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Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

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

To Whom It May Concern:

The Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau ("Bureau") regarding its proposed rule ("Proposal") to implement Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[1]

Small businesses, including those that are women-owned or minority-owned, drive the American economy—and they rely heavily on access to credit to do so. Indeed, it is hard to overstate the importance of credit to these businesses: it allows them to support their inventory, finance their warehouses and offices, cover payroll, manage downturns, and otherwise push the economy forward. The smallest firms and start-ups often rely on business credit, which can come in many forms, including a credit card, mortgage or home equity line of credit to finance their business needs. It is critical that policymakers continue to support lending to these businesses, particularly in light of the COVID-19 pandemic.

CCMC thus long has been focused on the implementation of Section 1071 of the Dodd-Frank Act which requires financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses. We have appreciated the collaborative approach taken by the Consumer Financial Protection Bureau ("Bureau") throughout its policymaking process, including through engaging in roundtables and creating a dialogue with stakeholders, and in response to the outline of proposals issued by the Small Business Advisory Review Panel.[2] We appreciate the Bureau's continued engagement and the opportunity to comment on implementation of Section 1071.

Section 1071 is intended to "facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community

[1] *See* Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Fed. Reg. 56356 (Oct. 8, 2021).
[2] Small Business Advisory Review Panel For Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered ("SBREFA Outline"), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf (Sept. 15, 2020).

development needs and opportunities for women-owned, minority-owned, and small businesses." Properly implemented, Section 1071 will help strengthen the credit market and ultimately should lead to greater credit access to women-owned, minority-owned, and small business borrowers. We share the Bureau's commitment to achieving this goal.

As the Bureau also surely appreciates, however, implementing Section 1071 will be a challenging and high-stakes endeavor. Numerous harmful unintended consequences could follow if Section 1071 is implemented through an overly complex rule or one that is inconsistent with the applicant's right of refusal under the law. For example, such a rule could inadvertently reduce women-owned, minority-owned, and small business access to affordable credit, make borrowers doubt the fairness of a lending process by injecting sensitive questions about demographics into loan applications, or expose highly sensitive data to unnecessary security risks. We recommend that the final rule maximize simplicity and closely adhere to the statute.

The Proposal reflects the Bureau's collaborative approach throughout this rulemaking process as well as numerous sound judgments about the best way to implement Section 1071. We nonetheless believe that the Bureau can improve upon the Proposal in the final rule. Specifically, targeted changes will help ensure that the rule achieves the statutory purpose without creating challenges—and costs—that will ultimately be passed on to consumers in the form of reduced access to affordable credit. We consequently write to urge the Bureau to:

1. Scope the rule to cover the appropriate small businesses and the appropriate financial products;
2. Define an "application" that triggers the requirements of the rule in a way that minimizes disruption to the flow of small business credit;
3. Provide for voluntary collection of high-quality data;
4. Make the final rule's "firewall," recordkeeping, and third-party channel provisions workable;
5. Provide a three-year implementation period;
6. Implement the final rule in a manner that provides a clear path to compliance; and,
7. Prioritize privacy and security.

Analysis

1. Scope the rule to cover appropriate small businesses and the appropriate financial products.

As proposed, the forthcoming final rule would cover an extremely broad range of businesses and financial products. We appreciate the Bureau's determination to ensure that the rule does not sweep too narrowly and share the Bureau's interest in accomplishing the legislative intent behind Section 1071. We caution, however, that scoping the rule in a way that results in collecting inaccurate data or imposing undue compliance burdens would equally defeat Congress' intent. We accordingly urge the Bureau to ensure that it scopes the final rule appropriately to best accomplish Congress' intent, including making it easy for stakeholders to quickly determine whether an entity or product falls within the scope of the rule.

a. Define "small business" using an annual gross revenue threshold.

We applaud the Bureau's decision to define small businesses using an annual gross revenue threshold. This approach is simple and clear for lenders and borrowers, and will support compliance without unduly burdening lenders or complicating the application process. The Bureau says it well: the trigger for being a small business "must be easily understood by small business owners who may be completing an application online, or by the tens of thousands of customer-facing personnel who take small business applications in an industry with a typical annual turnover rate of 10 to 20 percent."[3] Using an annual gross revenue threshold would readily accomplish this goal while accurately gauging a company's status as a small business. Indeed, the amount of a company's annual gross revenue "wholly encompasses whether an applicant is a small business."[4] We consequently join in the "broad support" for the use of a gross annual revenue threshold, consistent with the approach noted in the Bureau's 2017 RFI.[5] The Bureau is right to seek approval from the Small Business Administration ("SBA") of this approach.[6] We believe that the SBA granting this approval will be critical to the ultimate success of this rulemaking.

We urge the Bureau not to shift to an alternative approach to defining a small business. The Bureau should not adopt an approach that relies upon navigating the complexities of determining the appropriate six-digit NAICS code and then the relevant size standard based on that NAICS code. Nor should the Bureau adopt an approach based on the number of employees or average annual receipts/gross annual revenue. As the Bureau notes, alternative approaches are likely to make compliance more difficult and increase confusion within the marketplace. The Bureau is justly concerned that "requiring financial institutions to rely on the SBA's existing size standards for purposes of the section 1071 data collection and reporting requirements would pose risks to the efficient operation of small business lending."[7] We agree with the "overwhelmingly consistent feedback" from stakeholders that "using the SBA's existing size standards for the purposes of Section 1071 . . . would not align with current lending and organizational practices."[8] Indeed, application of the existing SBA size standards could "slow down the application process," resulting in financial institutions being "compelled to raise the cost of credit or originate fewer covered credit transactions."[9] The Bureau is right that "[e]liminating credit opportunities or reducing access to credit to small businesses, including women-owned and minority-owned small businesses" in this way would defeat the statutory purposes of Section 1071.[10]

We consequently strongly urge the Bureau to maintain its proposed approach and use an annual gross revenue threshold for determining a business' status as a "small business" within the scope of the forthcoming final rule.

