CBA | CONSUMER BANKERS ASSOCIATION

March 24, 2023

The Honorable Dan Meuser
Chairman
Subcommittee on Economic Growth, Tax, and Capital Access
House Committee on Small Business
2361 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Greg Landsman
Ranking Member
Subcommittee on Economic Growth, Tax, and Capital Access
House Committee on Small Business
2069 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Meuser and Ranking Member Landsman:

The Consumer Bankers Association (CBA) is pleased to submit this letter for the hearing entitled "The End of Relationship Banking? Examining the CFPB's "Small Business Lending Data Collection" Rule" focused on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") notice of proposed rulemaking for Small Business Lending Data Collection under the Equal Credit Opportunity Act ("proposal"),[1] concerning the small business lending market pursuant to Section 1071 of the Dodd-Frank Act. CBA is the voice of the retail banking industry whose products and services provide access to credit to millions of consumers and small businesses. Our members operate in all 50 states, serve more than 150 million Americans, and collectively hold two-thirds of the country's total depository assets.

CBA and its member institutions understand that Section 1071 was mandated by Congress; however, this rule **is not as simple as data collection efforts undertaken on other lending products such as residential mortgages. Business loans are often complex and involve multiple owners who can be businesses themselves, not individual consumers which is an easier data point to capture**. Business lending materially differs from residential mortgage lending and the use of Home Mortgage Disclosure Act ("HMDA")-like reporting for business lending activity may not identify potential discrimination as Congress intended because of these important distinctions.[2]

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[1] 86 FR 56356 (October 8, 2021).

[2] Examples include: (1) Residential lending shares the same type of collateral. Business lending may not be secured at all, and when secured, the type of collateral varies tremendously; (2) residential lending has (with rare exceptions) consumers as the applicants, whereas business lending involves loans to all sorts of applicants, ranging from sole proprietors to sophisticated corporate structures; (3) business loans are often renewals rather than new loans and are not akin to refinances in the residential world; (4) business loans have much shorter and varied durations; (5) the appropriate property address for a business loan to use for reporting and analysis can be debated with no easy or right answer; (6) capturing business loan applicants for reporting and analysis can be debated with no easy or right answer given the various ownership and structures; (7) residential mortgage transactions often do not result in ongoing relationships and are much more transactional; (8) residential lending generally involves creditor interactions with only the future homeowners, whereas in business lending, creditor interactions could be with a number of business representatives which may or may not include the principal owners; (9) residential mortgage applications seldom include more than two primary applicants whereas commercial credit applications may involve many equal part business owners; and (10) residential mortgage applicants customarily apply on their own behalf whereas commercial credit applicants may involve an authorized representative with no ownership interest in the business.

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

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

CBA values the Bureau's proposed adoption of many provisions that will make the 1071 data collection more efficient and meaningful. These positive steps include the CFPB's inclusion of a simplified small business definition, limiting data collection to women- and minority-owned small business, and the general ability for lenders to rely on borrowers' representations. We believe these changes will help lenders better collect small business data.

Compliance Lead Time

Under the proposal, a final rule implementing Section 1071 would be effective 90 days after publication in the Federal Register, with compliance mandated eighteen months after publication.

Given the complexities and the many other challenges presented by the Bureau in the proposal, it is difficult to say exactly how much lead time lenders will need to implement the regulations without knowing the specific requirements for implementation, which, of course, will only be known when the regulations are final. Due to the highly complex nature of the proposed amendments and the implications of not getting the collection of 1071 data right, the proposed eighteen-month compliance timeline will not allow lenders to properly implement any final 1071 rule. It is vitally important for lenders to have a reasonable amount of time to implement the new requirements. Providing adequate implementation time will allow financial institutions the opportunity to make the changes necessary to achieve the statutory purpose and Bureau's goals for 1071 data collection and reporting. Without the time to properly implement for Section 1071, lenders may be forced to pause small business lending, which could have significant negative impacts on the most vulnerable business the rule is intended to benefit. Accordingly, **we believe an implementation period of no less than thirty-six months would afford adequate time for lenders to properly stand up 1071 requirements.**

Covered Borrowers– Definition of Small Business

The proposal would require financial institutions to collect and report Section 1071 data regarding all "covered applications" from "small businesses." Small business would be defined by reference to the Fair Lending and Small Businesses September 10, 2021 definitions of "business concern" and "small business concern" in the Small Business Act[3] and the implementing regulations of the Small Business Administration ("SBA"),[4] which is consistent

[3] 15 U.S.C. 631 et seq.
[4] 86 FR 56356 at 789.

with the approach specified in Section 1071.[5] The CFPB would not, however, employ the SBA's size standards for defining a small business concern, which vary based on a business's six-digit North American Industry Classification System ("NAICS") code. Instead, the CFPB would look to whether the business—regardless of NAICS code—had $5 million or less in gross annual revenue for its preceding fiscal year.[6] Any business that is at or under the $5 million threshold would be a "small business" for purposes of the proposed rule. CBA strongly agrees with the Bureau's application of a revenue-based approach to the definition of a small business. However, **we believe a $5 million gross annual revenue threshold is too high, would capture much larger businesses that should not be covered by the rule, and would obscure the intent of Section 1071 – the collection and analysis of data on the nation's truly small businesses.**

As acknowledged in the proposal, most of the small entity representatives convened for the 1071 SBREFA analysis commented that most of their small business customers were under $1 million in annual revenue.[7] We believe this is true and companies that fall above a $1 million threshold often offer different structures, are more sophisticated, and data collection would bleed into separate commercial banking operations with different systems, processes, and platforms, increasing the cost of collection, while offering little insight into actual small business lending.

