February 2021, NCRC, https://ncrc.org/are-loan-modifications-for-small-businesses-a-possibility-in-the-covid-19-pandemic/

[20] Mels de Zeeuw, Federal Reserve Bank of Atlanta Community and Economic Development Department, and Brett Barkley, Federal Reserve Bank of Cleveland Supervision and Regulation Department (November 2019). *Mind the Gap: Minority-Owned Small Businesses' Financing Experiences in 2018*. Consumer and Community Context, a Federal Reserve System publication, Vol. 1, No. 2, p. 16. https://www.federalreserve.gov/publications/2019-november-consumer-community-context.htm

[21] National Women's Business Council – *Problem: Women Entrepreneurs Need Greater Access to Capital*, https://cdn.www.nwbc.gov/wp-content/uploads/2012/01/11091753/fact-sheet-access-to-capital.pdf

factors in credit underwriting so these can be controlled for in analyses of gender and racial disparities in lending. As the CFPB recognizes, annual disclosure of lending by the vast majority of small business lenders is a prerequisite for adequate oversight. The current data that consists of periodic surveys which are not usually lender specific is not sufficient.[22] The publicly available data is also inconsistent in the amount of detail on key underwriting variables that is needed for community needs and fair lending analysis.

The Section 1071 database should also become the data relied upon on an interagency basis for CRA and fair lending enforcement, examination and research just as HMDA data is relied upon for home lending. Currently, small business data is collected in a haphazard manner across multiple agencies including the federal bank agencies, the Small Business Administration (SBA), and the CDFI Fund at the Department of Treasury.

Section 1071 has the potential to replace this inconsistent, duplicative and inefficient collection with a database that is more comprehensive. Lenders and community-groups alike would prefer to consult with one database than to contend with two or more that are collected annually. In this vein, the Section 1071 database should be able to capture more information than the current CRA data and other data on small business lending do. It seems that this is possible since the CFPB is proposing a comprehensive database (below, this comment will include more details regarding this issue).

The following are principles that the CFPB has adopted for this rulemaking and that must also guide the issuance of the final rule:

The rule must comprehensively cover the marketplace

NCRC applauds the CFPB's decision to require lenders with 25 or more originations to report data. This will cover most banks and would likely cover most non-depository institutions. The CFPB estimates that the proposed threshold of 25 loans would cover about 70% of all banks. However, if the CFPB increases the threshold to 50 loans, coverage would drop precipitously to 52% of all banks. If the threshold is increased to 100 loans, just one third of banks would report.[23] Simply put, the fair lending and community development purpose would be frustrated if coverage of banks dropped to 50% or 33%. The database would no longer be statistically representative of actual lending and would not be able to accurately reveal whether credit needs were being met in all communities, but particularly in smaller urban areas and rural counties where smaller banks tend to be headquartered.

Intermediate small banks (assets between $346 million and $1.384 billion)[24] were previously required to report small business CRA data. These banks are especially important in rural communities and smaller cities. Using CRA data from 2003, one of the last years in which

[22] NPR, page 18 and 25.
[23] NPR, p. 239.
[24] Agencies release annual asset-size thresholds under Community Reinvestment Act regulations, December 16, 2021, https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm

intermediate small banks reported data, NCRC estimated that these banks were between 15 to 20 percent of the market in the Appalachian portion of states like Maryland and Virginia.[25] Also, a Federal Reserve survey reported that 42 percent of small businesses applying for credit applied to small banks. As of 2020, the Federal Reserve Banks found that applicants' satisfaction rates of 79% was the highest with the small banks.[26] Thus, Section 1071 data would be particularly useful to further probe reasons regarding whether this higher level of satisfaction is due to lower denial rates or better pricing. If these survey results were borne out via data analysis, the data would provide competitive impetus to larger banks to improve their performance.

In addition to banks, the rule must apply to credit unions, online financial technology companies, other non-depository institutions, Community Development Financial Institutions and public sector-based lenders. These lenders have different abilities to meet credit needs. Therefore, data on their performance is needed to not only make sure they are adhering to fair lending law but to ascertain if subgroups of small businesses are or are not receiving affordable and sustainable credit just because of which types of lenders disproportionately serve them.

Including reporting requirements for all types of lenders and for the vast majority of loans is necessary in order to promote fairness in the lending marketplace. As the CFPB itself states, "In general, the Bureau believes that broad coverage of institutions and products as requested by a number of…stakeholders would result in the collection of more data and would be consistent with the statutory purposes of section 1071."[27]

Non-depository lenders, which currently do not publicly report data but must be included in Section 1071 data collection, were about 40% of the small business lending market according to the CFPB.[28] In addition, the Federal Reserve Banks reported that 20% of small business sought credit from online lenders.[29] Covering online lenders is imperative because Federal Reserve surveys have revealed that small business applicants found their loan offers hard to understand, increasing the chances that the applicants will receive loans with higher interest rates than they anticipated or other undesirable terms and conditions.[30] If online lenders reported information about their loans, including loan terms and conditions, the act of public data reporting and accountability may curb excessive pricing and onerous terms and conditions.

[25] *Access to Capital and Credit for Small Businesses in Appalachia*. (2007). National Community Reinvestment Association. https://ncrc.org/wp-content/uploads/2007/05/ncrc%20study%20for%20arc.pdf
[26] Federal Reserve Banks, *Small Business Credit Survey*, April 2017, 14
[27] NPR, p. 97, The CFPB continued by stating, "The Bureau does not believe that the request made by several trade association stakeholders to take a more limited approach to scope—including the various limitations on the coverage of certain types of financial institutions and products—would be consistent with the statutory purposes of section 1071."
[28] NPR, p. 25.
[29] Federal Reserve Banks (2020). *2020 Report on Employer Firms, Small Business Credit Survey*. p. 8. https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2020/2020-sbcs-employer-firms-report.pdf
[30] Barbara J. Lipman, Federal Reserve Board Division of Consumer and Community Affairs, and Ann Marie Wiersch, Federal Reserve Bank of Cleveland Community Development Department (November 2019). *Searching for Small Business Credit Online: What Prospective Borrowers Encounter on Fintech Lender Websites*. Consumer and Community Context, Vol. 1, No. 2, a Federal Reserve System publication, pp. 3 and 10.

NCRC is pleased that the CFPB reversed its earlier decision and opted to include Merchant Cash Advance (MCA) companies as data reporters. MCAs advance funds to small businesses and then receive a daily or periodic percentage of small businesses receipts. This form of lending has been high-cost and can be abusive. The CFPB estimated it likely equaled $19 billion in financing, a significant increase from a few years ago.[31] In addition, a Federal Reserve survey found that African American and Hispanic small businesses were more likely to use MCAs than white-owned businesses.[32] Fair lending concerns about high-cost financing being targeted to businesses owned by people of color must be monitored via Section 1071 data reporting requirements.

Likewise, factors that advance funds to small businesses and then collect payments from the clients of small businesses must be covered. The CFPB has opted against covering factors, stating that they do not engage in lending. Yet, the amount of their funding is less than the amount of payments they receive from the small businesses' clients. This would appear to be equivalent to interest payments. Factoring, like MCAs, can be abusive if not monitored. We urge the CFPB to reconsider and require reporting from factors.

The data must be robust including key factors for underwriting

A database will be able to adequately achieve a fair lending purpose only if it contains key variables that are used in underwriting and that allow analysts to assess if women-owned and minority-owned businesses are receiving a fair share of credit when compared to similarly qualified male-owned or white-owned small businesses. In this vein, the CFPB is correct to use its discretionary authority to require collection of data regarding whether a business is a start-up, the number of employees and the North American Industry Classification (NAIC) code which indicates the sector of the small business.[33]

We ask the CFPB to reconsider its decision to refrain from collecting the credit score of the small business applicant. The CFPB cites complexity as a reason to refrain from collection.[34] While a number of credit score systems can be used by lenders, the CFPB's HMDA rule contains a useful precedent for collecting this critical variable. In addition, the possibility of a small business owner's personal score rather than the business' score being used can be accommodated in the data collection process. To the extent that credit score is relied upon by lenders writ large or a subgroup of lenders, the explanatory power of the Section 1071 database will be reduced if this variable is not collected. NCRC also believes that the CFPB should reconsider its decision to not disclose credit scores in any form in HMDA data. Should credit scores be collected in Section 1071 data, it should also be disclosed perhaps in a masked but still useful form.

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[31] NPR, p. 15.

[32] Federal Reserve Bank of Atlanta, *Report on Minority-Owned Firms, Small Business Credit Survey*, December 2019 p. 5, https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf

[33] NPR, p. 291.

[34] NPR, p. 296.

In its final rule, the CFPB must retain the discretionary variables it has chosen for collection. Its list is carefully chosen and reflects key factors in the loan approval process. The list should be expanded to include other important variables like credit score, not diminished.

Pricing information measures affordability, sustainability and viability of lending

The CFPB proposed to collect a number of data points for pricing, including interest rates, fees, loan terms and the presence of prepayment penalties.[35] It is not sufficient to assess the accessibility of loans to women- and minority-owned small businesses in order to achieve the fair lending and community development purposes of Section 1071. Access to loans is not meaningful if they are disproportionately high-priced with onerous terms and conditions for traditionally underserved small businesses. Community development is frustrated if small businesses struggle to repay the loans instead of being able to expand their businesses and hire more employees. Fair lending could be violated if high-cost lending is targeted to protected classes. We applaud the CFPB's proposal for pricing information but also urge the CFPB to consider the disclosure of the Annual Percentage Rate (APR) in addition to the components of pricing so that the public can determine via a well-understood variable, the APR, whether credit is being extended at a fair price.

Data on race and gender of the small business must be granular and not just aggregate; disability status should be added

The linchpin of Section 1071 is the required data on the race and gender of the small business owners. A large body of research, briefly discussed above, reveals past and continuing discrimination and difficulties in accessing credit for these businesses. Not only does race and gender data need to be collected but it needs to be collected in a precise manner. NCRC therefore appreciates the CFPB's proposal to collect disaggregated race and ethnicity data as well as aggregated or broad categories of race and ethnicity. As HMDA data analysis has demonstrated, racial and ethnic subgroups have different experiences in the lending marketplace, meaning that data that only has broad categories will not reveal these differences and will thus underperform in achieving Section 1071's fair lending purpose. We appreciate the CFPB's decision to largely mirror HMDA's aggregated and disaggregated racial and ethnic categories and also to propose additional categories such as Middle Eastern origins.[36]

NCRC urges the CFPB to further refine the gender categories. Gender is not binary as the CFPB recognizes. However, the CFPB's choices of male, female, and "I prefer to describe" is not sufficient.[37] The comment below provides additional categories for consideration for gender identify and also sexual orientation. The proposed data collection will not be sufficient to determine if discrimination is occurring against LGBTQ businesses. Preliminary HMDA data

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[35] NPR, p. 367.
[36] NPR, p. 458.
[37] NPR, p. 463.

analysis found disparities based on sexual orientation but the current analysis probably understates these disparities due to HMDA data limitations.[38]

Furthermore, the CFPB should consider adding variables to make it possible to determine with a business is owned by people with disabilities. While Congress did not mandate collection of disability status in Section 1071, it appropriately provided discretionary authority to the CFPB in case it missed critical data points. No one can seriously claim that discrimination does not occur against people with disabilities. It would be consistent with Section 1071's fair lending purpose to collect data on people with disabilities owning small businesses because this would enable the CFPB and other data users to identify disparities and discrimination against people with disabilities.

The data must be easily accessible to the public

Section 1071 data will be most effective in holding lenders accountable for providing access to reasonably-priced credit if it is publicly available in an easy manner for community-based organizations, public officials and other stakeholders to use. In contrast if many variables are not disclosed to the public, lenders cannot be held as accountable. The agency would have all the data but may not engage in robust and frequent analysis of lenders' records. The public will then have a truncated dataset that could not adequately reveal whether fair lending or community development objectives were being met. Lenders could object that analysis done by members of the public did not have key variables for explaining disparities not because the public did not know how to use the variables but because they were not available. Public availability of a robust dataset is therefore key to accountability by removing a veil of secrecy from vital data points.

The CFPB will employ its proposed balancing test to decide after the first year of data collection which data points to disclose to the public.[39] NCRC is confident that the vast majority of the contemplated data points can be disclosed without violating the privacy of applicants. In the more than 40 years of HMDA collection and dissemination, NCRC is not aware of a single incident of re-identification of an applicant that has caused harm. In contrast, private sector actors like Equifax have comprised the identifies of hundreds of millions of consumers via data breaches.[40] Truncating publicly available data used for fair lending and community development purposes is not the appropriate way to promote privacy interests. Instead, better enforcement against private sector databases is needed so they cannot be compromised in a detrimental manner.

As the CFPB recognized, "The bureau also notes that, based on the Bureau's expertise and analysis, the publication of HMDA data—which contains many data fields that are similar to

[38] Jason Richardson and Karen Shakira Kali, *Same-Sex Couples And Mortgage Lending*, NCRC, June 2020, https://ncrc.org/same-sex-couples-and-mortgage-lending/
[39] NPR, p. 572.
[40] Josh Silver, *The Big Red Herring: The Home Mortgage Disclosure Act (HMDA) Will Help Predators Identify You!* NCRC, February 2018, https://ncrc.org/big-red-herring-home-mortgage-disclosure-act-hmda-will-help-predators-identify/

data fields that would be disclosed under section 1071—has not resulted in any measurable increase in fraud or identity theft against mortgage applicants."[41]

The data must be accessible to users at all levels of expertise. While some stakeholders will engage in more sophisticated analyses, others will want to obtain basic facts such as the number and percent of loans offered to women-owned and businesses owned by people of color. This type of analysis is not supposed to be fully explanatory but instead is useful for discussions with lenders to see if those lagging behind their peers in reaching underserved businesses will take steps to increase their lending.

The full potential of Section 1071 data is only realized if the data is publicly and fully available in a form that a range of users can employ. It must be available for download on a loan-level basis. In addition, either summary tables must be available or query engines should be able to produce useful cross tabulations such as term loans by race or gender of the small business. The CFPB took steps backwards in HMDA data dissemination by providing the raw loan-level data but removing summary tables and not replacing them with a query engine that produces a variety of cross tabulations at different levels of disaggregation. The CFPB should revisit its HMDA dissemination and avoid similar truncated dissemination with the Section 1071 data.

Detailed Responses to CFPB Questions

We now offer detailed responses to the CFPB's questions and discuss additional issues below such as those related to the characteristics of the small business, loan terms and conditions, the definition of an application, action taken, loan type, loan purpose and more:

Characteristics of the Small Business

Definition of Minority Individual

Question: The Bureau seeks comment on its proposed approach to this definition, including its proposed clarification of the definition of minority individual, and requests comment on whether additional clarification is needed. The Bureau is requesting comment regarding whether an additional category for Middle Eastern or North African should be added for purposes of responding to a financial institution's inquiry regarding a principal owner's ethnicity or race and, if so, how this category should be included and defined.[42]

The CFPB proposed that the definition of minority individual is Black or African American, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino. A multi-racial and multi-ethnic person would also be considered a minority individual. This would be consistent with the HMDA categories.[43] The CFPB's proposal to mirror HMDA is desirable because the racial and ethnic categories are reasonably comprehensive and using the same categories eases reporting requirements for banks and also

[41] NPR, pp. 608-609.
[42] NPR, p. 134.
[43] NPR, pp. 132-133.

makes them consistent for applicants. In addition, NCRC is supportive of the CFPB adding Middle Eastern or North African as an additional category.[44] Bias against applicants that are first generation immigrants or whose family emigrated from those regions occurs and has a better chance of being captured by the data if these categories are added to the data.

Definition of Minority-Owned Business

Question: the Bureau seeks comment on the proposed definition of minority-owned business and possible alternatives that may clarify the term in order to help ensure that small business applicants can determine whether they are minority-owned businesses for purposes of section 1071 data collection.[45]

Should visual observation be required in all cases when applicant does not provide demographic information or only in the case when there is only one principal owner.[46]

In particular, the Bureau seeks comment on whether applicants are likely to have difficulty understanding and determining the information they are being asked to provide and, if so, how the Bureau may mitigate such difficulties.[47]

The CFPB must follow the statutory language Section 1071 of the Dodd Frank Act, which defines a minority-owned small business as one in which more than "50% of the ownership or control…is held by 1 or more minority individuals."[48] In addition to identifying small businesses in the Section 1071 database that met the statutory definition of minority-owned, NCRC had urged the CFPB in our letter commenting on the agency's Small Business Regulatory Enforcement Fairness Act (SBREFA) outline to add a variable in the database that would identify the percentage of owners that were minority.[49] The CFPB opted against this recommendation but indicated that it would add a variable indicating the number of principal owners.[50]

It also appears that a lender would collect demographic data for each of the principal owners just as lenders do currently for applicants and co-applicants for HMDA data (we ask the CFPB to clarify data collection for demographics of principal owners in its final rule).[51] If we are interpreting the proposal correctly, the proposed data collection procedures would provide the public with some sense of whether a small business is just over 50% minority-owned or closer to 75% or even 100% minority-owned. In addition, if the small business was less than 50%

[44] NPR, p. 134.
[45] NPR p. 139.
[46] NPR, p. 468.
[47] NPR, p. 433.
[48] P. 685 Public Law 111–203—July 21, 2010, https://www.congress.gov/111/plaws/publ203/PLAW-111publ203.pdf
[49] P. 297
[50] Ibid.
[51] See proposed § 1002.107 (a)(20) Compilation of reportable data, p. 793, proposed Appendix G on p. 809 and proposed Appendix E, proposed data collection form that asks an applicant to use a separate sheet of paper for reporting demographic information for each principal owner.

minority-owned, the data would allow the user to calculate the percentage of minority ownership in many cases. It would therefore be useful in helping the public determine if businesses with various levels of minority ownership have different experiences in the lending marketplace.

When a small business applicant opted against indicating in a form submitted with the application if it was a minority-owned small business, the CFPB proposed instructing lenders to visually observe (if the application is in-person or via Zoom or some other similar technology) if the applicant was a person of color. The CFPB proposed that the lender then report its observation in the Section 1071 data. However, these observations would not be used to determine if the business was minority-owned because the lender may not have the information for all owners, particularly when the applying owner did not provide the information.[52] Nevertheless, this information would be useful in the Section 1071 data when combined with the variable of the number of principal owners because data users could still approximate if the business was minority-owned or if one or more of the principal owners were minority. It would be part of the picture to help analysts assess if the experiences in the marketplace were different for businesses with various levels of minority ownership.

We also support the procedure in the proposed regulation that the lender shall indicate if the ethnicity and race was based on visual observation.[53] The publicly available data should then have a flag to indicate if the information was based on visual observation so that data users could determine how they want to use the data and compare it to race and ethnicity data that was provided by the applicant.

NCRC supports the CFPB's proposed use of aggregate and disaggregated racial and ethnic categories. NCRC has used HMDA data to document that borrowers in the disaggregated categories have different experiences in the lending marketplace. For example, NCRC found that one out of three Hispanic borrowers received a government-insured loan but that 52% of Puerto Ricans did.[54] In addition, applicants were receptive to the disaggregated categories. The CFPB reported a high incidence of disaggregated categories appearing in the data. For example, about half of applicants reporting Asian as their race in the first data field for race also reported a disaggregated category for Asian in the second data field.[55] Lastly, based on the experience of HMDA with aggregated and disaggregated categories, NCRC does not anticipate that applicants will have widespread difficultly understanding the information requested regarding race or gender as long as the CFPB sample forms are clear for both lenders and applicants to follow.

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[52] NPR, pp. 432-433 and p. 810.

[53] NPR, p. 793 § 1002.107 Compilation of reportable data (20). The section reads in part, "The data compiled for purposes of this paragraph (a)(20) shall also include whether ethnicity and race are being reported based on visual observation or surname."

