Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Request for Information Regarding the Small Business Lending Market (Docket No.: CFPB-2017-0011)

Dear Ms. Jackson:

The American Financial Services Association (AFSA)[1] is pleased to respond to the Consumer Financial Protection Bureau's (CFPB) request for information regarding the small business lending market (RFI) and to help inform the CFPB's work on the business lending data collection rulemaking to implement Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 1071 amends the Equal Credit Opportunity Act (ECOA) to require financial institutions to compile, maintain, and report information concerning credit applications made by women-owned, minority-owned, and small businesses.

At the outset, AFSA emphasizes four key points. First, AFSA supports the CFPB's focus on small businesses in the development of the business lending data collection implementing rule (the "Rule"). As the RFI states, "[u]nder nearly any definition of 'small business,' a substantial percentage of women-owned and minority-owned businesses would be covered."[2] In collecting data on small businesses, the CFPB will obtain information on many of the women-owned and minority-owned businesses. As detailed in the body of this response letter, collecting and reporting the data points specified in Section 1071 (the "Data Points") for small businesses alone will be a significant undertaking for financial institutions, requiring extensive system and process changes. Requiring financial institutions to collect and report the Data Points for all women-owned and minority-owned businesses separate from and in addition to the obligation to report such information on small businesses would impose increased burdens on financial institutions without adding value. Thus, it is appropriate for the CFPB to focus on small business data collection, as opposed to imposing the considerable additional obligations that would be necessary if financial institutions were required to report information concerning credit applications made by all women-owned and minority-owned businesses, including large and possibly even publicly-held businesses, as well as small businesses.

Second, AFSA stresses that the Rule should require financial institutions to collect and report the Data Points only from applicants that self-identify as business entities at the time of application and that also meet the small business definition. For example, if a credit applicant self-identifies as an individual consumer, or self-identifies as a business but does not meet the definition of a

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.
[2] 82 FR 22319

small business under the Rule, the financial institution should not be required to collect or submit any Data Points on that applicant. Section 1071 does not permit collection of Data Points from individuals or businesses that are not small businesses—in fact, ECOA actually prohibits the collection of such information.[3] To facilitate compliance with ECOA and satisfy the purpose of Section 1071, the Rule should clarify that financial institutions should collect and report the Data Points only from applicants meeting the small business definition on the face of their applications.

Third, financial institutions should be able to rely on the information submitted by the applicant in its request for credit and should not be subject to any independent verification requirements regarding the information. If the applicant indicates that she is an individual, or that the financing is primarily for personal, family, or household purposes, the financial institution must be able to rely on that designation and not collect the Data Points. Similarly, if the applicant identifies as a business entity and the entity meets the small business definition, the financial institution must be able to rely on that designation and submit the Data Points regarding that application. In part, this is because there are no databases or other mechanisms by which financial institutions can independently verify whether an applicant is a small business. Requiring financial institutions to try to validate information submitted by applicants to determine whether the applicant is a small business will dramatically slow down the credit process and hinder access to credit.

Fourth, as explained in more detail in the response to Question 1, the Rule should define "small business" using a gross annual revenue threshold with the determination made based on the revenue information provided in an applicant's request for credit. Many, if not all, financial institutions ask for revenue information during the credit application process because it is relevant to the applicant's creditworthiness, particularly the ability to repay the debt. Moreover, applicants likely expect financial institutions to request revenue information and are prepared to provide that information during the application process. If applicants have the information on hand when applying for credit, the determination as to whether the applicant is a small business subject to data collection under the Rule can be made early in the application process and the Data Points can be collected at that time.

AFSA will expand on these points and others in response to the questions below. In the RFI, the CFPB asks a series of questions in five different categories: (1) Small Business Definition; (2) Data Points; (3) Financial Institutions Engaged in Business Lending; (4) Access to Credit and Financial Products Offered to Businesses; and (5) Privacy. In this letter, AFSA will answer the questions that affect its membership.

I. Small Business Definition

1. What potential challenges and burdens would financial institutions or applicants encounter if a business lending data collection rule defined a "small business" applicant using the SBA's NAICS-specific size regulations?

Defining a "small business" using the Small Business Administration's (SBA) NAICS-specific size regulations (the "NAICS Regulations") would be overly burdensome for applicants and very difficult to administer for financial institutions. To obtain credit, an applicant would need be aware

[3] 12 C.F.R. § 1002.5(b)

of and understand the NAICS Regulations, determine within which category the applicant falls, and decide whether the applicant is a small business based on the applicable threshold (number of employees or average annual receipts). The Table of Small Business Size Standards[4] (the "NAICS Size Standards") is almost 50 pages long and includes hundreds of categories with varying thresholds for determining if an entity is a small business. If an entity has not had reason to review the NAICS Size Standards (e.g., the entity does not bid for government contracts or receive certain government loans), trying to learn and understand them would be a daunting task. In fact, if small businesses are required to know and provide information on where they fall within the NAICS Size Standards, the effect may be the opposite of what Dodd-Frank hopes to accomplish. Instead of ensuring access to credit for small businesses, these businesses may shy away from obtaining credit because they are not familiar with the NAICS Size Standards and do not have the internal resources or means to retain external resources to perform the analysis.

