

September 15, 2020

High-Level Summary of Outline of Proposals Under Consideration for SBREFA: Small Business Lending Data Collection Rulemaking

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1071 of the law amended the Equal Credit Opportunity Act (ECOA) to require financial institutions (FIs) to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses.¹

The Bureau is now in the process of writing regulations to implement section 1071. Under the process established by Congress in the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Bureau is required to consult with representatives of small entities likely to be affected directly by the regulations the Bureau is considering proposing and to obtain feedback on the likely impacts the rules the Bureau is considering would have on small entities.

The Bureau has released an Outline of Proposals Under Consideration and Alternatives Considered (Outline), which is a detailed document that discusses (1) the relevant law, (2) the

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, section 1071, 124 Stat. 1376, 2056 (2010) (section 704B of ECOA was added by section 1071 of the Dodd-Frank Act) (codified at 15 U.S.C. 1691c-2). For ease of reading, this document refers to the provisions of 704B in a shorthand expressed in terms of section 1071. For example, when this document refers to “section 1071(b),” it is employing this shorthand to refer to section 704B(b) of ECOA, which is codified at 15 U.S.C. 1691c-2(b).

regulatory process, (3) the rule proposals the Bureau is considering, and (4) an economic analysis of the potential impacts of the proposals on directly affected small entities.²

This document is intended to help facilitate review of the Outline by providing a high-level summary of just the regulatory provisions the Bureau is considering proposing. This Summary follows the structure of part III of the Outline and identifies where within the Outline more detail can be found.

Scope of the rulemaking (Outline, part III.A)

Section 1071(b) states that “in the case of any application to a financial institution for credit for [a] women-owned, minority-owned, or small business, the financial institution shall—(1) inquire whether the business is a women-owned, minority-owned or small business.” That is, the text of section 1071 may be read to include data collection for all small businesses as well as women-owned and minority-owned businesses that are not small. Most existing businesses are “small business concerns,” as that term is currently defined by the Small Business Act and the Small Business Administration’s (SBA) implementing regulations. It is therefore likely that if the 1071 rule included all small businesses, the rule would cover nearly all women-owned and minority-owned businesses. In light of this, the Bureau is considering proposing that the data collection and reporting requirements of its eventual 1071 rule would apply to any application to an FI for credit by a small business, and that FIs would not be required to collect and report 1071 data for women- and minority-owned businesses that are not “small.”

Covered lenders—definition of “financial institution” (Outline, part III.B)

The Bureau is considering proposing to adopt a general definition of “financial institution” in a manner consistent with section 1071(h)(1), which defines the term “financial institution” as “any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.” Under this proposed definition, the rule’s data collection and reporting requirements may apply to a variety of entities that engage in small business lending, including depository institutions (DIs) (i.e., banks, savings associations, and credit unions), online lenders/platform lenders, community development financial institutions (both DIs and non-DIs), lenders involved in equipment and

² The Outline is available at https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf.

vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and non-profit, non-DI lenders. The Bureau is also considering proposals, in light of section 1071's statutory purposes, to exempt FIs from any collection and reporting requirements based on either or both a size-based and/or activity-based threshold.

Covered applicants—definitions of “small business,” “women-owned business,” “minority-owned business,” and “minority individual” (Outline, parts III.C & D)

Section 1071 defines the term “small business” by reference to the Small Business Act's definition of “small business concern” in 15 U.S.C. 632. That Act provides a general definition of a “small business concern,” authorizes SBA to establish detailed size standards for use by all agencies, and permits an agency to request SBA approval for a size standard specific to an agency's program. The Bureau is considering adopting a simplified size standard for purposes of its section 1071 rule. Consistent with the statutory requirements, the Bureau will seek SBA approval for a simplified size standard if it ultimately decides to take this approach. The Bureau understands that implementing this approach will necessitate close coordination with, and approval from, the SBA.

The Bureau is considering clarifying the terms “women-owned business” and “minority-owned business” in line with the definitions of those terms provided in section 1071(h)(5) and (6), and to clarify the categories of “minority individual” (used in the definition of “minority-owned business”) to mirror the aggregate categories used under the Home Mortgage Disclosure Act.

Covered products—definition of “credit” (Outline, part III.E)

Section 1071 requires FIs to collect and report information regarding any application for “credit” made by women-owned, minority-owned, and small businesses. ECOA and Regulation B define “credit” as “the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.” Products that meet the definition of “credit” under ECOA and are not otherwise excluded from collection and reporting requirements will be covered products under section 1071. Specifically, the Bureau is considering proposing that covered products under section 1071 include term loans, lines of credit, business credit cards. The Bureau is also considering proposing that the following products not be covered by the 1071 rule: consumer-designated credit, leases, factoring, trade credit, and merchant cash advances.

