

## **FAIR LENDING FOR BUSINESS LOANS READY OR NOT, HERE IT COMES**

The CFPB is finally prepared to begin writing regulations implementing Section 1071 of the Dodd-Frank Act, which could usher in a new regulatory chapter for small business lenders and result in significant new reporting requirements, fair lending examinations and possible enforcement actions.

### **BACKGROUND**

Section 1071 amends the Equal Credit Opportunity Act by requiring “financial institutions” to collect, maintain and report to the CFPB certain data from loan applications submitted by women-owned, minority-owned, and small businesses, including the gender, race, and ethnicity of the owners of these businesses. These requirements will provide the CFPB the tools necessary to conduct examinations focused on potential gender and race-based lending discrimination against these businesses.

Private Lenders who currently file a loan application register with the CFPB as required by the Home Mortgage Disclosure Act (“HMDA”) will find that some (but not all) of the data points required to be collected and reported under the new rules are duplicative of or similar to data fields required under HMDA. However, other Private Lenders who are not currently covered by the HMDA reporting requirements may be required to report data under the new rules implementing Section 1071.

The CFPB has met with industry representatives and small business owners to collect advice and recommendations on how to proceed with its rulemaking process. On September 15, 2020, the CFPB released its long-awaited proposals, which provides guidance on the CFPB’s current thoughts on how it will shape its new regulations to implement Section 1071. On October 15, the CFPB held a Small Business Review Panel to consult with small entities that will likely be regulated under the new rules. On December 15, the CFPB published feedback that it received from small entity representatives and recommendations made by the Panel.

### **OUTLINE OF PROPOSALS FOR NEW REGULATIONS UNDER CONSIDERATION**

Below is a summary of the CFPB’s “Outline of Proposals Under Consideration and Alternatives Considered,” which describes proposals that the CFPB is considering to implement Section 1071. Many of these proposals could change based on feedback received or to be received by the CFPB. However, these proposals are instructive as to the CFPB’s current thinking of how it intends to proceed with its new rulemaking.

#### **What is the Proposed Scope of the New Rules?**

As mentioned above, Section 1071 requires a financial institution that receives a credit application to ask whether the applicant is a women-owned, minority-owned or small business. This can be read to require a financial institution to collect and report data about women-owned and minority-owned businesses that are not “small businesses.”

The CFPB is considering limiting the coverage of its new rules to only those women-owned and minority-owned businesses that are small businesses.

#### **What is the Proposed Definition of a “Financial Institution” to be Covered by the New Rules?**

The CFPB is considering adopting Section 1071’s definition of “financial institution,” which is “any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.”

This broad definition could cover many Private Lenders who make certain loans to small businesses that will be covered by the new rules.

### **What Types of Financial Institutions are Proposed to be Exempt From the New Rules?**

The CFPB is considering using either or both a “size-based” or “activity-based” test to exempt financial institutions from the new rules.

First, the CFPB is considering an asset-based exemption for small banks and other depository institutions. The CFPB asked whether a \$100 million or \$200 million asset exemption level would be appropriate.

Second, the CFPB is considering the following 3 options to exempt all financial institutions (and not just depository institutions) based on their small business lending activity:

- Option 1 Exemption Threshold: originations of at least 25 loans or \$2.5 million
- Option 2 Exemption Threshold: originations of at least 50 loans or \$5 million
- Option 3 Exemption Threshold: originations of at least 100 loans or \$10 million

Finally, the CFPB is considering whether to combine the size- and activity-based approaches for exempting financial institutions.

### **How Does The CFPB Propose to Define a “Small Business” Applicant?**

The CFPB is considering proposing to define “small business” by cross-referencing the SBA’s general definition of “small business concern,” but adopting a simplified size standard for purposes of its new rules. A small business concern is a “for profit” enterprise in the United States that is independently owned and operated and is not dominant in its field of operation. If the CFPB takes this approach, it will ask the Small Business Administration (“SBA”) to approve a simplified size standard for the new rules.

The CFPB is considering 3 options for its size standard:

- Option 1: Gross annual revenue threshold of \$1 million or \$5 million in the prior year.
- Option 2: Maximum of 500 employees for manufacturing and wholesale industries and a maximum of \$8 million in gross annual revenue for all other industries.
- Option 3: Gross annual revenue or the number of employees based on a size standard in each of 13 two-digit NAICS code categories that applies to the largest number of firms within each two-digit NAICS code category. For example, the standard would be \$8 million of gross annual revenues for NAICS code 52-53 (finance and insurance, real estate and rental and leasing).