The large number of categories and varying thresholds in the NAICS Size Standards would likely lead to inconsistent application and, in turn, inconsistent data reporting under the Rule. Under the NAICS Size Standards, there is a unique threshold for each industry used to determine if a business within the industry is a small business. This means that two businesses with the same number of employees and same average annual receipts but different NAICS categories could be classified differently—one as a small business and the other not as a small business. Also, businesses may wrongly classify themselves and thus provide the Data Points when they should not do so, or not provide the data when they should. Inconsistent application is contrary to the purpose of Section 1071, in part which is to facilitate enforcement of fair lending laws. The CFPB would not be able to rely on or use the reported data in the aggregate for analysis or otherwise because it would be impossible to know whether the NAICS Size Standards were applied accurately.

Rather than using the NAICS Regulations, which are lengthy, complex, and use varying thresholds for determining whether a business is a small business, AFSA recommends that the CFPB use one bright-line threshold that is easy to apply. A simple gross revenue test based on the entity's previous year's revenue would be easy to apply because revenue (also referred to as "income") is often part of the application process today and would not require reference to or analysis using third-party documents (e.g., the NAICS Size Standards) or additional steps. Gross revenue is also one of the Data Points that financial institutions must submit to the CPFB under Section 1071. Applicants will likely have revenue information for the previous year on hand to provide during the application process, but may not have information beyond the previous year's revenue readily available. Using the gross revenue test, the CFPB could use the Community Reinvestment Act's (CRA) definition of small business; businesses with gross annual revenues of $1 million or less. The CRA definition coincides with the threshold used under the ECOA (the law amended by the Dodd-Frank Act) for the adverse action notifications required for business credit applicants.[5] Thus, using a test of gross annual revenue of $1 million or less would be internally consistent with other provisions of ECOA and with the CRA.

[4] U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes.* Jan. 1, 2012. Available at https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf

[5] 12 C.F.R. § 1002.9(a)(3)

Some may ask how to apply a gross annual revenue test to new businesses. We ask that the CFPB specify in the Rule that in a "buy/sell" situation where an applicant was involved in an asset sale in the previous year, the new entity's gross annual revenue should not be assessed at zero, but at the level of the previous owner's revenue the previous year. Otherwise, it is possible that large businesses will fall within the small business definition because they do not have income from the prior year. This approach is consistent with the approach in at least one large industry, as financial institutions often base credit decisions for dealerships involved in changes of ownership on the previous owner's gross annual revenue.

Furthermore, using a gross revenue test of $1 million or less to identify small businesses would cover the overwhelming majority of small businesses, minority-owned businesses and women-owned businesses. The RFI states "… a definition of small business as businesses with annual revenue of $1 million or less covers approximately 95% of all firms, over 97% of all minority-owned firms, and over 98% of all women-owned firms."[6] Conversely, using a definition that includes businesses with annual revenues of over $1 million would change the Rule from a "small business" rule to an "every business" rule.

AFSA recommends against using a definition based on number of employees, primarily because that number may not be representative of the size of the business. The number of employees necessary to run a business can vary based on industry. In addition, having different employee volume thresholds for different industries would be overly burdensome to apply for both applicants and financial institutions. Capturing the number of employees adds an unnecessary level of complexity by requiring the business to determine who is an employee (temporary workers, agency employees, part-timers, etc.). Businesses likely do not bring information on the number of employees with them when applying for credit (e.g., the entity likely would not bring that information to a dealership when purchasing a vehicle), and financial institutions do not capture information on the number of employees as it is not relevant to making a credit decision. Requiring applicants to provide information on how many employees they have would slow the credit approval process and hinder access to credit. It is also important to note that it is likely that original creditors involved in indirect lending will push back greatly on increased requests in the credit application process—especially requests for information not relevant to creditworthiness or otherwise required to be submitted under Section 1071. Therefore, instead of using a definition based on the number of employees, the preferred measure is gross annual revenue.

> *2. What definitions of "small business" do financial institutions currently use internally or for external reporting purposes?*
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>> *a. What factors are used to define a "small business" (such as revenue of the business applicant)? If more than one factor is used, are those factors considered individually or in combination?*
>> *b. What minimum or maximum thresholds are used to define a "small business"?*
>> *c. Are certain types of small businesses excluded or treated differently under the definitions?*
>> *d. Do the definitions take into account entities that are related to the small business applicant (such as parents, subsidiaries, affiliates, etc.)?*

[6] 82 FR 22319

Many nonbank financial institutions do not use a definition of "small business" for internal purposes or external reporting purposes. Banks generally use the CRA definition of a small business.

II. Data Points

3. What data standards regarding information on small business financing are financial institutions currently subject to or using? Data standards are rules by which data is described and recorded using standardized formats and meanings for purposes such as sharing, exchanging and analyzing data. Examples could include governmental reporting or recordkeeping requirements, as well as standards associated with credit bureaus, data repositories, trade associations, accounting standards, or securitization or guarantee programs.

a. What information is being collected, reported, or disclosed using these data standards?
b. Are these data standards applicable at the loan level, on an aggregate basis, or some combination of the two?

Nonbank financial institutions neither collect nor report data on small business financing. Banks do so in connection with the CRA.

4. What information concerning the data points specifically identified for reporting under section 1071 by Congress[7] do financial institutions collect and maintain in the ordinary course of business concerning their small business lending?

