

January 6, 2022

The Hon. Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Proposed Rule on Small Business Lending Data Collection Under the Equal Credit Opportunity Act, Docket No. CFPB-2021-0015

Dear Director Chopra:

The American Financial Services Association (AFSA)¹ appreciates the opportunity to comment on the proposed rule to implement the Small Business Lending Data Collection provision of the Equal Credit Opportunity Act (the Rule).² AFSA member companies support the Consumer Financial Protection Bureau (the Bureau) in its efforts to enforce fair lending laws and identify business and community development opportunities for small businesses. AFSA also wishes to convey its appreciation for the Bureau's engagement on the Rule and the Bureau's sincere consideration of industry perspectives presented by AFSA and other groups. For example, clarifying that the scope of the requirements of the Rule is limited to small businesses and advancing a clear and simple to apply definition of small business based on annual gross revenue are much appreciated.

As an initial matter, one of the key themes throughout this letter is that this rulemaking should balance the benefits of the additional data with the complexity it will create for business lending transactions. For many financial institutions, the obligations under Section 1071 to inquire, manage, and report on new items of data will be challenging to implement; and we encourage the Bureau not to make it even more difficult by requiring additional information. Some of the additional information required under the Rule is available, but creates concerns that when reported it will not be understood in the proper context (*e.g.*, denial reasons and pricing information). Other additional information required under the Rule is not presently available in typical business credit transactions and would add complexity to the application process (*e.g.*, NAICS codes and number of workers). And finally, other additional information required under the Rule will be completely new to typical commercial lending practices (*e.g.*, sexual orientation and gender identity).³

AFSA members and others are aligned with the Bureau's intention for the Rule and support active, competitive, and sustainable credit markets for business customers in order to achieve it. However, for financial institutions offering commercial credit, the resources devoted to designing, building, and operating the processes and systems to effectuate the Rule will be significant. If the compliance burdens prove to be unacceptable, some financial institutions may scale back from engaging in commercial lending or leave the small business lending sector altogether. The Rule states that it is intended to "help small businesses drive inclusive and equitable growth," but overly burdensome data collection requirements that exceed the Congressional mandate could result in a reduction of available credit, which would have the opposite effect. The Rule is broader in scope than what the Bureau

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 86 Fed. Reg. 56356 (proposed October 8, 2021).

³ 86 Fed. Reg. 56482.

sketched out in the SBREFA outline, which featured a two-year period for implementation. Imposing greater industry burden while affording less time for implementation, just 18 months, does not seem reasonable. As discussed further below in Section IX, we respectfully request a longer implementation period that mandates compliance on January 1 of the first calendar year that begins two years after the effective date of the Rule.

In our comment letter, we will discuss: perspectives on the data fields to be collected under the Rule; issues in implementing the Rule for financial institutions engaged in indirect vehicle finance; considerations for certain commercial finance transactions; questions regarding auctions in the vehicle remarketing context; operational concerns relating to the Rule; treatment of transactions that are reported under the Home Mortgage Disclosure Act (HMDA); consistent treatment for trade credit; and alternative methods of achieving the Rule's aims through a Small Business Database. We will also address specific requests for comment expressed in the Rule. Our letter also includes appendices with information requested by the Bureau in a previous meeting with AFSA and background information on certain transaction types.

I. Data Fields to be Collected under the Rule

Under the statutory scheme established by Congress, the small business data collection requirement is limited to specified data fields (collectively, the “statutory fields”). The statutory fields are:

- (A) the number of the application and the date on which the application was received;
- (B) the type and purpose of the loan or other credit being applied for;
- (C) the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved for such applicant;
- (D) the type of action taken with respect to such application, and the date of such action;
- (E) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant;
- (F) the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application;
- (G) the race, sex,⁴ and ethnicity of the principal owners of the business; and
- (H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.⁵

While the statute provides the Bureau with authority to require collection and delivery of additional data (collectively, the “discretionary fields”) by financial institutions beyond the statutory fields, that authority is limited to data that aids in fulfilling the purposes of §1071. AFSA urges the Bureau to limit the discretionary fields to what is truly necessary to avoid creating an overly burdensome data collection process for the financial institution and the customer, and also to refrain from creating new discretionary fields for subjects that are beyond the scope of the statute. The full scope of data that the Rule would require financial institutions to collect and deliver is inconsistent with the operation of business credit markets. Furthermore, as discussed further below, the Bureau's plans to publish much of the discretionary field data sought will harm the privacy interests of financial institutions and applicants for business credit alike.⁶

One critical consideration not addressed by the Rule is the comparison between the §1071 data planned to be collected and the data that is sought in connection with actual fair lending enforcement actions and supervisory

⁴ This letter follows the language of the statute establishing the small business data collection requirement and the Rule in using the term “sex.” The Bureau may consider whether the term “gender” is a more suitable term to use in connection with this rulemaking.