[54] Agatha So, Unidos US and Jason Richardson, NCRC, Hispanic Mortgage Lending: 2019 HMDA Analysis, https://www.ncrc.org/hispanic-mortgage-lending-2019-analysis/

[55] CFPB, *Introducing New and Revised Data Points in HMDA: Initial Observations from New and Revised Data Points in 2018 HMDA*, August 2019, pp. 20 and 21, and Table 3.2.2, pp. 106-111 https://files.consumerfinance.gov/f/documents/cfpb_new-revised-data-points-in-hmda_report.pdf

For race, the CFPB proposed to collect information on the following aggregate and disaggregated categories:[56]

American Indian or Alaska Native (print name of enrolled tribe)

Asian

- Asian Indian
- Chinese
- Filipino
- Japanese
- Korean
- Vienamese
- Other Asian

Black or African American

- African American
- Ethiopian
- Haitian
- Jamaican
- Nigerian
- Somali
- Other (print race for example, Ghanaian or South African)

Native Hawaiian or Other Pacific Islander

- Guamnian or Chamoro
- Native Hawaiian
- Samoan
- Other Pacific Islander

White

I do not wish to provide this information

NCRC believes that the above aggregate and disaggregated categories are appropriate and would also support the addition of a Middle Eastern and North African category.

Definition of Women-Owned Business and Gender Identity

Question: The Bureau also seeks comment on whether the sample data collection form should list examples from which the applicant could choose when a principal owner self-identifies and an applicant writes in or otherwise provides additional information about the principal owner's sex, such as "intersex," "non-binary," or "transgender." The Bureau also seeks comment on whether, alternatively, sex should be collected solely via the "I prefer to self-describe" option (with the ability to write in or otherwise provide additional information)—that is, without male and female being listed as options.

[56] NPR, p. 803.

The Bureau also seeks comment on whether financial institutions should be required to ask separate questions regarding sex, sexual orientation, and gender identity and, if so, what categories should be offered for use in responding to each question.[57]

Just as with minority-owned business, the CFPB must follow the Dodd Frank Act's definition of women-owned business as one in which 50% or more of the ownership or control is held by one or more women. Just as in the case of minority-owned companies, the proposed data point of number of principal owners would help data users identify businesses with various percentages of ownership above or below 50%. Thus, the CFPB should retain its proposed data point of the number of principal owners. Unlike the collection of race data, the CFPB is not requiring lenders to record gender on the basis of visual observation (if the applicant does not provide gender information) because it will not be possible in some cases for a visual observation to accurately identify gender.[58] NCRC believes that this is appropriate instruction.

Regarding gender identity, the CFPB proposed to ask whether the applicant was male, female, "I prefer to self-describe," or "I do not wish to provide this information."[59] The CFPB also acknowledged multiple possibilities for sexual orientation[60] but seemed to propose "I prefer to self-describe" with a free form text box permitting more detailed explanations as a way to account for combinations of gender identity and sexual orientation.

Instead, NCRC requests that the CFPB requires lenders to ask two questions with multiple choice options: one for gender identity and another for sexual orientation. Discrimination unfortunately takes many forms; a particular lender may not discriminate against gay males but may do so against trans individuals or other gender identities or sexual orientations. Therefore, a more accurate method for asking gender identify and sexual orientation is preferred in order to more accurately measure disparities or discrimination.

NCRC suggests that the CFPB consult with the UCLA School of Law, the Williams Institute, which has templates on its website.[61] For gender identity, one possibility is:

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

For sexual orientation, one possibility is:

- Straight

[57] NPR, pp. 464-465.
[58] NPR, p. 464.
[59] NPR, p. 463.
[60] NPR, P. 462
[61] UCLA School of Law, the Williams institute, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys (GenIUSS)*, September 2014, https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/

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

Businesses owned by people with disabilities

NCRC supports the recommendation of the National Disability Institute (NDI) that the Section 1071 data collection requirements include collecting information on the disability status of the small business. While Section 1071 of the Dodd Frank Act did not mandate this collection as stated above, it provided the CFPB with discretionary authority to collect other data it deemed important. As NDI stated in its comment letter, about 15 % of the adult population or 40 million people have a disability. Almost 2 million own small businesses. Further, a higher percentage of people with disabilities (17%) are likely to be self-employed than the general population (11%).[62]

It is likely that the full potential of small business ownership is not being realized for persons of disability due to discrimination in the lending marketplace and/or lack of access (either physical or virtual). In order to further understand and ameliorate barriers to access, the CFPB should mandate data collection on the disability status of the principal owner(s) of the small business applicant. This would help carry out the objectives of the Americans with Disabilities Act (ADA) as well as those of Section 1071. Moreover, federal agencies such as the Department of Transportation (DOT) include businesses owned by people with disabilities to be a disadvantaged business enterprise (DBE).[63] Collecting data on the experiences of small businesses owned by people with disabilities would therefore be consistent with other federal efforts to bolster their prospects and growth.

Number of principal owners

Question: The Bureau also seeks comment on whether the Bureau should instead, or additionally, require collection and reporting of similar information about owners (rather than principal owners). For example, should the Bureau require that financial institutions collect and report the number of owners that an applicant has that are not natural persons, in order to obtain a more complete picture of the applicant's ownership structure?[64]

As stated above, NCRC supports the addition of the proposed data point of number of principal owners in order to provide more information on the minority- or women-owned status of the small business.[65] Even in cases when the small business is not women- or minority-owned, it would be useful to know this data point since it is possible that experiences in the lending marketplace might still be different if one of the owners is a woman or a person of color. The

[62] National Disability Institute comment letter to CFPB, https://www.regulations.gov/comment/CFPB-2021-0015-0081.
[63] Department of Transportation, *Eligibility Guidelines for Disadvantaged Business Enterprise*, https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/eligibility
[64] NPR p. 472.
[65] NPR, pp. 470-472.

CFPB proposed to define a principal owner as one with 25% of more of the ownership stake in the business. This makes intuitive sense since a 25% stake is a significant amount of ownership. The CFPB should also consider asking for the number of owners that own less than 25% as an additional data point in order to be shed more light on the distribution of small businesses and their experiences in the marketplace.

Definition of Small Business

Question: The Bureau seeks comment on this proposed definition of a small business, including the $5 million gross annual revenue size standard. Similarly, the Bureau seeks comment on whether the SBREFA Second Alternative Approach at $8 million gross annual revenue or 500 employees (depending on the type of business) would align more closely with section 1071's purposes.[66]

In order to keep pace with changes to the SBA's own size standards and the potential impact of future inflation, the Bureau is considering whether it might update its proposed $5 million gross annual revenue size standard over time (perhaps at the end of a calendar year in order to allow financial institutions to use the same threshold consistently throughout the year). The Bureau seeks comment on how this should be done and the frequency at which it should occur.[67]

The CFPB should reconsider its small business definition as a business with revenues of up to $5 million. The CFPB stated that it adopted this threshold because it is a common one used in industry so it would be straightforward for lenders to implement.[68] While simplicity is a commendable objective, so is comprehensiveness, particularly if a more inclusive standard is not too complicated. In its SBREFA outline, the CFPB proposed to define a small business as one with revenues up to $8 million and up to 500 employees. The CFPB estimated that this definition covered almost the entire universe of small businesses. It was also important for Section 1071 purposes because it would create a robust database that would allow stakeholders to compare the experiences of smaller and larger small businesses in the lending marketplace. Moreover, the CFPB reported that some lenders observed that the $8 million and 500 employees threshold was also straightforward enough to implement.[69]

If the CFPB opts for the $5 million revenue threshold, it estimated that experiences in the lending marketplace of about 270,000 businesses classified as small under Small Business Administration (SBA) standards would not be captured by the Section 1071 database.[70] This would seem to be too large an omission to countenance in the interests of simplicity when the SBREFA proposal is also feasible.

Lenders would be required to collect demographic information for small business applicants for only those businesses that are included in the definition of a small business. Thus, adopting an

[66] NPR, p. 272.
[67] NPR, p. 473.
[68] NPR, p. 260.
[69] NPR, p. 266
[70] NPR, p. 282

appropriate definition is critical towards effectuating the purposes of Section 1071. If the CFPB does not adopt its SBREFA proposal, it should consider adjusting the $5 million threshold annually for inflation. Yearly indexing is a procedure that lenders follow under a number of statutes including CRA and HMDA.[71]

Small Business Structure

Question: Nonetheless, the Bureau seeks comment on whether the following potential data points or any others would further the purposes of section 1071 and thus should be considered for inclusion in the final rule.[72]

The CFPB proposed to refrain from requesting that lenders collect and report the small business structure. The agency reasons that the number of principal owners would be an effective proxy and easier to collect.[73] However, a recent NCRC report documented that businesses structured as C-corps or LLCs were significantly more likely to receive a Paycheck Protection Program (PPP) loan during the pandemic than sole or joint partnerships.[74] It is possible that businesses with more complex structures also have more savvy and experience applying for loans than others. The CFPB should conduct additional research and determine if the number of principal owners would reveal differences of the magnitude documented by NCRC's survey. If not, it should reconsider its decision to omit business structure from the required data points to be collected under Section 1071. Since PPP required applicants to report their business structure, the CFPB has an additional resource to consider regarding the ease of applicants understanding this request and lenders collecting this information.

Previously collected data can be used within the same year

Question: The Bureau also seeks comment on whether a period of one calendar year to reuse certain previously collected data is appropriate or whether it should be extended to a longer period (such as two or three years). In addition, the Bureau seeks comment on whether financial institutions should be required to notify applicants that information they provide (including, in particular, minority- owned business status, women-owned business status, and the principal owners' ethnicity, race, and sex) could be reused for subsequent applications.[75]

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[71] Annual indexing is used under CRA and HMDA to determine reporting requirements for various types of lenders. Under CRA, the asset threshold for small intermediate banks is adjusted annually, see https://www.ffiec.gov/cra/pdf/2021_Asset_Size_Threshold.pdf. The HMDA reporting threshold is likewise adjusted annually, see https://www.consumerfinance.gov/rules-policy/final-rules/home-mortgage-disclosure-regulation-c-adjustment-asset-size-exemption-threshold/.

[72] NPR, p. 294.

[73] NPR, p. 297.

[74] Anneliese Lederer, Sara Oros In collaboration with Dr. Sterling Bone, Dr. Glenn Christenson and Dr. Maura Scott, *Business Structure May Have Been A Barrier To The Paycheck Protection Program And Access To Credit*, NCRC, September 2021, https://ncrc.org/business-structure-may-have-been-a-barrier-to-the-paycheck-protection-program-and-access-to-credit/

[75] NPR, p. 487.

The CFPB proposed to allow lenders to use data collected previously within a year if for some reason an application is continued at a later date. This is reasonable but a time period longer than a year should not be allowed since the characteristics of the small business applicant such as revenue size may have changed.[76]

Definitions and Reporting Procedures Regarding Applications and Loan Actions

Definition of an Application

Question: The Bureau also seeks comment on the advantages and disadvantages of collecting data on incomplete or withdrawn applications, as well as how collection would or would not further the purposes of section 1071. In addition, the Bureau seeks comment on reporting of multiple lines of credit on a single credit account, including how financial institutions internally consider multiple lines of a credit on a single account and the Bureau's proposed approach in comment 103(a)-6.[77]

Question: should pre-qualifications be reported if they result in denials? Would additional data fields be required? If pre qualification denials are reported would a lender want to report all pre-qualifications?[78]

Question: the Bureau seeks comment on whether it is necessary to specify a time period specifically for the collection of protected 1071 demographic information, and if so, what time period the Bureau should designate. Should POS applications should follow a different procedure?[79]

The CFPB proposes to define an application consistent with the current statutory and regulatory definition under the Equal Credit Opportunity Act (ECOA). Under Regulation B, which implements ECOA, an application is now defined as "an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested."[80]

The definition of application needs to have enough standardization that it would generate consistent data. In addition, the definition needs to occur early enough in the lending process to capture instances when the application was never completed by the applicant or was withdrawn by the applicant. If the definition allows lenders to define an application as occurring late in the process shortly before it renders a decision, it would reduce accurate reporting of applications

[76] NPR, pp. 486-487.
[77] NPR, p. 159.
[78] NPR, p. 171.
[79] NPR, p. 485.
[80] See the regulatory text of Regulation B, § 1002.2(c)(3), https://www.consumerfinance.gov/rules-policy/regulations/1002/2/#c-3

that never reach the underwriting stage because a discriminatory lender discouraged an applicant from proceeding and providing all relevant information.

The CFPB sought to balance the importance of collecting accurate information with offering some flexibility to lenders. It reported that lenders have different definitions of an application. Some, for example, may define an application as occurring when a business fills out an application form while other lenders may specify that an application occurs when a business requests credit and authorizes a lender to pull a credit report.[81] It is understandable that the CFPB is seeking to avoid upending existing procedures that lenders use for determining when an application has occurred, in part because they have been using the existing ECOA definition for some time.

The CFPB further stated that gaming would be discouraged by inherent features of data collection. For example, if a lender defined an application as occurring late in the underwriting process, it would likely have distorted data such as approval rates nearing 100%.[82] While NCRC is concerned with the lack of standardization under the proposed definition, the CFPB's use of common sense numerical checks may allay our concerns. If approval rates appear inflated compared to peers or the rates of incomplete applications appear to be abnormally low, the CFPB should further investigate the reporting procedures of the particular lender(s) and require any appropriate adjustments.

Peer comparisons such as online lenders compared to online lenders or smaller banks compared to smaller banks are probably the best way to make sure that approval rates or other data are not distorted by manipulating the definition of an application. In addition, the CFPB appropriately suggested that peer comparisons is a reasonable method for determining whether its definition of an application is generating Section 1071 data, including demographic data, at a rate comparable to similar institutions.[83]

The CFPB hinted that Section 1071 data should be collected at the time a "covered" application occurs. The CFPB should consider making this a requirement rather than a suggestion in a comment to the regulation in order to maximize the collection of Section 1071 data.[84] Point of sale (POS) applications should follow a similar procedure for collecting data as other applications. We agree with the CFPB that a retail store can use a sample application form, either printed or on-line, for POS applications.[85]

In response to situations in which an applicant requests multiple types of credit, the CFPB proposed that a lender report a separate application for each type of covered transaction.[86] For example, if an applicant requests a term loan and a credit card, then the lender reports two

[81] NPR, p. 156.
[82] NPR, p. 157.
[83] NPR, p. 480.
[84] NPR, p. 481.
[85] NPR, p. 483.
[86] NPR, p. 158.

applications: one for the term loan and one for the credit card. NCRC believes this is a reasonable approach and also accurately reflects the varied credit needs of an applicant.

Action Taken

Question: The Bureau also specifically seeks comment on whether the "withdrawn by applicant" category should be merged with the "incomplete" category for purposes of reporting action taken. The Bureau seeks comment as well on whether the Bureau's proposal to categorize all incomplete applications as a single category of "incomplete" (closed or denied) should instead be reported consistent with the approach in Regulation C, which provides separate categories for denials (including on the basis of incompleteness) and files closed for incompleteness (if the financial institution sent a written notice of incompleteness). In addition, the Bureau seeks comment on whether counteroffers that are not accepted, such as a credit offer for a lower credit amount than requested, should be reported as "approved but not accepted" rather than "denied," in order to reflect the availability of credit. As recommended by the SBREFA Panel, the Bureau also seeks comment on whether to specifically capture counteroffers in section 1071 data, and if so, whether to use a counteroffer flag in the data or some other method.[87]

The CFPB proposed the following action taken categories:[88]

- withdrawn by applicant
- incomplete (includes denials based on incompleteness as well as applicant being notified of incompleteness and lender never acting on the application)
- origination
- denial
- approved by lender but not accepted by applicant

NCRC agrees with the CFPB's approach to the intricate action categories beyond originations and denials. Withdrawals, incompletes and approved by the lender but not accepted by the applicant are important information for fair lending investigations. A high number and/or percentage of withdrawals and incompletes may signal a lender is discouraging applications from protected classes and/or does not want to meet credit needs as required by CRA. NCRC also agrees with the CFPB's decision to not combine withdrawals and incompletes. Since these are different actions by the applicant, data analysis and fair lending investigations would be more accurate if they are collected and reported separately as they are under HMDA.[89]

In addition, NCRC agrees with the CFPB's proposed deviation from Regulation C that implements HMDA to include denials based on incompleteness to be reported as incompletes

[87] NPR, p. 351.
[88] NPR, pp. 346-350.
[89] NPR, p. 349.

instead of denials.[90] Denials should be reserved as denials based on creditworthiness and other underwriting factors instead of an incomplete application. Finally, the category, approved by the lender but not accepted by the applicant, might be indicative of high interest rates or unfavorable terms and conditions that could be targeted to vulnerable and traditionally underserved small businesses.

The CFPB's proposed treatment of counteroffers is appropriate. If a lender makes a counteroffer to an applicant and the applicant rejects it, the CFPB would instruct lenders to report the transaction as a denial. This makes sense since the lender was not going to offer an origination on the terms requested by the applicant. Also, if the applicant decides to accept the counteroffer, the CFPB suggested that this be reported as an origination based on the terms of the counteroffer. This is also appropriate and would capture an originated loan in the database.[91]

Separate reporting for various action taken dates useful for fair lending purposes

Question: In addition, for originated transactions, the Bureau is considering whether the date the application was approved should be captured in addition to, or instead of, the date of closing or account opening. The Bureau is also considering whether the date of closing or account opening should be reported separately from the date of disbursement of funds (for term loans) or funds availability (for lines of credit).[92]

Separate data fields for date of approval and for date of closing or account opening would be important for fair lending and community development analyses. Stakeholders would want to know if any particular institutions are delaying the availability of funds for unreasonable periods of time after loan approvals. This inferior customer service would not be serving community needs and could also possibly indicate fair lending problems if protected classes disproportionately experience delays. The CFPB noted that delays in disbursing funds could be particularly problematic for agricultural businesses.[93] Therefore, data of this sort would allow the CFPB and the public to identify and work with any institutions with these problematic practices.

Denial Reasons

Question: The Bureau seeks comment on its proposed approach to this data point, including regarding whether the denial reason categories listed and explained in proposed comment 107(a)(11)-1 sufficiently cover the common credit denial reasons in the small business lending industry.[94]

Denial reasons would include credit characteristics of business and owners; use of loan proceeds (whether a lender as a general practice does not lend to certain industries); cash flow; collateral; time in business; government criteria (the applicant did not meet the criteria for a government

[90] NPR, p. 348.
[91] NPR, pp. 350-351.
[92] NPR, p. 353.
[93] NPR, p. 354.
[94] NPR, p. 359.

program); aggregate exposure (debt levels); unverifiable information; and other.[95] The CFPB would instruct lenders to indicate up to four reasons for denial.

NCRC concurs that this information would further the fair lending and community development statutory purposes of Section 1071. This data could be used to see if a particular lender has an usually high level of denials for a particular reason to applicants from protected classes that other lenders appear to be approving.[96] In addition, as the CFPB noted, this data can be used in self-assessments by a lender to see if a particular underwriting policy might be erecting an unnecessary barrier to meeting credit needs. Furthermore, aggregate analysis of different types of lenders could also determine if industry-wide practices or approaches could be creating unnecessary barriers.