### **How Does The CFPB Propose to Define “Women-Owned Business?”**

The CFPB proposes to define “women-owned business” in the same manner as Section 1071, which is a business where more than 50 % of the ownership or control is held by one or more women and more than 50 % of the net profit or loss accrues to one or more women.

The CFPB is considering proposing simplified applicant-facing materials to help lenders collect this information. These materials would define “ownership” and “control” of a business, and “accrual of net profit or loss.”

## **How Does The CFPB Propose to Define “Minority-Owned Business?”**

The CFPB proposes to define “minority-owned business” in the same manner as Section 1071, which is a business where more than 50 % of the ownership or control is held by one or more minority individuals and more than 50 % of the net profit or loss accrues to one or more minority individuals.

The CFPB is considering proposing guidance that would clarify that a minority individual is a natural person who is Black or African American, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino. This guidance is the same as the aggregate race categories in HMDA.

The CFPB is considering proposing simplified applicant-facing materials to help lenders collect this information. These materials would define “ownership” and “control” of a business, and “accrual of net profit or loss.”

## **What Kind of Loan Products Does the CFPB Propose to be Covered by the New Rules?**

### Covered Loan Products

The CFPB is considering proposing that covered products under section 1071 include:

- Term loans,
- Lines of credit, and
- Business credit cards.

### Excluded Loan Products

- Consumer credit used for business purposes
  - Covered loans are proposed to be limited to loans designated by a lender as business purpose products. Covered loans would NOT include loans designated by a lender as consumer purpose products that a borrower might use for business purposes.
- Leases
  - The CFPB is considering proposing that leases not be covered under the new rules unless the product is a credit sale.
  - A “credit sale” is a transaction where the lessor is a creditor and the lessee (a) agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and services involved; and (b) will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.
- Trade credit
  - The CFPB is considering proposing that trade credit not be covered by the new rules.
  - Trade credit typically involves a transaction where a seller allows a business to buy the seller’s goods without requiring immediate payment, and the seller is not otherwise in the financial services business.
- Factoring

- The CFPB is considering proposing that factoring not be covered by the new rules
- Factoring is a purchase of an accounts receivable.
- Merchant cash advances
  - The CFPB is considering proposing that merchant cash advances not be covered by the new rules.
  - Under a typical merchant cash advance, a merchant receives a cash advance and promises to repay it (plus some additional amount) by either pledging a percentage of its future revenue (such as its daily credit and debit card receipts) or agreeing to pay a fixed daily withdrawal amount to the merchant cash advance provider until the agreed upon payment amount is satisfied.

### **How Does the CFPB Propose to Define an “Application?”**

Section 1071 requires a financial institution to collect and report certain information relating to an “application” to the financial institution for credit. The receipt of an “application” will trigger the data collection and reporting requirements under the new rules.

The CFPB is considering proposing to generally adopt the existing definition of “application” in Regulation B, which is “an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested.” This definition is intended to be flexible and allow lenders to develop individually tailored requirements on what constitutes an “application” that fits within the context of their specific credit processes.

However, a lender could NOT define an “application” as a “completed application” where the lender has received all the information that the lender regularly obtains and considers” in evaluating similar loan products. This definition could exclude incomplete applications and many withdrawn applications.

The CFPB is considering EXCLUDING from the definition of “application” and exempting from the new data collection and reporting rules:

- Inquiry or prequalification requests, including inquiry and prequalification requests that may be an “application” under Regulation B for purposes of its notification requirements.
- Borrower requests to modify the terms and/or duration of an existing loan or lender-initiated reviews of existing loan extensions. However, the CFPB is considering proposing to require collection and reporting of borrower requests for additional credit amounts (line increases or new money on existing facilities).
- Prescreened solicitations or firm offers of credit unless the applicant responds in a manner that triggers an “application.”

### **What Does the CFPB Propose to do if More Than One Financial Institution Receives the Same Application?**

- The CFPB is considering proposing that where more than one person is involved with a single small business loan or application, the data collection and reporting requirements would be limited to the financial institution making the final credit decision (even if the financial institution used credit standards set by another person).

- If more than one financial institution approves a loan, and the loan is purchased by one of the financial institutions approving the loan, the purchaser would report the loan.
- If an application is not approved and multiple financial institutions received the same application, then any financial institution that made a credit decision must report the application (even if other financial institutions also report the same application).