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[3] *See* Proposal, 86 Fed. Reg. at 56431.
[4] *See* Proposal, 86 Fed. Reg. at 56428.
[5] *See* Proposal, 86 Fed. Reg. at 56387.
[6] *See* Proposal, 86 Fed. Reg. at 56357.
[7] *See* Proposal, 86 Fed. Reg. at 56431.
[8] *See* Proposal, 86 Fed. Reg. at 54631.
[9] *See* Proposal, 86 Fed. Reg. at 56432.
[10] *See* Proposal, 86 Fed. Reg. at 56432.

b. Use a lower gross annual revenue threshold in the definition of a "small business."

The Proposal would key the definition of "small business" to a $5M gross annual revenue threshold.[11] Imposing a $5M gross annual revenue threshold would be significantly overinclusive, reaching into commercial lending activity and capturing many larger businesses that are not "small businesses" within the intended scope of Section 1071. By using an unduly high threshold, the Bureau will expand the number of businesses subject to the data collection, resulting in the collection of sensitive business data that does not advance congressional purposes. It also would unduly increase the amount of time that businesses will have to spend providing information to lenders, as well as discourage some borrowers from pursuing an application. Moreover, it will likely increase the compliance burden for lenders. Most basically, the volume of transactions for which lenders will be required to collect relevant data will significantly expand. Moreover, because larger businesses use a broader range of credit products, lenders would have to build out their compliance activities to capture information about more traditional corporate lending products that are not typically offered to the small businesses that should be the focus of this rulemaking. Because these larger companies fall outside the intended scope of Section 1071, these substantial increased compliance burdens for lenders are not justified by any corresponding increase in the intended value of the data that would be collected.

Using a lower gross annual revenue threshold would achieve the goals of the statute without creating unnecessary compliance burdens for financial institutions engaged in commercial lending and a corresponding increase in the cost of credit for small businesses. As the Bureau notes, there are readily available measures from other regulatory frameworks that can provide the gross annual revenue threshold for the purposes of Section 1071. For example, as the Bureau notes, for a "business applicant with gross annual revenues of $1 million or less," under the Equal Credit Opportunity Act, as implemented through Regulation B, "a creditor must provide a notification following an adverse action, such as a credit denial."[12] Regulation B affords relaxed notification requirements for businesses with revenue in excess of the $1 million threshold precisely because those businesses are materially different. Those businesses should not be considered "small" under the final rule. Likewise, the $1 million threshold is used in other regulatory contexts (as well as for other measures of small business activity). The Bureau notes, for example, that the Federal Financial Institutions Examination Council (FFIEC) and National Credit Union Administration (NCUA) Consolidated Reports of Condition and Income (Call Reports) and Community Reinvestment Act data both "identify loans of under $1 million in value, and CRA data also identify loans to businesses with annual revenues of $1 million or less."[13] Moreover, the recently rescinded CRA rule promulgated by the Office of the Comptroller of the Currency would have used a $1.6 million gross annual revenue threshold to define CRA-eligible businesses.[14] Other regulatory frameworks thus offer ample models for a lower gross annual revenue threshold in the definition of a "small business." We would urge the Bureau to select one of these models as the threshold measure for "small business" status under the forthcoming final rule. Doing so will better align the final rule with the practical realities of the small business market and better accomplish

[11] *See* Proposal, 86 Fed. Reg. at 56380.
[12] *See* Proposal, 86 Fed. Reg. at 56427.
[13] *See* Proposal, 86 Fed. Reg. at 56363.
[14] *See* Final Rule, Community Reinvestment Act Regulations, 85 Fed. Reg. 34734, 34794 (Jun. 5, 2020).

Congress' purpose in enacting Section 1071. Using a revenue threshold to define "small business" that is used in other regulatory frameworks also will streamline compliance with Section 1071.

c. Confirm that all forms of not-for-profit organizations are outside the scope of the forthcoming final rule.

Understanding the types of entities whose information must be collected under the rule is critical to enabling efficient compliance. To that end, we understand the Bureau intends to exclude all not-for-profit organizations from the scope of the forthcoming final rule (i.e., a lender would not have to collect information from a not-for-profit organization applying for a loan). To avoid any confusion, however, we would urge the Bureau to clearly state in the final rule or associated materials that collection from all not-for-profit organizations will not be required under the forthcoming final rule.

Specifically, the Proposal refers to existing SBA regulations to define the "small business concerns" that will be the focus of any final rule. As the Bureau notes, these regulations indicate that:

> a business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture. Thus, for example, financial institutions would not be required to collect and report data under proposed subpart B for not-for-profit applicants, because they are not 'organized for profit' and are thus not a 'business concern.'[15]

We understand this explanation to mean that the Bureau intends not to require data collection regarding loans to not-for-profit organizations. For clarity, however, we would ask the Bureau to confirm in the Final Rule that Section 1071's data collection requirements do not apply to any not-for-profit organizations, including trusts, special purpose vehicles, pass-through entities, holding companies that are not organized for profit, and limited liability companies that are not formed for business purposes.[16] Likewise, we would ask the Bureau to confirm that government agencies and institutions are equally excluded from the coverage of the forthcoming final rule.

d. Clarify coverage of rule and create appropriate product exclusions.

i. Exempt private label and co-branded commercial credit cards from the requirements of Section 1071.

[15] *See* Proposal, 86 Fed. Reg. at 56426 n.493.

[16] With respect to this last category of entities, we understand that applicants often create borrowing entities solely for tax, anonymity, or other purposes and that these entities are not intended to earn profit through business means. Including these entities in the scope of the forthcoming final rule would not advance the purposes of Section 1071.