Amount Applied for and Amount Approved

Question: the Bureau requests comment on potential methods for avoiding misinterpretations of disparities between the credit amount or limit applied for and the credit amount or limit originated or approved and on the possible use of ranges of numbers for reporting the amount applied for and amount approved or originated data points. In addition, the Bureau requests comment on whether it would be useful and appropriate to require reporting of the amount approved as well as the amount originated for originated closed-end credit transactions.[97]

NCRC agrees with the CFPB's proposal to require reporting the amount applied for as well as the amount approved.[98] Also, we agree with the proposed reporting of amount approved in cases when the lender approves the application but the applicant does not accept the loan offer. It is also appropriate to report the credit limit in cases of open-end credit.[99] In the case of line increases, the Board's proposal that the lender reports the additional amount instead of the additional and the original amount makes sense in terms of more precisely being able to assess whether credit needs are being met.[100] Finally, the CFPB was correct not to report amounts in ranges since the statute requires reporting of amounts.[101] Ranges are not useful for assessing whether lenders are responding adequately to credit needs.

Reporting amount applied for and amount approved is critical for fair lending investigations and to assess whether credit needs are being met. A recent Federal Reserve survey found that African American owned firms that applied for loans were least likely to receive all of the financing they requested (13%). Hispanic and Asian-owned firms (20% and 31%, respectively) were also not as likely as white-owned firms (40%) to receive all of the loan amount they requested. Even among

[95] NPR, pp. 354-356, p. 861.
[96] NPR, pp. 356-357.
[97] NPR, p. 345.
[98] NPR, p. 334.
[99] NPR, pp. 340-341.
[100] NPR, p. 338.
[101] NPR, pp. 343-344.

firms with good credit scores, African American owned firms were half as likely as white-owned firms to receive full loan amount they sought (24% versus 48%).[102]

When this phenomena is observed on a local level or for particular lender(s), the Section 1071 data would enable stakeholders to detect this and ascertain what actions to take such as establishing new partnerships between lenders and community groups and/or reforming underwriting practices. This way, the data could bolster community development and fair lending objectives.

Application method

The CFPB proposed to require lenders to report on the method of receiving the application. Specifically, did the lender receive the application in-person, over the phone or via the internet. NCRC agrees with the CFPB's statement, "The Bureau believes that data on application method would improve the market's understanding of how applicants apply for credit which, in turn, would facilitate fair lending enforcement, including helping determine whether certain application methods are more or less likely to be associated with violations of fair lending laws."[103]

In addition, the CFPB indicated that application method might help stakeholders and researchers better understand which type of lending – traditional or on-line – is more effective at reaching underserved communities such as banking "deserts."[104] Much debate and discussion currently revolves around whether the newer, on-line lenders are more effective at reaching underserved populations and businesses. This data point would shed some light on this important issue and would help further the community development purpose of Section 1071.

Application recipient

The CFPB also proposed to collect who the application recipient would be, that is, whether it was the lender directly or a third party who then sent it to the lender.[105] This is an important data point because in combination with application method, it would help stakeholders determine whether traditional banking or online lending is most effective in reaching underserved small businesses or whether the effectiveness of the lending model depends on local context and conditions. This information would help achieve both the community development and fair lending purposes of the statute.

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[102] Federal Reserve Banks, Small Business Credit Survey 2021 Report on Firms Owned by People of Color, exec summary iii, https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/sbcs-report-on-firms-owned-by-people-of-color.

[103] NPR, pp. 305-306
[104] NPR, p. 307.
[105] NPR, pp. 310-311.

Loan Types and Purposes

Question: The Bureau seeks comment on its proposed approach to the credit type data point, including the lists of products and guarantees proposed and the other specific requests for input below.[106]

Loan Product

NCRC believes that the CFPB appropriately chose to collect a range of credit products including term loans, credit card loans and MCAs. Credit cards are widely used by small businesses, often with smaller principal balances and higher interest rates than term loans. It is thus important to assess whether the smallest businesses or women- and minority-owned businesses have equitable access to term loans or are served disproportionately by credit card loans or other small business credit products. If an imbalance exists, stakeholders can then determine the factors behind the imbalance and take steps to narrow the disparities in access. The SBA reported that Hispanic and African-American owners are more likely to rely upon credit cards than other businesses.[107] Section 1071 data would inform us if this continues to be the case.

A significant limitation in the CRA small business data is a lack of separate reporting for different types of loans. The CRA small business data combines credit card lending and non-credit card lending without the ability to separate credit card and non-credit card lending in analyses.[108] Section 1071 must eliminate this limitation.

The CFPB also proposed including lines of credit that meet important credit needs to help businesses weather fluctuations in revenues.[109] Lines of credit will help inform stakeholders whether minority- and/or women-owned businesses are able to access this important credit type or whether they experience disproportionate amount of denials.

MCAs are an important and growing source of small business credit

NCRC is pleased that the CFPB included MCAs under the definition of covered product. These loans have become a staple of the small business lending industry, and there is evidence that most small businesses perceive these transactions as a form of credit.[110] MCAs grew rapidly following the 2008 financial crisis, as traditional lenders tightened lending standards and fled

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[106] NPR, p. 316.

[107] Small Business Administration, Office of Advocacy (September 2011) Frequently Asked Questions about Small Business Finance. http://www.sba.gov/sites/default/files/files/Finance%20FAQ%208-25-11%20FINAL%20for%20web.pdf.

[108] Community Reinvestment Act: Interagency Questions and Answers, Section .42(a)(2)-3, p. 11669, http://www.ffiec.gov/cra/pdf/2010-4903.pdf.

[109] NPR, p. 317, p. 848.

[110] Lipman, Barbara and Ann Marie Wiersch. (June 2018). "Browsing to Borrow: 'Mom and Pop' Small Business Perspectives on Online Lenders." Board of Governors of the Federal Reserve System. Retrieved at https://www.federalreserve.gov/publications/files/2018-small-business-lending.pdf

from small business lending markets. The MCA industry was estimated to have provided $19.2 billion in small business funding by the end of 2019.[111]

According to its latest annual report, Square Capital has by itself issued approximately 1 million MCAs, for a total amount of more than $6.3 billion, since 2014.[112] Shopify Capital extended $153 million in MCAs in the second quarter of 2020, a year-over-year increase of 65 percent. In its corresponding presentation to investors, Shopify's management noted that COVID created new demand for its credit offerings, in part because the kinds of smaller firms that it primarily serves encountered greater-than-normal challenges to accessing capital through traditional bank financing during the pandemic. Future growth will be fueled by the pandemic's effect on our economy: For example, 60 percent of the 80,000 small businesses that received their PPP loan via Square had no prior relationship with the company.[113]

MCAs have the potential to cause businesses to incur repayment liability

MCAs have the potential to cause businesses to incur repayment liability even after default. MCA often include personal guarantees and collateral requirements that allow lenders to seize a business owner's assets. The FTC has found that provisions sometimes are unadvertised to small business consumers, suggesting that MCA providers are engaging in deceptive practices. For example, the FTC found RCG Advances LLC, a New York-based MCA provider, advertised its products as having "no personal guaranty of collateral from business owners." Yet RCG's lending contracts include provisions that if a borrower is deemed to be unable to make a repayment, any guarantor on the MCA contract "will be jointly and severally liable to RCG for all of RCG's losses and damages."[114] RCG and other providers were also found to have told borrowers that delays in repayment or failure to repay due to bankruptcy were not a violation or default on the lending contract, yet proceeded to hold borrowers in default and pursue repayment under such circumstances. In pursuing these cases, the FTC found that MCA providers went as far as to threaten physical violence against borrowers who failed to make repayment.[115]

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[111] Sweeney, P. (2019, August 19). "Gold Rush: Merchant Cash Advances Are Still Hot." Debanked. https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/

[112] Square. 2019 10-K, (2020, February 26). Annual Report filed to the Securities and Exchange Commission. Retrieved at https://s21.q4cdn.com/114365585/files/doc_financials/2019/q4/Square-2019-10-K.pdf In its filing, Square provides additional commentary on its lending model: "Generally, for loans to Square sellers, loan repayment occurs automatically through a fixed percentage of every card transaction a seller takes. Loans are sized to be less than 20% of a seller's expected annual GPV and, by simply running their business, sellers repay their loan in eight to nine months on average. https://s21.q4cdn.com/114365585/files/doc_financials/2019/q4/Square-2019-10-K.pdf

[113] Credit Suisse Equity Research. (2020, September 27th). "Square: Updated Model with New Seller & Cash App Segmentation; Updated GPV Exit Rates & App Download Data." A research note to investors.

[114] Federal Trade Commission v. RCG Advances LLC, Ram Capital Funding LLC, Robert L. Giardina, Jonthan Braun, Tzvi Reich. Case No. 20-CV-4432. https://www.ftc.gov/system/files/documents/cases/192_3252_rcg_advances_-_complaint.pdf

[115] Ibid

Collecting and disclosing data on MCAs is necessary to monitor the market and identify the growth of higher-cost products

Exemptions for the MCA industry under state usury laws does not justify exempting the industry from Section 1071 data requirements. MCA providers labeled their products as factors to avoid state usury laws and licensing requirements, allowing them to charge often high interest and annual percentage rates (APR). A study by Opportunity Fund found that MCAs had an average APR of 94 percent, almost three times higher than some of the laxest state usury limits.[116] In some of the most egregious cases, MCAs had rates that exceeded 1,000 percent.[117] The CFPB cited high default rates, due in part to large percentages of revenues or receipts that MCA providers took from the small businesses.[118]

These high rates can force borrowers to take out another MCA to make repayments. This creates a cycle of debt as the borrower now owes the original amount borrowed several times over. For example, Antelope Valley Community Clinic, a healthcare services non-profit that helped underserved communities, originally received $250,000 through an MCA but ended up owing $4.3 million in cumulative MCA debt.[119] With concerns over predatory and abusive pricing, including the MCA industry under the reporting requirements of 1071, especially because pricing information is proposed to be collected, could provide more information on the industry's pricing practices.

MCAs often have other harmful terms that warrant market-wide monitoring under Section 1071

MCA providers often require that small business borrower's sign "Confessions of Judgement" (COJs) agreement within their lending contracts.[120] COJs waive a borrower's procedural due process rights and force them to accept liability and automatically lose any legal disputes with lenders. MCA providers claim COJs are efficient and prevent the lengthy and costly parts of the litigation process. However, in practice, COJs allow MCA providers to claim that a business owner has breached the lending contract without providing sufficient evidence. This can result in the seizure of the borrower's business accounts and even personal assets without the borrower even being aware that the provider has alleged that their contract has been breached. MCA

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[116] Louis, T., Weaver, E., Brown G., McShane, C., (2016, May.) Unaffordable and Unsustainable: The New Business Lending on Main Street. Opportunity Fund. https://www.opportunityfund.org/blog/unaffordable-and-unsustainable-new-opportunity-fund-report/

[117] New York Attorney General (2020, June 10) Press Release: Attorney General James Sues Predatory Lender That Threatened Violence and Kidnapping, and Illegally Collected Millions from Small Businesses. https://ag.ny.gov/press-release/2020/attorney-general-james-sues-predatory-lender-threatened-violence-and-kidnapping

[118] NPR, p. 179.

[119] McLean, B. (2018, December 8). 'We're coming after you': Inside the merchant cash advance industry. Yahoo! Finance. https://finance.yahoo.com/news/merchant-cash-advances-salvation-small-businesses-payday-lending-reincarnate-161835117.html?guccounter=1

[120] Lewis, K. M. (2019, January 3). "Agreeing in Advance to Lose? Legal Considerations in Regulating Confessions of Judgment." *Congressional Research Service*. https://fas.org/sgp/crs/misc/LSB10239.pdf

providers can claim the lending contract has been breached and freeze a borrower's bank account if a single daily payment is missed. MCA providers have been found to have altered or even forged COJ agreements.[121] Similar concerns and abuses about COJs led the Federal Trade Commission (FTC) to outlaw them in consumer credit transactions in 1985, considering it to be an abusive practice.[122] However, this reform did not apply to commercial small business transactions.

Despite these previous concerns, COJs have become an increasingly common practice within MCA lending. Bloomberg found the number of MCA cases ending with a confession in favor of a merchant cash advance company in New York state rose from 14 cases in 2014 to over 3,500 cases in 2018. These COJ cases are estimated to have won the MCA industry an estimated $500 million.[123]

Federal regulators have begun to crack down on the industry. In August of 2020, the FTC filed a complaint against one of the MCA industry's pioneers, Yellowstone Capital, the same company that Antelope Valley received financing from. The FTC alleged that Yellowstone illegally withdrew millions of dollars in excess payments from borrowers and relied on deceptive marketing, including misrepresenting collateral requirements, personal guarantees, and financing amounts available under their products.[124]

The CFPB also cited fair lending concerns; it reported that minority-owned small businesses use MCAs to a greater extent than white-owned firms.[125] Hence, data on MCAs must be collected to further the statutory fair lending purpose of Section 1071. If it is not, the data would be less effective in monitoring fair lending since MCAs are rapidly increasing and disproportionately used by businesses owned by people of color.

Agricultural lending must be included

Question: The Bureau seeks comment on the potential costs and complexities associated with covering such credit.[126]

The CFPB proposed to include agricultural loans in Section 1071 data, stating that lending to farms can pose fair lending risks since it is conducted on a de-centralized basis and involves several discretionary elements. The CFPB stated, "The share of minority representation in farming, particularly that of Black farmers, has declined sharply over the last 100 years. Based

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[121] Mider, Z.R., Faux, Z. (2018, November 20) Sign Here to Lose Everything Part 1: "I Hereby Confess Judgement." Bloomberg. https://www.bloomberg.com/graphics/2018-confessions-of-judgment/?srnd=confessions-of-judgment
[122] 16 CFR § 444.2
[123] Mider, Z.R., Faux, Z. (2018, November 27) Sign Here to Lose Everything Part 2: The $1.7 Million Man. Bloomberg. https://www.bloomberg.com/graphics/2018-confessions-of-judgment-millionaire-marshal/
[124] Federal Trade Commission. (2020, August 3). FTC Alleges Merchant Cash Advance Provider Overcharged Small Business Millions. https://www.ftc.gov/news-events/press-releases/2020/08/ftc-alleges-merchant-cash-advance-provider-overcharged-small
[125] NPR, p. 178.
[126] NPR, p. 188.

on the disposition of numerous lawsuits alleging discrimination against minority farmers, the Bureau believes that credit discrimination may play a role in this decline."[127]

The history of discrimination against African American farmers also illustrates the importance of collecting data regarding whether the loans were issued by a public sector lender or had a federal guarantee. Under the largest discrimination settlement in United States history, the Department of Agriculture has made more than $1 billion of payments to African American farmers that experienced discrimination. The Department of Agriculture lending programs were operated by biased county organizations whose elected committee members were virtually all white (1% were African American).[128] Section 1071 data therefore needs to include agriculture lending and also needs to make sure that public sector lending programs are held accountable.

In addition to critical fair lending issues, NCRC believes that better understanding credit needs of farmers is vital to helping ensure the survival of a sector that will need to invest in more sustainable practices and organic produce in order to contribute to climate control. The CFPB stated that 98% of the farms in this country are family farms and 90% of family farms were on the smaller side, bringing in $350,000 or less in revenue on an annual basis.[129] In order to promote adaptive and sustainable agriculture, our country cannot rely on big agribusiness but will need a viable sector of smaller farmers also. Section 1071 data becomes all that more important in assessing the extent to which their credit needs are being met.

Finally, the CRA data currently has data on small farm lending.[130] If Section 1071 data has the potential to replace CRA data, it must likewise have data on farm lending. It would not appear that this data would be too complex to collect and report since it is already reported under CRA.

HMDA reportable multifamily home lending

Question: the Bureau seeks comment on whether it should require such applications to be flagged as such when reported under subpart B. The Bureau believes that for data integrity and analysis purposes, it may be helpful to know if a loan is in both datasets and a dual reporting flag may help ensure any data analysis is not double-counting certain applications.[131]

Question: The Bureau seeks comment on its proposed approach for credit secured by certain investment properties, including whether it is appropriate to consider credit not to be business credit when it is secured by 1-4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy; and, if not, whether a different number of dwelling units in the property securing the credit would be an appropriate way to

[127] NPR, pp. 186-187
[128] Wikipedia, *Pigford v. Glickman*, https://en.wikipedia.org/wiki/Pigford_v._Glickman#:~:text=the%20free%20encyclopedia-,Pigford%20v.,1999%2C%20by%20Judge%20Paul%20L
[129] NPR, p. 185.
[130] See CRA data products on the FFIEC webpage to view farm loan data, https://www.ffiec.gov/cra/craproducts.htm
[131] NPR, p. 189.

make a distinction between business and consumer-designated credit. The Bureau also solicits comment on whether to permit financial institutions to voluntarily report real estate investment loan transactions that are secured by non-owner occupied 1-4 dwelling units.[132]

The CFPB proposed that loans for the purpose of purchasing single family units to be occupied by the small business owner and loans for multifamily units (five or more units) be reported as part of Section 1071 data. As CFPB cited, this would be important data collection for the fair lending and community development purposes of Section 1071. It would help stakeholders and researchers better understand whether small property owners and landlords remain viable in communities across the country. Small property owners and landlords occupy an important niche in the rental market, often providing units that are more affordable with lower median rents than larger property owners and landlords.[133]

In addition, the Section 1071 data would contain important demographic data that is lacking in HMDA data for multifamily lending. The race and gender of small business owners of multifamily property would be present in the Section 1071 database. The public would therefore be able to determine whether women-owned businesses and businesses owned by people of color had fair opportunities to acquire loans and thereby serve communities of color and other underserved communities.

The CFPB's decision to not require reporting of loans when an investment property of 1 to 4 units is not occupied by the small business owner seems appropriate. In this case, it seems that the purpose is one of investment and not operating a business of renting out units. In contrast, if the small business owner is to occupy one of the units, it makes sense to require reporting of this loan since it is more likely that the units will be used as a residence by the small business owner and for rentals.[134] All lending involving units of 5 or more should be reported as it is likely that the small business owner is renting them out. Finally, it would be useful to have a flag indicating if the loan is also reported under HMDA.

CFPB should rethink exclusions of consumer lending, factoring and leases from Section 1071 reporting

Consumer lending

As recommended by the SBREFA Panel, the Bureau seeks comment on this proposed interpretation, including how the Bureau has defined the scope of consumer-designated credit. The Bureau also seeks comment on whether it should permit financial institutions to voluntarily report consumer-designated credit when they have reason to believe the credit might be used for business purposes.[135]

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[132] NPR, p. 206.
[133] Federal Housing Finance Agency, *2022–2024 Enterprise Housing Goals*, Federal Register, Vol. 86, No. 162, Wednesday, August 25, 2021, Proposed Rules, p. 47411.
[134] NPR, pp. 204-205.
[135] NPR, p. 203.

The CFPB proposed to omit consumer lending including consumer credit card lending from Section 1071 data reporting, primarily out of concern for the potential cost of this data collection and increasing the possibilities of inconsistent reporting.[136]

However, the lines between consumer and small business lending can get blurred, especially for the smallest businesses. Studies find that about one-quarter of new small businesses are funded by the personal loans received by their owners.[137]

The CFPB should further investigate whether a reasonable compromise can be achieved that reduces costs for lenders but that also captures a significant amount of consumer or personal lending that is used for small business purposes. Perhaps personal credit card applications should ask whether 50% or more of the loan would be used for small business purposes. If the answer is yes, then Section 1071 data collection would commence for that credit application. Fifty percent or more would seem to be a threshold that would sufficiently weed out applications that would result in nominal amounts of funding for small business purposes but would still capture ones that are potentially important for meeting the community development purposes of Section 1071.

CFPB should require reporting of factoring

Question: The Bureau also seeks comment on how the subset of purported factoring arrangements that may in fact be credit (i.e., those that are revolving in nature or that cover anticipated receivables) should be reported under the 1071 rule. Specifically, the Bureau seeks comment on whether such arrangements should be reported as credit extensions incident to factoring (and thus reported "other sales-based financing") or as MCAs.[138]

The CFPB proposed to exclude factoring from Section 1071 reporting because it is a transaction that is focused on the small business selling the "factor" an accounts receivable purchase.[139] For example, a landscaper sells a factor a contract for a client to pay $500 at the end of the month for lawn mowing services. The factor gives the landscaper $450 in exchange. The factor would then seek to collect the $500 due from the landscaper's client instead of the landscaper.