⁵ 15 U.S.C §1691c-2(e)(2).

⁶ We note that were the Bureau to adopt our suggestion to create a Bureau-controlled database as discussed in Section VIII below, then many of these concerns would be alleviated.

interactions. The broad scope of the data contemplated to be collected in the Rule begs the question of what additional data is collected in an actual fair lending action. If these data sets are in fact substantially similar, then the Bureau should justify the commonality. Congress established a limited scope data collection regime in §1071. If Congress intended to require all covered financial institutions to proactively deliver the same data required in fair lending enforcement actions, Congress would have written that into the law.

The Rule embraces the view that the benefits of collection and publication of discretionary fields provide value that is greater than the harms to credit applicants and financial institutions. But the harm to financial institutions is significant: increased costs for programming, training and re-training, data collection (with its inevitable errors that could lead to enforcement actions having nothing to do with financial institution behavior), monitoring, and reporting. These costs must be considered.⁷ AFSA urges the Bureau to consider that in the context of business lending, credit applicants and financial institutions have established effective systems of underwriting that eschew inquiries about individual characteristics. The Rule places covered financial institutions in an untenable position of asking business customers probing, personal questions that are outside the scope of business necessity. AFSA members are concerned that such personal and sensitive questions may violate applicants' privacy for reasons that have nothing to do with their credit application.

II. Indirect Vehicle Finance Transactions⁸

Many AFSA member companies are financial institutions that are active in the indirect vehicle finance business. As explained in Appendix 1, indirect financing is a three-party process. In this section, we will largely focus on vehicle finance, but many of these comments also apply to other types of indirect financing, including furniture and electronics sales. As we discussed with the Bureau when we met on October 28, 2021, indirect financing, particularly indirect vehicle finance transactions, present unique challenges due to the nature of the transactions and the roles of the parties.

Indirect vehicle finance transactions involve two separate, but related transactions. First, a customer purchases a vehicle from a motor vehicle dealer (dealer), and executes a retail installment sales contract that finances the purchase price and any voluntary protection products the customer elects to purchase. The dealer is the original creditor and negotiates the financing terms with the customer. Second, the dealer communicates with one or more financial institutions to determine which one will purchase the completed retail installment sales contract. The financial institution that purchases the contract takes an assignment of the contract and commences servicing the contract until it is paid in full.

It is imperative that the Bureau address how financial institutions can comply with the Rule because when Congress established the Consumer Financial Protection Bureau, it enacted a provision that prevents the Bureau from:

... exercis(ing) any rulemaking, supervisory, enforcement or any other authority, including any authority to order assessments, over a motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.⁹

⁷ Again, our Bureau database suggestion in Section VIII would alleviate many of these costs and concerns.

⁸ See also the more detailed explanation of Indirect Vehicle Finance Transactions in Appendix 1.

⁹ 12 U.S.C. §5519(a). For the purposes of this comment letter, assume that dealers fully satisfy the conditions of §1029(b)(2) and is fully excluded from rulemaking, supervision, and enforcement by the Bureau.

Regulation B, which implements the Equal Credit Opportunity Act (ECOA), provides that financial institutions are specifically prohibited from inquiring about protected class status including “the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction...”¹⁰ The present rulemaking proposes an amendment Regulation B to permit financial institutions to make §1071 inquiries that are currently prohibited, but because of the limitation in the Bureau’s authority, that permission will not extend to dealers.

Taking these provisions into consideration, with regard to the present rulemaking, it appears clear that while Congress intended the Bureau to require financial institutions to make inquiries for certain data elements in connection with applications for credit by women-owned, minority-owned, or small business applicants, the Bureau is limited in its authority to effectuate those requirements to the extent they affect dealers:

1. The Bureau has no authority to impose mandates relating to the small business loan data collection provisions of Dodd-Frank and the present rulemaking upon dealers; and
2. The existing ECOA prohibition on asking about protected class status cannot be amended in the present rulemaking to permit such inquiries by dealers, as the Bureau lacks authority to engage in rulemaking relating to dealers.