Financial institutions, particularly nonbanks, currently collect very few of the Data Points required by Section 1071 in the ordinary course of business. (See the Appendix for an explanation of the indirect auto financing originations process for one captive automotive finance company.) Collecting, maintaining, limiting access to, and reporting this information will require development of new systems and significant changes to existing systems and processes. The cost of these new systems and changes to existing systems and processes will likely be in the multi-millions of dollars for even a small financial institution. Below is a more detailed explanation of what information financial institutions collect.

[7] The data points identified for reporting under section 1071 include:

- Application number;
- application date;
- type and purpose of the financing;
- amount applied for;
- amount approved;
- type of action taken and action taken date;
- census tract of the principal place of business;
- gross annual revenue in the last fiscal year of the applicant preceding the date of the application; and
- information about the race, sex, and ethnicity of the business principal owners.

- **Application number and date**: Some nonbank financial institutions assign offering numbers and capture the date the credit application is received by them as the offering date (as opposed to the date the applicant completed the application). Other financial institutions do not assign application numbers.

- **Type and purpose of financing**: Financial institutions receive limited information on the type and purpose of financing from the applicant. Indirect automotive finance companies know from the credit offering whether an applicant is seeking to finance a purchase or a lease and for what vehicle. Different financial institutions collect different information about the "purpose" of the credit. Some financial institutions may only ask the applicant to designate whether the credit requested is for "personal, family, or household use" or "business, commercial, or agricultural use." The purpose is a factor in determining whether the applicant is eligible for special programs of the finance company and determines the scoring model that is used for the applicant. In some cases, the "purpose" is a field on the credit application and/or the contract but may not be tracked as a unique field in the finance company's system of record.

  Additionally, sometimes an application may be submitted for business credit and ultimately underwritten by the finance company as personal use and vice versa. AFSA recommends the Rule require financial institutions to submit the Data Points on applications submitted for business credit by entities meeting the small business definition at the time the application is submitted to the financial institution for consideration, regardless of how the contract is ultimately underwritten (whether for personal or business use). The determination as to whether the requisite Data Points must be collected from the applicant should be done at one point in time—at the time of application for credit—so that the data collection does not slow down or halt the credit process and there is one consistent point in time at which the data is collected and submitted.

- **Amount applied for and amount approved**: Financial institutions receive information on the amount applied for and maintain information on the amount approved. More specifically, they maintain information on whether the financing was approved or denied; whether a counter offer was extended (e.g., the applicant wanted to put 10% down and the finance company required 25%; or the applicant wanted a term of 3 years, but the finance company countered with 5 years; or the applicant requested $10,000 but the finance company offered only $7,500); or whether the application was incomplete (either the application was incomplete or the finance company asked for more information and has not received it).

- **Type of action taken**: If the CFPB defines "type of action taken" as whether or not the application was approved, withdrawn, cancelled, or denied, then yes, financial institutions do maintain that information. They also maintain the date of the action taken.

- **Census tract of principal place of business**: Financial institutions do not collect information on the census tract of the principal place of business. Financial institutions receive the applicant's address in the credit application. Virtually no financial institutions would know the census tract, and requiring such information would necessitate programming and increased costs of compliance.

- **Gross annual revenue in fiscal year preceding application**: Many, but not all, financial institutions collect gross annual revenue or some variation of income or revenue information.

- **Information about race, sex and ethnicity of business principal owners**: Under ECOA, financial institutions cannot collect information about the race, sex, and ethnicity of applicants.[8]

a. What sources of information do financial institutions rely on in obtaining this data, including, for example, applicant self-reporting, specific documents used by financial institutions to obtain this data, or third party sources?

Financial institutions rely on a combination of self-reporting, documentation and third-party sources, depending on the amount financed and the credit risk. For instance, a finance company may obtain a credit report and credit history on an applicant when financing a lawn tractor for $2,500. But, if the financial institution is financing a fleet of delivery vans for $300,000 and the applicant has marginal credit history, the financial institution may ask for documentation—a tax return, for example.

b. What technological or other challenges do financial institutions foresee in collecting and reporting this data (such as the manual compilation of information, the lack of an electronic system for maintaining this information, the potential for this information to be found in multiple systems within a financial institution, etc.)? What steps can the Bureau take within a business lending data collection rulemaking to minimize the challenges?

One significant challenge is that many AFSA members are financial institutions that engage in indirect lending and thus do not have direct contact with applicants to collect the Data Points. To minimize this challenge, the Rule should require financial institutions to collect and report the Data Points only from applicants that self-identify as businesses and that meet the small business definition at the time of application. Financial institutions also should be able to rely on the information submitted by the applicant in its request for credit and should not be subject to any independent verification requirements regarding the information.

Another challenge is the obligation to keep certain Data Points separate and unavailable to those employees making credit decisions. If the Data Points are collected during the credit application process, financial institutions will have to build the ability to segregate that data in their systems, including in imaging systems if credit applications are imaged. These changes could be very costly and involve significant changes for financial institutions and other parties involved (e.g., auto dealers) in indirect lending situations. One way to address this challenge is to have a unique form

[8] 12 C.F.R. § 1002.6(9)

for businesses to fill out to determine whether they are small businesses and to provide the Data Points if they are in fact small businesses. The form could first ask the applicant to provide the information needed to determine whether the entity is a small business (preferably annual gross revenue for the previous year, as explained in more detail earlier in this response letter). Then, there can be the list of Data Points with spaces for the applicant to provide the information. The CFPB could develop a model form for this purpose.