The CFPB reasoned that this is not a loan transaction since the small business is not deferring payment, that is, promising to pay back a loan at a future date or to make periodic payments in the future to pay back the credit. The CFPB stated that including this type of transaction would create inconsistencies in Section 1071 reporting since the other reported transactions include deferred payments.[140] To date, the CFPB has issued a staff interpretation of ECOA that factors are not loans.[141] However, it would seem that when the small business receives an amount less

[136] NPR, pp. 200-202.
[137] Scott Shane (May 2014). How Personal Credit Affects Small Business Borrowing. http://smallbiztrends.com/2014/05/personal-credit-affects-small-business-borrowing.html/print/
[138] NPR, p. 194.
[139] NPR, p. 193
[140] NPR, p. 194.
[141] Staff interpretation or Comment for 1002.9(a)3-3, 3. Factoring. Factoring refers to a purchase of accounts receivable, and thus is not subject to the Act or regulation. If there is a credit extension incident to the factoring

than the amount due from its client, it is effectively paying interest and/or fees. The CFPB should re-consider or at a minimum require reporting of factoring when credit is issued in conjunction with the factoring arrangement or a credit-like transaction occurs, which is not an uncommon occurrence according to the CFPB.[142]

Although the CFPB stated that factoring constituted about 3% of funding-related transactions for small businesses,[143] factoring could very well increase if it is excluded from Section 1071 data collection and reporting. Unscrupulous institutions would note that this would be part of the market that would be opaque since it is not subject to data reporting and could possibly migrate to this part of the market and increase the exploitation of vulnerable small businesses.

The CFPB noted a lack of comments on fair lending implications of omitting factors from reporting requirements but the lack of comments is mostly due to a lack of regular data on the users of factors. Practitioners and small business technical assistance providers, however, have reported on abuses associated with factors. In addition, a recent Federal Reserve survey suggests that businesses owned by people of color disproportionately use factoring. The survey found that African American and Hispanic firms were twice as likely to use factors than white-owned firms.[144]

Moreover, in our previous comments on the SBREFA outline, we stated, "MCA providers label their products as factors to avoid state usury laws and licensing requirements, allowing them to charge often high interest and annual percentage rates (APR)." Because the labels MCA and factors are used interchangeably by the industry, complete data disclosure of both forms of financing is necessary to monitor this high-cost lending and to promote consistent reporting of these types of financing.

CFPB should reconsider exclusion of leases from Section 1071 data

Question: The Bureau seeks comment on whether there are types of leases, or leases with certain characteristics that should be excluded from proposed comment 104(b)-2 and thus treated as reportable under 1071.[145]

Under a lease, a small business will pay an entity for the right to use equipment for a specified time period. The CFPB stated that it is estimated that leasing could constitute about 13% of the lending market.[146] The CFPB, however, proposed that leasing not be covered under Section 1071 since the small business often returns the equipment. However, some contracts apparently provide the option for the small business to keep the equipment after payments that presumably

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arrangement, the notification rules in § 1002.9(a)(3)(ii) apply, as do other relevant sections of the Act and regulation. https://www.consumerfinance.gov/rules-policy/regulations/1002/interp-9/#9-a-1-Interp-7

142 NPR, p. 193.

143 NPR, p. 191.

144 Federal Reserve Bank of Atlanta, *Report on Minority-Owned Firms*, *Small Business Credit Survey*, December 2019 p. 5, https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf

145 NPR, p. 199.

146 NPR, p. 197.

could equal all or most of the value of the equipment.[147] Since leasing could effectively be a significant part of the loan market, the CFPB ought to investigate whether some of this activity should be covered. In particular, it would seem appropriate to report leasing in cases in which a small business has the option to retain the equipment. In this case, leasing is akin to lending in which debt is incurred, payment is deferred and payments are made over a significant time period for a substantial asset, that is, the equipment. Further, the CFPB could apply the loan threshold to entities that lease. It could rule that reporting is required of those entities that offer 25 or more leases with the option to retain the equipment over a period of a year.

CFPB should reconsider its decision not to require reporting of loan purchases

Question: The Bureau seeks comment on its proposal not to expressly exclude the purchase of covered credit transactions in the proposed rule's regulatory text or commentary.[148]

The CFPB proposed to exclude purchases of loans from Section 1071 data reporting, explaining that the statutory text is focused on applications and that reporting requirements are triggered when a lender makes a decision on an application.[149] However, the CFPB also has discretionary authority under the statute to include reporting of activities that are important for the provision of credit. Loan purchasing activity provides more capital for lenders to make more loans.

CRA exams consider loan purchasing activity. Because NCRC argues that Section 1071 should replace CRA small business data reporting, including loan purchases in Section 1071 data would facilitate its replacement of the CRA data. The 2019 CRA small business data revealed that loan purchases was about 5% of the total amount of small business lending activity reported (418,429 loan purchases and 7,219,295 loans).[150] While this may seem small compared to the overall loan activity, it could represent an important source of capital for smaller lenders. In addition, purchasing activity is likely concentrated among larger banks and thus would not represent reporting burden for a wide berth of lenders. Moreover, the CFPB reported that some lenders on its SBREFA panel supported reporting purchasing activity since it would be consistent with HMDA reporting.[151]

Type of Guarantee

The CFPB proposed requiring lenders to ask if the loan involves a federal or non-federal government guarantee or a personal guarantee by the borrower.[152] These are important data points because they allow stakeholders to further determine whether traditionally underserved small business receive more costly or onerous products. In home lending, people of color are disproportionately represented as recipients of Federal Housing Administration (FHA) loans or other government guaranteed-loans. While providing a critical source of credit to people of

[147] NPR, p. 196 and p. 199.
[148] NPR, p. 208.
[149] NPR, p. 209.
[150] See Table 1 of the FFIEC pre-formatted tables for 2019 via https://www.ffiec.gov/craadweb/national.aspx
[151] NPR, p. 207.
[152] NPR, pp. 849-850.

color, government-guaranteed loans are more expensive. It is therefore important to see if lenders can work with other stakeholders to increase conventional home lending to people of color. Likewise, federal and non-federal government guarantees would be valuable data points in the Section 1071 database to determine the access of women- and minority-owned businesses to government guaranteed loans and conventional loans.

The CFPB also proposes to require an indication of whether the borrower guaranteed the loan. This data point would allow an analysis of whether they are disparities in the frequency of minority-owned and women-owned businesses being required to guarantee loans compared to non-minority and male-owned businesses. Such disparities could be significant obstacles to credit. Predatory lenders can also abuse personal guarantees to seize assets of businesses as described above. The Section 1071 data can therefore help monitor abuses associated with personal guarantee requirements and determine how often they are associated with high prices and other onerous loan terms.

Collateral information should be more detailed

Question: Bureau seeks comment on its proposed approach to this data point, as well as regarding additional information that could help reduce misinterpretations of disparities in pricing, including modifications to the pricing information in proposed § 1002.107(a)(12). For example, the Bureau seeks comment on whether more information about the nature of the collateral securing the loan is necessary to understanding pricing data, such as total origination charges, applicable to a particular transaction.[153]

The CFPB should consider additional data points describing collateral requirements. According to businesses involved in Federal Reserve focus groups and meetings, collateral asset values held by their businesses dropped during the Great Recession. As a result, several lenders required additional collateral that small businesses need for loans, making it harder for small businesses to be approved for loans.[154] Collateral information will, therefore, shed light on underwriting changes and approaches during various economic conditions and will help stakeholders better understand fluctuations in access to credit. In addition, the CFPB should consider asking lending institutions to report the value of any personal collateral pledged for loans in addition to collateral owned by the business. According to Robb, start-ups tend to pledge personal assets when securing financing.[155] In addition, personal guarantees were offered on 41 percent of small business loans, according to a study using data collected by the Federal Reserve Board.[156]

[153] NPR, p. 371.
[154] Addressing the Financing Needs of Small Businesses: Summary of Key Themes from the Federal Reserve System's Small Business Meeting Series (2010). http://www.federalreserve.gov/newsevents/conferences/sbc_small_business_summary.pdf.
[155] Alicia Robb (April 2013). Access to Capital among Young Firms, Minority-Owned Firms, Women Owned Firms and High-Tech Firms, for the SBA Office of Advocacy. p. 14.
[156] This is data from a 1998 study so the percentages may have changed over the years, but personal guarantees probably remain important, especially for sole proprietors and microbusiness. John Moon (Winter 2009/2010).

The proposed rule would collect information on whether a personal guarantee was made in conjunction with the loan but it did not propose any more information collection regarding the type of collateral or the dollar value of the collateral.[157] First, the data should distinguish whether the guarantee is offered by the natural person(s) owning the business or the business. There is a clear and important distinction about whether a creditor can seize assets of a person or the business. Stakeholders should be able to determine the incidence of both types of guarantees in the data. Second, the data should have information on the dollar value of the collateral and the collateral type such as whether it is commercial or residential property. This information would allow stakeholders to understand why pricing might be lower on some loans and also the risk that loans pose to the borrowers.

Term length

NCRC agrees with the CFPB that the term length expressed in months be collected and reported.[158] The term length influences pricing and other loan terms and conditions. Without this information, the data will not be as robust in explaining pricing and term differences. It should be a straightforward data point to report for lenders.

Credit purpose categories capture a variety of purposes but CFPB should re-think refinances and require reporting as a credit type

Question: The Bureau seeks comment on its proposed approach to the credit purpose data point. In addition, the Bureau seeks comment on whether there are any purposes that should be added to or modified on its proposed list including, in particular, on the potential usefulness of including "agricultural credit" and "overdraft line of credit" in the credit purposes list. Finally, the Bureau requests comment on whether further explanations or instructions with respect to this data point would facilitate compliance.[159]

The CFPB's overall proposal for various categories of credit purpose accurately captured the wide variety of credit purposes that borrowers seek to finance. The proposal to distinguish buildings to be used for dwellings versus those to be used for non-dwellings is an important distinction.[160] The CFPB was also prescient to require the creation of a database that would require lenders to list up to three credit purposes since loans are often sought for more than one purpose.[161] Lastly, the "other" category should be accompanied by a free form data field enabling the lender to provide another loan purpose. If the CFPB notices a common reason(s) that is omitted from its list, it could amend the list in a future rulemaking.

Small Business Finance and Personal Assets. Federal Reserve Board of Governors, Community Investments, Volume 21, Issue 3. http://www.frbsf.org/community-development/files/moon_john.pdf.
[157] NPR, p. 849.
[158] NPR, p. 323, p. 850.
[159] NPR, p. 330.
[160] NPR, p. 327.
[161] NPR, p. 328.

The CFPB proposed to offer an option for lenders to provide applicants with a list of purposes instead of requiring this list. The CFPB may want to further think through this instruction since the list below is rather lengthy and easier for an applicant to respond to if it is in writing rather than a barrage of choices provided orally to the applicant.[162] In general, the CFPB may want to create a sample application form with all the required Section 1071 elements to facilitate data collection.

The CFPB asked about whether a purpose of agricultural credit should be listed.[163] We are not sure this is necessary and it might be confusing since one of the credit types above will be farm loans. A loan purpose of "overdraft" line of credit could be useful if a lender states that it is offering a product that automatically covers overdrafts and informs the borrower of loan terms and conditions.[164] A lender should not provide overdraft protection that comes with hidden and possibly abusive costs. A loan purpose of "overdraft protection" could help the CFPB and the public better monitor lenders that offer overdraft protection for compliance with consumer protection laws.

The item "refinance" existing debt as a loan purpose below is confusing since the preamble of the proposed rule stated that the CFPB would not include modifications of loan terms and conditions in the data collection and reporting of Section 1071 data. The CFPB stated that modification requests occur frequently in small business finance and would not necessarily reveal the demand for new credit (since the data point indicates a desire to change the terms of existing credit).[165] We believe, however, that a community need is manifested when a small business requests a refinance or a renewal. The small business is indicating it has a need for a lower interest rate or a stretch out of the original loan. The community need purpose of the statute is better realized if the CBPB opts for some form of reporting of refinance or renewals.

While the CFPB would not have lenders report refinances under credit type, reporting refinances as a credit purpose just seems confusing. It would be more straightforward to include this reporting as a credit type like it is in HMDA data. Perhaps the CFPB ought to conduct more research to determine how onerous it would be to include refinances as a credit type and whether the frequency of this credit type would be reduced if it was narrowly tailored to more accurately reflect a credit need such as cash-out refinances in HMDA data.

A possible compromise for reporting refinances and renewals is the approach adopted under the Interagency Question and Answer document that helps implement CRA. The agencies indicate that a lending institution can report one renewal or refinance as an origination per year.[166] This

[162] NPR, p. 329.
[163] NPR, p. 330.
[164] NPR, p. 330.
[165] NPR, p. 165,.
[166] §__.42(a)—5: Should institutions collect and report data about small business and small farm loans that are refinanced or renewed? Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Reserve System, *Interagency Questions and Answers Regarding Community Reinvestment*, Federal Register, Vol. 81, No. 142, Monday, July 25, 2016, Rules and Regulations p. 48551.

seems reasonable in that a need for a lower interest rate or a loan extension is reported in the data. However, it avoids a lender having to report multiple refinances of a particular loan in a given year. We would modify the approach in the Interagency Q&A to require reporting of refinance or renewal as separate loan types just like in HMDA instead of reporting it as an origination (the Interagency Q&A most likely adopts this approach because the CRA data is less detailed than Section 1071; the CRA data has no detailed reporting for loan type or action taken).

CFPB proposed list of loan purposes

Purchase, construction/improvement, or refinance of owner-occupied dwelling(s).
Purchase, construction/improvement, or refinance of non-owner-occupied dwelling(s).
Purchase, construction/improvement, or refinance of non-owner-occupied, non-dwelling real estate.
Purchase, construction/improvement, or refinance of owner-occupied, non-dwelling real estate.
Purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks).
Purchase, refinance, or rehabilitation/repair of equipment.
Working capital (includes inventory or floor planning).
Business start-up.
Business expansion.
Business acquisition.
Refinance existing debt (other than refinancings listed above).
Line increase.
Other.
Not provided by applicant and otherwise undetermined.
Not applicable.[167]

CRA requires federal bank agency examiners to determine if banks are responding to a variety of credit needs. The degree of a bank's responsiveness to priority needs is an important criterion on CRA exams. The proposed data points on credit purpose above would therefore be critical to help analyze whether the smallest business in low- and moderate-income census tracts are receiving loans that meet their needs for a variety of purposes, including start-up and expansion. This data would provide important motivations for banks to improve their CRA performance because it would measure, for the first time, banks' records of making loans to meet these purposes.

In addition, the credit purpose data point would help identify priority needs for various geographical areas. For example, if loans for working capital were especially scarce in one particular geographical area, CRA examiners could reward banks with higher ratings on the small business part of the CRA exam if the banks were performing better than their peers in providing loans for working capital. This in turn, may encourage other banks to increase their lending for working capital.

[167] NPR, p. 851.

Characteristics of the small business

Gross annual revenue must be reported and disclosed in a meaningful manner

The CFPB correctly proposed that lenders report the dollar amount of gross annual revenue as opposed to ranges as some lenders had suggested.[168] The data reporting needs to be as accurate as possible in order to supply the publicly available database with as precise data as possible.

In order to bolster the accuracy of the data, we urge the CFPB to re-consider its proposals regarding verification of gross annual revenue and procedures for reporting revenues of affiliates. Gross annual revenue is one of the critical variables in Section 1071 reporting since it captures whether a business is considered small. The accuracy of determining whether credit needs of small businesses is being met therefore hinges on the accuracy of collecting and reporting the revenue size of the business. The CFPB proposed that it will allow lenders to rely on the applicant without the lender needing to verify this information.[169] However, we would think that using tax documents or cash flow information, it would be feasible for the lender to verify annual revenue.

Using tax documents would be consistent with the Section 1071 mandate that requires lending institutions to report "the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant."[170] Tax documents capture the preceding fiscal year.

Just as with overall revenue, the CFPB proposed that the lender can rely upon representations of the applicant regarding whether it has affiliates and the revenue size of those affiliates.[171] The difficulty with this approach is that in some sectors such as multifamily property owning, a small business can organize itself into separate limited liability corporations (LLCs). If these affiliates are not accounted for in data collection, the Section 1071 database could include businesses that exceed the revenue limits established by the CFPB. This would reduce the efficacy of the database in reporting on the experiences of small businesses in the lending marketplace. Thus, the CFPB should further investigate this issue and determine whether there are feasible methods a lender can use to identify the presence of affiliates.

We urge that revenue size be reported as a continuous variable as that is the most accurate reporting method. However, if the CFPB adopts another reporting method, it should consider a modified version of continuous reporting that involves selecting the mid-point within $10,000 increments for reporting revenue. A version of a continuous variable is our preferred option because it is the most accurate for capturing experiences of the range of small businesses in the lending marketplace. A categorical variable could obscure experiences of various small businesses as described below.

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[168] NPR, p. 402.
[169] NPR, p. 871, see proposed 107(a)(14) Gross annual revenue.
[170] Section 1071 of Dodd-Frank Act.
[171] NPR, see proposed 107(a)(14)-3 affiliate revenue as part of proposed comment on gross annual revenue, p. 871.

The gross annual revenue size of the small business is a critical data element since research shows that smaller businesses are less likely to receive loans. In a report conducted for the Appalachian Regional Commission (ARC), NCRC obtained Pepperdine survey data that revealed approval rates for businesses of various revenue sizes. As revealed by survey data for the first quarter of 2012, just 18 percent of the small businesses with revenues less than $500,000 who sought loans obtained them. In contrast, 35 percent of the businesses with revenues between $500,000 and $1 million and 55 percent of the businesses with revenues between $1 million and $5 million received loans.[172]

Revenue categories should be more detailed than those in the CRA small business loan data. In the CRA small business data, the revenue categories are small businesses with revenue below $1 million dollars and small businesses with revenues above $1 million. Just the one example above from the Pepperdine survey reveals the inadequacies with this classification since businesses with revenues below $500,000 had markedly less access to loans than businesses with revenues above this amount.

In order to capture microenterprises, revenue categories need to be expanded. The Association of Enterprise Opportunity (AEO) has a further breakdown for the smallest microbusinesses as those with gross sales and receipts below $50,000.[173] The CDFI Fund also uses $50,000 as a category in the data it makes publicly available. At a minimum, the revenue categories should replicate the Census Bureau categories and include businesses with annual sales/receipts below $10,000, $10,000 to $49,999, $50,000 to $99,999, $100,000 to $249,999, $250,000 to $499,999, $500,000 to $999,999, and $1 million or more. In 2017, the vast majority of small businesses had receipts under $100,000.[174] The Census Bureau data supports AEO's classification in that a classification system that does not have separate categories below $500,000 would fail to adequately capture the experience in the lending markets for large numbers of small businesses.

The CFPB should further investigate the body of research to determine whether additional revenue categories are needed beyond the Census categories. According to JP Morgan Chase, "the median Black-owned firm earned $39,000 in revenues during its first year, 59 percent less than the $94,000 in first-year revenues of a typical White-owned firm. Small businesses founded by Hispanic owners earned $74,000 in revenues, or 21 percent less than the median for White-owned firms."[175] Revenue categories of up to $50,000 and then $50,000 to $100,000 would

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[172] Josh Silver, Archana Pradhan (NCRC), Spencer Cowan (Woodstock Institute), *Access to Capital and Credit in Appalachia and the Impact of the Financial Crisis and Recession on Commercial Lending and Finance in the Region*. Appalachian Regional Commission (ARC), p. 86. https://www.ncrc.org/access-to-capital-and-credit-in-appalachia-and-the-impact-of-the-financial-crisis-and-recession-on-commercial-lending-and-finance-in-the-region/

[173] Association of Enterprise Opportunity. Bigger than You Think – The Economic Impact of Microbusiness in the United States.