The Rule as proposed contemplates that financial institutions will collect §1071 data in connection with an application for credit, which occurs with the dealer in an indirect vehicle finance transaction. Due to the unique nature of indirect vehicle finance transactions, customers who purchase vehicles make their initial credit application to the dealer, who is the original creditor under the terms of the retail installment sales contract. Once the vehicle purchase transaction is closed, the credit application process is over and financial institutions have no authority under ECOA to request §1071 data.

With respect to indirect vehicle finance, AFSA members face the daunting prospects of building systems and processes to request and manage §1071 data in transactions where the original creditor is a dealer with no conceivable obligations for dealers to facilitate such data collection under the present rulemaking. Dealers, being completely exempt from Bureau rulemaking, have no inducement to assist financial institutions who are obligated to make §1071 inquiries. As dealers are the original financial institution in all indirect vehicle finance transactions and take the application first in many such transactions, the dealer might be well-placed to gather §1071 information, but collection of some critical data elements by dealers is impermissible under ECOA, and the Bureau lacks the power to either authorize collection of uncollectible data or compel dealers to do anything.

Therefore, with respect to indirect vehicle finance, the present rulemaking compels financial institutions to build and operate entirely new processes and systems to make §1071 inquiries and process any responsive information without any ability to enlist the aid of dealers in acquiring information responsive to §1071 inquiries.

In order to facilitate orderly implementation of the Rule with respect to transactions involving dealers, AFSA asks the Bureau to delay implementation of the Rule until such time as the Federal Reserve, which has authority to issue rules that are effective on dealers, has issued a rule based on §1071 that will clarify the obligations of dealers that extend credit to small business customers. Such a rule should conform with the Bureau’s rulemaking, and both rules should have the same implementation period.¹¹

¹⁰ 12 C.F.R. §1002.5(b).

¹¹ To be more specific, the compliance date for indirect vehicle finance companies and dealers should be January 1, two years after the Federal Reserve publishes its rules.

AFSA strongly encourages the Bureau to refrain from creating an intermediate, limited solution that would require vehicle finance companies to collect some of the data immediately while awaiting a companion rule applicable to dealers from the Federal Reserve. Such a limited solution would not permit collection or reporting of data related to the race, sex, or ethnicity of the principal owners of the business applicant which is fundamental to achieving the dual purposes of §1071 of enforcing fair lending laws and identifying needs and opportunities for women-owned and minority-owned small businesses. In addition, it would place an unreasonable burden on indirect vehicle finance companies to develop technology to meet the intermediate solution only to need to develop another technology when the coordinated rule with the Federal Reserve is finalized. The cost of this two-tiered implementation will far outweigh the very small benefit of collecting limited data that is unrelated to achieving the purpose of §1071.

In the alternative, in Section VIII of this letter, we describe an approach using a government sponsored and maintained database to collect and hold §1071 data. Such a database would eliminate the requirement for dealers to make §1071 inquiries altogether. As such, collection of §1071 data could begin absent a Federal Reserve rule.

In previous conversations between AFSA and the Bureau, the Bureau asked for information regarding the data that financial institutions receive in indirect vehicle finance transactions and data that is not typically available. A summary identifying the data elements under the proposed rule that are typically collected as part of a vehicle finance transaction and the data elements that are not typically collected is provided in Appendix 2.

Indirect vehicle finance transactions share many features with equipment finance and retail sales finance transactions. As many financial institutions who are engaged in these businesses are not currently participating in any federal data collection programs, they have many operational questions about the Rule and compliance after its effective date. AFSA urges the Bureau to engage with financial institutions frequently throughout the implementation period to understand the questions that arise, and to publish compliance aids to address those issues, as it has done in other rulemakings. The Bureau's engagement with industry is very much appreciated.

III. Particular Commercial Finance Transactions

Some AFSA members extend credit to businesses to finance real estate acquisitions, business expansion, inventory, or other purposes. In connection with these sectors, AFSA requests additional clarity regarding the application of the Rule.

