

September 1, 2021

Summary of Proposed Rulemaking: September 2021 Proposal Regarding Small Business Lending Data Collection

On September 1, 2021, the Consumer Financial Protection Bureau (Bureau) issued a notice of proposed rulemaking (NPRM) inviting the public to comment on its proposal to implement the small business lending data collection requirements set forth in section 1071 of the Dodd-Frank Act (Section 1071). The Bureau is proposing to add a new subpart B to Regulation B to implement Section 1071's requirements. Some background information and a summary of key aspects of the Bureau's NPRM are provided below.

The NPRM, which includes information on submitting comments, is available at <https://www.consumerfinance.gov/1071-rule>. The NPRM has a comment period of 90 days following publication in the *Federal Register*.

Background

Section 1071 amended the Equal Credit Opportunity Act (ECOA) to require that financial institutions collect and report to the Bureau certain data regarding certain business credit applications. Section 1071's purposes are to facilitate enforcement of fair lending laws and to enable the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.

Section 1071 specifies several data points that financial institutions are required to collect and provides authority for the Bureau to require collection of additional data that the Bureau determines would aid in fulfilling Section 1071's purposes. Section 1071 also contains a number of other requirements regarding information collected pursuant to Section 1071, including a requirement that financial institutions restrict certain persons' access to certain information, requirements regarding maintaining certain information, and requirements regarding publication of data.

Section 1071 also directs the Bureau to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to Section 1071. It permits the Bureau to adopt exceptions and exemptions to Section 1071's requirements as the Bureau deems necessary or appropriate to carry out Section 1071's purposes.

Covered Financial Institutions

The Bureau is proposing to apply the Section 1071 requirements to “covered financial institutions.” A “covered financial institution” would be a “financial institution” that satisfies an origination threshold. For this purpose, a “financial institution” would be any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. A financial institution would satisfy the origination threshold, and thus be a covered financial institution, if it originated¹ at least 25 credit transactions that would be “covered credit transactions” to “small businesses” in each of the two preceding calendar years. The proposed definitions for the terms “covered credit transaction” and “small business” are discussed below.

Under this definition, the requirements would apply to a variety of entities that engage in small business lending as long as they satisfy the origination threshold, including depository institutions (*i.e.*, banks, savings associations, and credit unions), online lenders, platform lenders, community development financial institutions, lenders involved in equipment and vehicle financing, commercial finance companies, governmental lending entities, and nonprofit lenders.

The Bureau is also proposing to permit creditors that are not covered financial institutions to voluntarily collect and report data under Section 1071 in certain circumstances.

Covered Applications, Covered Credit Transactions, and Small Businesses

The Bureau is proposing that covered financial institutions collect and report data regarding covered applications from small businesses. Covered financial institutions would also need to meet other requirements regarding covered applications from small businesses.

¹ If more than one financial institution was involved in the origination of a credit transaction, only the financial institution that made the final credit decision approving the application before closing or account opening would count the transaction for purposes of meeting the origination threshold for coverage.

The Bureau is proposing to define “small business” by reference to the definitions of “business concern” and “small business concern” as set out in the Small Business Act and Small Business Administration (SBA) regulations. However, in lieu of using the SBA’s size standards for defining a small business concern, the Bureau’s proposed definition would look to whether the business had \$5 million or less in gross annual revenue for its preceding fiscal year. The Bureau is seeking SBA approval for this alternate small business size standard pursuant to the Small Business Act.

A covered financial institution would be required to collect and report data and satisfy other requirements pursuant to the NPRM for applications that are “covered applications” from small businesses. The Bureau is proposing to define a “covered application” as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. While this proposed definition of covered application is largely consistent with the existing Regulation B definition of “application,” the Bureau is also proposing that certain circumstances would not be covered applications, even if they are considered applications under existing Regulation B. Specifically, the Bureau is proposing that a covered application would not include:

- Reevaluation requests, extension requests, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts;² or
- Inquiries and prequalification requests.

The Bureau is proposing to define a “covered credit transaction” as a transaction that meets the definition of business credit under existing Regulation B. Covered credit transactions would include, among other things, loans, lines of credit, credit cards, and merchant cash advances (including such credit transactions for agricultural-purposes and those that are also covered by the Home Mortgage Disclosure Act of 1975 (HMDA)³). However, the following would not be covered credit transactions even if they satisfy the definition of business credit:

- Financing arrangements wherein a business acquires goods or services from another business without making immediate payment to the business providing the goods or services (*i.e.*, trade credit);
- Public utilities credit as defined in Regulation B, 12 CFR 1002.3(a)(1);

² A request for additional funds or to increase a credit limit on an existing line of credit could be a covered application.