[174] See 2017 SUSB Annual Data Tables by Establishment Industry, United States Census, March 2020, https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html and United States Census Bureau (n.d.). *Annual Business Survey Methodology*. The United States Census Bureau. Retrieved November 30, 2020, from https://www.census.gov/programs-surveys/abs/technical-documentation/methodology.html

[175] JP Morgan Chase & Co. Institute (July 2020) Small Business Owner Race, Liquidity, and Survival. p. 17. https://www.jpmorganchase.com/institute/research/small-business/report-small-business-owner-race-liquidity-survival

work for capturing differences between white and Black owned-firms since the median revenue amounts for these two racial categories of businesses are in different Census revenue categories. However, the Census categories would not work for capturing differences in median revenue amounts between white and Hispanic businesses since the difference of $20,000 would be within one revenue category. For businesses with revenues under $100,000, the revenue categories would probably need to be in $10,000 increments.

In addition, the need for care in revenue categories is reinforced by the size distribution of women-owned small businesses. According to an American Express report, 88% of all women-owned businesses have revenues less than $100,000.[176] Just as with minority-owned firms, a reporting method needs to be developed to ensure that the data accurately describes the credit experiences of women-owned businesses. Within the $100,000 or less in revenue category, the experiences of women-owned businesses could be quite different among themselves and/or different compared to male-owned businesses.

An alternative to a categorical variable for revenue size is adopting the HMDA procedure for reporting loan amount. Lenders are instructed to report the dollar amount for loan size that represents the mid-point within a $10,000 increment in which the actual dollar amount falls.[177] For example, if the loan amount is $112,000, this loan amount falls within the $110,000 to $120,000 interval and would be reported as $115,000. The CFPB adopted this procedure to safeguard borrower privacy. The CFPB should investigate whether it would similarly protect borrower privacy and would be a more precise data reporting method for capturing the experiences of small businesses with various revenue sizes.

An important issue in the CRA small business loan data is that for a sizable number of loans, the revenue size of the small business is unknown because the bank did not consider revenue size in its underwriting.[178] This could be the case, for example, in credit card lending. However, the publicly available data provided by the FFIEC does not indicate for which loans the revenue size is unknown. When analysts seek to calculate the percentage of loans for businesses of various revenue categories, the percentage can be incorrect since it is not possible to subtract from the denominator the number of loans for which revenue size is unknown. At the very least, reporting institutions should be required to indicate the loans for which revenue size is unknown so that the data's accuracy can be improved. The CFPB, however, must instruct lenders to make strenuous efforts to collect revenue size since it is a key variable for assessing whether lenders are meeting the credit needs of businesses of various revenue sizes.

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[176] American Express. The 2018 State of Women-Owned Businesses Report. p. 9.

[177] CFPB (December 2018). Executive Summary of the HMDA Data Disclosure Policy Guidance. p. 4. https://files.consumerfinance.gov/f/documents/HMDA_Data_Disclosure_Policy_Guidance.Executive_Summary.FINAL.12212018.pdf

[178] Community Reinvestment Act: Interagency Questions and Answers, March 2010, p. 11670, Sections _.42(a)(4)-2, 42(a)(4)-3, 42(a)(4)-4 discuss revenue of small business and that lending institutions are not required to ask for revenue size. Lending institutions report "revenues not known" on loans for which they do not collect revenue information. However, the FFIEC does not include a code in the publicly available data that indicates when revenue is unknown. See http://www.ffiec.gov/cra/pdf/2010-4903.pdf.

The inaccuracy due to loans for which revenue is unknown impairs regulatory enforcement. For example, the CRA exam for East Boston Savings Bank reports that the bank issued a higher percentage of its loans than the aggregate (all other banks, as a group) to businesses with revenues of less than $1 million. However, the CRA exam acknowledges that it is unknown to what extent the bank exceeds the aggregate. The exam states:

> The disparity between the aggregate and Bank performance can, in part, be explained by a significant volume of business credit card lending by larger, nationwide institutions, which often do not perform underwriting that considers GAR (Gross Annual Revenue) information. Therefore, it is reasonable to assume that a significant portion of the aggregate data comprises loans to businesses upon which GAR information was not relied on, rather than to businesses with GARs over $1 million.[179]

In sum, this inaccuracy diminishes the ability of even regulatory agencies to adhere to their CRA responsibilities in assessing whether banks are meeting credit needs of small businesses. The Section 1071 data must have more accurate public reporting for revenue size of the small business.

The CFPB should instruct lenders to be as precise as possible about census tract and location of business

Question: The Bureau seeks comment on its proposed approach to the census tract data point. In addition to the specific requests for input above, the Bureau notes that the waterfall method is intended to allow CRA reporters to provide the same data for both reporting regimes, but requests comment on whether the proposed method would achieve this goal and, if not, whether and how this data point should be further coordinated with CRA.[180]

The CFPB's proposed "waterfall" approach for reporting census tract location is sensible. If known, the CFPB proposed that lenders report the location in which the loan proceeds would be used. If the applicant does not provide that information for some reason, the CFPB would allow the lender to report the location of the business' main office and if that is not known, any address associated with the credit application.[181] In this approach, the CFPB asked for the most important location first, where the loan proceeds would be used, followed by secondary locations.

While this makes sense, the CFPB then instructed lenders that they would not be required to at least ask where the loan proceeds would be used.[182] We urge the CFPB to reconsider this instruction since asking for the location that would benefit from the loan proceeds would help achieve the community development purpose of Section 1071, which is understanding whether

[179] 2011 CRA exam of East Boston Savings Bank, http://www2.fdic.gov/crapes/2011/33510_111117.PDF.
[180] NPR, p. 399.
[181] NPR, p. 393.
[182] NPR p. 394.

LMI or other underserved census tracts were receiving loans. Moreover, only one line in an application form (whether in-person or online) is needed for this important information.

As stated above, NCRC hopes that the Section 1071 database can eventually replace the CRA database. Thus, it should be able to accommodate most of the data collection currently undertaken under CRA and should have collection procedures similar to those under CRA or at least that are sensible and accurately collect critical information such as the business location benefiting from the loan proceeds.

Six-digit NAICS codes should be used to determine lending by industry

Question: The Bureau seeks comment on its proposal to collect 6-digit NAICS codes together with the safe harbor described in proposed § 1002.112(c)(2). The Bureau also seeks comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.[183]

We urge the CFPB to adopt as it has proposed, the collection of the six-digit North American Industry Classification System (NAICS) code for covered applicants for consistency and hierarchical compatibility with existing public data related to small business lending activity.

The ability to identify needs and opportunities requires the ability to compare lending by sector to the total number of businesses in that sector based on other public data sources. The Annual Business Survey, which provides business characteristics, including two-digit NAICS classifications for employer firms, is one such data source.[184] Two-digit NAICS codes are also used as part of the US Census Small Business Pulse surveys conducted to gauge the impact of the COVID-19 pandemic on small businesses.[185]

The six-digit NAICS codes are commonly used by employers and institutions, including the financial sector in order to complete annual EEOC certifications.[186] They are also collected by the SBA as part of the process to determine the eligibility of business for SBA guaranteed loans.[187] The NAICS code system is maintained by the Office of Management and Budget (OMB) and is updated periodically, offering a standardized and simple method for assessing the type of businesses that are seeking, obtaining, or failing to secure credit.[188] Taken together, this suggests that six-digit NAICS codes are already being collected by lenders, are widely accepted, and frequently used. Based on the hierarchical structure of the NAICS coding system and the

[183] NPR, p. 410.
[184] Classification Development Branch, E. S. M. D. (n.d.). *North American Industry Classification System (NAICS) Frequently Asked Questions (FAQs)*. Retrieved November 24, 2020, from https://www.census.gov/eos/www/naics/faqs/faqs.html#q4
[185] *Small Business Pulse Survey—About the Data*. (2020). https://portal.census.gov/pulse/data/#about
[186] *EEO-1 Survey | U.S. Equal Employment Opportunity Commission*. (n.d.). Retrieved December 3, 2020, from https://www.eeoc.gov/employers/eeo-1-survey
[187] *Table of size standards*. (2019). Small Business Administration. https://www.sba.gov/document/support--table-size-standards
[188] Classification Development Branch, E. S. M. D. (n.d.). *North American Industry Classification System (NAICS) Main Page*. United States Census Bureau. Retrieved December 3, 2020, from https://www.census.gov/eos/www/naics/

progressively narrower categories of two, three, four, five and six-digit[189] we urge the Bureau to adopt six-digit NAICS as part of this dataset to ensure comparability with existing and future public datasets that may, in conjunction with data collected under Section 1071, inform the small business market.

We agree with the CFPB that the reporting of the six digit NAICS code supports the fair lending purpose of Section 1071. The identification of the sector and industry group of the small business allows data analysts to control for the lending risk of various industries, enabling the comparison of the treatment in the lending marketplace of similarly situated small businesses. The two or three digit code is too high a level of aggregation to facilitate this important analysis.[190]

The CFPB should collect data on the number of workers and provide clear instruction to lenders

Question: The Bureau also seeks comment on whether financial institutions collect information about the number of workers from applicants using definitions other than the SBA's, and how the collection of this data point could best be integrated with those collections of information.[191]

The collection of the number of workers helps achieve the statutory purposes of Section 1071. For example, the number of workers assists with the community development purpose by providing insight into the number of jobs created, retained and/or supported by access to credit.[192] The data point would also assist in analysis of whether businesses of various sizes fare differently in the lending marketplace and whether smaller businesses may need more support and technical assistance in their quest for loans.

The CFPB proposed to explain in guidance that the number of workers would reported separately from the number of principal owners. This is necessary in order to promote data accuracy. Moreover, we agree with the guidance that workers include part-time staff, seasonal staff and contractors that primarily work for the small business.[193]

The CFPB is correct that time in business is an important variable

Question: The Bureau also seeks comment on whether time-in-business information may be less relevant or collectable for certain products or situations (such as retailer-branded credit cards acquired at point of sale) and whether reporting "not applicable" should be allowed in those instances. In addition, the Bureau seeks comment on whether there should be an upper limit on

[189] Classification Development Branch, E. S. M. D. (n.d.). *North American Industry Classification System (NAICS) Frequently Asked Questions (FAQs)*. Retrieved November 24, 2020, from https://www.census.gov/eos/www/naics/faqs/faqs.html#q4
[190] NPR, pp. 408-409.
[191] NPR, p. 415.
[192] NPR, p. 410.
[193] NPR, p. 413.

time in business—for example, to allow reporting of "over 20 years" for any applicant of that duration, rather than requiring reporting of a specific number of years.[194]

NCRC supports the CFPB's proposal to require the reporting of time in business in whole years and not in ranges.[195] Time in business is important for the fair lending and community development purposes of Section 1071. Start-ups and younger businesses generally have more difficulties qualifying for credit.[196] This data point is needed to assess if access to credit is reasonably available and if not, are there geographical barriers that do not seem present in other areas based on analysis of the Section 1071 data. Comparative analysis of this nature can help stakeholders to identify and ameliorate any barriers that are making access to credit for younger firms, which is generally difficult, more so in particular locales. In addition, the variable would allow fair lending analyses to control for years in business and therefore account for any differences in the lending marketplace caused by time in business.

Research confirms the importance of years in business in exploring racial and gender disparities in credit access. In a recent survey of microbusinesses, CFED (now Prosperity Now) finds that younger businesses are twice as likely to indicate trouble accessing credit than more established businesses.[197] In addition, businesses under one-year-old used an average of 3.9 financial products in contrast to 6.6 used by businesses over ten years old. The Federal Reserve Banks reported that their 2016 survey revealed that start-up firms had greater difficulty accessing credit than mature firms and that they were less likely than mature firms to receive the full amount of credit requested.[198]

The reporting of this data point should be consistent across lenders. We do not support credit card lenders routinely reporting "not applicable" for this data point. This data point should not be too hard to ask for on an application form.

Time is business could refer to either the time period since the business was formally incorporated or the time period of operation. In order to avoid confusion, the CFPB should specify that the lender should report the time of business it used when underwriting the loan.

The CFPB should reconsider its decision not to report credit score

The CFPB cited complexity and cost as part of its reason not to require the reporting of credit score.[199] We respectfully disagree regarding this conclusion, particularly since the CFPB implemented credit score reporting as part of the Dodd Frank Act updates to the Home Mortgage Disclosure Act (HMDA) data. Under HMDA reporting, a lender is required to report the

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[194] NPR, p. 426.
[195] NPR, p. 418.
[196] NPR, p. 418.
[197] Lauren Williams and Kasey Wiedrich, *In Search of Solid Ground: Understanding the Financial Vulnerabilities of Microbusiness Owners*, CFED, April 2014, p. 13, https://prosperitynow.org/resources/search-solid-ground-understanding-financial-vulnerabilities-microbusiness-owners-full
[198] Federal Reserve Bank of New York (August 2017). Small Business Credit Survey: Report on Startup Firms. p. iv.
[199] NPR, p. 292.

numerical score and the system such as Equifax or Transunion that was used to generate the score.[200]

While small business lending entails the use of a different range of models, it does not appear that it would be too difficult to develop a list of the major models while also allowing lenders to indicate "other" for additional models or "proprietary" for their own model. The HMDA precedent should make this data collection relatively straightforward, especially considering the substantial overlap between HMDA and Section 1071 reporters. This data collection is too important for achieving the fair lending purpose of controlling for differences in businesses creditworthiness to be forfeited.

The Bureau should collect and disclose whether a financial institution relied on a personal or business credit profile under Section 1071. Small business owners frequently rely on their personal credit reports to apply for credit. In fact, 86% of employer firms stated that they relied on their personal credit score, while only 13% relied solely on the credit score of the business.[201]

The credit score fields in CFPB sample data collection forms could include columns for credit scores for the personal score of the principal owner(s) or the credit scores for the small business. In order to cut down on cost in the case of personal scores, the CFPB could indicate that the scores of a subset of the owners for which the lenders placed most weight would be collected. In most cases, small business applicants in Section 1071 data would likely be just one or two owners, therefore, making this data collection feasible.

Finally, if the CFPB reverses itself and requires the collection of credit score, we urge the CFPB to disclose the data in contrast to their decision to not disclose it in any form in the case of HMDA data. Percentiles or quintiles of risk would not allow adversaries to identify particular applicants while providing critical data for stakeholders to use in fair lending and community development analysis. Alternatively, disclosure on a census tract level such as the median score or percentile can likewise aid fair lending and community development inquiries.

Comprehensive pricing data points must be included as the CFPB proposes

Question: Bureau seeks comment on its proposed approach to this data point, as well as regarding additional information that could help reduce misinterpretations of disparities in pricing, including modifications to the pricing information in proposed § 1002.107(a)(12). For example, the Bureau seeks comment on whether more information about the nature of the collateral securing the loan is necessary to understanding pricing data, such as total origination charges, applicable to a particular transaction.[202]

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[200] CFPB, *Reportable HMDA Data: A Regulatory and Reporting Overview Reference Chart for HMDA Data Collected in 2021*, p. 21, https://files.consumerfinance.gov/f/documents/cfpb_2021-reportable-hmda-data.pdf

[201] *Small Business Credit Survey: Report on Employer Firms*. (2019). Federal Reserve System. https://www.smefinanceforum.org/sites/default/files/blogs/SBCS-Employer-Firms-Report.pdf

[202] NPR, p. 371.

The CFPB proposed to collect a wide variety of pricing data points, which are necessary to effectuate the fair lending and community development purposes of Section 1071. We generally agree with the CFPB's approach but also urge the CFPB to consider requiring the disclosure of an Annual Percentage Rate (APR) as a commonly understood metric that readily can be employed to compare loan prices, particularly among similarly situated businesses that differ mainly by the racial and gender composition of their owners.

The CFPB proposed to collect a number of pricing data points including: interest rate, total origination charges, broker fees, total amount of non-interest charges over the first annual period and whether the loan contains prepayment penalties. For a MCA or other sales-based financing transactions, data collected would include the difference between the amount advanced and the amount to be repaid. The data would be collected for originations or loans approved but not accepted by the applicant.[203]

The HMDA pricing data have been critical to identifying disparate pricing among protected classes, including higher prices charged to same-sex couples and disaggregated categories of Asian borrowers and Latino borrowers.[204] While some pricing data were required by the HMDA amendments in Dodd-Frank, other data points were added under the Bureau's discretionary authority. The challenges that women-owned businesses and businesses owned by people of color have when seeking to access credit are well-documented, and regular analyses of pricing disparities in the small business market must be included in efforts to address these challenges. The CFPB cited research conducted by the Federal Reserve and others that documented higher priced loans for minority-owned firms than white-owned ones for several products including credit cards and those offered by online lenders.[205]

As the CFPB stated, "Heightened risks to fair lending and small business development may arise from different pricing for the same products and the selective marketing of higher-priced or even predatory and unsustainable products. Because price-setting is integral to the functioning of any market, any analysis of the small business lending market—including to enforce fair lending laws or identify community and business development opportunities— would be less meaningful without this information."[206]

The CFPB continued by stating that without pricing data, the Section 1071 data, "..might show that a particular market segment is expanding and apparently filling an important need, but this could actually be an area with predatory conduct. Pricing information would allow the Bureau and others to understand the situation more accurately. Data collection without pricing

[203] NPR, pp. 367-368.
[204] See Richardson, J., & So, A. (2020). *Hispanic Mortgage Lending 2019 Analysis*. National Community Reinvestment Association and UnidosUS. https://ncrc.org/hispanic-mortgage-lending-2019-analysis/, Agnani, S., & Richardson, J. (2020). *Mortgage Lending in the Asian American and Pacific Islander Community*. National Community Reinvestment Associatio n. https://ncrc.org/mortgage-lending-in-the-asian-american-and-pacific-islander-community/ and Richardson, J., & Kali, K. S. (n.d.). Same-Sex Couples and Mortgage Lending. *NCRC*. Retrieved December 10, 2020, from https://www.ncrc.org/same-sex-couples-and-mortgage-lending/.
[205] NPR, pp. 360-361.
[206] NPR, p. 360.

information could have the unintended consequence of incentivizing irresponsible lending, as providers seeking to increase representation of underserved groups could be encouraged to adopt high-cost models of lending."[207]

The CFPB indicated that separately collecting and reporting interest rate and fee information could facilitate more precise data analysis than an APR-like disclosure alone.[208] For example, pricing disparities could be driven by either high fees or interest rates or both in combination. These various possibilities would be revealed by data collection and reporting that disclosed components of pricing separately but would not be revealed by an APR alone. While NCRC agrees with this, we also ask for an APR disclosure to ease data analysis and as a useful screening device. It would allow data users to focus analysis of pricing components for those groups of loans to groups of borrowers that exhibit significantly different APRs.

Reporting interest rates in adjustable rate loans

Question: The Bureau seeks comment on whether the index value should be reported based on a different time period or if at the time of approval is the most appropriate measure.[209]

In the case of adjustable interest rate loans, the CFPB proposed to require reporting of the margin, index value, and index name.[210] The lender would report the index value at the time of loan approval and would report the interest rate as the rate that would apply after the first time the loan's rate adjusts following the introductory period.[211] This would appear to be appropriate as long as data users would have access to the initial interest rate (which we are assuming is effectively the index value) and the interest rate after first reset.