The Bureau acknowledges the comments it received that explained the complexities associated with extensions of credit at the point of sale.[17] As those comments explain, such point of sale applications "include those private label credit cards or other products offered through retailers in which the financial institution itself does not interact with the applicant at the time of application."[18] The challenges associated with such applications will be acute. Point of sale applications will be received by a broad range of representatives of retail partners, many of whom may be seasonal employees or otherwise of short tenure with the retail partner. Likewise, the individual filling out the application may be well removed from the business' ownership, rendering them unable to accurately complete the requested information. As a result, attempting to collect data at the point of sale will result in significant compliance challenges and the collection of inaccurate data.[19] Indeed, many of our members are highly concerned about the challenges that both retailers and customers will face in a non-bank application scenario. We accordingly urge the Bureau to focus its rulemaking away from these transactions and allow institutions to focus their compliance resources on the transactions that comprise the vast majority of lending that Congress intended to cover with Section 1071. To do so, the Bureau should exclude private label and co-branded commercial credit cards from the scope of the forthcoming final rule.

Proceeding with the Proposal as drafted is likely to decrease the availability of, and demand for, small business and commercial credit cards with little public policy benefit. Merchants offer and promote private label and co-branded credit because it can be integrated seamlessly into the sales process without undue burden or delay at the point of sale. Retailers continue to push their credit partners to make the application process increasingly simple to satisfy consumers' desire for speed and convenience. The Proposal, on the other hand, would make the process of applying for commercial credit burdensome and time consuming. The Proposal would require credit applications to include numerous additional data fields and a lengthy disclosure/data request around race and gender. This will make it less likely that merchants would promote or even offer commercial credit options in their stores and more likely for customers to abandon the application. Not only would the Proposal make the application process itself unattractive from the merchant's perspective, but the Proposal would force merchants to prepare for discussions of gender and race in their stores. We appreciate that the greatly expanded application for commercial credit will state that providing information around race and gender is optional. However, not all applicants will read that disclaimer among the significant volume of information they must wade through. The application will prompt questions about race and gender from applicants, even from those who read the disclaimer, directed at the retailer's employees – not a banker. That means store associates will face questions that they may not be able to answer. Furthermore, there will inevitably be circumstances when a denied applicant publicly alleges in the store that the application was denied because the store and/or the lender discriminated based on race or gender. Merchants are sure to consider these factors before promoting commercial credit in store, with a reduction in the availability of credit the most likely result.

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[17] *See* Proposal, 86 Fed. Reg. at 56486.
[18] *See* Proposal, 86 Fed. Reg. at 56486.
[19] Notably, a retailer—not a lender—will choose the location of the retailer's locations. As a result, any data collected in that channel will reflect the decisions made by the retailer, not the lender's outreach in any particular community.

Assuming the merchant chooses to make commercial credit available, the Proposal also would make it less likely that the commercial customer submits an application. Potential applicants will face an application with significant data requests, only to be followed by a detailed inquiry into issues around race and gender. This will discourage potential applicants from completing and submitting their applications.

We accordingly urge the Bureau to exclude commercial and co-branded credit from the scope of the forthcoming final rule.

ii. Exempt indirect lending from the requirements of Section 1071.

Similarly, we would recommend that the Bureau exempt indirect lending where the small business applicant interacts only with a vendor partner of the financial institution (such as an equipment dealer or manufacturer). Application takers in the indirect lending model are not trained employees of covered financial institutions, and the individual filling out the application may well be removed from the business' ownership. Collecting Section 1071 data in these scenarios could result in significant compliance challenges and the collection of inaccurate data.

iii. Clearly exclude personal loans from the scope of the final rule.

We welcome the Bureau's decision not to require lenders to attempt to look for a business purpose behind consumer-designated credit.[20] The SBREFA panel advised against including such personal loans in the scope of the rule implementing Section 1071.[21] As the Bureau likewise notes, declining to cover consumer purpose loans would support consistent reporting, align with Section 1071's focus on reporting of business loans, and provide certainty to institutions.[22] However, the Bureau also solicits 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."[23] The Bureau should not permit such reporting. While such reporting would be voluntary, it would encourage lenders to second guess their customers, injecting counterproductive dynamics into the customer relationship and creating substantial risk of error. Rather, the Bureau should clearly exclude these personal loans from the scope of the final rule.

iv. Exclude trade credit from the scope of the rule.

Consistent with the SBREFA Outline,[24] the Proposal excludes trade credit from the definition of "Covered credit transactions," including it instead in the definition of "Excluded transactions."[25] The Bureau should retain this exclusion of trade credit in the forthcoming final rule. As the Bureau notes: "Trade credit is an often informal, business-to-business transaction,

[20] *See* Proposal, 86 Fed. Reg. at 56411.
[21] *See* SBREFA Outline 20 (indicating intent to exclude "consumer purpose products" from the scope of the proposal).
[22] *See* Proposal, 86 Fed. Reg. at 56411.
[23] *See* Proposal, 86 Fed. Reg. at 56411.
[24] *See* Proposal, 86 Fed. Reg. at 56414 ("In its SBREFA Outline, the Bureau stated that it was considering proposing that trade credit not be a covered product under section 1071.4.").
[25] *See* Proposal § 1002.104(b)(1).

usually between nonfinancial firms whereby suppliers allow their customers to acquire goods and/or services without requiring immediate payment."[26] Adding reporting requirements to trade credit transactions would create substantial burdens for companies and discourage the extension of trade credit that is often critical to American businesses.

We accordingly urge the Bureau to continue to exclude trade credit from the scope of the final rule. In doing so, we would ask the Bureau to ensure that this exclusion covers existing forms of trade credit as seen in the marketplace. In particular, trade credit should properly be understood to include residual buyouts, as well as contractual rebates, offsets, or other monetary incentives to enter into a contractual relationship. None of these are financing options. They should not be subject to the final rule. Likewise, we would ask that all forms of trade credit—not only in-house trade credit—be exempt from the data collection and reporting requirements imposed by the forthcoming final rule. Consistent regulatory treatment of all forms of trade credit will ultimately benefit consumers. We accordingly would urge the Bureau to revise proposed Comment 1 to Section 1002.104(b)(1) to exclude trade credit extended by financial institutions from the coverage of the forthcoming final rule.

v. Clarify application of rule to merchant cash advances.