Some financial institutions offer floor plan financing, which generally allows merchants to stock inventory available for sale without advance payment to the manufacturer or distributor. Such financing programs feature very flexible timing and pricing terms, as merchants' inventory needs are dynamic with shifting and sometimes seasonal demand for goods. Also, floor plan finance companies may be affiliated with the manufacturer or distributor, and therefore have an aligned interest with supporting the merchants' maintaining some level of inventory that necessitates frequent adjustments to the financing and payment terms. With these considerations in mind, AFSA requests clarification that floor plan or other inventory finance products can be considered "trade credit" that is outside the scope of the Rule.

IV. Clarification regarding Auctions

Vehicle finance companies, other equipment finance companies, other financial institutions, and new and used car dealers use auctions to buy and sell inventory and dispose of personal property that is returned after a lease, or that is taken by the financial institution following an event of default. Reliance on auctions for this function is a well-established process in industry that treats consumers the most fairly and readily comports with Uniform Commercial Code requirements.

While the auction facilitates the sale of the property to a buyer, the auction does not hold legal title to the property being sold. Rather, it provides a facility or platform for the sale to take place and administers the funds. In most instances, the auction pays the seller upon seller's delivery of physical title to the property. Thereafter, the auction looks to the buyer to remit the purchase price. In some cases, the auction allows the buyer to leave the auction facility with the property with payment to be made at a later date. This delayed payment mechanism is similar to the concept of trade credit in the Rule and AFSA members request clarification that auction sales and the delayed payment mechanism are not transactions that trigger §1071 requirements for the auction. AFSA asks that the definition of "trade credit" be modified by including a reference to the business' agent as follows:

- (1) Trade credit. A financing arrangement wherein a business acquires goods or services from another business or its agent without making immediate payment to the business or its agent providing the goods or services.¹²

V. Operational Concerns regarding the Rule

AFSA member companies have identified several concerns regarding the Rule and the work that will be necessary to comply with its provisions.

The Rule proposes that financial institutions establish a firewall to isolate three items of §1071 data from any personnel who are involved in making any determination concerning the application for credit.¹³ The particular data to be segregated are whether the applicant is a minority-owned business, whether the applicant is a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners.¹⁴ The Rule also provides that if a financial institution determines that it is not feasible to limit the personnel's access to this data, the data need not be segregated if a disclosure is made to the borrower.¹⁵ This creates considerable complexity for financial institutions that will need to develop new technology solutions for separate communication channels and databases to move and store the data required under the Rule that are separate from the existing solutions.

AFSA members agree that the information required to be collected under the Rule is of a very sensitive nature and must be protected. For AFSA members, there is not and has never been a business reason to collect the information regarding the women-owned or minority-owned status of an applicant or the sex of the applicant's principal owners. Such questions could be considered contrary to financial institutions' obligation to serve all customers in a non-discriminatory manner. AFSA notes again that were the Bureau to instead create a database as suggested in Section VIII, this information would not be available to the financial institution or its employees, thus meeting the purpose of the Rule while protecting the sensitive information of the business credit applicants.

¹² 86 Fed. Reg. 56577.

¹³ §1002.108.

¹⁴ *Id.* AFSA also notes that there will be instances in which a small business may qualify as minority- or women-owned based on the 50% direct and indirect ownership test, yet may not have any women or minority principal owners based on the 25% direct ownership test.

¹⁵ *Id.*

In addition, the firewall requirement is problematic when combined with the obligations in §1002.107(b) of the Rule requiring verification of applicant-provided information. The rulemaking should distinguish between verification of data that is collected to satisfy the requirements of the Rule and data that is collected as part of the underwriting process. AFSA strongly opposes any requirement to update §1071 data if different data is collected during the underwriting process. This is not only burdensome and complex, it is also inconsistent with the clear expectation of Congress in enacting §1071 that the small business data collection is to be kept separate from the evaluation of the application. The proposed rule should clarify that there is no obligation for a financial institution to update data that it received from the applicant as part of the §1071 information gathering process with data it receives during the underwriting process. The financial institution should have no obligation to compare the data received during underwriting or to compile, maintain, or report that data under the Rule.

AFSA member companies are also concerned that one effect of the Rule is to bring sensitive information about applicants for credit into the financial institution's possession. Financial institutions generally attempt to collect only the minimum amount of data necessary for business purposes. Having more data increases risks of negative outcomes (such as, but not limited to, data breaches) without providing benefit to the customer or the business. In the context of fair lending, financial institutions are concerned that the Rule's mandate to collect and maintain sensitive demographic information about applicants will invite litigation and baseless allegations of discrimination by unscrupulous parties who hope that §1071 data held by financial institutions can be interpreted to substantiate litigation threats.