### **What are the Proposed Data Points That Lenders Would be Required to Collect and Report?**

Section 1071 requires each financial institution to collect and report certain “mandatory data points,” including:

- (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.

Section 1071 also requires financial institutions to collect and report any “discretionary data points” that the CFPB determines would help in fulfilling the purposes of Section 1071. The discretionary data points include pricing, time in business, North American Industry Classification System (NAICS) code, and number of employees.

Private Lenders who currently file a loan application register with the CFPB as required by the Home Mortgage Disclosure Act (“HMDA”) will find that certain of the data points required to be collected and filed under the new rules are duplicative of data fields required under HMDA.

The following page contains a summary of these data fields and related key information:

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Women-Owned Business Status</b>	§ 1071(b)(1): Whether the business is a women-owned business.	Financial institution reports an applicant’s response as to whether it is a women-owned business.	<p>Applicant’s self-reporting of women-owned business status (report one):</p> <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Applicant responded “I do not wish to provide this information” or did not respond.	<p>Self-reporting by applicant only.<sup>1</sup></p> <p>Financial institution is not obligated to verify if the applicant is women-owned.</p> <p>Financial institution will not use visual observation or surname to determine the status of an applicant.</p>
<b>Minority-Owned Business Status</b>	§ 1071(b)(1): Whether the business is a minority-owned business.	Financial institution reports an applicant’s response as to whether it is a minority-owned business.	<p>Applicant’s self-reporting of minority-owned business status (report one):</p> <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Applicant responded “I do not wish to provide this information” or did not respond.	<p>Self-reporting by applicant only.<sup>2</sup></p> <p>Financial institution is not obligated to verify if the applicant is minority-owned.</p> <p>Financial institution will not use visual observation or surname to determine the status of an applicant</p>
<b>Small Business Status</b>	§ 1071(b)(1): Whether the business is a small business	Financial institution reports applicant’s response to certain threshold questions/data points, which will be used to determine small business status and whether other data points should be collected.	<p>Is the applicant in a manufacturing or wholesale industry?</p> <input type="checkbox"/> Yes <input type="checkbox"/> No <p>If yes, does it have fewer than 500 employees?</p> <input type="checkbox"/> Yes <input type="checkbox"/> No <p>If the applicant is not in a manufacturing or wholesale industry, does it have less than \$8 million in gross annual revenue?</p> <input type="checkbox"/> Yes <input type="checkbox"/> No	<p>The specifics of this data point will depend on the definition of “small business.”</p> <p>This is an example based on the second alternative option under consideration.</p>
<b>Application/Loan Number</b>	§ 1071(e)(2)(A): The number of the application	Financial institution reports an alphanumeric application or loan number of no more than 45 characters that is unique, within the financial institution, to the referenced extension (or requested extension) of small business credit and that remains uniform through the application and origination stages of the process.	Unique alphanumeric application or loan number of no more than 45 characters.	<p>Reported as an application number if loan is not originated.</p> <p>Same number reported as a loan number if the loan is originated.</p> <p>CFPB may structure application/loan number to follow HMDA rules.</p>

<sup>1</sup> Please note that the status of a small business as “women-owned” is based on ownership *or* control. The sex data points discussed below apply to principal *owners* only.

<sup>2</sup> Please note that the status of a small business as “minority-owned” is based on ownership *or* control. The race and ethnicity data points discussed below apply to principal *owners* only.

