The CFPB's Small Business Data Collection Proposals: Ten Things To Know

On September 15, 2020, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") released an Outline of Proposals under Consideration and Alternatives Considered for the small business data collection rulemaking mandated by Section 1071 of the Dodd-Frank Act and a High-Level Summary of Outline of Proposals under Consideration for SBREFA: Small Business Lending Data Collection Rulemaking. The Bureau intends to release a proposed rule to implement Section 1071 after receiving public feedback, which is due by December 14, 2020.

Section 1071 amends the Equal Credit Opportunity Act ("ECOA") to require financial institutions to collect certain data regarding applications for credit for women-owned, minority-owned, and small businesses, maintain records of responses, and report the data to the CFPB on an annual basis, in accordance with rules and guidance issued by the CFPB. The Bureau's proposals under Section 1071 have been long-awaited by industry associations, consumer groups, state regulators, Congress, and many other stakeholders, and represent the start of a rigorous and potentially lengthy rulemaking process following several years of research and outreach by the Bureau.

1 Only small business loans would be subject to reporting requirements.

Section 1071 requires financial institutions to inquire whether a loan applicant is a "women-owned, minority-owned, or small business." On its face, Section 1071 could be read to require financial institutions to obtain data on all women- or minority-owned businesses applying for credit, regardless of their size. The Bureau, however, is considering proposing a measured and pragmatic approach that would require data collection and reporting under Section 1071 only for loan applications by small businesses. As a result, loan applications by women- and minority-owned businesses that are not small businesses would not trigger data collection and reporting requirements. The Bureau supports its proposed approach by citing Census Bureau data that "almost all" women- or minority-owned businesses are also small businesses and noting that applying Section 1071 to large businesses would provide limited additional information while impacting all aspects of varied and complex commercial lending operations.

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2 The Bureau is considering several alternative standards for identifying small businesses, including standards based on revenues, receipts, employees, and industry codes.

The Bureau is considering establishing a simplified size standard with approval from the Small Business Administration. Alternative approaches under consideration for a simplified size standard include: (1) gross annual revenue; (2) a hybrid metric of gross annual revenue, average annual receipts, or number of employees; and (3) size standards based on broad, two-digit NAICS industry code categories. All of these standards would exclude non-profit organizations of any size.

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3 A broad range of financial institutions would be covered by the small business data collection rule, subject to certain exemptions based on size and/or activities.

The Bureau is considering a framework that would apply the rule to depository institutions, online lenders/platform lenders, community development financial institutions, equipment and vehicle financing lenders, commercial finance companies, government lending entities, and non-profit, non-depository institution lenders. Additionally, the Bureau is considering imposing the Section 1071 obligation solely on the lender(s) of record when multiple financial institutions are involved in a credit decision, which generally would impose responsibility upon the institution(s) making a final credit decision.

The CFPB also is considering exempting certain financial institutions based on their size, their activities, or some combination of each. Two alternative proposed sized-based exemptions would set asset size thresholds at $100 million or less and $200 million or less, respectively, and would be available only to depository institutions. Activity-based exemptions described in the proposals would set thresholds based on the number of loans a financial institution originates annually or the annual dollar value of such originations, and would be available to all institutions, but the asset size-based exemption would apply only to depository institutions. These alternate approaches to exemptions are likely to generate significant comments from stakeholders regarding, among other things, the maintenance of a level playing field between depository institutions and non-deposit-taking financial institutions.

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4 Data collection and reporting would not apply to certain credit-related activities, such as certain credit renewals and reevaluations, nor to certain products, such as leases, factoring, and trade credit.

Section 1071 requires financial institutions to collect and report "any application to a financial institution for credit." The Bureau is considering a proposal to exclude renewals, extensions, and reevaluations of credit with no additional credit amounts, inquiries and pre-qualifications, and solicitations and firm offers of credit, even if they may be considered "applications" under Regulation B, which implements ECOA. The Bureau considered possible alternatives to the "application" definition, including incorporating Regulation B's definition of a "completed application," or referencing particular documents or specific data points that, if collected, would trigger the institution's duty to collect and report Section 1071 data. The proposal outlined by the CFPB also would exempt consumer-designated credit, leases, factoring, trade credit, and merchant cash advances from the scope of the rule.

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5 Required data collection and reporting would encompass ten data points mandated by statute.

The Bureau anticipates requiring the reporting of the ten statutorily-mandated data points for each applicant: (1) status as a minority- or women-owned small business; (2) application number; (3) application date; (4) type of loan or credit; (5) loan purpose; (6) amount of credit or credit limit applied for (and approved, if applicable); (7) type of action taken and date of action; (8) location by census tract; (9) gross annual revenue of the business; and (10) and race, sex, and ethnicity of principal owner(s).