The Proposal would include merchant cash advances as covered loans for data collection requirements.[27] The Proposal generally describes merchant cash advances, or MCAs, "as typically structured to provide a lump sum payment up front (a cash advance) in exchange for a share of future revenue until the advance, plus an additional amount, is repaid."[28] The Proposal also notes, however, that "MCAs vary in form and substance," and that MCAs may purport to be structured as a sale rather than an extension of credit.[29] Given the stated structure of many MCAs as purchases, not loans, as well as their varying forms, it is unclear exactly which transactions will qualify as MCAs under the rule and thus trigger reporting requirements. Moreover, since many, if not most, MCA transactions do not involve a credit application, it is unclear how a MCA transaction could be properly subject to the rule. Likewise, some of the standard terms to describe a credit transaction – such as an APR – do not readily transfer into the MCA context. The Proposal does not clearly explain how lenders should report such information in light of the features of MCA products.

We accordingly are concerned that application of the current Proposal to MCAs could result in substantial confusion and unnecessary compliance burden. We also are concerned at the prospect of this regulatory uncertainty translating into unfair enforcement activity in the future. We consequently would urge the Bureau to clarify the application of the rule to MCA transactions, including by clearly defining the MCA transactions that are subject to the rule and explaining how the rule will apply to the particular features of MCA products.

vi. Allow more efficient compliance with overlapping reporting requirements in Section 1071 and HMDA.

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[26] 86 Fed. Reg. at 56368-56369.
[27] *See, e.g.*, Proposal, 86 Fed. Reg. at 56359, 56368.
[28] *See* Proposal, 86 Fed. Reg. at 56368
[29] *See* Proposal, 86 Fed. Reg. at 56404.

We welcome the Bureau's focus in the Proposal upon avoiding unnecessary or duplicative compliance burdens. One remaining area in which we believe the risk of such unnecessary compliance burdens is particularly acute, however, is the overlap between reporting requirements imposed under Section 1071 and under the Home Mortgage Disclosure Act ("HMDA"). As the Bureau knows from its implementation of that statute, HMDA requires certain lenders to report detailed information to their Federal supervisory agencies about mortgage applications and loans at the transaction level.[30] As the Bureau acknowledges, "[t]here may be some overlap between what is required to be reported [to a Federal supervisory agency] under HMDA and what is covered by section 1071 for certain mortgage applications and loans for women-owned, minority-owned, and small businesses."[31] Indeed, the Bureau notes that "[b]ased on Bureau calculations using the 2019 HMDA data, the Bureau found that close to 2,000 lenders and around 530,000 applications indicated a 'business or commercial purpose' and around 500,000 applications were used for an 'investment' (as defined by the occupancy code) purpose. Of those applications, around 50,000 were for 5+ unit properties."[32]

Based on conversations with our members, we expect that this overlap in reporting requirements will create undue compliance burden and regulatory confusion. We consequently ask the Bureau to reconsider this provision and exclude HMDA-reportable transactions from Section 1071 rulemaking. It would be unnecessarily duplicative and burdensome to require institutions to collect from applicants two different sets of information for the same transaction and the same application. We urge the Bureau to consider relieving lenders of such duplicative reporting requirements or shaping the final rule to minimize the confusion or unnecessary regulatory burden that any such duplicative requirements may cause. In doing so, we would ask the Bureau to carefully consider the input of industry stakeholders, as well as to make this topic a focus of its post-rule activities as it seeks to facilitate compliance.

vii. Clarify application of automotive dealers' exemption to the rule.

As the Bureau is well aware, auto dealers play an important role in the indirect auto-lending market. However, Congress made a policy judgment that auto dealers would be better regulated through pre-existing channels, not by the Bureau. To that end, Congress clearly excluded auto dealers from the Bureau's authority under the Dodd-Frank Act. In no uncertain terms, Congress provided in Section 1029 of the Dodd-Frank Act, subject to certain exclusions that are not relevant here, that "the Bureau may not exercise any rulemaking, supervisory, enforcement or any other authority . . . over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both."[33] The Bureau consequently may not impose requirements on auto dealers under Section 1071, except when auto dealers act within the scope of the limited exclusions in Section 1029. We accordingly would urge the Bureau to ensure that the final rule explicitly excludes auto dealers and, by extension, financial institutions when working with auto dealers in indirect financing transactions from its scope.

[30] *See* Proposal, 86 Fed. Reg. at 56372.
[31] *See* Proposal, 86 Fed. Reg. at 56372.
[32] *See* Proposal, 86 Fed. Reg. at 56407.
[33] *See* Dodd Frank Act § 1029(f)(2).

2. Define an "application" that triggers the requirements of the rule in a way that minimizes disruption to the flow of small business credit.

Properly defining an "application" that triggers data collection requirements will be critical to ensuring the collection of high-quality data and thus the long-term success of this rule. If "application" is defined incorrectly, the Bureau could risk gathering misleading information—e.g. information about businesses that abandoned their initial interest in a loan—that creates misleading impressions of the state of the market. Additionally, certain "small business" (as defined in the Proposal) credit products do not require traditional applications. We accordingly urge the Bureau to define an "application" for purposes of the forthcoming final rule in a way that accurately reflects the practical realities of small business lending.

a. Exclude inquiries and prequalification requests from the definition of an "application."