A potential step that the CFPB could take to minimize the challenges to financial institutions is to require applicants to register directly with the CFPB. Under this approach, each business entity applicant would have to register on-line with the CFPB and provide all of the required Data Points. The applicant would then be assigned a unique CFPB business identification number. Financial institutions would then ask applicants: (1) will the credit proceeds be used primarily for a business purpose; and, if the answer is "Yes" (2) provide your CFPB business identification number, or, if you do not have that number, register with the CFPB and get that number. Financial institutions would then report the unique identifier numbers to the CFPB. The CFPB, in turn, would use its records to determine if the reported loan is to a "small business" and all reporting of other data fields on those small business borrowers would be done only by the CFPB.

> *c. With respect to which data points, if any, among those specifically identified by Congress in Section 1071, do financial institutions currently not collect any information?*

Please see the response to Question #4 above.

> *5. The Bureau understands that applications for small business financing may vary both by financial institution and by the business credit product. How do financial institutions integrate data collection into their application process?*

Financial institutions request and collect only the information they need to assess creditworthiness and for underwriting purposes. For financial institutions engaged in indirect auto financing, dealerships usually submit the applicant's information (sorted into data fields) to the financial institution, and the financial institution puts the data through its credit origination system. The financial institution may approve, deny or condition the offering. The financial institution also may request additional information from the dealership (e.g., proof of income). An explanation on how one AFSA member that engages in indirect auto financing obtains information through the credit application process is included in the Appendix.

Financial institutions will have to make significant systems and process changes to collect and submit the Data Points under the Rule.

> *a. When are different data collected in the process (such as at the time of initial application, during the application process, or near the end of the process)?*

The data is collected at the time of initial application. This is especially true for financial institutions who are not original creditors and who purchase contracts initiated by dealers. It is not feasible to go back and collect the Data Points after the application has been submitted and the credit decision made. This is especially true for financial institutions who are not original creditors but will be subject to the Rule. Such financial institutions have no direct contact with the applicants during the application process. In the indirect auto finance industry, auto dealers are the original creditors in the transaction but they are not subject to rulemaking or enforcement by the CFPB. By the time the application is submitted by the dealer to the financial institution, the customer may already have been extended the credit requested. The applicants would have no incentive to cooperate and provide additional information and may even balk at the request for new information—especially that of a sensitive nature (race, sex, ethnicity) —if the credit has already been granted or denied.

b. What verification procedures are used?

In indirect financing, the financial institution does not have direct contact with the applicant during the application process and thus has limited opportunities to verify information provided. The financial institution relies on the entity obtaining the information from the applicant—in indirect auto financing, the dealership—to obtain and verify information from the applicant. Imposing verification requirements on financial institutions would be inconsistent with the indirect lending model. The financial institution is not the original creditor in those transactions and only purchases completed retail contracts and leases. Often the credit is extended prior to the financial institution receiving the application.

c. Are certain data not collected or more difficult to collect if the application is not originated and instead is withdrawn, denied, or involves a counteroffer?

Yes. Once the application is denied or withdrawn, there is no "relationship" between the applicant and the creditor and thus no basis upon which a creditor can ask for additional information and certainly no basis upon which an applicant would have any incentive to provide additional information to the creditor.

d. Are different data collected for different types of credit events (such as renewals, line increases, etc.)?

Yes. See the answer to Question #14 below.

e. What systems, whether proprietary or provided by a third party vendor, are used by financial institutions to collect and maintain the data?

Collecting and reporting the Data Points will require systems changes and potentially new systems for financial institutions and related third parties (e.g., auto dealers in the indirect auto finance space). Financial institutions do not collect all Data Points today and likely do not have a process to segregate some of the data as required by Section 1071.

f. How does data collection differ according to business credit product?

Data collection is different at the time of first application than for renewals. Again, the process is outlined more thoroughly in the answer to Question #14.

6. Considering the data points specifically identified by Congress for reporting in section 1071:

> *a. What concerns, if any, do financial institutions have about the possibility of misinterpretations or incorrect conclusions being drawn by regulators from the collection of the data provided for in Section 1071 or by the public from potential release of these data in a manner protective of privacy interests?*
> *b. Are there limited additional data points that could be readily reported and potentially disclosed that would mitigate these concerns and reduce the risk of misinterpretation or help reduce incorrect conclusions?*

Financial institutions have several concerns about the possibility of misinterpretations or incorrect conclusions being drawn by regulators and others from the collection and release of this data. First, the information provided by applicants may be inaccurate. Financial institutions will need to rely on information for the Data Points submitted by credit applicants, but the credit applicants will be under no obligation to report accurate information. Second, the Data Points submitted to the CFPB will show raw approval and denial rates without including any consideration of credit quality. This means that the data could suggest financial institutions are not extending credit to a protected class but will not show the justifiable business reasons why such denials are appropriate—such as a lack of credit history.