But for this Rule, financial institutions would not be collecting this information, and AFSA asks the Bureau to consider means by which financial institutions can be shielded from fishing expeditions by plaintiffs and regulatory bodies. To alleviate these concerns, the Bureau could adopt either or both of two AFSA requests: (1) the Bureau should create and maintain a database of small business data as discussed in Section VIII, and/or (2) the Bureau should specifically (i) state the regulation does not create a private cause of action against a financial institution who, but-for the regulation, would never make such inquiries or collect such data and (ii) state that data collected by financial institutions pursuant to this rule is not discoverable in any private-party proceeding or litigation.

After a period of time, the Bureau should consider evaluating the Rule, specifically focusing on: (1) the burden on small business applicants to provide sensitive personal information, (2) the cost for creditors to collect this information, (3) whether the Bureau's sample forms could be improved, (4) the usefulness of the data collected, and (5) the effect of the Rule on the small business credit market.

Finally, in preparing this Rule, it is important for all stakeholders to consider the effect of §1071(c). In setting up the small business loan data collection regime, Congress provided:

(c) RIGHT TO REFUSE.—Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.¹⁶

The effect of this provision is clear: all applicants for credit are entitled to decline to provide data requested by financial institutions relating to the small business loan data collection provision of the statute and the Rule.

¹⁶ 15 U.S.C. §1691c-2(c).

In considering the effects of the Rule on applicants and financial institutions, the Bureau must always consider that all applicants for credit can refuse to provide §1071 data. As a result, any §1071 data collected is necessarily incomplete and will not represent the actual attributes of actual credit applicants. The Bureau must consider and explain how it will overcome the inherent inaccuracies that will result from analysis of incomplete and misleading data. Further, §1071 will not be reliable as an indicator of a financial institution’s portfolio characteristics because the data will only be provided on a voluntary basis by the applicants.

Furthermore, while the Rule proposes a mechanism to collect information about transactions with small business customers, the Bureau has not articulated how it will acquire data about the broader business credit market. Without a view of the entire market for business credit, it is unclear how the Bureau will be able to make accurate decisions that certain small business credit transactions should be scrutinized for potential violations of fair lending or other laws.

The Rule provides that financial institutions who are not told the race or ethnic background of applicants should make a visual observation of those statuses (if a visual observation is possible based on the manner in which the application for credit is made) and record that when the applicant declines to provide that information. The visual observation requirement is inconsistent with Congress’ clear intent to give applicants the right to refuse to provide this sensitive demographic data. AFSA urges the Bureau to refrain from requiring collection and reporting of visual observations because it is subjective and violates the customer’s statutory right to not report the data.

Finally, AFSA asks the Bureau to confirm that it will refrain from making enforcement or supervision decisions on the basis of this incomplete and unrepresentative data.

VI. Treatment of Transactions that are Reported Under HMDA

As proposed, both the HMDA and §1071 data collection and reporting regimes could be triggered for financial institutions that extend business purpose term loans secured by multi-family and commercial income producing rental properties. It is unnecessarily duplicative and burdensome to require financial institutions to collect from applicants and report to the Bureau two datasets for the same transaction. This would also create a cumbersome application experience for business applicants. The Bureau should exclude all transactions where financial institutions have actually collected and reported data to the Bureau pursuant to Regulation C.

If the Bureau narrowly-tailored this exception to applicants that are reported under HMDA, then institutions not subject to the HMDA reporting regime would still have to report HMDA-eligible applications under §1071 because they would not actually report such applications under HMDA. The fact that these transactions are being captured by either HMDA or §1071 should still facilitate the enforcement of fair lending laws and enable communities, governmental entities, and financial institutions to identify whether all communities are being served with respect to these credit transactions.

VII. Consistent Treatment for Trade Credit

The Rule generally excludes trade credit from the definition of a covered credit transaction. The Rule defines trade credit as a “financing arrangement wherein a business acquires goods or services from another business without making immediate payment to the business providing the goods or services.”¹⁷ The Proposal further states

¹⁷ 86 Fed. Reg. 56577.

that “an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit.”¹⁸ Typically trade credit is granted in terms not exceeding one year.