The Proposal would "exclude inquiries and prequalification requests as a 'covered application,' even if the inquiry or prequalification request may become an 'application' under existing § 1002.2(f) that may trigger notification requirements."[34] This is the correct approach. The Bureau should exclude inquiries and pre-qualifications—concepts that are already familiar from existing implementation of the Equal Credit Opportunity Act—from the definition of "application" under the rule. These informal interactions cannot practically support the reporting regime contemplated by the Proposal. As lenders explained to the SBREFA panel, "they encounter a high number of inquiries from rate shoppers asking about qualification requirements and potential rates, many of which are abandoned or otherwise do not progress to a completed application."[35] Indeed, the Bureau correctly notes numerous concerns with including inquiries and pre-qualifications as covered applications. As the Bureau observes, for example, there would be "operational challenges" associated with the sheer volume of pre-qualifications and inquiries, the informal nature of the requests would lead to the collection of inaccurate data, and there would be duplication of reports between the prequalification and/or inquiry and any ultimate loan application.[36] The Bureau consequently should continue to exclude pre-qualifications and inquiries from the definition of "application" in the forthcoming final rule. In doing so, the Bureau should continue to make clear that the rule equally would not apply to the full range of other informal engagements that lenders may have with small businesses about potential loans,[37] such as proactive offers to raise a credit limit or provide a different credit product. It also should ensure that the line between an "application" and an "inquiry" or "prequalification" is sufficiently clear as to avoid undue uncertainty as the forthcoming final rule is implemented in the marketplace.

b. Exclude requests for credit line increases from the definition of "covered application" under the rule.

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[34] *See* Proposal, 86 Fed. Reg. at 56402.
[35] *See* SBREFA Outline 25.
[36] *See* Proposal, 86 Fed. Reg. at 56402.
[37] Elsewhere in the Proposal, the Bureau notes that "[a] financial institution would not be required to report amounts discussed before the application is made, which would accommodate preliminary informal interactions." *See* Proposal, 86 Fed. Reg. at 56447.

The Proposal would include a "[r]eevaluation, extension, or renewal request[]" within the definition of a "covered application" if the "request seeks additional credit amounts."[38] As commenters have explained, however, "financial institutions may not require a new application for [credit line increase] requests" and "underwriting a line increase request is substantively distinct from underwriting a request for new credit because a line increase extensively relies on past performance data and prior relationships."[39] As a result, data relating to credit line increases is unlikely to be informative and in fact may unduly skew or distort the data. Furthermore, the process for requesting line increases is highly streamlined and covering these transactions would create unnecessary complexity and potential delays for small business applicants. We would urge the Bureau to exclude requests for credit line increases from the definition of "covered application" under any final rule, even credit line increases that seek additional credit.

c. Do not require reporting if the applicant ultimately accepts a non-reportable product.

At times, a credit applicant may initially request a covered credit transaction only to ultimately select a product that is not reportable under Section 1071. Including such initial applications under Section 1071 reporting will not advance the purposes of the statute. We accordingly urge the Bureau to create a safe harbor for the collection of data for applications that request a covered credit transaction when the applicant ultimately accepts a product that is not reportable.

3. Provide for voluntary collection of high-quality data.

The goals animating Section 1071 will be best accomplished by the collection of accurate data. Ensuring that applicants submit the relevant information on a voluntary basis will greatly increase the quality of the data that they submit. As a result, we would urge the Bureau to focus on the voluntary collection of high-quality data in the forthcoming final rule in order to foster data integrity.

a. Focus data collection to maximize its value.

i. Ensure value of collected data points outweigh risks of collection.

As the Bureau explains, "Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the Bureau to require any additional data that the Bureau determines would aid in fulfilling section 1071's statutory purposes."[40] The Bureau proposes to use this authority to expand the group of required data fields beyond those identified by Congress.

We believe that the Bureau should use this authority very carefully and gradually. Data collection under Regulation C, for example, became more robust over a number of years. Here, small businesses should be afforded time to become accustomed to these new requirements.

[38] *See* Proposal § 1002.103(b)(1).
[39] *See* Proposal, 86 Fed. Reg. at 56400.
[40] *See* Proposal, 86 Fed. Reg. at 56356.

Collection of additional information will increase the time required to fill out the form, raise compliance burdens, and increase the risk that the data collection deters small businesses from applying for the credit that they need.

In particular, we would urge the Bureau not to add pricing data to the list of required data fields. The inclusion of pricing data would significantly increase the sensitivity of the data and heighten privacy considerations. Moreover, because contextual data would not accompany such pricing data, it would be difficult to draw any useful conclusions from the data. Unlike mortgages reported under HMDA, which are driven largely by current interest rates and the creditworthiness of the applicant, small business lending pricing can be influenced by creditworthiness, the nature and value of the collateral, compensating loan balances, the pricing structure for the product (i.e., indexed or non-indexed), compensating deposit balances, and the presence of other financial services bundled with the loan. As a result, any corresponding benefits from collecting this datapoint do not outweigh the associated risks and costs.[41]

Moreover, we would ask the Bureau not to require the collection of NAICS codes. Many applicants will not know the NAICS code for their business, resulting in the collection and reporting of inaccurate information as well as unnecessary delay and confusion for the applicant as they complete the relevant form. This requirement also would increase the compliance burden for lenders that are not currently familiar with the NAICS code system, including because of increased training and systems requirements.

ii. Permit lenders to rely on data provided by the applicant.

The data collection required by any final rule will be counterproductive if it leads to the collection of inaccurate data. While errors occasionally may occur under any approach, the most surefire way to ensure accuracy will be to rely upon the data submitted by the applicant—the entity by far best equipped to answer the questions that will be posed under any final rule. The Bureau generally recognizes this principle, permitting a lender to rely upon the information provided by the applicant, except when it verifies information.[42] We recommend that the Bureau take that approach in any final rule and confirm a lender may not be held liable if an applicant provides inaccurate data on the Section 1071 data collection form and that data is then reported by the lender to the Bureau. We also recommend that the final rule make clear that lenders are not required to verify applicant-provided data, make their own determinations or observations about whether applicants are small businesses, or continually ask applicants for information if the applicant is non-responsive. Finally, we would ask the Bureau not to treat applicants' decisions *not* to provide information to lenders as evidence that lenders lack reasonably designed procedures for collecting Section 1071 data.

iii. Do not require a lender to guess an individual's race/ethnicity.