And third, in some industries, the data may not be useful or could lead to inaccurate conclusions. For example, the data are highly likely to show a large percentage of financing for agricultural equipment will be made to white men. This is not due to discrimination, but to the fact that most farming in this country is done primarily by white men. According to the U.S. Department of Agriculture, in 2012 of the 2.1 million principal operators in the United States, 288,264 were women, 67,000 were Hispanic, 37,851 were American Indian, 33,371 were Black, and 13,669 were Asian.[9] In other words, almost 80% of farmers are white men.

AFSA has not identified any additional Data Points that could be readily reported and potentially disclosed that would mitigate these concerns, reduce the risk of misinterpretation or help avoid incorrect conclusions.

7. What information about the type of business (such as NAICS code or other industry information) of a small business applicant do financial institutions currently collect? What challenges might financial institutions have in potentially collecting this information under section 1071?

Financial institutions do not collect NAICS code or other industry information from small business applicants. It would be difficult to collect this information because many applicants would not know the applicable code. Please see the response to Question #1 above for details.

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[9] U.S. Department of Agriculture. *2012 Census Highlights: Farm Demographics - U.S. Farmers by Gender, Age, Race, Ethnicity, and More.* May 2014. Available at:
https://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Farm_Demographics/

8. What information about the number of employees of a small business applicant do financial institutions currently collect? What challenges might financial institutions have in potentially collecting this information under section 1071?

Financial institutions do not collect information about an applicant's number of employees. There would be no purpose in collecting such information because the number of employees is not relevant to creditworthiness. In fact, collecting this information could harm the applicant by slowing down the application process because the number of employees likely will not be information the applicant has on hand when applying for credit. Please see the response to Question # 1 above for a more detailed explanation.

9. In section 1071, Congress requires financial institutions to collect and report information on whether an applicant is a women-owned, minority-owned, or small business and the ethnicity, race, and sex of the principal owners of the business. Section 1071 provides for limitations on access to certain information, including an applicant's minority-owned or women-owned business status, by underwriters, where feasible, and provides for limited access in certain circumstances determined by the financial institution with notice to the applicant.

a. What challenges do financial institutions foresee in complying with these requirements with respect to applications by small businesses, including any potential challenges in identifying the principal owners of the business and reporting demographic information about them?

Financial institutions foresee several challenges in complying with the requirement to report the Data Points, including an applicant's minority-owned or women-owned status and the ethnicity, race and sex of the principal owners of the business. For financial institutions engaged in indirect lending, a significant challenge is that the financial institution does not have direct contact with the applicant during the application process. The Data Points presumably will be collected during the application process, so financial institutions engaged in indirect lending will have to rely on the original creditor (e.g., an auto dealer in the indirect auto finance industry) to collect and provide the requisite Data Points to the financial institution.

Another challenge is that applicants may not want to provide or may be apprehensive about providing the Data Points, especially if they have previously participated in credit transactions in which the Data Points were not requested. A third challenge is that the individual submitting a credit application for a business entity may not be an owner of the business or may not know the ethnicity, race or sex of the business' principal owners. Or, the applicant may provide inaccurate information about the principal owners. This could slow down the credit process and hinder access to credit.

In addition, collecting the Data Points will involve significant system, process, procedure and training changes for financial institutions, particularly with respect to building out a mechanism to obtain and track the Data Points separately from the application process and application documents available to underwriters.

Financial institutions are also concerned about the risk inherent in collecting ethnicity, race and sex data. ECOA prohibits financial institutions from collecting ethnicity, race and sex data. Requiring financial institutions to collect and report such data will be a shift in practice since those Data Points are not collected today to ensure compliance with ECOA. In fact, some financial institutions do not even collect or keep items such as driver's license images to avoid any potential allegations of discrimination on the base of ethnicity, sex, race, or any of the other protected bases. The Rule should recognize that financial institutions, if required to start collecting this demographic information, are potentially going to be subject to increased risk under ECOA. Financial institutions will need to develop and implement processes to mitigate such risk, which will involve a lot of time and money. Ample time will be needed to create systems and processes to adequately segregate race, sex and ethnicity data from the credit decision and underwriting processes.

b. In what situations, if any, may it not be feasible to limit underwriter access to this information?

For some financial institutions engaged in indirect lending, there may be multiple points at which information is coming in to the financial institution. For example, one such financial institution engaged in indirect auto lending uses a two-step process—first, a credit analyst reviews the credit information for an applicant that comes in electronically. It is possible that the original creditor in the transaction, the auto dealer in this example, may wait to extend credit until it receives the decision from the financial institution, or may have already extended the credit to the customer. If the applicant is approved, the dealer then submits the contract documents to the financial institution for review by underwriter discounters. In both cases, the financial institution would need to put systems and processes in place to segregate the Data Points from its employees at both steps in the process.

In the case of traditional installment lenders, with offices staffed by two to three people, and walk-in applicants, it would be impossible to limit an underwriter's access to this information without dramatically increasing the overhead costs and business models of these lenders.

Financial institutions will need to review the proposed Rule to determine in which situations limiting underwriter access may not be feasible since it is unclear at this stage in the Rulemaking what will be required to be reported and when.

c. What steps can the Bureau take to minimize burden on financial institutions and applicants and facilitate compliance with the requirements to identify the principal owners of the business and report demographic information about them?