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Application Date</b>	§ 1071(e)(2)(A): . . . and the date on which it was received	Financial institution reports application date using either: 1. The date shown on paper or electronic application form, or 2. The day on which a credit request becomes an “application.”	Date Reported as day, month, and year	Grace period of several days on either side of the date reported to reduce the compliance burden of pinpointing an exact date on which an application is received.
<b>Loan/credit type</b>	§ 1071(e)(2)(B): the . . . type of the loan or other credit being applied for	Financial institution reports loan/credit type in three parts: 1. Loan/credit product chosen from a specified list, 2. Guarantee chosen from a specified list 3. Loan term in number of months	<b>1. Type of Loan/Credit Product</b> <input type="checkbox"/> Term loan - unsecured <input type="checkbox"/> Term loan - secured <input type="checkbox"/> Line of credit - unsecured <input type="checkbox"/> Line of credit - secured <input type="checkbox"/> Business credit card <input type="checkbox"/> Other <input type="checkbox"/> Unknown (for applications) <b>2. Type of Guarantee</b> <input type="checkbox"/> Personal guarantee - owners <input type="checkbox"/> Personal guarantee – non-owners <input type="checkbox"/> SBA guarantee – 7(a) program <input type="checkbox"/> SBA guarantee – 504 program <input type="checkbox"/> SBA guarantee - other <input type="checkbox"/> USDA guarantee <input type="checkbox"/> Other federal guarantee <input type="checkbox"/> State or local government guarantee <input type="checkbox"/> Other guarantee <input type="checkbox"/> No guarantee <input type="checkbox"/> Unknown <b>3. Loan Term (report one, as applicable):</b> <input type="checkbox"/> Number of months <input type="checkbox"/> NA (for products that do not have a loan term - such as credit cards - and for applications that did not specify a loan term)	<b>Application for More Than One Type of Loan</b> If an applicant applies for more than one type of loan, the CFPB is considering whether to propose that: 1. Financial institutions choose up to 3 items from the subcomponent lists for the Loan Type data point if there is only one application and multiple products, guarantees, and/or loan terms were asked for; or 2. Financial institutions report separate applications/originations for each loan type requested or originated. <b>Multiple Guarantees</b> Because a single loan could have multiple guarantees, a financial institution may choose more than one guarantee for a loan that is “originated” or “approved but not accepted.” <b>Loan Product and Loan Term</b> A financial institution would report only one loan product and loan term for a loan that is “originated” or “approved but not accepted.”

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Loan Purpose</b>	§ 1071(e)(2)(B): the . . . purpose of the loan or other credit being applied for	Financial institution reports loan purpose from a specified list.	Loan purpose (choose up to three): <ul style="list-style-type: none"> <li><input type="checkbox"/> Commercial real estate – owner-occupied</li> <li><input type="checkbox"/> Commercial real estate – non-owner occupied (includes investors)</li> <li><input type="checkbox"/> Motor vehicle (including light and heavy trucks)</li> <li><input type="checkbox"/> Equipment</li> <li><input type="checkbox"/> Working capital (includes inventory or floor planning)</li> <li><input type="checkbox"/> Business start-up</li> <li><input type="checkbox"/> Business expansion</li> <li><input type="checkbox"/> Business acquisition</li> <li><input type="checkbox"/> Refinance existing debt</li> <li><input type="checkbox"/> Line increase</li> <li><input type="checkbox"/> Other</li> <li><input type="checkbox"/> Unknown or unreported by applicant</li> </ul>	
<b>Credit Amount/Limit Applied For</b>	§ 1071(e)(2)(C): The amount of the credit or credit limit applied for	Financial institution reports the initial amount of credit or credit limit requested by the applicant at the application stage, or later in the process but prior to the financial institution’s evaluation of the credit request.	Credit amount/credit limit applied for (report one, as applicable): <ul style="list-style-type: none"> <li><input type="checkbox"/> \$ amount for initial amount of credit/credit limit requested by applicant</li> <li><input type="checkbox"/> \$ amount of a “firm offer” (which may occur in connection with a pre-approved credit solicitation) if the application is in response to a firm offer that specifies an amount</li> <li><input type="checkbox"/> \$ amount underwritten (if applicant does not request a particular amount but the financial institution underwrites for a specific amount)</li> <li><input type="checkbox"/> NA (if the product applied for does not involve a specific amount)</li> </ul>	Does not require reporting of amounts discussed before an application is made but would capture the initial amount requested at the application stage or later.  The credit amount/limit applied for would reflect the amount evaluated by the lender in making a credit decision.



Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Credit Amount/Limit Approved</b>	§ 1071(e)(2)(C): The amount of the credit transaction or the credit limit approved	Financial institution reports the credit amount of the credit limit approved, using: <ol style="list-style-type: none"> <li>1. The <b>amount of the originated loan</b> for a closed-end origination;</li> <li>2. The <b>amount approved</b> for a closed-end loan application that is approved but not accepted; and</li> <li>3. The amount of the <b>credit limit approved</b> for open-end products.</li> </ol>	For approved or originated loan only (report one, as applicable): <ul style="list-style-type: none"> <li><input type="checkbox"/> \$ amount of originated loan (if a closed-end origination)</li> <li><input type="checkbox"/> \$ amount approved (if a closed-end application is approved but not accepted)</li> <li><input type="checkbox"/> \$ amount of credit limit approved (for open-end loans/applications, regardless of whether the loan is “originated” or “approved but not accepted”)</li> </ul> Report NA for applications that are: <ul style="list-style-type: none"> <li><input type="checkbox"/> Denied,</li> <li><input type="checkbox"/> Closed for incompleteness, or</li> <li><input type="checkbox"/> Withdrawn by the applicant before a credit decision is made.</li> </ul>	
<b>Action Taken</b>	§ 1071(e)(2)(D): The type of action taken	Financial institution reports one of five actions taken on the application.	Action taken (choose one): <ul style="list-style-type: none"> <li><input type="checkbox"/> Loan originated</li> <li><input type="checkbox"/> Application approved but not accepted</li> <li><input type="checkbox"/> Application denied</li> <li><input type="checkbox"/> Incomplete application (closed or denied)</li> <li><input type="checkbox"/> Application withdrawn by applicant</li> </ul> Actions listed are similar to Regulations B (ECOA) and C (HMDA) actions taken, with simplifying modifications.	<p><i>Loan Originated</i> - Any originated loan or credit, including applications involving counteroffers where the final counteroffer was accepted, and the credit extended.</p> <p><i>Application Approved But Not Accepted</i> - The application was approved, but the loan or credit was not originated.</p> <p><i>Application Denied</i> - The application was denied, or the applicant did not accept the creditor’s counteroffer.</p> <p><i>Incomplete application (closed or denied)</i>—The application was incomplete regarding information that the applicant could provide and the creditor lacked sufficient data for a credit decision. Includes both denials due to incompleteness as well as if a creditor notifies the applicant of the incompleteness and the applicant fails to timely respond.</p> <p><i>Application Withdrawn by Applicant</i> – The applicant withdrew its application before the creditor issued a decision.</p>

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Action Taken Date</b>	§ 1071(e)(2)(D): the date of such action	Financial institution reports the date the action was taken.	Date: Reported as day, month, and year.	
<b>Census Tract (Principal Place of Business)</b>	§ 1071(e)(2)(E): The census tract in which is located the principal place of business	Financial institution reports a geocoded census tract based on an address collected in the application, or during review or origination of the loan.	Geocoded Census Tract Nature of the address used to geocode census tract (report one, as applicable): <input type="checkbox"/> Address where the loan proceeds will principally be applied. <input type="checkbox"/> Location of borrower’s main office or headquarters <input type="checkbox"/> Another business address associated with the application.	Census tract is reported using the following factors in the order shown below: <i>First:</i> the address where the loan proceeds will principally be applied - For example, if a loan is made to buy or improve commercial real estate, the census tract where the real estate is located is reported, or <i>Second,</i> the location of borrower’s main office or headquarters, or <i>Third,</i> another business address associated with the application. Financial institution then specifies which type of address it has used.
<b>Gross Annual Revenue</b>	§ 1071(e)(2)(F): The gross annual revenue in the last fiscal year	Financial institution reports the Gross Annual Revenue of the applicant during the last fiscal year.	Gross Annual Revenue (report one, as applicable): <input type="checkbox"/> If verified, \$ amount of verified Gross Annual Revenue. <input type="checkbox"/> If not verified, \$ amount of Gross Annual Revenue as reported by applicant or otherwise obtained.	
<b>Race of Principal Owners</b>	§ 1071(e)(2)(G): The race of the principal owners of the business	Financial institution reports the applicant’s response regarding the race of principal owner(s).  The CFPB is considering developing a sample collection form to assist industry in collecting this information and to communicate an applicant’s right to refuse to provide such information.  This sample form would also include the definition of principal owner and clarify that it is possible, depending on the factual circumstances, that no one will be identified as a principal owner	<b>Principal Owner 1 (choose one or more):</b> <input type="checkbox"/> American Indian or Alaska Native <input type="checkbox"/> Asian <input type="checkbox"/> Black or African American <input type="checkbox"/> Native Hawaiian or Other Pacific Islander <input type="checkbox"/> White <input type="checkbox"/> Applicant responded “I do not wish to provide this information” or did not respond. <b>Principal Owner 2 (choose one or more):</b> <input type="checkbox"/> [Same as above] <b>Principal Owner 3 (choose one or more):</b> <input type="checkbox"/> [Same as above] <b>Principal Owner 4</b> <input type="checkbox"/> [Same as above]	“Principal owner” is an individual who directly or indirectly, through any contract, arrangement or understanding, relationship or otherwise, owns ≥ 25% of the equity interest of the business. Self-reporting by the applicant only. Financial institution is not obligated to verify the applicant’s race.  If an applicant interacts with a FI in person and does not provide a race, the FI would not report race based on visual observation or surname.  More than one race can be reported for each principal owner.  Aligns with the aggregate HMDA categories.