³ 12 U.S.C. 2801 *et seq.*

- Securities credit as defined in Regulation B, 12 CFR 1002.3(b)(1); and
- Incidental credit as defined in Regulation B, 12 CFR 1002.3(c)(1), but without regard to whether the credit is consumer credit, is extended by a creditor, or is extended to a consumer.

In addition to the transactions listed above, factoring, leases, consumer-designated credit used for business purposes, and credit secured by certain investment properties would not be covered credit transactions.

Proposed Requirements to Collect and Report Data

Pursuant to the NPRM, a covered financial institution would be required to collect and report certain data regarding covered applications from small businesses.

First, the NPRM includes data points that financial institutions would generate or provide. These data points include a unique identifier for each covered application or covered credit transaction, an application date, the application method (*i.e.*, the means by which the applicant submitted its application), the application recipient (indicating whether the application was received directly or indirectly via an unaffiliated third party), the action taken by the financial institution on the application, and the action taken date. For denied applications only, there would be a data point for denial reasons. For applications that are originated or approved but not accepted, there would be data points for the amount originated or approved and for pricing information. The pricing information would include, as applicable, information regarding interest rate, total origination charges, broker fees, initial annual charges, additional cost for merchant cash advances or other sales-based financing, and prepayment penalties.

Second, the NPRM includes data points that could be provided by the applicant or that a financial institution could determine by reviewing information provided by the applicant or a third party. These data points include information specifically related to the credit being applied for (*i.e.*, credit type; credit purpose; and the amount applied for), and information related to the applicant's business (*i.e.*, a census tract based on an address or location provided by the applicant; gross annual revenue for the applicant's preceding fiscal year; the six-digit North American Industry Classification System (NAICS) code appropriate for the applicant; the number of the applicant's

non-owner workers; the applicant's time in business; and the number of the applicant's principal owners⁴).

Third, there are data points that address the demographics of the applicant's principal owners or ownership status. Generally, a financial institution would be required to ask an applicant to provide this information. These data points would include minority-owned business status, women-owned business status, and the ethnicity, race, and sex of the applicant's principal owners. If an applicant does not provide any ethnicity, race, or sex information for at least one principal owner, the Bureau is proposing that the financial institution must collect at least one principal owner's race and ethnicity (but not sex) via visual observation and/or surname if the financial institution meets in person with any principal owners (including meeting via electronic media with an enabled video component). Minority-owned business status and women-owned business status would only be reported on the basis of information the applicant provides specifically for Section 1071 purposes, and financial institutions would not be permitted or required to report these data points based on visual observation, surname, or any other basis.

The Bureau is proposing detailed instructions for financial institutions regarding how to collect and report minority-owned business status, women-owned business status, and principal owners' ethnicity, race, and sex pursuant to Section 1071. The NPRM also includes a sample data collection form, which includes a notice to applicants that the financial institution is not permitted to discriminate on the basis of an applicant's minority-owned business status, women-owned business status, or on any principal owner's ethnicity, race, or sex. Covered financial institutions would be required to provide this non-discrimination notice to applicants. The sample data collection form also includes a notice informing an applicant it is not required to provide a response to the financial institution's inquiries regarding minority-owned business status, women-owned business status, and the principal owners' ethnicity, race, and sex.

As illustrated in the proposed sample data collection form, the Bureau is proposing that principal owners' ethnicity and race be collected from applicants using aggregate categories and disaggregated subcategories. The Bureau is proposing to permit principal owners to self-describe their sex (instead of or in addition to choosing male or female) and is seeking comment on

⁴ The NPRM proposes to define "principal owner" as a natural person who directly owns 25 percent or more of the equity interests of a business. Thus, under the proposed definition, an applicant would have no more than four principal owners and may not have any principal owners if no natural person directly owns 25 percent or more of the equity interests of the business.

whether and how the collection of principal owners' sex should incorporate sexual orientation and gender identity.

The Bureau is proposing that covered financial institutions maintain procedures to collect applicant-provided data at a time and in a manner that is reasonably designed to obtain a response. The NPRM also addresses how financial institutions should report certain data if, despite having such procedures in place, they are unable to obtain that data from an applicant. In addition, financial institutions would be permitted to rely on statements made by an applicant (whether in writing or orally) or information provided by an applicant when collecting and reporting data, but a financial institution may be required to report verified information if the financial institution chooses to verify information. However, financial institutions would not be required or permitted to verify an applicant's responses to the Section 1071 inquiries regarding the applicant's minority-owned business status or women-owned business status, or regarding a principal owner's ethnicity, race, or sex.

The NPRM would also permit the reuse of certain previously collected data in certain circumstances. A covered financial institution would be permitted, but not required, to reuse previously collected data to satisfy the requirement to collect and report certain data points if: (1) the data were collected within the same calendar year as the current covered application; and (2) the financial institution has no reason to believe the data are inaccurate.