For certain data points, such as loan type and loan purpose, the Bureau is considering providing lists of possible applicant responses to serve as compliance aids. The Bureau is also considering providing a sample collection form with applicant disclosures. The Bureau's outline lists several options for identifying the location of a business by census tract, including the address where loan proceeds will principally be applied (which may be difficult to ascertain in practice), the location of the applicant's main office or headquarters, or some other business address associated with the application. Finally, the Bureau is considering defining an individual as a "principal owner" if the person owns 25 percent or more of the applicant's equity interests, which is consistent with the customer due diligence rule promulgated by FinCEN.

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6 The Bureau is considering a requirement that institutions report three additional data points not required by statute, including pricing data.

In addition to the ten data points required by statute, the CFPB is considering a proposal to require the collection and reporting of three additional data points: (1) credit pricing; (2) applicant time in business; and (3) applicant NAICS industry code and number of employees. According to the Bureau, the credit pricing data point "could be reported on the basis of annual percentage rate (APR), total cost of credit (TCC), interest rate and total fees, or some other pricing metric." The collection and reporting of credit pricing is likely to be controversial in view of the potential use of such data in fair lending analyses, competitive considerations, and the wide variability of pricing arrangements for small business loans.

7 Financial institutions generally would be permitted to rely on self-reported applicant data and would not be required to verify such data, and unlike the approach taken in HMDA, would not need to collect and report based on visual observation or surname.

The Bureau is considering allowing financial institutions to satisfy the rule's collection and reporting obligations based solely on the applicant's self-reported information, unless the institution verifies the information for other purposes, in which case it would report the verified information. Financial institutions could rely solely on applicant self-reported data points for small-business status, women-owned status, minority-owned status, and the race, sex, and ethnicity of the principal owner(s), among others. If an applicant does not self-report information on women- or minority-owned status or principal owner information, the Bureau does not contemplate requiring institutions to collect and report information based on visual observation or surname. This differs from the consumer data collection provisions under Regulation B and under Regulation C, which implements the Home Mortgage Disclosure Act ("HMDA"). These provisions require the collection and reporting of applicant characteristic data on the basis of visual observation or surname to the extent possible. *See* 12 C.F.R. § 1002.13(b); 12 C.F.R. part 1003, app. B. The Bureau also does not expect to require financial institutions to infer information about the women- or minority-owned status of the business based on the race, sex, or ethnicity of the principal owner(s).

8 The Bureau would publish data collected under Section 1071 after applying a "balancing test" to take into account applicants' privacy interests.

The Bureau contemplates an approach in which financial institutions collect data and report it to the CFPB, which would decide whether to publish the data and the specific form in which it would be published. In publishing Section 1071 data, the Bureau would exclude personally identifiable information, and may also "at its discretion, delete or modify data . . . if the Bureau determines that the deletion or modification of the data would advance a privacy interest." The Bureau would apply a "balancing test" to determine whether disclosure of the data "in unmodified form would pose risks to privacy interests that are not justified by the benefits of public disclosure in light of the statutory purposes of section 1071." When the release of unmodified data would be improper, the Bureau would consider whether modifications to the data would justify its release.

9 Timing considerations may spur stakeholder comments.

The Bureau's outline of proposals notes that although the receipt of an application triggers a financial institution's duty to collect and report applicant data, the language of Section 1071 does not indicate when during the application process data collection must occur. Despite this, the Bureau indicates that it "is not currently considering specifying a particular time period in which [financial institutions] must seek to collect 1071 data from applicants." This flexible approach to the timing of data collection is likely to raise stakeholder questions, as it could impact response rates and the design of a model collection form. The Bureau also is considering allowing institutions to collect data on a calendar year basis and submit it to the Bureau by a specified date after the end of each calendar year and providing a two-year implementation period from the date of the final rule.

10 A federal court settlement may influence future developments in the rulemaking process.

The Section 1071 rulemaking process may be impacted by a February 2020 settlement resolving a lawsuit against the Bureau regarding its delay in promulgating these regulations. Community groups sued the Bureau to compel the issuance of a regulation. The parties reached a settlement governing the timeline of the rulemaking. Under the settlement, the

Bureau must meet and confer with the lawsuit's plaintiffs regarding appropriate timing for future issuance of a Notice of Proposed Rulemaking and of a final rule. The settlement also entitles the plaintiffs to request that the court set key deadlines in the rulemaking, should the parties fail to reach agreement as to timing.

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