Reporting total origination charges

Question: The Bureau seeks comment on whether concepts and guidance adapted from Regulation Z, such as proposed comment 107(a)(12)(ii)-1 on comparable cash transactions, are applicable in the small business lending context such that they should be incorporated as drafted. The Bureau also seeks comment on whether to enumerate certain types of charges separately in the 1071 data, and whether to include or exclude certain types of charges in the total origination charges.[212]

The CFPB proposed to define total origination charges as "the total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars."[213] The CFPB then proceeded to state that a proposed comment

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[207] NPR, p. 361.
[208] NPR, pp. 368-369.
[209] NPR, p. 373.
[210] NPR, p. 373.
[211] NPR, p. 371 and 373.
[212] NPR, p. 379.
[213] NPR, p. 374.

107(a)(12)(ii)-1 would clarify that charges imposed uniformly in cash and credit transactions *are not reportable.*[214]

We are concerned about the proposed instruction regarding not reporting these charges. We agree with the CFPB that a "measure of origination charges with numerous exclusions may encourage financial institutions to shift costs to the excluded fees, where they would be hidden from users of the 1071 data."[215] How would the CFPB determine what charges are imposed uniformly in all small business loans? It seems implausible that there would be uniform charges of a uniform dollar amount imposed by all lenders. The easiest way to avoid too many exclusions is to eliminate proposed comment 107(a)(12)(ii)-1.

Broker fees must be reported

Question: The Bureau seeks comment on proposed § 1002.107(a)(12)(iii) and its commentary, including on the knowledge that financial institutions might have about direct broker fees and the challenges of reporting such information.[216]

NCRC appreciates the CFPB's proposal to require the reporting of broker fees as a dollar amount. As the agency noted, borrowers of small business loans, unlike home loan borrowers, do not have legal protections against broker compensation varying based on the loan term and conditions. It is thus critical to guard against excessive broker fees by requiring their disclosure in Section 1071 data, which would enable the public to analyze the data to monitor whether any lender or group of lenders are engaged in abusive practices associated with high broker fees.[217] The "best information readily available" standard for reporting broker fees is used for HMDA data reporting and is appropriate as proposed by the CFPB to be used for Section 1071.[218]

Reporting of the initial annual charges

Question: The Bureau seeks comment on the likelihood that financial institutions (FIs) would schedule charges in the second year of a covered credit transaction and beyond specifically in an effort to avoid reporting the charges for purposes of 1071.[219]

We encourage the CFPB to proceed with its proposal to require the reporting of scheduled charges during the initial annual period, subject to the caveat that the CFPB conduct additional research to ensure that lenders would not game this proposal and schedule charges to occur in the second or subsequent years of the loan. As the CFPB mentioned, disclosure of the scheduled annual charges would help account for the true cost of loans that may have low or no interest rates but that have high scheduled charges.

[214] Ibid.
[215] NPR, p. 377
[216] NPR, p. 381.
[217] NPR, p. 380.
[218] NPR, p. 379 and 381.
[219] NPR, pp.383-384.

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CFPB is correct to require reporting on MCA costs but APR should be considered

Question: The Bureau seeks comment on proposed § 1002.107(a)(12)(v) and proposed comment 107(a)(12)(v)-1, including whether to require additional pricing information for MCAs, and whether MCAs could be structured in ways that evade the proposed reporting requirement, such as by omitting or making variable the amount to be repaid.[220]

NCRC agrees with the CFPB's proposal to require reporting the difference in amount advanced and the amount to be repaid.[221] The CFPB explained that additional pricing data would not be required for MCAs because MCA providers often do not provide information to borrowers on interest rates charged or fees that add up to a substantial cost of the advance.[222] However, we would urge the CFPB to require the collection and reporting of the APR, using procedures developed by New York and California. In this manner, data users could make comparisons between the costs of traditional loans and MCAs if APRs are required for all loans, whereas the current proposal would not facilitate price comparisons. Also, the APR calculations should be provided to the borrowers so they have more of a sense of the true cost of the MCA. Lastly, the CFPB should collect fees for MCAs, which can be substantial, in a manner similar to origination costs and other fees for traditional loans discussed above.[223]

We urge the Bureau to require pricing disclosures for MCAs, using the procedures adopted in New York and California. Admittedly, the Bureau will have to address certain complexities associated with MCAs, as their structures differ from traditional lines of credit and term loans. We urge the Bureau to price MCAs using an internal rate of return calculation, based on the use of estimates derived from lenders for future cash flow, with the ability to also capture fees, and with a system for retroactively identifying cases where lenders are falsely deflating projected cash flows that include enforcement provisions.

To capture an annual percentage rate for an MCA, the Bureau must adopt a procedure for determining the term of the MCA. This presents some challenges since, under an MCA, repayment periods are determined by future cash flows. Generally, a lender collects a percentage of debit and credit card sales. A hypothetical example: a lender advances the merchant $10,000 with the expectation that a business will return $14,000, with repayments made on a monthly basis for 10 percent of card-related sales, and over a period of no more than three years. If the borrower can generate card sales of $3,889 per month, the lender will satisfy the debt after 36 months. In this instance, the APR using a term of 36 months would be 23.3 percent (assuming no fees). However, if the business recorded monthly average card sales of $5,833, leading to repayment in 24 months, the APR is 34.6 percent. The challenge is that card sales cannot be predicted with certainty, and if a borrower repays earlier, the interest rate is higher. This uncertainty requires a pricing calculation that uses an estimate of future sales. Moreover, unless

[220] NPR, p. 387.
[221] NPR, p. 387.
[222] NPR, p. 386
[223] Woodstock Institute, *Analysis of Business Loan Terms*, https://woodstockinst.org/wp-content/uploads/2016/07/Woodstock_Analysis_of_Online_SB_Loan_Terms.pdf

the regulator implements retroactive procedures to verify the consistent accuracy of estimates, a lender could inaccurately disclose the APR by underestimating predicted card sales.

The formulas used by California and New York address the uncertainty of the loan term by estimating the future cash flows of the small business. Other facts, such as the amount disbursed, the amount that a business is obligated to repay (including any fees), and the portion of cash flows that the lender will capture to satisfy the debt, are readily available from stated terms of the MCAs.

The California and New York methods impute the loan term by using one of two methods to estimate future revenues. One system (the "historical" method) uses recent sales records; the other (the "opt-in") allows the lender to submit an estimate of likely future cash flows. The latter approach solves for the problem of applications made by startup businesses. The Bureau would not have to create the estimates, now would it have to decide which method applied, as lenders develop these estimates internally during the course of underwriting. The Bureau could ask the lenders to indicate the type of source (historical or opt-in) and the expected amount.

The Bureau can determine the APRs using a standard internal rate of return calculation (IRR). In some cases, a contract may also call for the payment of certain fees independent of charges associated with card sales. The IRR calculation has the flexibility to accommodate that condition, even if the fees are not charged in a consistent cadence.

Given the possibility that an unscrupulous lender could manipulate the system by intentionally underestimating cash flows in the opt-in approach – with the effect of extending the loan term and therein lowering the APR – both states adopted review processes to verify the integrity of a lender's reporting system. Enforcement provisions have been added when evidence shows that a lender consistently underestimates cash flows.

If the CFPB collects data on factoring, pricing data should include an APR

We believe that the Bureau can collect pricing data for factoring agreements in ways that are neither burdensome nor ambiguous. The critical data points to determine pricing for factoring agreements are the value of the underlying receivables, the advance rate, the number of days between the distribution of the advance and the due date of the receivables, the periodic factoring rate, and any administrative fees. Factoring companies have these data points, and they are often provided in the contract. Broadly speaking, collected data should include the specific points needed to calculate the cost of credit as well as certain variables that provide clarity on how receivables default risk is assigned. APRs could be calculated which would facilitate comparisons between the cost of factoring and more traditional credit.

Consider a hypothetical example where a factoring company advanced $16,000 to a small business at an advance rate of 80 percent on a $20,000 portfolio of receivables due in 60 days. The factoring fee is 2 percent per month (or 0.07 percent per day). The contract charges a monthly maintenance fee of $50, to be paid separately on day 30. On a daily accrual basis, the small business pays a credit expense of $13.15 per day, but for the purposes of an internal rate of return calculation, the cost of the credit is experienced when the factoring company debits the factoring fees against the $4,000 held in the outstanding escrow deposit at the end of day 60. Thus, the small business receives $16,000 on day 0 and pays back the $16,000 in principal and $789 in factoring fees on day 60. The IRR before administrative fees is 29.3 percent, and the APR after accounting for the maintenance fee paid on day 30 is 31.2 percent.[224]

We urge the Bureau to collect data points on all administrative fees, such as fees to transfer funds, mail documents, or for establishing the account. Additionally, the data should indicate who bears the risk for defaulted receivables and if the receivables are for a portfolio or a single ("spot") invoice, as such indicators will add important context to understanding the risk-reward tradeoff. Additionally, as factoring uses risk-based pricing, data set users need additional data points. To convey the default risk on the collection of receivables, the data should indicate if the contract has recourse or non-recourse structure. To convey diversification risk, the data should report the number of invoices in the portfolio, as factoring companies charge more when a portfolio includes fewer invoices.

Other thoughtful alternatives for MCA and factoring APR calculations and disclosures of fees have been developed by the Lending Club and the Responsible Business Lending Coalition.[225] A wide variety of stakeholders have called for APR disclosure since it is a uniform method to compare pricing across traditional and non-traditional lending and help assess whether traditionally underserved small businesses are receiving access to affordable and responsible credit.

Prepayment Penalty Information Must be Collected

Question: The Bureau also seeks comment on whether there are alternative data that would provide similar insight into whether certain borrowers are being steered into covered credit transactions containing prepayment penalty terms or other similar contingent terms.[226]

The CFPB proposed to collect information on whether the loan included a prepayment penalty to be paid by the borrower if the borrower pays off the loan before the due date of the loan.[227] The CFPB indicated that prepayment penalties can be sizable and are calculated as a percentage of the outstanding loan balance.[228] Given this, it is necessary for the Section 1071 data to include information on prepayment penalties to make sure that they are not targeted to women-owned, minority-owned or other underserved small businesses. Unscrupulous lenders often targeted communities of color with high-cost subprime home loans with prepayment penalties. The Section 1071 data could help prevent a recurrence of this reverse redlining.

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[224] The APR is the period rate, annualized. The APR of a factoring transaction, calculated according to TILA/ Reg Z Appendix J, using the "general equation" as simplified for "single advance, single payment transactions," just as described in NY S5470 § 806(c).
[225] See http://www.borrowersbillofrights.org/rblc.html.
[226] NPR, p. 389.
[227] NPR, p. 389.
[228] NPR, p. 387.

Coverage of Financial Institutions Must be Comprehensive

Question: The Bureau seeks comment on this proposed definition of a financial institution, and generally requests comment on whether additional clarification is needed.[229]

Question: The Bureau requests in response to this proposal such information and data that might bear on any activity-based exemption for non-depository institutions.[230]

Question: The Bureau seeks comment on its proposed 25 originations threshold incorporated into the definition of a covered financial institution. The Bureau also solicits comment on whether this threshold should alternatively be set at 50 or 100 covered credit transactions.[231]

Question: In addition, the Bureau seeks comment on whether an activity-based threshold should be based on the total number of small business applications, rather than originations.[232]

Section 1071 of the Dodd-Frank Act requires broad coverage of financial institutions. It defines financial institutions as "any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity." [233] The broad definition is necessary to execute the fair lending and community development purpose of the statute as discussed above.

If any significant segment of the industry is omitted from coverage, the CFPB and the public will not know if credit needs in communities across the country are being met with responsible and affordable credit. Exemptions also encourage abusive lending institutions to violate fair lending laws and either discriminate by declining qualified minority-owned or women-owned small business applicants or offering them loans with high prices and onerous terms and conditions.

The CFPB stated, "The Bureau believes that this definition reflects the broad nature of small business lending data collection specified in section 1071. Under such a definition, the rule's data collection and reporting requirements would apply to a variety of entities that engage in small business lending, including depository institutions (i.e., banks, savings associations, and credit unions) online lenders, platform lenders, CDFIs, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit, non-depository lenders."[234]

The CFPB reported that some lenders on the SBREFA panel agreed with the reasons of broad coverage. The Bureau stated, "These SERs emphasized a general need for thorough data reporting from a wide variety of lenders, and cautioned that in many smaller and rural markets,

[229] NPR, p. 225.
[230] NPR, p. 239.
[231] NPR, p. 240.
[232] NPR, p. 244.
[233] Section 1071 statute.
[234] NPR, p. 223.

larger exemptions might result in little or no data collection given that many lenders in those markets make very few small business loans annually."[235]

We are pleased that the CFPB did not adopt an asset threshold. Assets are a poor measure of lending capacity and are not generally reported for several lenders including non-depository lending institutions.[236] In addition, too many additional depository institutions, ranging from 500 to 874, would be exempt if assets thresholds of $100 million to $200 million had been combined with the loan thresholds.[237] This would thwart the fair lending and community development purposes of Section 1071 as the CFPB acknowledged.[238]

A review of non-depository lending volumes reinforces the inadequacy of using an asset threshold. Platform lending now constitutes a sizable share of lending for small and micro-businesses. Online lenders and lending platforms have a significant presence in the small business credit market. For example, through its direct online lending and platform lending marketplace, OnDeck Capital originated $2.4, $2.1 and $2.5 billion in small business loans in 2016, 2017, and 2018, respectively. OnDeck makes loans for as little as $5,000 and never for more than $500,000.[239] Platforms lenders' share of the market will only continue to grow, and their exclusion would render 1071 less comprehensive every year.

In the fall of 2020, the CFPB's SBREFA cost-benefit analyses did not justify a higher threshold than 25 loans annually.[240] In this NPR, the CFPB repeated the cost-benefit analysis and came to

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[235] NPR, p. 228.
[236] NPR, p. 235, p.245.
[237] NPR, p. 248
[238] NPR, p. 250
[239] OnDeck Capital. (2019, March 1) Annual Report for the Year Ending December 31st, 2018. Submitted to the Securities and Exchange Commission. Retrieved at https://www.sec.gov/Archives/edgar/data/1420811/000142081119000045/ondk-20181231x10k.htm

[240] Here is a summary of the CFPB's findings in its SBREFA's analysis: In its SBREFA outline, the CFPB described a detailed analysis of costs for smaller banks of $600 million in assets or less. The CFPB assumed that these small banks were divided into two categories: Type A received an average of 75 applications per year, and Type B received about 300 applications per year. The CFPB described data entry costs, costs associated with preparing the data for reporting and transmitting the data, and costs associated with auditing and compliance for Type A and Type B institutions.

For type A institutions, the per-application costs ranged from $26 to $56, while the net income ranged from $37,000 to $45,000. For type B, the per-application costs ranged from $62 to $145, while net income ranged from $12,000 to $13,000. The costs were small compared to the net income generated from each loan for the two categories of lenders. The CFPB, therefore, predicted that the low variable costs would range from $17 to $40 per loan. The agency concluded, "Even if the variable cost were passed on in full to small business borrowers in the form of higher interest rates or fees associated with a loan or line of credit (or even to applicants in the form of application fees), the Bureau expected that this would comprise a small portion of the total cost of the average loan to the small business borrower."

Based on the CFPB's analysis of costs and how much of them would be passed onto the borrower, costs were quite low compared to the benefits of more precision in estimating community needs and improved fair lending enforcement. Moreover, the Board estimated that the costs of adding discretionary data points in addition to the mandatory ones would add only $4 to $5 per application.

the same conclusion described below. The CFPB mentioned that if costs of data collection caused some lenders to stop lending, this result would be contrary to the purpose of community development. The CFPB stated, "However, the Bureau is not convinced, based on the feedback from lenders (SERs) and other stakeholders, that higher thresholds (50 or 100 loans) would be more necessary or appropriate to carry out the purposes of section 1071."[241]

In order to mitigate costs and to avoid lenders being covered if they experienced an anomalous surge of lending in any one year, NCRC agrees that a two-year look back (only reporting if the lending activity exceeded the threshold in two consecutive years) is appropriate and reasonable. This follows procedures established under CRA and HMDA.[242] Further, NCRC finds that it is acceptable and consistent with CRA and HMDA to use originations as opposed to applications to establish thresholds.[243] The purpose is to narrowly exempt smaller lenders or those for which small business lending is an incidental activity while creating a database that will capture the vast majority of lending activity, which is necessary to further the purposes of community development and fair lending, in a manner that is fair and cost effective.

When multiple lenders are involved, the one that made the credit decision should report

Question: The Bureau seeks comment with respect to proposed § 1002.109(a)(3) on whether, particularly in the case of applications that a financial institution is treating as withdrawn or denied, the financial institution can ascertain if a covered credit transaction was originated by another financial institution without logistical difficulty or significant compliance cost.[244]

The lending market is becoming more complex, including situations in which third parties send applications to multiple lenders simultaneously. The CFPB appeared to have chosen the correct reporting procedure in these cases that clearly assigned reporting duties. The CFPB proposed that the financial institution that made the final credit decision approving or not approving the application shall be the Section 1071 reporter.[245] This increases the accuracy of the database in terms of determining which lenders made credit decisions and should be held accountable for these decisions.

Characteristics of the Lender Must be Collected and Disseminated

Question: The Bureau further seeks comment on whether it should consider defining any of the types of financial institutions in the proposed list, in particular whether and how to define the term "fintech."[246]

The CFPB proposed to collect vital information regarding the identities and characteristics of lending institutions, which must be publicly available in the Section 1071 database. These

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[241] NPR, p. 236.
[242] NPR, p. 241.
[243] NPR, p. 242.
[244] NPR, p. 513.
[245] NPR, p. 243 and 512.
[246] NPR, p. 524.

include the name of the institution, the federal prudential regulator (if applicable), the legal entity identifier (LEI), the Research, Statistics, Supervision, and Discount identification (RSSD ID) number (if applicable), the parent institution, the type of financial institution and whether the institution is voluntarily reporting Section 1071 data.[247]

The community development and fair lending statutory purposes of Section 1071 are furthered with this information. The difficulty with the current data, particularly survey information about race and gender of loan applicants, is that the data does not identify the lenders associated with the loans. Neither regulatory agencies nor the public can hold lenders accountable for fair lending to small businesses of different races and genders.

The LEI and RSSD would be important data points needed to hold financial institutions accountable. The Global Legal Entity Identifier Foundation (GLEIF)[248] assigns unique LEI to financial institutions which is available in HMDA data and simplifies the task of identifying parents and affiliates. The RSSD numbers help researchers identify banks and their branch network, which is also needed to assess the responsiveness of banks to community development needs.

Identifying parents, affiliates and subsidiaries assists in robust fair lending analyses. Is the lender as a whole or separate parts of the lender complying with fair lending laws or is exhibiting troublesome lending patterns that might warrant further fair lending investigation. In this vein, the CFPB is also correct that LEIs and parent institution names will be helpful in identifying the family tree of non-depository institutions since there is a dearth of information on the National Information Center database or elsewhere about parents, affiliates and subsidiaries in the case of non-depository lenders.[249]

The CFPB proposal to require lenders to identify the immediate parent entity as well as the top holder parent is needed to gain a complete picture of the lending institution.[250] The data point of the prudential bank regulatory agency will also enable stakeholders to assess if one or more of the bank oversight agencies are not identifying fair lending issues or if the fair lending patterns of a bank and any non-bank affiliates are different, meriting closer examination.

The CFPB proposed to include a data point categorizing lenders by type. The proposed list includes: (i) bank or savings association, (ii) minority depository institution (MDI), (iii) credit union, (iv) non-depository 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) fintech, and (xiii) other.[251] This list is useful in comparing and contrasting the fair lending and community development

[247] NPR, p. 514.
[248] For more about the Global Legal Entity Identifier Foundation, see https://www.gleif.org/en/about/this-is-gleif
[249] NPR, p. 524.
[250] NPR, p. 522.
[251] NPR, p. 523.

performance of various types of lenders. This data provides insights to stakeholders about which lending model(s) are effective in reaching underserved populations.