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Sex of Principal Owners</b>	§ 1071(e)(2)(G): The race of the principal owners of the business	<p>Financial institution reports applicant’s response regarding the sex of principal owner(s).</p> <p>The CFPB is considering developing a sample collection form to assist industry in collecting this information and to communicate an applicant’s right to refuse to provide such information.</p> <p>This sample form would also include the definition of principal owner and clarify that it is possible, depending on the factual circumstances, that no one will be identified as a principal owner</p>	<p>Principal Owner 1 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Male</li> <li><input type="checkbox"/> Female</li> <li><input type="checkbox"/> Applicant chose male and female</li> <li><input type="checkbox"/> Applicant responded “I do not wish to provide this information” or did not respond.</li> </ul> <p>Principal Owner 2 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul> <p>Principal Owner 3 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul> <p>Principal Owner 4</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul>	<p>“Principal owner” is an individual who directly or indirectly, through any contract, arrangement or understanding, relationship or otherwise, owns ≥ 25% of the equity interest of the business.</p> <p>Self-reporting by applicant only.</p> <p>No verification or visual observation/surname analysis.</p>
<b>Ethnicity of Principal Owners</b>	§ 1071(e)(2)(G): The ethnicity of the principal owners of the business	<p>Financial institution reports applicant’s response regarding the ethnicity of principal owner(s).</p> <p>The CFPB is considering developing a sample collection form to assist industry in collecting this information and to communicate an applicant’s right to refuse to provide such information.</p> <p>This sample form would also include the definition of principal owner and clarify that it is possible, depending on the factual circumstances, that no one will be identified as a principal owner</p>	<p>Principal Owner 1 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Hispanic or Latino</li> <li><input type="checkbox"/> Not Hispanic or Latino</li> <li><input type="checkbox"/> Applicant responded “I do not wish to provide this information” or did not respond.</li> </ul> <p>Principal Owner 2 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul> <p>Principal Owner 3 (choose one or more):</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul> <p>Principal Owner 4</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> [Same as above]</li> </ul>	<p>Self-reporting by applicant only.</p> <p>No verification or visual observation/surname analysis.</p> <p>Aligns with aggregate HMDA categories.</p>
<b>NAICS Code</b>	§ 1071(e)(2)(H): Any additional data that the CFPB determines would aid in fulfilling the purposes of [§ 1071]	Financial institution reports the NAICS code for the small business based on information provided by the applicant.	NAICS Code	<p>The SBA’s size standards for small businesses are generally based on average annual receipts or number of employees for each industry based on NAICS code.</p> <p>NAICS Codes are also important for fair lending analysis (allowing separation of dissimilar types of businesses) and assessing community development impacts.</p>

Data Point	Statutory Language	Description	Data Elements to be Reported	Notes
<b>Number of Employees</b>	§ 1071(e)(2)(H): Any additional data that the CFPB determines would aid in fulfilling the purposes of [§ 1071]	Financial institution reports the number of employees of the small business applicant.	Number of Employees (report one, as applicable): <input type="checkbox"/> If verified, verified number of employees. <input type="checkbox"/> If not verified, number of employees reported by applicant or otherwise obtained.	
<b>Time in Business</b>	§ 1071(e)(2)(H): Any additional data that the CFPB determines would aid in fulfilling the purposes of [§ 1071]	Financial institution reports the time in business of the applicant, expressed in years, or months if less than one year.	Time in Business in years, or months if less than 1 year (report one, as applicable): <input type="checkbox"/> If verified, the verified Time in Business <input type="checkbox"/> If not verified, the Time in Business reported by the applicant or otherwise obtained.	Time in business information could help explain differences in underwriting risk among small business applicants and distinguish potentially riskier new businesses from less risky established businesses.  Time in business information could also provide a better measurement of community development effects, in terms of number of start-ups or other relatively new businesses seeking and obtaining financing.
<b>Pricing</b>	§ 1071(e)(2)(H): Any additional data that the CFPB determines would aid in fulfilling the purposes of [§ 1071]	Financial institution reports the pricing of originated credit and credit that is approved but not accepted.	Pricing Information. Reporting metric could be: <input type="checkbox"/> APR. <input type="checkbox"/> Total cost of credit <input type="checkbox"/> Interest rate and total fees <input type="checkbox"/> Some other metric	

## **When During the Application Process Does the CFPB Propose That a Lender Collect the Data Points?**

The CFPB is not currently considering specifying a specific time period in which a financial institution must collect the data points from an applicant.