Proposed Requirements to Report Data to the Bureau and Provisions Regarding Availability and Publication of Data

The Bureau is proposing that covered financial institutions be required to collect data on a calendar-year basis and report their data to the Bureau by June 1 of the following year. Financial institutions submitting data to the Bureau would be required to provide certain identifying information about themselves as part of their submission. The Bureau is proposing to provide technical instructions for the submission of data in a *Filing Instructions Guide* and related materials.

The Bureau is proposing to make the data submitted by financial institutions (subject to certain modifications or deletions the Bureau determines would advance a privacy interest) available to the public on an annual basis. To determine whether and how the Bureau might use its discretion to modify or delete data prior to publication, the Bureau is proposing a "balancing test" that would assess the risks and benefits of public disclosure. After the Bureau receives at least one full year of 1071 data following the compliance date of the final rule, the Bureau plans to issue a policy statement in which it would set forth its intended modifications and deletions. The Bureau is also

proposing that the Bureau’s publication of data will satisfy financial institutions’ statutory obligation to make data available to the public upon request. More specifically, a covered financial institution would be required to make available to the public on its website, or otherwise upon request, a statement that the covered financial institution’s small business lending application register, as modified by the Bureau, is or will be available on the Bureau’s website. The NPRM includes language that a financial institution could use for this statement.

Proposed Requirement to Limit Certain Persons’ Access to Certain Data

The NPRM proposes to implement the requirement in Section 1071 that financial institutions limit certain employees’ and officers’ access to certain data. The Bureau refers to this as the “firewall.” Pursuant to the proposed firewall provisions, an employee or officer of a covered financial institution or a covered financial institution’s affiliate would be prohibited from accessing an applicant’s responses to inquiries that the covered financial institution makes pursuant to Section 1071 regarding whether the applicant is a minority-owned business or a women-owned business and regarding the ethnicity, race, and sex of the applicant’s principal owners, if that employee or officer is involved in making any determination concerning the applicant’s covered application.

This prohibition would not apply to an employee or officer if the covered financial institution determines that it is not feasible to limit that employee’s or officer’s access to an applicant’s response to the covered financial institution’s Section 1071 inquiries regarding whether the applicant is a minority-owned business or a women-owned business or regarding the ethnicity, race, or sex of the applicant’s principal owners, and the covered financial institution provides a notice to the applicant regarding that access. It would not be feasible to limit access if the covered financial institution determines that an employee or officer involved in making any determination concerning a covered application should have access to one or more applicants’ responses to these inquiries. The Bureau is proposing sample language that a covered financial institution could use to satisfy the proposed notice requirement. The notice would need to be provided to each applicant whose information will be accessed or, alternatively, the covered financial institution would be permitted to provide the notice to a broader group of applicants, up to and including all applicants.

Proposed Recordkeeping Requirements, Proposed Effective and Compliance Dates, and Other Provisions

The NPRM addresses issues related to recordkeeping, including a proposed requirement to retain evidence of compliance, including a copy of small business lending application registers, for at

least three years. It also includes a proposed requirement to maintain an applicant's responses to the Section 1071 inquiries regarding whether an applicant is a minority-owned business or a women-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners, separate from the rest of the application and accompanying information.

The NPRM also includes proposed provisions regarding enforcement of violations, bona fide errors, and safe harbors. It proposes safe harbors for certain incorrect entries of census tracts, NAICS codes, and application dates. It also proposes a safe harbor regarding incorrect determinations of small business status. Specifically, it proposes that if a financial institution initially determines that an applicant for a covered credit transaction is a small business, but then later concludes the applicant is not a small business, the financial institution would not be in violation of ECOA or a final rule implementing Section 1071 if the financial institution collected information regarding whether the applicant is a minority-owned business or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. The financial institution would need to comply with certain provisions of the final rule in order to rely on this safe harbor.

Finally, the Bureau is proposing that its final rule to implement Section 1071 would become effective 90 days after that final rule's publication in the *Federal Register*. However, compliance with the final rule would not be required until approximately 18 months after publication in the *Federal Register*. The Bureau is also proposing a transitional provision that would permit financial institutions to begin collecting minority-owned business status, women-owned business status, and principal owners' ethnicity, race, and sex information prior to the compliance date and a transitional provision that would permit financial institutions to use either the two calendar years immediately preceding the effective date or the second and third years preceding the compliance date to determine coverage (*i.e.*, if the compliance date is in 2025, a financial institution could use either 2023 and 2024 to determine if it meets the origination threshold for covered financial institutions or it could use 2022 and 2023 to make that determination).

Additional Resources

The Bureau has released a chart of proposed data points and an unofficial table of contents for the NPRM. They are available at <https://www.consumerfinance.gov/1071-rule>.