NCRC urges the CFPB to replace "fintech" with "online lender." The term fintech eludes a straightforward definition. It seems that the CFPB intends to use this category to capture lenders that mostly deliver loans and other products online. Therefore, it is simpler and more accurate for the CFPB to inform lenders to use the category online lender if most of their loans and products are made available via the internet. Furthermore, in the preamble to the final rule, the CFPB should state that the categories of this data field are intended to assess how effective different types of lenders are in furthering community development and fair lending. The categories should not be construed to justify exemptions for any type of lenders from consumer protection laws at the federal or state level.

The CFPB may also want to give lenders an option to select up to five responses since a bank can be CDFI, an MDI and also consider itself an online lender. This case comprises four of the categories, meaning it is possible that a number of lenders could fit in multiple categories. It would seem that five categories would probably cover most of the permutations.

The CFPB proposed a data field indicating if a lender is a voluntary reporter. This would facilitate data analysis and enable data users to assess if they are any differences in fair lending or community development performance among voluntary reporters and those that are required to report. It is a useful data field because a lender has to exceed the proposed loan threshold of 25 loans in two consecutive years in order to be required to report the data. It is much easier for data users to have a data field indicating voluntary reporting than to analyze and match two years of data for the purpose of identifying voluntary reporters.[252]

Voluntary data reporting should be encouraged but only complete data collected voluntarily should be in public database

Question: The Bureau seeks comment on these three proposed exemptions to be added to existing § 1002.5(a)(4), and associated commentary, including whether there are other specific situations that should be added to the list of exemptions in § 1002.5(a)(4) to permit the collection of applicants' protected demographic information, and whether any similar modifications to other provisions are necessary. In particular, the Bureau seeks comment on whether it should add another exemption to § 1002.5(a)(4) relating to proposed § 1002.114(c)(1), wherein the Bureau is proposing to permit financial institutions to collect, but would not require them to report, applicants' protected demographic information prior to the compliance date.[253]

The CFPB proposed to allow a financial institution to voluntarily report data if it would not be required to report data because its number of loans was below the 25 loan threshold in two consecutive years. In particular, the CFPB would allow voluntary reporting if a lender exceeded the threshold in any of the previous five years or if it exceeded the loan threshold in the current

[252] NPR p. 525.
[253] NPR, p. 122.

year but not in the previous year.[254] The CFPB reasoned that such lenders may want to voluntarily report because they want to develop their loan reporting infrastructure in case they exceed the threshold in two consecutive years. The CFPB also suggested that these lenders are more likely to serve sparsely populated and rural areas, and because of this, their data has important fair lending and community development purposes.[255]

We agree with this reasoning and approach to allowing voluntary reporting. However, we are not sure if the CFPB would allow voluntary reporting for just the demographic data on the race and gender of the small business or all the Section 1071 data points. If the CFPB just intended that the voluntary data collection is solely for those data points involving demographics, then it may not make sense to add this data to the publicly available data base. The data for these voluntary reporters would have several fields in which data is not reported, limiting the usefulness of the data for understanding the lending patterns of these small lenders. Also, a data user would have to make additional decisions whether to include this incomplete data in a fair lending or community needs analysis.

Balancing Test must be applied in a Manner that does Not Violate Public Disclosure, Fair Lending and Community Development Purposes of Section 1071

Question: The Bureau seeks comment on its approach to assessing the risks of harm and sensitivity presented by the disclosure of unmodified 1071 data.[256]

Section 1071 provided the CFPB with discretionary authority to "delete or modify data collected under [section 1071] which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest."[257] The CFPB proposed a balancing test that would weigh the benefit of disclosure of the various data points against the risk that a small business applicant would be identified and harmed by the disclosure or that a lender's competitive position could be impaired.[258] The CFPB will conduct a full-fledged balancing test after collecting the first year of data and will issue a policy statement describing how it will disclose the Section 1071 data to the public.[259] In the NPR, the CFPB asked the public for general thoughts regarding the methodology of the balancing test and how to modify data if a balancing test determines some modifications are necessary.

CFPB concluded that privacy risks of Section 1071 are minimal compared to benefits

The CFPB believed that overall the risks are minimal compared against the benefits of Section 1071 disclosure. As stated above, the agency cited the experience of more than 40 years of

[254] NPR, pp. 117-118.
[255] NPR, p. 120.
[256] NPR, p. 613.
[257] NPR, p. 571
[258] Ibid.
[259] NPR, p. 572 and 585.

HMDA data, which has data points that are similar to those proposed for Section 1071. The CFPB concluded that HMDA data has not resulted in any measurable increase in fraud or theft against consumers. In addition, the CFPB concluded that "the Bureau generally believes that successful re-identification of application-level 1071 data would require several steps and may present a significant challenge. To the extent that the risk that re-identification would be accomplished is low, the risk of disclosing harmful or sensitive information would be reduced."[260] Moreover, the CFPB stated repeatedly that the delay in release of the Section 1071 data (which is likely to include actions on applications that were taken more than a year previous to the public release of the data) would render the data less useful to adversaries that seek real time data to target victims of their scams.[261]

According to the CFPB, the risk of identity theft or financial fraud against small businesses is small because the Section 1071 database does not contain personally identifiable information such as Social Security numbers, date of birth, passport numbers or driver's license numbers that would facilitate fraud and theft.[262] In contrast to public sector databases like Section 1071 whose purposes include fair lending compliance, private sector databases are the primary threats to personal privacy. The breach of Equifax data a few years ago imperiled the privacy of up to 143 million consumers precisely because the Equifax data contained personally identifiable information such as Social Security numbers, street addresses, and birth dates.[263] Lastly, the CFPB concluded that the Section 1071 database would be unlikely to harm the competitive position of lenders partly because it would not contain the credit history of the applicant.[264]

An overreaction to privacy risks would violate the statutory purposes of Section 1017

The CFPB stated that it did not plan to significantly truncate the Section 1071 data disclosure because doing so would violate the Section 1071 statutory purposes while not meaningfully bolstering the privacy protections afforded to small businesses or lenders. The CFPB maintained:

> Each of the data fields prescribed by the statute—with the exception of the application number—could provide some insight into a financial institution's lending practices. If the Bureau were to exclude data on this basis, it would exclude virtually all of the statutorily required 1071 data points from the public data. This would significantly frustrate both of the statutory purposes of section 1071 because it would prevent the public from using the data to identify potential fair lending violations, and it would prevent communities and

[260] NPR, p. 607.
[261] NPR, pp. 598-600, p. 609.
[262] NPR, p. 608.
[263] Washington Post (September 2017). Equifax Breach Hits Credit Data of Millions. https://www.washingtonpost.com/news/the-switch/wp/2017/09/08/after-data-breach-equifax-asks-consumers-for-social-security-numbers-to-see-if-theyve-been-affected/?hpid=hp_hp-more-top-stories_equifax-1145am%3Ahomepage%2Fstory&utm_term=.bf6cc31f537d
[264] NPR, p. 611.

creditors from using the 1071 data to identify business and community development needs and opportunities of small businesses.[265]

The CFPB also stated that, "deleting all application-level data from public release and instead publishing aggregate data would advance privacy interests but would substantially undermine the public disclosure purposes of the statute."[266] In other words, the CFPB proposed that it would not create a database that only revealed data at a high level of aggregation such as at a county or state level because such disclosure would violate the intent of the statute that sought to assess whether community development needs are met. A "community" is not commonly described in CRA or related statutes assessing responsiveness to needs as a population grouping at a county or state level but rather at a neighborhood level usually represented by census tracts.

The harms on which the CFPB focused are those against small businesses that could be identified. These harms include risks to the competitiveness or reputation of the small business due to exposure of a precarious financial condition. If an adversary identified that the small business applicant was denied a loan, the adversary could gain more insight into the fragile nature of the business' financial condition. Likewise, the business could be exposed to predatory lending if an unscrupulous lender or other actor targeted a small business based on an unfavorable lending experience identified by the small business data.[267]

While these are legitimate concerns, common experiences of the general public suggest that adversaries and unsavory lenders already target a wide swath of the public, including small businesses, on a daily basis using existing databases, predominantly private ones. Each of us can probably count more than half a dozen times daily in which one's landline, cellphone, or mailbox receives scams with all varieties of "hard sells" and "enticing" offers. A public sector database of the nature of Section 1071 is unlikely to add to the volume of these solicitations because as the CFPB noted it does not contain real time information about lending activity. It is the real time information of purchasing large durable items like homes, cars or furniture that generates these solicitations.

A decision to truncate the Section 1071 database would not only achieve little in terms of protecting privacy but would impair the ability of the CFPB and the public at large to stop predatory lending. Predatory home lending thrived not because adversaries were mining the HMDA data but because abusive lenders were able to peddle high-cost loans with onerous terms and conditions in secret. Subsequent research has shown that the federal regulatory agencies in addition to the public at large lacked information about the breadth of abusive and unsustainable lending.[268] If the HMDA data had more information on pricing and loan terms and conditions before the financial crisis, the federal agencies and other stakeholders could probably have detected the abusive lending earlier and taken steps to curb it. It was precisely due to this data

265 NPR, p. 617.
266 NPR, pp. 575-576.
267 NPR, p. 609.
268 Adam J. Levitin and Susan M. Wachter, *The Great American Housing Bubble*, Harvard University Press, 2020, pp. 189-190.

deficiency that the Dodd Frank Act mandated improvements to home and small business data and that the CFPB proposed enhancements to Section 1071 to include information on pricing and loan terms and conditions.

Increase the number of loans and applications in Section 1071 data to thwart adversaries

The CFPB described that an adversary would use the Section 1071 database to uncover a small business identify by matching it with another publicly-available database using variables in common to both databases. The objective would be to find lending records that were unique in Section 1071; these records would have combinations of data points that were either not shared by any other record in Section 1071 or very few records in Section 1071. A unique record in Section 1071 could then be matched to another database using a data point in common to both databases.[269] Once matching is completed, the adversary would have identified the particular small business.

The CFPB identified a number of other public and private sector databases that have data points in common with Section 1071. These include Uniform Commercial Code (UCC) filings, Small Business Administration (SBA) databases, and other public sector and private sector databases. Data points in common include the census tract and NAICS code.[270]

In order to increase the difficulty for adversaries, the CFPB proposed a number of masking techniques such as reporting a range instead of a precise value for a data point. These are useful techniques as long as they are implemented carefully so that they do not impair the efficacy of the data. However, before masking any data point, the first investigation of a balancing test should be how increasing the number of observations in a database would make it more difficult to identify unique records in the Section 1071 database.

If Section 1071 data can include almost as much or more observations than HMDA data, the fears of re-identification on a census tract level are substantially ameliorated. Adversaries have more difficulty identifying unique data records when databases are large. Although HMDA data has been disclosed on a loan level and census tract level for decades, it has not led to identification of individual homeowners or borrowers because of its large size.

It appears that the Section 1071 database would rival the size of HMDA. In 2019, the CFPB reported that the HMDA database contained 8,111,000 loan originations.[271] The Federal Financial Institutions Examination Council (FFIEC) indicated that the CRA small business and farm data contained 7,422,561 loan originations in 2019.[272] However, a number of lenders are missing that would be covered by CFPB's proposal. As stated above, the CFPB estimated that non-depository lenders made about 40% of the loans in the small business market. In addition,

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[269] NPR, p. 594.
[270] NPR, p. 595.
[271] See Table 1, p. 15 of Consumer Financial Protection Bureau, *Data Point: 2019 Mortgage Market Activity and Trends: A First Look at the 2019 HMDA Data*, June 2020, https://files.consumerfinance.gov/f/documents/cfpb_2019-mortgage-market-activity-trends_report.pdf
[272] Small business and farm data for 2019 retrieved from Table 1 via https://www.ffiec.gov/craadweb/national.aspx.

smaller banks do not report small business data but issued about 30% of the loan dollars in recent years.[273] It is hard to translate loan dollars into loan originations (since larger banks include credit card banks with smaller average loan dollars), but to be conservative, assume that 30% of loan dollars converts to about 10% of total loan originations. Thus, if the CFPB covered non-depository lenders and small banks, the number of loan originations would increase by about 50% and would thus appear to be at the same or higher level as HMDA data. This should sufficiently allay privacy concerns and permit application level and census tract disclosure in most cases.

Since Section 1071 would be disclosed at the application level instead of the origination level, the number of observations would increase significantly, further thwarting the efforts of adversaries to identify individual small businesses. In 2019, HMDA data reported 12.6 million applications and 8.1 million single family loan originations. The number of applications was 55.6% higher than the number of originations. It is not known what the relationship between originations and applications would be in the Section 1071 data but it is likely to be of similar magnitude. This suggests that the number of observations could further increase by 50%, making the database large enough to disclose on an application level and census tract level.

Masking, binning and data swapping as a means of thwarting adversaries

Question: The Bureau seeks comment on whether targeted suppression techniques could preserve the benefits of the public application-level 1071 data, and, if so, what the Bureau should consider as the minimum cell size to implement targeted suppression.[274]

The Bureau seeks comment on other modification techniques, such as "data swapping" (sometimes called "switching").[275]

If, after considering the number of observations in the Section 1071 data, the CFPB concluded that additional protections were needed, NCRC would be supportive of modification techniques that increase the difficulty of identifying small businesses but that also preserve the precision of data for the fair lending and community development purposes of Section 1071.

NAICS and census tract

The CFPB seemed to be particularly concerned about the disclosure of NAICS codes and census tracts.[276] As discussed above, the CFPB is proposing to collect six-digit NAICS codes. These are sufficiently detailed to allow for meaningful fair lending analyses that seeks to isolate the experiences of similarly situated small businesses that differ mainly by race/ethnicity or gender. If, however, the agency only were to disclose publicly a two-digit NAICS code, this would not

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[273] Federal Financial Institutions Examination Council (August 2016). Reports - Findings from Analysis of Nationwide Summary Statistics for 2015 Community Reinvestment Act Data Fact Sheet. https://www.ffiec.gov/hmcrpr/cra_fs16.htm
[274] NPR, p. 620.
[275] NPR, p. 621.
[276] NPR, p. 595. The CFPB stated, "the Bureau expects that the census tract and NAICS code data fields may significantly contribute to re-identification risk."

allow for adequate fair lending analyses. An example of a two-digit NAICS code is "11" which represents agriculture, forestry and fishing. However, within code "11," there are a variety of enterprises identified by four digits ranging from vegetable to animal production.[277] These diverse enterprises could have different credit needs and creditworthiness. Thus, it would seem that a public database would need a four-digit NAICS code. Moreover, there seems to be enough diversity of enterprises within the four digit codes to make it hard for an adversary to narrow the search to a unique record.

Question: The Bureau seeks comment on how disclosing the county, State, or some other geographic identifier—rather than the census tract— would affect the benefits of disclosure, the potential for harm or sensitivity, and the potential for re-identification of applicants or related natural persons.[278]

Regarding census tracts, we believe as a rule that census tract level disclosure would not endanger the privacy of small businesses. However, in some cases, particularly in more rural tracts, the number of observations could be low. In the case of census tracts with low levels of lending to a specific type of small businesses (for example, either a minority-owned or a microenterprise with one employee), the data associated with those particular small businesses could be moved to a contiguous or nearby census tract.

In particular, the CFPB should consider using data swapping to protect the privacy of loan applicants whose demographic data points are part of a small group. Following the methodology used by the U.S. Census in its Public Use Microdata Sample, the CFPB could switch records for similarly-situated loan applicants between nearby census tracts, making it nearly impossible to reconnect individual loan applicants with public records while maintaining the utility of Section 1071 data, including for users doing analysis at the neighborhood level.[279] The CFPB should explore which of the data swapping techniques the U.S. Census uses would best balance protecting loan applicants' privacy and allowing users to do a meaningful analysis of Section 1071 data at the census tract level. This would not significantly compromise the integrity of the database and could more effectively mask the identity of the small business.

We are opposed to county- or state-level only disclosure, which are options that the CFPB asked about in the NPR. It is not necessary to protect privacy and it would frustrate the fair lending and community development statutory purposes of Section 1071. There are numerous masking techniques that would be appropriate alternatives.

Gross annual revenue

The CFPB discussed that gross annual revenue could be sensitive if revealed since it indicates the financial condition of the small business and/or the owners. The CFPB stated that one option

[277] Office of Management and Budget, North American Industry Classification System, 2017, p. 27, https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf
[278] NPR, p. 653.
[279] Privacy in Statistical Databases. https://link.springer.com/book/10.1007%2Fb97945

it might consider is reporting annual revenue in ranges of $25,000.[280] As discussed above, our first choice is reporting annual revenue as a continuous variable. The second choice would be the mid-point of $10,000 intervals while the third choice would be ranges. Ranges larger than $25,000 would obscure observations of significant differences between minority and white-owned businesses.

Top coding to eliminate large revenue sizes as outliers would be acceptable if the top coding does not mask any significant differences in experiences in the lending marketplace of larger small businesses. The CFPB should conduct testing with the first year of data to determine if there is an appropriate top coding choice. Our guess is that it would be towards the upper end of $5 million or $8 million in revenues; $5 million and $8 million are possible upper limits discussed by the CFPB.

Amount applied for and approved

The CFPB contemplated bins of $25,000 for these data points.[281] Instead, we would urge the CFPB to consider HMDA's method of reporting the mid-point of $10,000 intervals since this would be sufficient for masking and would produce more accurate data for the statutory purposes of Section 1071.

Time in Business and number of workers

The CFPB mentioned that combined with SBA datasets, time in business and number of workers could contribute to re-identification risk.[282] For number of workers, the CFPB may bin or top code.[283] In most cases, the number of workers will be relatively few, therefore, bins need to be carefully developed so as not to obscure differences in small business characteristics and experiences in the lending marketplace. Bins could be along the lines of 1-2, 3-4 and 5-6 workers. The CFPB should undertake a distributional analysis of small businesses by number of workers to develop bins that would meaningfully characterize small businesses by number of workers and would not cloak different experiences in the lending marketplace. The CFPB should take likewise care for time of business. It suggested that bins could include 2 or 5 year intervals; five years would be too long.[284] It might top code at 25 years, which appears reasonable but further analysis should confirm that it is.

Credit type

The CFPB expressed concern that credit type could be used to match Section 1071 to other datasets using information on whether a business received a SBA loan. The agency said it could provide the public an indication of whether a loan had a Federal guarantee instead of a specific

[280] NPR, p. 656.
[281] NPR, pp. 636 and 638.
[282] NPR, p. 597.
[283] NPR, p. 661.
[284] NPR, pp. 663-664.

SBA program. It also suggested that term length could be reported in bins of 2 to 5 years.[285] We do not believe that these pre-cautions are necessary since HMDA data has indicated for several years whether a loan is a FHA or VA loan. However, it does not appear that the data would lose explanatory power if a specific federal government guarantee such as SBA 7(a) was instead represented as "Federal" government. The CFPB should test bins for term length to make sure they do not reduce the robustness of the data.

Action taken and denial reasons

Question: In light of the potential harm or sensitivity arising from the disclosure of application denials and the reasons for denial, the Bureau seeks comment on whether there are specific modifications it should consider, and whether modifying these data fields by grouping them, or deleting these data fields, would appropriately balance the privacy risks and benefits of disclosure, in light of the purposes of section 1071.[286]

We oppose any deletion of action categories such as denials, incompletes, or approved but not accepted by the applicant. These are integral to the fair lending purpose of the statute. HMDA has had these categories for decades without any adverse consequences. A suppression of these data points would be an unwarranted measure and an overreaction to an unlikely threat.

Since reasons for denial are also in HMDA data, it would be unlikely that including them at the application level for Section 1071 would have unintended or harmful consequences. Nevertheless if the CFPB deems it necessary, a higher level of disclosure that includes reasons of denial by category of business (such as racial/ethnic category and revenue category) for groupings of census tracts (such as LMI or predominantly minority) could achieve important fair lending and community development objectives. For example, a data user could determine what types of interventions and technical assistance might be needed depending on the predominant reason(s) for denial.