The CFPB is considering giving a financial institution the discretion and flexibility to time the data collection at a point during the application process that works best for the lender's loan process and relationship with the applicant.

## **Will The CFPB Place a "Firewall" to Shield Sensitive Data From Underwriters?**

Yes.

Section 1071 provides that, where "feasible," loan underwriters or other officers or employees of a financial institution or its affiliates "involved in making any determination concerning an application for credit" may not have access to:

- Women-owned status,
- Minority-owned status,
- Race information,
- Sex information, and
- Ethnicity information.

If a financial institution determines that an underwriter or other person involved in the credit determination should have access to this sensitive information, the financial institution must provide a statutorily required notice to the applicant.

The CFPB is considering proposing that a firewall is not necessary with respect to "small business" status.

The CFPB has not yet determined under what circumstances it would not be "feasible" to limit underwriter and other employee access to this sensitive information.

## **What is the Special Notice That a Lender Must Give to an Applicant When an Underwriter or Other Credit Decision Maker is Granted Access to Sensitive Information?**

If a financial institution determines that an underwriter or employee involved in making a credit decision should have access to this sensitive information, the financial institution must provide a notice that:

- The underwriter and other such persons have been given access to this sensitive information, and
- The financial institution may not discriminate on the basis of this information.

The CFPB is considering developing model disclosures that financial institutions could use to provide this notice. The CFPB is also considering not including language regarding "small business" status.

## **Does The CFPB Propose to Allow an Applicant to Refuse to Provide Sensitive Information?**

Yes.

A financial institution may ask but cannot require an applicant to provide information relating to:

- Women-owned status,

- Minority-owned status,
- Race information,
- Sex information, and
- Ethnicity information.

The CFPB is considering proposing that an applicant’s right to refuse to provide information does not apply to “small business” status.

**Does the CFPB Propose How a Lender Should Collect and Report Data to the CFPB?**

Yes.

The CFPB is considering proposing that data be collected on a calendar year basis and submitted to the CFPB by a specified date following the end of each calendar year.

**Does the CFPB Propose to Protect the Privacy of Applicants and Borrowers?**

Yes.

A financial institution may not include in the data records personally identifiable information about any individual who is, or is connected with, the applicant, including the individual’s:

- name,
- specific address (other than the census tract),
- telephone number,
- electronic mail address

The CFPB is considering prohibiting the inclusion of certain personally identifiable information about any individuals associated with small business applicants or borrowers in the data that a financial institution is required to collect, maintain, and report to the CFPB other than the information specifically required to be collected and reported. This prohibition would not extend to information collected by the FI outside of its specific CFPB data records under Section 1071.

The CFPB is considering proposing to use a “balancing test” that weighs the risks and benefits of public disclosure. Under this approach, data would be modified or deleted if its disclosure in unmodified form would pose risks to privacy interests that are not justified by the benefits of public disclosure in light of the purposes of section 1071. If the risks of disclosing unmodified data outweigh the benefits under the balancing test, the Bureau would determine whether modifications could bring them into balance.

The CFPB is considering proposing to apply the balancing test to the privacy interests of both:

- Small business entity applicants or borrowers with respect to protecting their sensitive commercial information, and
- Individual business owners with respect to protecting sensitive personal information.

**Has the CFPB Proposed Record Retention Requirements?**

Yes.

The CFPB is considering proposing that financial institutions retain their Section 1071 data for at least three years after it is submitted to the CFPB.

## **Would a Lender be Required to Make its Section 1071 Data Available to the Public on Request?**

Yes

## **Will the CFPB Publish Section 1071 Data?**

Yes

Section 1071 data must be made available to a member of the public upon request in the form required by the CFPB. The CFPB is considering proposing to make this data available on the CFPB's website.

## **How Long a Time Period Does the CFPB Propose Giving Lenders to Prepare For and Implement the CFPB's Final Rules?**

Two years.