The CFPB should permit financial institutions to rely on and report the information provided by applicants or the original creditor without any independent verification by the financial institution. The CFPB should also provide categories from which applicants can select to identify race and ethnicity. And, the CFPB should provide model language that financial institutions can use to tell applicants that the information request is required by federal law, that the applicant does not have to provide the requested information, and that there is no negative consequence to not providing the information. This could be similar to the guidance under the Home Mortgage Disclosure Act (HMDA). The CFPB should limit the race/ethnicity categories to those options in HMDA.

III. Financial Institutions Engaged in Business Lending

10. Section 1071 allows the Bureau to exercise exemption authority to exempt certain classes of financial institutions from collecting and reporting pursuant to a business lending data collection rule as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

a. Should certain classes of financial institutions be exempt from a small business lending data collection rule?

Financial institutions should be exempt from this Rule if they meet certain criteria. For example, financial institutions could be exempt if they: (1) originate fewer than 100 loans to small businesses, (2) finance fewer than 100 small business customers or (3) are a small business themselves (defined either as a business with fewer than 100 employees or a business that meets the SBA's definition of a small business - $35.5 million in annual receipts for non-depository institutions). It could cost millions of dollars to implement the data collection and reporting requirements required by Section 1071. The information gathered from fewer than 100 loans or customers would not be worth the millions of dollars it would cost to gather and report that information.

Furthermore, because the rulemaking is focused on small business lending, it would be appropriate for the CFPB to exempt financial institutions that only make loans or offer financing for personal, family, or household purposes and do so under statutes governing consumer lending, not commercial lending.

b. Are there data or data sources available that could inform the Bureau's decision to exempt certain classes of financial institutions (such as the size, type, or lending characteristics of the financial institution or types of small business credit products offered by the financial institution)?

AFSA is not aware of a way to obtain this data on non-bank financial institutions.

11. What are the roles of lending marketplaces, brokers, dealers and other third parties in the small business lending application process (such as in taking an application and in making a credit decision on an application)?

AFSA takes this opportunity to reiterate that indirect automotive finance companies do not interact with applicants directly, but rely on the applications submitted by auto dealers (see the Appendix). AFSA understands that the Federal Reserve Board is planning to issue a similar rule under Section 1071 that would apply to dealers. However, there could be a situation where the information is not being provided by dealers. If that is the case, AFSA members should not be deemed in violation of the Rule.

For traditional installment lenders, the applicant applies directly, either in person on online. Brokers and third-parties are not involved in the origination process other than perhaps informal referrals.

IV. Access to Credit and Financial Products Offered to Businesses

12. What business credit product types are currently offered to small businesses by financial institutions as defined in section 1071, and for which product types is data collection and reporting most important for furthering the purposes of section 1071?

Many business credit product types are currently offered to small businesses by financial institutions. AFSA members offer the following credit product types to small businesses: dealership financing (franchise acquisition, facility improvement, wholesale inventory financing, working capital lending, etc.), automotive financing and leasing, chassis financing, equipment financing, parts and services financing, agricultural livestock and crop inputs, and credit card lending. Traditional installment lenders market to consumers and do not lend to businesses. Rather, such loans are for personal, family or household purposes.

a. In addition to term loans, lines of credit, and credit card products, are there other business credit products that are an important source of financing for small businesses?

Leases are also an important source of financing for small businesses.

13. How do financial institutions define an application for business credit products? How, if at all, does a financial institution's definition of an application vary for different types of products offered to small business applicants?

The applications and application processes significantly vary by credit product type and financial institution. Some products require a formal application be submitted to the financial institution. However, depending on the nature of the product and existing relationship between customer and financial institution, additional credit may be granted without further application.

For instance, dealership financing encompasses several different products. Floorplan financing is a revolving line of credit. These lines of credit get reviewed periodically, but only the initial financing approval requires a formal application process—see the answer to Question #14. A financial institution may allow various dealership financing products (e.g., term loans) to be requested verbally, with the credit decision occurring without the submission of an application.

Applications for the financing of vehicles may vary depending on whether they are trucks or cars and whether they are leased. Some finance companies have a number of different credit applications for businesses, depending on the type of business and on what the applicant purchases and finances, Others have one application for business credit and another for personal. (See the Appendix for more information.)

a. Under what circumstances are preapproval, prequalification, and similar assessments made and what information is typically collected and evaluated during such assessments?

Preapproval, prequalification, and similar assessments are not generally made for business applicants.

14. Under what circumstances (such as renewal, line increase, etc.) would a credit review occur on an existing credit facility?

a. In what circumstances would the credit review be initiated by the borrower? In what circumstances is the credit review initiated by the financial institution?
b. For each circumstance, what information is collected as part of the credit review? How would such a credit review differ, if at all, from an application submitted on a new credit facility?
c. For each circumstance, what are the types of action taken?

Different financial institutions perform credit reviews on existing credit facilities in different ways. Fleet customers and dealerships with wholesale inventory financing may be subject to annual credit reviews. These customers have lines of credit and each financial institution has its own process for reviewing those lines. Such review may occur without any input or awareness from the customer. Each receivable has an approval process and part of that includes a review of what is in the line.

Other financial institutions offer revolving credit card accounts. Depending on the financial institution, a credit report is pulled each quarter on the customer and a review on the account is completed. A credit review may also happen if the customer asks for a higher credit limit. In that case, the financial institution may pull and review the customer's credit report and review the customer's past performance.