[41] *See generally* Proposal 86 Fed. Reg. at 56454-56462 (discussing inclusion of pricing data).
[42] *See* Proposal § 1002.107(b).

The Bureau would require a lender that takes an application in person to guess an individual's race/ethnicity if they do not voluntarily provide that information.[43] This requirement that a lender guess an individual's race/ethnicity raises significant concerns for three reasons.

- First, imposing a visual-observation requirement would be inconsistent with an individual's statutory right[44] to refuse to provide information requested, including information about race/ethnicity.
- Second, this approach will likely generate inaccurate information, both because of inherent challenges identifying race/ethnicity and because the primary business owner may not be present at the time of application. Such judgments may often be inaccurate and viewed as offensive by the applicant.
- Third, this approach will inject racial evaluation into credit application processes. This will occur across a broad range of contexts, including many in which the lender has not historically collected such information or has been prohibited from doing so.

We consequently believe that the proposed approach could lead to negative consequences that undermine the very purpose of Section 1071. In short, lenders do not want to offend their applicants and customers by speculating about their race or ethnicity. The Bureau should not ask them to do so since the Bureau will have significant data on small businesses even without the visual observation requirement.

b. Confirm the voluntary nature of Section 1071 data collection relating to race, ethnicity, sex, minority ownership and women ownership.

Section 1071 imposes significant obligations upon lenders. In contrast, it imposes no obligation of any kind upon the small businesses from whom lenders would collect information. Data collection under Section 1071 is purely voluntary in nature. Indeed, Congress left no doubt on this point: "Any applicant for credit may refuse to provide any information requested pursuant to [Section 1071(b)] in connection with any application for credit."[45]

The Bureau should not impose requirements inconsistent with the enabling statutory provision. Rather, the Bureau should make the voluntary nature of this information collection clear to credit applicants, clearly stating that principle to applicants on each relevant document so that they can make informed decisions about whether to provide the requested information.

The sample data collection form included in the Proposal should be revised.[46] It prioritizes the collection of data over informing the applicant of their right not to submit the information. It does so by deemphasizing the voluntary nature of the collection—phrased in the negative in smaller font in the second paragraph—and instead focusing on the federal requirement that the information be solicited, as well as on the value of the information (both of which are stated in positive terms in larger font in the first paragraph). We consequently recommend that the Bureau

[43] *See* Proposed comment 107(a)(20)–9.
[44] *See* 15 U.S.C. § 1691c-2(c) ("Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.")
[45] 15 U.S.C. § 1691o–2(d)(1).
[46] *See* Proposal, 86 Fed. Reg. at 56581.

refocus the sample data collection form (and other relevant materials) accompanying any final rule so that it makes the voluntary nature of the collection perfectly clear to applicants. In particular, we would ask the Bureau to emphasize the voluntary nature of the data collection in positive terms and with equal prominence as statements explaining federal requirements, and not to include language that could be misunderstood by applicants and cause them to complete the form. For example, we would ask the Bureau to prominently include a statement such as the following in any data collection form: "Completion of this form is voluntary: You are not required to provide this information."

4. Make the final rule's "firewall," recordkeeping, and third-party channel provisions workable.

Unworkable elements of a rule can undermine the effectiveness of an entire regulatory scheme. That is especially true in the Section 1071 context. We consequently would urge the Bureau to ensure that it removes or substantially revises unworkable elements of the Proposal.

a. Ensure that the Section 1071 "firewall" provision is implemented in a workable manner.

Sec. 1071 provides that "[w]here feasible, no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant" to Section 1071.[47] To implement this "firewall" requirement, the Bureau generally proposes to impose a prohibition on data access as required by the statute. It also provides an exception for infeasibility, subject to notice to the consumer, as generally contemplated by the statute.[48]

While the proposed approach is generally consistent with the statute, we would ask the Bureau to provide further clarity on a few key points. In particular, we would urge the Bureau to provide further explanation of its understanding of infeasibility and how an institution may determine infeasibility for purposes of the firewall provision. (In addition to clarification in the forthcoming final rule, this would likely benefit from the Bureau's further explanation during the implementation period.) As it does so, we would ask the Bureau to consider that the notice required in the event of an infeasibility determination will itself likely deter small business lending, so should not be considered lightly by the Bureau. We would also ask the Bureau to consider treating infeasibility determinations by lenders as consistent with the forthcoming final rule when they are made pursuant to documented internal procedures.

Moreover, as noted above, the interaction between Section 1071 and HMDA raises questions about the implementation of any forthcoming final rule. This is true in the context of the firewall provision. Here, if the Bureau chooses not to exclude HMDA-reported loans, we would ask that the Bureau clearly confirm that collection of or access to equivalent data for HMDA purposes is an appropriate assigned duty sufficient to satisfy the "should have access"/"feasibility"

[47] 15 U.S.C. § 1691o–2(d)(1).
[48] *See generally* Proposal, 86 Fed. Reg. 56380-56381 (describing proposal).

standard as interpreted by the Bureau.[49] Relatedly, we also would ask the Bureau to exempt lenders from the proposed notice requirement if the relevant access occurs in order to allow the lender to satisfy HMDA or another separate statutory or regulatory obligation.

Finally, as discussed above, we do not support the use of visual evaluation of an individual's race or ethnicity. The Bureau should not justify this flawed approach on the basis that the resulting data will be subject to the Section 1071 firewall. Including such guesses in the data subject to the Section 1071 firewall will not cure the many flaws in that approach.

b. Ensure that recordkeeping requirements are workable.