The CFPB is considering proposing that financial institutions have approximately two calendar years after the CFPB issues its final rules under Section 1071. This is intended to provide time for:

- Loan processing and management vendors to adjust their products and services to help lenders comply with the new Section 1071 requirements, and
- Lenders to update or revise their loan systems and processes to comply with the new Section 1071 requirements.

The CFPB intends to provide guidance in the form of compliance guides and aids; technical specifications and documentation; and by conducting meetings with stakeholders to discuss the rule and implementation issues.

## **REPORT OF SMALL BUSINESS REVIEW PANEL**

On October 15, the CFPB held a Small Business Review Panel to consult with small entities that will likely be regulated under the new rules. On December 15, the CFPB published the following feedback that it received from small entity representatives and recommendations made by the Panel:

### **Possible Expansion of Coverage to Women-Owned and Minority-Owned Businesses That Are Not Small Businesses**

The CFPB proposed in the Outline to impose data collection and reporting requirements only in connection with a Women-Owned or Minority-Owned Business that is also a Small Business. Under this proposal, a lender would not collect or report data for a Women-Owned Business or Minority Owned Business that is not a Small Business.

The Panel recommended that the CFPB continue to explore whether the data collection and reporting requirements should apply to applications for Women-Owned and Minority-Owned Businesses that are not small.

### **Lenders Covered**

As discussed above in the summary of the Outline, the CFPB is exploring exemptions for certain lenders based on certain size and activity standards. The Panel recommended that the CFPB continue to explore these exemption standards.

### **Small Businesses Covered.**

The Panel recommended that the CFPB:

- Adopt a “Small Business” definition that is simple for Small Business applicants to understand and easy for lenders to implement,
- Consult with the SBA officials before issuing proposed rules to determine whether any of the three alternatives for a small business size standard being considered by the CFPB or another alternative should be included in the proposed rules, and
- Continue to explore how information that small lenders collect from Small Business applicants (gross annual revenue, number of employees, and NAICS code) might assist in selecting an alternative for a “small business” standard.

### **Loans Covered**

As discussed above, the CFPB is considering proposing that covered loans include term loans, lines of credit, and business credit cards, and that covered loans would exclude consumer credit used for business purposes, leases, trade credit, factoring and merchant cash advances (MCAs).

The Panel recommended that the CFPB:

- Continue to assess the costs and benefits of covering MCAs, factoring and certain other credit products,
- Include in the CFPB’s proposed rules whether the CFPB intends to cover agricultural and real-estate secured loans in the rule, and
- Continue to explore the potential costs to lenders in connection with reporting consumer credit used for business purposes (products designated by a lender as consumer purpose products) and ask for comments in the proposed rule on how best to define this type of credit if the CFPB determines that this exclusion is appropriate.

### **Implementation**

The Panel recommended that:

- The CFPB ask for comments in its upcoming proposed rule about the sufficiency of a two-year implementation period,
- The CFPB ask for comments in its upcoming proposed rule about which requirements in a final rule might require more or less time to implement, and
- The CFPB comment in its upcoming proposed rule on ways to facilitate implementation for small lenders, particularly those that have no experience with any federal data reporting requirements.

### **POSSIBLE IMPACT OF THE NEW BIDEN ADMINISTRATION ON THE RULEMAKING PROCESS**

President-elect Biden will appoint a new CFPB Director, who will certainly be more closely aligned with the views of consumer advocates than the current Director. The new Director will oversee the proposed and final rules implementing Section 1071. As a result, the proposed and final rules could be less “lender friendly” than the proposals set forth in the Outline.

Further, the National Community Reinvestment Coalition issued a press release citing concerns with some of the CFPB’s approaches in the Outline.



## **WHERE DO PRIVATE LENDERS GO FROM HERE?**

Private Lenders who are not currently reporting HMDA data may still be covered by the new Section 1071 data reporting requirements, in which case they will need to develop new operations and procedures to collect, maintain and record these data points.

Private Lenders who are currently reporting HMDA data and who will also be covered by the new Section 1071 data reporting requirements will need to enhance their current operations and procedures to collect, maintain and record these additional data points.

All Private Lenders who will be covered by the new Section 1071 data reporting requirements should be aware that the CFPB and state regulators can use the data results to conduct fair lending exams and analyze their lending approval and pricing practices from a fair lending perspective. Private Lenders may wish to conduct self-testing prior to the effective date of the final rules.