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

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

Setting a revenue threshold at $5 million or less would also add complexity and unnecessary costs to institutions that currently lend to a broad range of business revenues. In moving from $1 million to $5 million, lenders start to get into commercial lending and often run into more complex ownership scenarios which becomes more cumbersome.

Data Collection and Reporting

[5] *See* 15 U.S.C. 1691c-2(h)(2).
[6] 86 FR 56356 at 789 - The Bureau is seeking SBA approval for this alternate small business size standard as required under the Small Business Act.
[7] 86 FR 56356 at 56429.

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Under the proposal, covered financial institutions would be required to collect and report three categories of data: (1) data generated primarily from specific requests by the institution; (2) data that may be provided by the applicant or discerned from information provided by the applicant or a third party; and (3) data that the institution itself generates. These three categories are made up of a total of twenty-one data points in the proposal.[8] Covered financial institutions would be permitted to rely on statements made by an applicant or information provided by an applicant when collecting and reporting data, but, where verification is permitted and the financial institution chooses to do so, a financial institution may be required to report verified information.[9] Covered financial institutions would be required to collect data on a calendar-year basis and report that data, along with certain identifying information about the institution, to the CFPB by June 1 of the following year.[10] Covered financial institutions would be permitted to reuse certain data points if the data were collected within the same calendar year as the current covered application and the institution has no reason to believe the data are inaccurate.[11]

CBA strongly supports the provisions in the proposal that limit the obligation of lenders to make any of their own determinations or observations concerning whether applicants are Covered Entities, the ability for lenders to rely on the accuracy of the response of applicants' representatives, and the affirmation that lenders do not need to continually ask if applicants are not responsive.[12] However, as proposed, in the case of race and ethnicity (but not gender) of an applicant's principal owners, the Bureau proposes for the information to be collected on the basis of observation. More specifically, if an applicant does not provide at least one principal owner's ethnicity, race, or sex information and the financial institution meets with any principal owners in person or by video, the financial institution would be required to collect such information via visual observation or surname.[13]

Data Points

Section 1071(e)(1) requires each financial institution to compile and maintain a record of certain information provided by any credit applicant pursuant to a request under Section 1071(b), and report that information to the Bureau. The Bureau refers to this information, along with the applicant's responses to the inquiries under 1071(b)(1), as "mandatory data points," which include: (1) whether the applicant is a women-owned, minority-owned, and/or small business, (2) application/ loan number, (3) application date, (4) loan/ credit type, (5) loan/ credit purpose, (6) credit amount/limit applied for, (7) credit amount/ limit approved, (8) type of action taken, (9) action taken date, (10) census tract (principal place of business), (11) gross annual revenue, and (12) race, sex, and ethnicity of the applicant's principal owners.

The Bureau has also proposed additional discretionary data points to be collect on top of the above-enumerated mandatory data fields. These include, among others, the collection of data points relating to pricing and NAICS code. CBA has always maintained that the 1071 data

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[8] 86 FR 56356 at 56551.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 56578.
[12] Id. At 56468- Under the proposal, minority-owned business status or women-owned business status could only be collected and reported on the basis of information provided by the applicant for purposes of Section 1071.[12] Financial institutions would not be permitted to collect or report such data based on any other basis (e.g., observation).
[13] *Id.* at 56358.

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collection process will need to be as streamlined as possible in order to produce useful data. As noted above, the process for small business data collection will not be as simple as the process under HMDA for home mortgages and any unnecessary data points will only serve to add distortion to the data mandated under Section 1071. Accordingly, CBA believes the mandatory data points sufficiently capture the information sought under Section 1071 and urges the Bureau to reconsider any additional data points that would be unnecessary and would create more constraints on borrowers and lenders alike.

Publication of Data and Limitations on Access

Under the proposal, application-level data submitted by financial institutions would be made publicly available on an annual basis on the CFPB's website, subject to modifications by the CFPB to advance privacy interests.[14] In exercising its discretion to modify the data, the CFPB proposes to employ a "balancing test" that assesses the risks and benefits of public disclosure.[15] The CFPB also proposes to issue a policy statement regarding its intended data modifications after receiving at least one full year of Section 1071 data.[16]

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

Our members are concerned the impact this rule will have on the availability of small business loans, especially for our small member institutions and the threat the release of data could present for litigation. We appreciate Congress taking a closer look at the 1071 rule and the impact this could have on main street businesses that have a close working relationship and rely on access to credit options provided by our member institutions. CBA greatly appreciates the opportunity to share our suggestions and to work with policymakers on considerations regarding Section 1071.

Sincerely,

Lindsey D. Johnson
President and CEO
Consumer Bankers Association

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[14] 86 FR 56356 at 56512.
[15] *Id.* at 56358.
[16] *Id.*

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