Section 1071 requires the collection of information from a business applicant to determine whether it is a women-owned, minority-owned, or small business. It also requires financial institutions to "maintain a record of the responses to such inquiry, separate from the application and accompanying information."[50] Section 1002.111 of the Proposal would implement this record keeping requirement. It would require a financial institution to "maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries pursuant" to Section 1071 regarding "whether an applicant for a covered credit transaction is a minority-owned business . . . or a women-owned business . . . , and regarding the ethnicity, race, and sex of the applicant's principal owners."[51] Proposed Comment 111(b)-1 further explains that a financial institution may satisfy this requirement by keeping such responses in "a file or document that is discrete or distinct from the application and its accompanying information." The Bureau further would note in the comment that the applicant's responses "need not be maintained in a separate electronic system, nor need they be removed from the physical files containing the application."

We welcome the Bureau's clarifications that would reduce the technical challenges associated with this requirement of separate record-keeping. We understand that there remain substantial concerns, however, about the feasibility of satisfying this requirement as the Bureau would propose to implement it. In particular, we have heard concerns that the current Proposal could require highly expensive technical separation of systems that is not necessary to accomplish the goals of Section 1071. We consequently urge the Bureau to ensure that its implementation of this record-keeping requirement is feasible in practice. In particular, we would ask the Bureau to engage with financial institutions as they develop workable solutions and confirm their compliance with the requirements of the forthcoming final rule. In addition, we recommend aligning the recordkeeping retention period with ECOA (25 months rather than three years).

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[49] *See generally* Proposal, 86 Fed. Reg. at 56492 (explaining that "Proposed § 1002.108(a)(2) would define the phrase 'should have access' to mean that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. Proposed comment 108(a)–2 would explain that a financial institution may determine that an employee or officer should have access for purposes of proposed § 1002.108 if that employee or officer is assigned one or more job duties that may require the employee or officer to collect (based on visual observation, surname, or otherwise), see, consider, refer to, or use information otherwise subject to the prohibition in proposed § 1002.108(b).").

[50] 15 U.S.C. § 1691o–2(b)(2).

[51] *See* Proposal § 1002.111(b).

c. Ensure that any final rule is workable in the context of applications submitted through vendor partners.

Section 1071 applies to a broad range of lenders who will interact with small business applicants in widely differing contexts. Any final rule should be workable in the context of each of these channels through which loan applications may be submitted.

As discussed above, we would urge the Bureau to exempt private label and co-branded commercial credit cards from the scope of the final rule given the particular complexities associated with application taking and data collection at the point of sale. Similarly, we would urge the Bureau to exempt indirect lending, where the small business applicant interacts only with a vendor partner of the financial institution (such as an equipment dealer or manufacturer). To the extent the Bureau elects not to provide such an exemption, we would urge it to allow for a tailored approach in the vendor partner context to avoid discouraging borrowers from completing applications and to maximize the likelihood of receiving accurate information. In that event, we would urge the Bureau: *first*, to allow additional flexibility to clearly explain the voluntary nature of data collection in the vendor channel; and *second,* to allow additional flexibility in the timing of collection of information in the vendor channel, including with respect to the design of any procedures required by the Bureau and that are intended to obtain responses from applicants.[52]

5. Provide a three-year implementation period.

Small business borrowers should not find themselves shut out of the credit market, or unable to get a loan from their preferred financial institution, because of an insufficiently flexible implementation period for the final rule. Compliance with any final rule will require lenders to undertake substantial changes in their policies and systems, as well as to retrain responsible teams. In the SBREFA outline, the Bureau contemplated an approximately 2-year implementation period.[53] The Proposal now contemplates an 18-month implementation period.[54] Neither period would be sufficient to allow financial institutions to prepare to comply with the forthcoming final rule. In conversations with lenders, it has become clear that a minimum of three years will be required to realistically enable compliance with the final rule. For example, lenders will, at a minimum, be required to develop new or revised policies or procedures related to credit applications and data collection; update and test technology systems to collect, store, and report the data; develop controls to ensure that demographic data are not used in credit or marketing decisions; provide training to customer-facing, operations, and other employees; and ensure appropriate governance and oversight.

We urge the Bureau to provide such a three-year implementation period for this complex and entirely new regulatory framework. We acknowledge that the time that different lenders will require to comply with the final rule may vary. The possibility that some industry members may be able to comply with any final rule more quickly than others does not make compliance easier

[52] *See generally* Proposal, 86 Fed. Reg. at 56486.
[53] *See* Proposal, 86 Fed. Reg. at 56506.
[54] *See* Proposal, 86 Fed. Reg. at 56507.

for lenders that will need three years to comply.[55] Moreover, the length of time that has passed since passage of Section 1071 will not reduce the amount of time necessary to comply with any final rule.[56] The Bureau accordingly should provide at least a three-year implementation period in the forthcoming final rule. We would also ask that the Bureau take appropriate other steps to reflect the complexity of this new framework, including by providing examiner relief for good faith efforts in complying, as the Bureau provided with respect to the qualified mortgage rules.

6. Implement the final rule in a manner that provides a clear path to compliance.

Lenders and small businesses will both benefit if the Bureau supports effective and efficient compliance with the forthcoming final rule. We consequently urge the Bureau to use all the tools at its disposal to facilitate compliance with its rule implementing Section 1071.

a. Use all available tools to educate and support companies as they implement the rule.

Lenders are committed to ensuring compliance with any final rule. Challenges and questions nonetheless will emerge as any final rule will be highly detailed and implementation will be complex. It consequently will be important for the Bureau to use all of the tools at its disposal to educate and support lenders and their vendors as they evaluate and implement the rule. For example, we would urge the Bureau to lead webinars and other similar sessions intended to educate lenders and their vendors on how to implement any final rule. We likewise think that the Bureau, in partnership with other agencies as appropriate, should educate small businesses about the forthcoming data collection (including the fact that lenders are required by law to request the relevant information) and their right not to provide such information. We also would ask the Bureau to develop relevant implementation guides and other appropriate educational materials that facilitate compliance by explaining key priorities and potential stumbling blocks. In addition, we would encourage the Bureau to use no-action letters and advisory opinions to support responsible lenders' compliance efforts by clarifying relevant interpretive questions that arise in implementation of the forthcoming final rule. As it takes these steps, we would ask the Bureau to pay particular attention to the clarity of relevant forms and instructions. The Bureau should evaluate these forms and instructions on an ongoing basis and make any necessary changes if implementation of the forthcoming final rule reflects the need to make improvements.

b. Stagger reporting dates.