Definition of “application” (Outline, part III.F)

Section 1071(b) requires that FIs collect, maintain, and report to the Bureau certain information regarding “any application to a financial institution for credit.” For covered FIs with respect to covered products, the definition of “application” will trigger data collection and reporting under section 1071. The Bureau is considering defining an “application” largely consistent with the Regulation B definition of that term—i.e., “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.”

The Bureau is considering clarifying circumstances that would not be reportable under section 1071, even if certain of these circumstances are considered an “application” under Regulation B, including (1) inquiries/prequalifications; (2) reevaluation, extension, and renewal requests, except requests for additional credit amounts; and (3) solicitations and firm offers of credit.

Data points (Outline, part III.G)

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

Discretionary data points. Section 1071(e)(2)(H) requires FIs to collect and report “any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071].” The Bureau is considering requiring the reporting of the following “discretionary data points”: pricing, time in business, North American Industry Classification System (NAICS) code, and number of employees.

Timing of data collection. Although the definition of “application” triggers a covered FI’s duty to collect 1071 data, the statute does not provide further direction on when during the application process information should be collected. The Bureau is considering not specifying a particular time period during the application process when FIs must collect 1071 data from applicants.

Shielding data from underwriters and other persons (firewall) (Outline, part III.H)

Under section 1071(d)(1), where feasible, underwriters or others at an FI or affiliate involved in making any determination concerning an application for credit cannot access “any information provided by the applicant pursuant to a request under subsection (b).” Under section 1071(d)(2), if an FI finds that an underwriter or others involved in making a determination regarding an application “should have access” to such information, the FI must provide the applicant a notice of “the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.”

The Bureau is considering proposing that FIs need only limit the access of a loan underwriter or other person to an applicant’s responses to inquiries regarding women-owned and minority-owned business status under section 1071(b), as well as the race, sex, and ethnicity of principal owners. The Bureau is further considering proposing that an applicant’s response regarding small business status need not be firewalled off pursuant to section 1071(d)(1).

The Bureau is considering developing model disclosures that FIs could use when providing the notice under section 1071(d)(2), which requires FIs to notify applicants of an underwriter’s access to women-owned and minority-owned business status and the race, sex, and ethnicity of principal owners. The Bureau is also considering proposing that the notice under section 1071(d)(2) need not include language regarding small business status.

Applicants’ right to refuse to provide certain information (Outline, part III.I)

The Bureau is considering proposing that the right of an applicant under section 1071(c) to refuse to provide certain information applies to the FI’s specific inquiries regarding women-owned and minority-owned business status in 1071(b), as well as the race, sex, and ethnicity of principal owners, but not to the FI’s specific inquiry regarding small business status in 1071(b).

Compiling, maintaining, and reporting 1071 data to the Bureau (Outline, part III.J)

The Bureau is considering proposing that 1071 data collection be done on a calendar-year basis, and submitted to the Bureau by a specified time after the end of each calendar year. In accordance with section 1071(e)(3), the Bureau is also considering proposing a prohibition on including certain personally-identifiable information about any individuals associated with small business applicants or borrowers in the data that an FI is required to compile, maintain, and report to the

Bureau, other than information specifically required to be collected and reported (such as the race, sex, and ethnicity of principal owners). Further, the Bureau is considering proposing that FIs retain 1071 data for at least three years after it is submitted to the Bureau.

Privacy considerations involving Bureau publication of 1071 data (Outline, part III.K)

The Bureau is examining the privacy implications of FIs' collection, reporting, and disclosure of information pursuant to section 1071 and the Bureau's public release of the data. For purposes of determining whether and how the Bureau might use its discretion to modify or delete data prior to publication, the Bureau is considering using 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 statutory 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.

Implementation period (Outline, part III.L)

Section 1071 does not specify an implementation period, though pursuant to section 1071(f)(1) FIs must submit 1071 data to the Bureau on an annual basis. The Bureau is considering proposing that FIs have approximately two calendar years for implementation following the Bureau's issuance of its eventual 1071 rule.

Additional resources and submitting feedback

A compilation of the Bureau's section 1071-related publications and resources can be found at <https://www.consumerfinance.gov/1071-rule/>.

Stakeholders are welcome to provide written feedback on the Bureau's proposals under consideration. The Bureau requests written feedback from small entity representatives (SERs) by November 9, 2020 in order to be considered and incorporated into the SBREFA Panel's Report. The Bureau requests that other stakeholders wanting to provide feedback do so no later than December 14, 2020. Detailed information on how to submit written feedback can be found in part II of the Outline.