AFSA strongly advises against a Rule requiring financial institutions to collect and report Data Points for customers at each credit review. Instead, AFSA recommends that financial institutions collect and report the Data Points with respect to existing credit facilities once, at the time of account origination. Periodic credit reviews are usually not requested by the customer and may result in no action being taken relative to the customer's account. Reporting these non-events would inundate the CFPB with a massive amount of data that in all likelihood will be extremely repetitive and not very useful. If financial institutions did have to report each time they review a record, it is likely that the application and servicing process for open-end credit would become more complicated and expensive, and, possibly, access to open-end credit could become more limited.

Similarly, data should never have to be collected and reported on payment schedule deferral requests, requests for loan terms modifications or refinancing of existing business loans with no new funds advanced. Requiring collection and reporting for such events would make the servicing of small business loans more difficult and expensive.

15. What challenges do small businesses face in accessing credit? What obstacles do women-owned or and minority-owned small businesses in particular face in accessing credit?

The biggest challenge that small businesses face in accessing credit is that they often do not have an established credit history. This is the same challenge that many consumers face as well.

Another challenge is that small businesses are often a credit risk. Running a business can be difficult, and according to USA Today and the SBA, "Roughly 20% of new businesses survive past their first year of operation. … However, around half of all businesses no longer exist after five years. Only one-third make it past their 10th anniversary."[10] Many small businesses cannot be open for business until they get financing. Adding burdensome reporting, with all of its increased costs, to this already risky business, will create additional barriers to small business creation and survival.

V. Privacy

16. What privacy-related concerns for applicants and confidentiality-related concerns of financial institutions are implicated by the statutorily-mandated data points in section 1071? For example, are there particular statutorily-mandated data points or a combination of data points that, if released to the public, may be harmful to applicant privacy or financial institution confidentiality? Are there particular statutorily-mandated data points or a combination of data points that may pose a risk of re-identification if released to the public?

If combined or if released to the public, the Data Points may be harmful to applicant privacy as well as financial institution confidentiality. Of particular concern is the combination of "census tract of the principal place of business" and the "type and purpose of financing." With those two Data Points, it could be possible to tie the data to a specific small business. Also, if the "type of action taken" is made public, financial institutions may be able to figure out competitors' credit scoring models, and identify which entities were denied credit. For reputation and business purposes, applicants would not want information on financial institutions denying them credit made public.

17. What steps can the Bureau take to mitigate such privacy or confidentiality-related concerns consistent with the purposes of section 1071?

To mitigate privacy and confidentiality-related concerns, the Rule should require financial institutions to aggregate the Data Points when submitting them to the CFPB, and the CFPB should further aggregate the Data Points if and when making such information available publicly.

It is important to aggregate the data that is collected. Aggregating the data maximizes the privacy of applicants and borrowers, and furthers the confidentiality interests of financial institutions. The

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[10] Speights, Keith. *Success Rate: What Percentage of Businesses Fail in Their First Year?* USA Today. May 21, 2017. Available at: https://www.usatoday.com/story/money/business/small-business-central/2017/05/21/what-percentage-of-businesses-fail-in-their-first-year/101260716/

Rule should require financial institutions to aggregate the Data Points when submitting them to the CFPB, and the CFPB should further aggregate the Data Points if and when making such information available publicly.

VI. Conclusion

AFSA appreciates the opportunity to comment on the RFI. We support the CFPB's focus on small businesses lending. At the same time, we stress that the Rule should require financial institutions to collect and report the Data Points only from applicants that self-identify as business entities at the time of application and that meet the small business definition. We also emphasize that financial institutions should be able to rely on the information submitted by the applicant in its request for credit and should not be subject to any independent verification requirements regarding the information. And lastly, we reiterate that the Rule should define "small business" using a gross annual revenue threshold with the determination made based on the revenue information provided in an applicant's request for credit.

Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

Bill Himpler
Executive Vice President
American Financial Services Association

APPENDIX

I. Captive Auto Financing

Captive auto finance companies purchase completed retail installment sale contracts and leases entered into between retail customers and motor vehicle dealers for the sale and financing or lease of vehicles. When a customer purchases or leases a vehicle from a dealer, the customer and the dealer agree on the purchase price of the vehicle and the purchase of any insurance, service contracts and other products offered by the dealer. If the customer elects to finance or lease the vehicle through the dealer, the customer and the dealer decide on the terms of the retail installment sale contract or lease. For a retail installment sale contract, the amount financed is the purchase price of the vehicle less any vehicle trade-in, down payment and cash payments from marketing programs offered by the manufacturer, plus taxes, additional products such as insurance and service contracts, dealer installed accessories, outstanding balances on turn-in or trade-in vehicles and other fees and charges the dealer agrees to pay on behalf of the customer. It is a similar calculation for the adjusted capitalized cost of a lease.

Each customer that elects to finance or lease through the dealer completes a credit application. If the dealer is requesting that the captive auto finance company purchase the retail installment sale contract or lease, the dealer submits the information from the credit application electronically to the captive auto finance company, typically through online systems, together with information about the proposed terms of the retail installment sale contract or lease. It is important to note that it is not the credit application completed by the customer itself that is submitted, but information from that credit application that is the "application" considered by the captive auto finance company. This information may be submitted by the dealer prior to completing the retail installment contract or lease with the customer or after the contract or lease has already been completed and the customer has the vehicle.