We ask the Bureau to shift the Section 1071 reporting date to July 1st. Doing so will provide separation between the HMDA and Section 1071 reporting deadlines for large institutions that submit quarterly. (For example, for institutions that report quarterly, first quarter HMDA reports are due 60 days after quarter end, which would be end of May and very near the proposed June 1 date.) Staggering reporting dates in turn will help financial institutions comply more efficiently with those laws since reporting under those statutes may rely on overlapping systems and staff.

c. Leverage existing regulatory frameworks.

[55] *See* Proposal, 86 Fed. Reg. at 56507.
[56] *See* Proposal, 86 Fed. Reg. at 56507.

Financial institutions have extensive experience complying with a broad range of regulatory frameworks. The Bureau's final rule implementing Section 1071 should draw on concepts from these other regulatory frameworks where appropriate to facilitate broad understanding of and compliance with the final rule. For example, we would urge the Bureau to consider statutory and regulatory frameworks implemented by the Financial Crime Enforcement Network ("FinCEN") relating to business ownership. Specifically, we would encourage the Bureau to look to the definition of a "beneficial owner,"[57] as it defines or amends the concept of "principal owner." Drawing on this or other established terms could reduce complexity and facilitate compliance, allowing financial institutions to leverage processes and training they already have in place for their bankers. This in turn will allow financial institutions to focus more on serving their customers' needs rather than interpreting unduly complex regulatory concepts.

d. Confirm that any final rule only applies on a forward-looking basis.

The Proposal would create numerous complex compliance burdens that will require the collection of new data fields, the establishment of new internal processes, and the development of new systems. It consequently will be impossible to apply any forthcoming final rule retroactively. We have heard concerns, however, about the possibility of retroactive application of requirements imposed by any final rule. We do not believe the Bureau intends to apply the rule retroactively, but certainly understand concerns about a contrary approach given the potentially enormous negative consequences. We consequently urge the Bureau to clearly explain in its forthcoming final rule that it does not apply retroactively, including as to draws made after the effective date on loans made before the effective date.

e. Clarify key terms.

We have heard concerns from our members that uncertainty around the definition of key terms could create significant, unnecessary compliance challenges. We consequently would ask the Bureau to take appropriate steps to ensure that key terms are appropriately clarified in the forthcoming final rule or during the implementation period. For example, while not an exhaustive list, we recommend that the Bureau ensure that it provides additional clarity around the meaning of the following terms:

- Gross annual revenue;
- Amount applied for;
- Census tract;
- Number of non-owner workers; and
- Time in business.

7. Prioritize privacy and security.

The Bureau will become the custodian of an enormous volume of sensitive data once its final rule implementing Section 1071 goes into effect. How the Bureau chooses to share this data

[57] *See generally* 31 U.S.C. § 5336(a)(3).

and how it protects that data will be key factors in the long-term success of this rulemaking. We consequently urge the Bureau to prioritize privacy and security in the forthcoming final rule.

a. Thoroughly account for privacy interests in the forthcoming final rule.

Section 1071 implicates important privacy and confidentiality interests. Publication of data collected pursuant to Section 1071 could disclose sensitive information about an applicant, whether with respect to personal financial information or confidential business information. Recognizing these interests, the Bureau proposes to use a balancing test to determine which data to publish.[58] However, the Bureau "does not intend to apply the balancing test until financial institutions have reported at least a full year of 1071 data to the Bureau."[59] Thus, while the Bureau extensively discusses this balancing test,[60] the limitation it places on the Bureau is unclear, particularly since the Bureau claims the right to apply the test at its discretion.[61] Moreover, businesses will not be able to make fully informed decisions about whether to provide the information sought under Section 1071 for at least a year in the absence of a clear sense of what data the Bureau will ultimately disclose to the public.

We believe that the privacy and confidentiality interests implicated by Section 1071 should be fully considered prior to the issuance of the forthcoming final rule and initial collection of the data. We would ask the Bureau to formalize its balancing test in the final rule or, prior to publishing any data, undertake a notice and comment process under which it formalizes the balancing test. This approach would have at least two key benefits. First, it would ensure the creation of a well-considered balancing test that was subject to appropriate comment from stakeholders. Second, it would allow businesses to understand what data will be published and thus make informed decisions about what information to provide to a lender.

b. The Bureau should store data collected under the final rule using the highest standards of data security.

Under the final rule, the Bureau will collect large volumes of extremely sensitive data about American women- and minority-owned, and small businesses. Any compromise of this information could have significant consequences for businesses as well as cause a substantial loss of confidence in the Bureau. The threat of such compromise is real. As demonstrated by the hack of the Office of Personnel Management that reportedly affected 22.1 million people, government agencies are established targets of sophisticated hackers, including sophisticated nation state actors. The Bureau consequently must hold itself to the highest standards of data security and protect the information that it gathers if it is going to achieve long-term success in administering the final rule.

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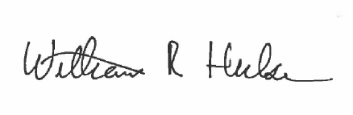
[58] *See generally* Proposal, 86 Fed. Reg. at 56381.
[59] *See* Proposal, 86 Fed. Reg. at 56434.
[60] *See* Proposal, 86 Fed. Reg. at 56512-56540.
[61] *See* Proposal § 1002.110(b).

We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,



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