Pricing variables

The CFPB stated that pricing data is available from a "limited" number of publicly available databases.[287] This does not suggest a strong need to mask the data and we would much prefer reporting pricing information as continuous variables. This type of reporting has been important in HMDA research uncovering disparities by race/ethnicity and gender.

The CFPB stated that it may report interest rates in bins of .25 percentage points. Recalling Department Justice settlements over discriminatory pricing, intervals longer than that could mask differences by race/ethnicity and gender of businesses. The CFPB should stress test the data and consult with its own settlements as well as those of DOJ to determine appropriate bins. The

[285] NPR, pp. 631-632.
[286] NPR, p. 643.
[287] NPR, p. 647.

CFPB should do likewise concerning its mentioned option of reporting origination fees in bins of $500.[288] However, we urge the CFPB to not adopt this approach.

CFPB proposal to publicly disseminate data should include a public advisory group

Based on the experience with HMDA data, NCRC believes that the CFPB's balancing test will conclude that the vast majority of proposed Section 1071 data fields can be publicly disseminated in a manner that allows for rigorous and accurate analysis supporting the fair lending and community development purposes of the statute.

The CFPB further proposed that it will be the entity disseminating data. Lenders would refer the public to the CFPB's website.[289] This approach is employed regarding HMDA data and is preferable to the dissemination method several years ago in which over a several month time period each year, the public had to request the data directly from lenders. Some lenders would disclose data in PDF format, making it very difficult if not impossible for the public to analyze the data. Dissemination by the CFPB avoids these intentional obfuscation techniques.

In addition to providing the pubic with "raw" application-level data, the CFPB contemplated disseminating certain compilations and aggregations of the data to increase its usefulness to the public.[290] For several years, the HMDA data included dissemination of the raw data as well as useful cross-tabulations by demographic characteristics by loan type by action category. The CFPB deleted several of these aggregate presentations of HMDA data, making it difficult for novice users of the data to understand and present the data. NCRC is encouraged by the CFPB's discussion of presenting summary data as well as providing the raw data to the public. In addition, we urge the CFPB to establish an advisory group composed of community-based organizations and other stakeholders that would regularly offer advice and feedback to the agency on the best ways to publicly disseminate the data.

Although lenders will not be providing the data directly to the public, we nevertheless support the CFPB's proposal that lenders keep the data for a time period of at least three years.[291] This is important to ensure the integrity of the public database in case of instances in which erroneous submissions are discovered over a multi-year time period. The data can be re-submitted in these instances and the public database can be updated. While it is not ideal to discover past errors more than year later, it is still preferable to preserve the ability of the lender(s) to make corrections, issue re-submissions to the CFPB and for the CFPB to be able to update the public database.

[288] NPR, p. 648.
[289] NPR, p. 532.
[290] NPR, p. 529.
[291] NPR, p. 534.

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Rigorous Procedures Needed to Create Accurate and Timely Data

Errors must be Penalized to Ensure Accurate Dataset

Just as with HMDA, the CFPB would assess a monetary penalty against a lender that exceeded a specified threshold of errors. In addition, the lender would be required to re-submit data to correct errors in any data field(s). The final rule must not have overly generous tolerances or exceptions of what constitutes an error. If the rule is too lax in this area, the quality of the database will suffer; it will become less accurate, imperiling the statutory purposes of assessing fair lending and community development needs. For example, the CFPB proposed that if the CFPB audits a lender's data submission and finds an error in the race and ethnicity fields of the applicant and co-applicant in the same data record, it would count the two errors in the applicant and co-applicant field as only one error.[292] This should count as two errors, not one.

Table 1 in Appendix H proposed error tolerance thresholds for lenders with various numbers of loans. For example, for a lender that made 25 to 50 loans, up to three entries in a data field in a sample of 30 loans could be erroneous but not cross the threshold triggering either a monetary penalty or re-submission. In this case, the threshold would be an error rate of 10%. As the loan volume grew, the error threshold would become smaller. A lender with between 191 and 500 loans would have a threshold of 5.1% and one with 100,000 or more loans would have a threshold of 2.5%.[293] More stringent tolerances expressed as lower percentages for larger lenders makes sense because errors by larger lenders are more likely to decrease accuracy on a local level, a statewide level or even a national level. The proposed thresholds also appear to be consistent with Regulation C (implementing HMDA), suggesting that they are time-tested in terms of striving for a balance between reasonableness and preserving the integrity of the data.[294]

The proposal regarding errors further stated that even when errors did not exceed the threshold, it could still trigger an adverse reaction. The CFPB illustrated that this would apply if a lender was coding withdrawn applications as denials in order to conceal a potential fair lending deficiency.[295] The agency should further spell out these examples so as not to completely overrule the proposed table of tolerances. Perhaps this extra scrutiny should apply mainly to the action categories, the revenue size, the race/ethnicity and gender data fields.

Verification procedures should be required for some critical data points

Question: The Bureau seeks comment on its proposed approach to verification of the 1071 data points, including the specific guidance that would be presented in comment 107(b)-1. The

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[292] NPR, pp. 547-548.
[293] NPR, p. 820.
[294] Interagency Examination Procedures, Home Mortgage Disclosure Act (HMDA), March 2019, https://www.fdic.gov/news/financial-institution-letters/2019/fil19016a.pdf, p. 42.
[295] NPR, p. 821.

Bureau also seeks comment on whether financial institutions should be required to indicate whether particular data points being reported have been verified or not.[296]

The CFPB proposed that lenders would not be required to verify the information applicants provide to lending institutions.[297] In the case of race/ethnicity and gender, it is appropriate that the CFPB did not allow or require the institution to verify the information provided by the applicant. This would amount to second guessing the demographic information provided by the applicant, who is in the unique position to provide this information. However, we believe that verification of a few key data points should be required. For example, the revenue size of the small business would be obtained by lenders in the usual course of underwriting and should be readily available from tax documents or cash flow information via bank accounts. The NAICS code (at least at the two or four digit level) could be another variable subject to verification requirements since it should be readily gathered by observing the major activities of the business or its website.

The proposed procedures regarding the firewall are reasonable

Question: The Bureau also seeks comment on the scope of the proposed firewall and the exception. The Bureau specifically seeks comment on whether the firewall should apply to information about principal owners' ethnicity and race that is obtained via visual observation and/or surname. Finally, the Bureau generally requests comment on whether additional clarification is needed regarding the firewall requirement.[298]

In general, Section 1071 required that lenders not allow underwriters or anyone involved in the credit decision to have access to the demographic information regarding race/ethnicity and gender. The law allowed an exception if a lender determined it is not feasible to maintain separation from demographic data for those involved in the credit decision. It is anticipated that the smaller lenders would generally find it not feasible since fewer staff must execute more tasks.

The CFPB's formulation of this exception is reasonable. In cases in which a firewall is not feasible, the CFPB would also require notification to applicants that those involved in the credit decision would know the race and gender of the applicant.[299] This notification would also inform the applicant that it is illegal for the lender to discriminate.[300] The notice is an important aspect of the proposed rule. Furthermore, we believe that in all cases, a lender must inform an applicant that discrimination is illegal and to provide the applicant with the CFPB's contact information for further questions.

[296] NPR, pp. 473-474.
[297] NPR, pp. 473-474 and 891-892.
[298] NPR, p. 572.
[299] NPR, p. 500.
[300] NPR, p. 488.

Annual submission and dissemination to the public must be timely and regular

Question: The Bureau seeks comment on its proposed approach to the aspects of reporting addressed in proposed § 1002.109(a), including that the reporting frequency be annual, that the reporting period be the calendar year, and that the submission date be June 1 of the next calendar year.[301]

The Bureau seeks comment on whether this provision may risk creating ambiguity with respect to compliance and whether additional safeguards may be required to dissuade financial institutions from creating subsidiaries for the sole purpose of avoiding the collection and reporting or section 1071 data.[302]

Question: The Bureau further seeks comment on two alternatives: (a) whether the Bureau should adopt a compliance date of two years after the publication of the final rule; and (b) whether the Bureau should adopt different compliance dates based on the size of a financial institution (e.g., one year for large financial institutions, two years for smaller institutions).[303]

The CFPB must establish procedures to ensure the timely and regular public release of the Section 1071 data. The ability of the public to hold financial institutions accountable for the fair lending and community development purposes of Section 1071 decreases if the CFPB unpredictably changes when it requires lenders to submit data to the CFPB and when the CFPB makes the data publicly available. The Federal Financial Institutions Examination Council (FFIEC) has been sporadic and inconsistent with the release of CRA small business and farm data. Several years ago, the FFIEC released the data in August; now the data for the previous year is released in December, which is almost two years after loan originations occurred.[304] Such a long time lag makes it difficult to hold lenders accountable.

The CFPB proposed to require lenders to report data to the agency in June, in part, to provide a sufficient time period between the submission of HMDA and Section 1071 data for those lenders that have to report both sets of data.[305] We can support a June reporting deadline only if the agency pledges to release the data publicly within a few months such as September instead of December. Too much of a lag in public release diminishes the implementation of the statutory purposes of Section 1071.

We support a partial year collection and dissemination if the compliance date occurs mid-year. For example, the CFPB stated that if the compliance data was July of 2024, lenders would be required to collect data from July through December of that year.[306]

[301] NPR, p. 508.
[302] NPR, p. 509.
[303] NPR, p. 560.
[304] The FFIEC released the 2019 CRA small business and farm data on December 14, 2020, see https://www.ffiec.gov/press/pr121420.htm
[305] NPR, pp. 505-507.
[306] NPR, p. 507.

The CFPB proposed a compliance date 18 months after publication in the Federal Register. We would have preferred a year but are pleased that the CFPB opted against two years as recommended by some lenders.[307] The statutory purposes of Section 1071 are better served by less time between publication of a final rule in the Register and data submission, especially considering that Congress passed the Dodd Frank Act in 2010. We do not support staggered compliance dates varying on the size of the lender. Eighteen months is sufficient particularly because lenders can start preliminary planning now since the agency proposed the rule in September of 2021.

The CFPB must also safeguard against the possibility that a lender will develop its ownership structure in such as manner as to evade Section 1071 reporting requirements. For example, the agency stated that a lender may create a subsidiary so that the lender and its subsidiary are both under the reporting threshold of 25 loans.[308] The agency could simply create a rule that for the purposes of determining the loan threshold, loans are counted at the parent institution or holding company level. Furthermore, the CFPB must create a database that makes it considerably easier for the public to identify all subsidiaries and affiliates of a lender than is the case with HMDA data so that the public can more accurately assess the lender's fair lending and community reinvestment performance.

Dodd Frank Cost-Benefit Analysis Indicates that Costs are Manageable and Benefits Significant

Question: The Bureau is particularly interested in the quantifiable impact of increased transparency on financial institution behavior, and the need for public and private investment. The Bureau is unaware of data that would enable reliable quantitative estimates of all of these effects.[309]

As required by the Dodd Frank Act, the CFPB was required to consider the benefits and costs to financial institutions and small business applicants of the proposed Section 1071 rule.[310] As discussed throughout this comment letter, the benefits of the proposed rule include increased transparency in the small business lending marketplace, which is likely to make it more equitable and efficient. By increasing sunlight into pricing, terms and conditions, and action taken on applications, the data is likely to curb excessive pricing, reduce abusive terms and increase access to credit for traditionally underserved small businesses. Lenders will also realize benefits in terms of improved ability to gauge their competitive position in the market and opportunities for them to serve new customers.

As mentioned above, prime and sustainable home lending surged to people of color and modest income borrowers in the early to mid-1990s after Congress improved demographic characteristics in the HMDA data. To the extent possible using sophisticated statistical

[307] NPR, pp. 557-558.
[308] NPR, p. 509.
[309] NPR, pp. 690-691.
[310] NPR, p. 686.

techniques, the CFPB should estimate the impact of Section 1071 after the first few years of data disclosure in terms of increased access and improvements in pricing and terms and conditions to traditionally underserved borrowers. Our belief is that the benefits of data disclosure overwhelm costs.

The CFPB's detailed discussion of costs suggests that financial institutions will not exit the market in significant numbers after the implementation of Section 1071. In addition, any passed-on costs to small business borrowers will likely be modest. The experience with HMDA data over the decades further supports this conclusion. The Home Mortgage Disclosure Act (HMDA) has required data reporting for more than 40 years and has not caused any lender to our knowledge to cease making home loans. The Federal Reserve Board enhanced HMDA data in 1990 to include information on action taken on applications in addition to demographic data on loan applicants.[311] By 1998, 7,925 lending institutions reported HMDA data.

The Federal Reserve Board enhanced HMDA data again in 2004 to require reporting of price information along with additional data points such a lien status. In 2004, 8,121 lenders reported HMDA data and by 2007 the number of reporters surged to 8,886. Over time, therefore, the number of reporters grew, which is inconsistent with the supposition that data reporting and/or additional reporting requirements caused a decrease of lending or lenders. It was only after the subprime lending crash, which was caused by a deregulatory environment enabling risky and abusive lending, that the number of HMDA reporters plummeted. By 2012, the number of reporters had fallen to 7,632 institutions.[312]

The proclivity of smaller banks to voluntarily report small business and farm data suggests that data disclosure helps rather than hinders them as they assess marketplace opportunities and comply with CRA. Smaller banks are not averse to reporting data. In order for small business lending to be included on their CRA exams, some smaller banks have been regularly reporting this data, although they are not required to do so. In 2018, 157 or 22% of the 700 institutions reporting CRA small business loan data were smaller banks voluntarily reporting the data.[313] These institutions found data reporting to be beneficial for CRA compliance purposes and/or to gauge their performance in the small business lending marketplace.

Likewise, the Section 1071 data reporting will not adversely affect the number of lenders nor constrain their product offerings. The CFPB employed surveys of lenders and detailed discussions with them to develop estimates of one-time start-up costs, annual fixed costs and variable costs. The CFPB stated that conventional economic theory suggests that lenders would absorb the one-time and fixed costs but may pass on the variable costs to the borrowers in the form of increased loan costs, either higher fees or interest rates.[314] The CFPB divided lenders

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[311] Federal Financial Institutions Examination Council. History of HMDA. https://www.ffiec.gov/hmda/history2.htm
[312] Federal Financial institutions Examination Council. Background and Purpose of HMDA. https://www.ffiec.gov/hmda/history.htm
[313] NCRC analysis of 2018 CRA small business data found via https://www.ffiec.gov/hmcrpr/cra_fs19.htm.
[314] NPR, pp. 689-690.

into three types – Type A or low complexity lenders that were smaller volume lenders, Type B or moderately complex lenders, Type C or high complexity lenders that were also higher volume lenders. These lenders varied based on the extent to which technology or manual labor handled various data tasks. The composition of fixed or variable costs varied, depending on the extent to which technology was employed to handle various tasks.

The one-time startup costs of complying with Section 1071 might seem expensive, ranging from $58,400 for a Type A depository institution (DI), $75,700 for a Type C DI, to $95,200 for a non-depository lender. Likewise, the total ongoing costs ranged from $35,476 for a Type B DIs to $243,266 for a Type C DI. However, income per application ranged from $30,000 to $90,000. When considering revenue and costs per application, the Section 1071 requirement becomes quite feasible and manageable. The per application costs were $74 for Type A DIs, $89 for Type B DIs and $41 for Type C DIs.[315] The costs are modest considered overall and small on a per application basis. Therefore, they are unlikely to cause lenders covered by the proposed Section 1071 rule to exit from small business lending.

In addition, the cost-benefit analysis does not support only requiring the mandatory data points and deleting the data points that the CFPB added under their discretionary authority. The CFPB estimated the per application costs for reporting the mandatory data points would be $68, $85, and $39 for Type A, Type B and Type C DIs, respectively.[316] Dropping the discretionary data points, would save only $6, $4, and $2 for Type A, B, and C, respectively, on a per application basis. This is certainly not worth the price reduction, considering the loss in explanatory power the data would experience.

Any cost increase experienced by borrowers is likely to be minimal. The CFPB estimated that per application, the variable costs were approximately $28, $24, and $7 for Type A FIs, Type B FIs, and Type C FIs, respectively.[317] Per economic theory, these are the small costs that could be passed onto the borrower. Further, this is the second time that the CFPB estimated these costs, and the agency had more information from lenders than the first time the agency generated the estimates for the SBREFA outline. The variable costs were similar under both estimates.[318]

To supplement the cost estimates, the CFPB surveyed lenders about how they would react to Section 1071 data reporting requirements. If the lenders would react at all, they were much more likely to raise application fees than tighten underwriting standards or exit some geographical markets or small business lending altogether.[319] The same results occurred when lenders that primarily served rural areas were surveyed.[320]

[315] NPR, p. 732.
[316] NPR, p. 744.
[317] NPR, p. 738.
[318] SBREFA outline, p. 64, https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf
[319] NPR, p. 738.
[320] NPR, p. 748.

The CFPB concluded that "the Bureau estimates that these costs would be relatively low. Further, the Bureau received feedback through the One-Time Cost Survey process on how creditors might react to increased compliance costs due to the proposed rule. The results generally suggest that covered financial institutions will generally pass the increased cost of compliance on to small businesses and would not exit the market."[321] Any costs passed onto borrowers would be relatively low. Also, if borrowers were surveyed, they would probably agree to these fees in exchange for monitoring and reducing the amount of discrimination in the lending marketplace.

Conclusion

The CFPB must require the collection and public dissemination of a database detailed enough to meaningfully achieve the fair lending and community development statutory purposes of Section 1071. The CFPB judiciously used its discretionary authority to propose additional variables that further the statutory purposes of Section 1071 by creating a database that can control for important small business characteristics such as sector and time in business when analysts seek to probe the extent of racial and gender disparities in small business lending. The CFPB itself stated that these additional variables are critical for the purposes of the statute. NCRC recommends that the CFPB consider the collection of a few more data points such as credit score and structure of business in order to further improve the rigor of the database in revealing disparities.

Coverage of the industry must be comprehensive. While we are pleased that the CFPB included MCAs in the database, the omission of all types of factoring could create a two-tiered small business lending marketplace in which the lending that is captured by the Section 1071 data is responsible and affordable while the lending missed by the data becomes abusive because it is concealed by a veil of secrecy. In addition, various industry stakeholders will argue for raising the threshold of 25 loans by a significant amount but these proposals would violate the purpose and intent of the statute by hiding lending which is important in various markets and geographical areas including smaller towns and rural counties. The careful cost-benefit analysis conducted twice by the CFPB during the proceedings of the SBREFA panel and for this NPR also does not justify a significant increase in the threshold.

Regarding race and gender, NCRC is pleased with the disaggregated approach adopted for the racial and ethnic categories by the CFPB. We ask that the CFPB include disability status in the data and adopt separate data points for gender identity and sexual orientation.

Finally, the CFPB's balancing test suggested that the agency can provide the public with a robust database that comprehensively captures small business and loan characteristics. The more than four-decade experience with HMDA data further suggests that robust public sector databases that further community needs and fair lending enforcement are not subject to fraud and abuse.

[321] NPR, pp. 689-690.

A failure to provide a robust and comprehensive database on small business lending focused on race and gender would be a failure to implement the statutory purposes of Section 1071. We are confident that the CFPB will not adopt a crimped approach to Section 1071 implementation, which would only thwart our nation's ability to overcome a discriminatory past and ensure that all people and small businesses are treated fairly. Wealth building and economic growth for all hinges on complete and transparent data.

Thank you for the opportunity to comment on this important matter. If you have any questions, please contact myself on jvantol@ncrc.org or Josh Silver, Senior Advisor, on jsilver@ncrc.org.

Sincerely,

Jesse Van Tol
President and CEO