On receipt of the application, the captive auto finance company automatically obtains a credit report on the applicant from a national credit bureau, which includes a credit score and other credit information. In a small number of cases, a credit report is not available because an applicant does not have a sufficient credit history. The captive auto finance company also automatically obtains other information on the applicant including results of compliance and fraud checks, whether the applicant has other active credit applications, whether the applicant is a current or former customer, and in some cases, other available credit information.

The first step the captive auto finance company takes on receipt of the application is to classify the applicant based on whether the vehicle is being financed or leased, whether the applicant is an individual or business entity, the applicant's credit profile and whether the vehicle being financed is new or used. This classification determines the particular origination scoring model to be used. The captive auto finance company's origination scoring models assess the creditworthiness of the applicant using the information in the applicant's credit application, the proposed terms of the retail installment sale contract and the applicant's credit bureau data and other information. The origination scoring models are statistical tools used to differentiate credit applicants based on their probability of paying the amounts due under their contracts.

After all information is obtained, the captive auto finance company evaluates it to determine whether to approve the application. The decision process is based on a judgmental evaluation of the applicant, the credit application information, the proposed terms of the contract, credit bureau information, and other information. The evaluation emphasizes the applicant's ability to pay and creditworthiness, focusing on payment, affordability, applicant credit history and stability as key considerations. The creditworthiness of any co-applicant or guarantor is evaluated in a similar manner to the applicant and is also considered when determining whether to approve an application.

All applications automatically go into an electronic decision process in order to expedite the review of applications, promote consistent decisions and allow the captive auto finance company to make and communicate decisions to dealers faster and more efficiently. Electronic approval and rejection decisions are made using models that generally replicate the judgmental evaluation that would be applied by an experienced credit analyst based on various combinations of factors that have resulted in credit analyst approval or rejection. Applications that are not electronically approved or rejected are sent to a credit analyst for review.

On receipt of an application, the credit analyst judgmentally evaluates it using uniform system processes and system based decision-making tools in the framework of the captive auto finance company's purchasing standards. Each application is reviewed separately and the credit analyst makes an individual decision based on the credit analyst's assessment of the strengths and weaknesses of the application. The credit analyst may work with the dealer to determine acceptable contract terms for applications that cannot be approved as originally submitted. The credit analyst may condition approval on the addition of a qualified co-applicant or guarantor or on modifications to the financing terms, such as a higher cash down payment or a less expensive vehicle. For less creditworthy applicants, or if there is a discrepancy in the information provided by the applicant, the credit analyst may verify the identity, employment, income, residency and other applicant information.

For approved applications, dealers must submit the retail installment sale contracts and leases, signed by both the customer and the dealer, on paper or electronic forms approved by the captive auto finance company and determined to be in compliance with law and enforceable. After the dealer submits a completed contract or lease, the captive auto finance company confirms that the terms of the contract or lease are consistent with the application approval and checks for errors apparent in the disclosures made by the dealer. If the contract or lease is consistent with the approval but contains minor errors, the captive auto finance company may purchase it and send a correction notice to the customer or obtain a signed modification from the customer. If the contract or lease is not consistent with the approval or has more significant errors, it is returned to the dealer for correction or replacement.

All contracts and leases purchased are entered into the captive auto finance company's originations and receivables systems and assigned a unique account number for their duration.

II. Other equipment financing

Captive finance companies purchase retail and lease contracts from dealerships and make direct loans to customers. The customer selects the application for the purpose of the financing (consumer versus commercial use) and for the credit product (installment versus revolving). When the dealership submits a credit application to a captive finance company on behalf of an applicant, it does so electronically. The dealership submits the application in data points—it is not an image of the credit application. When the finance company is making the credit decision on the applicant, the finance company knows whether the retail installment contract or lease is primarily for personal or business purpose. The application document is retained by the dealer.

The finance company may seek additional information from the applicant to make the credit decision (financial statements, etc.). The deal is documented on the finance company's consumer or commercial credit paper provided to the dealer, with all of the required disclosures.

All leasing applicants are required on the application and the lease agreements to confirm that the leased equipment will not be used primarily for personal family or household use and consumer leases are not offered or provided.

III. Commercial use revolving (credit card) financing

A captive finance company affiliate provides revolving credit (credit card) financing. The customer selects the application for the purpose of the financing (consumer versus commercial use) and for the credit product (equipment use type). When the dealer or other retailer submits a credit application to the captive finance company affiliate on behalf of an applicant, it does so electronically. The dealer or other retailer submits the application in data points—it is not an image of the credit application. When the finance company affiliate is making the credit decision on the applicant, it knows whether the requested revolving account will be primarily for personal or business purpose. The application document is retained by the dealer.

The finance company affiliate may seek additional information from the applicant to make the credit decision (financial statements, etc.). The deal is documented on a consumer or commercial revolving credit application and credit agreement provided to the dealer or other retailer, with all of the required disclosures. Once the account is created, it can be used to finance purchases of small equipment, parts, service, and other eligible goods and services, at thousands of dealers and other retailers nationwide who have signed a merchant agreement with the captive finance affiliate. The customer account is periodically reviewed to determine if the credit limit is appropriate and accounts may be closed or restricted if circumstances warrant.