All forms of trade credit with original terms of one year or less, not just in-house trade credit, should be exempt from the Rule’s data collection and reporting requirements. Trade credit extended by financial institutions facilitates the very same agreements between the very same businesses. Trade credit offered by financial institutions allows more suppliers to offer trade credit programs, and as a result provides more opportunities for credit access to small businesses. Both forms of trade credit deserve consistent regulatory treatment. This will prevent the creation of an unlevel regulatory playing field that discourages competitive services to develop around the issuance of trade credit.

Uneven regulatory treatment will likely force suppliers to move toward “in-house” solutions in order to accommodate the preference of purchasers who are not accustomed to or amenable to providing this type of information for trade credit. By drawing an arbitrary line between these two forms of trade credit, the Rule forces more business transactions to a less regulated environment without the oversight offered by financial institutions. Not all suppliers, however, will be able to create an in-house program. After all, suppliers are not experts in trade credit and provide these programs as a service for their customers. Additionally, an in-house trade credit program can impact a supplier’s cash flow, tying up funds it might otherwise need. When in-house solutions prove too challenging to develop and trade credit offered by financial institutions (accompanied by §1071 data reporting) proves unattractive to would-be purchasers, suppliers will find themselves out of options and the result will likely be a reduction in trade credit access to small businesses.

Additionally, the uneven treatment of trade credit will competitively disadvantage trade credit programs offered by financial institutions. It will allow in-house trade credit providers to offer a lower friction experience for purchasers that will not require §1071 data reporting. Meanwhile, trade credit programs offered by financial institutions that provide the very same service will need to implement changes required by the Rule that purchasers will find unfamiliar and unwelcome.

Finally, the data gathered from only the trade credit programs offered by financial institutions will be less valuable to the Bureau, given that most trade credit is extended “in-house” and will not be subject to the Rule’s data collection and reporting requirements. The partial and incomplete data gathered on trade credit will not offer meaningful insights into that market and will not advance the statutory purposes that underlie §1071.

VIII. Small Business Database

In AFSA’s past comments to the Bureau regarding small business lending data collection, AFSA suggested that the Bureau approach the problem of collecting demographic information in a different way. Rather than enlisting financial institutions to collect and manage new sensitive and personal demographic information regarding borrowers, the Bureau could establish a Small Business Database to facilitate the tasks associated with the Rule. As noted throughout this letter, such a database would significantly alleviate the burdens on financial institutions with no reduction in the effectiveness of the Rule.

¹⁸ 86 Fed. Reg. 56589.

A Small Business Database would allow the following simplified process:

- An applicant for credit would file its demographic and financial information with the Bureau. Once the Bureau has received a completed submission, the Bureau would assign the applicant a unique identifying number.
- When an applicant applies for credit, it would provide this unique identifying number to the financial institution, who would include this as part of the small business lending application register. Once submitted to the Bureau, the Bureau could then correlate the details of the transaction with the attributes of the borrower stored in the Small Lending Database.

This approach would provide many benefits to market participants.

- Applicants for credit would only need to maintain their financial and demographic information in one place, rather than responding to inquiries each time they seek credit.
- Applicants would not be upset in being asked to provide information to financial institutions that clearly is not needed for legitimate business purposes and which, in the applicant's mind, could be used for inappropriate purposes relating to the credit application.
- Financial institutions would be spared the significant costs and burdens of programming, training, collecting, monitoring, and reporting the information required under the Rule that is not needed for business purposes.
- Financial institutions would be relieved from demands to produce the §1071 data in connection with investigations and discovery as financial institutions would not be in possession of the data.
- Financial institutions will neither possess nor have access to sensitive §1071 data held in the database and therefore inappropriate use of the data by financial institutions will not be possible.
- Financial institutions would not have the further risks (including regulatory and litigation) associated with data breaches of this information and concurrent costs of protecting the same.

AFSA observes that the Small Business Administration already maintains a database of small businesses. The Bureau could easily collaborate with other agencies in the federal government on developing the database, or it could work independently to streamline and simplify the tasks of collecting and managing demographic and financial information of small businesses.

IX. Responses to Particular Requests for Comment in the Rule

The Rule includes discussion of several aspects of the proposal or alternatives that are being considered by the Bureau. AFSA appreciates the opportunity to share perspectives on the following items.

a. Inquiries about sexual orientation

Recently, the U.S. Supreme Court expanded upon the concept of sex as referenced in the context of Title VII protections against employment discrimination.¹⁹ This decision established that protections against sex discrimination also provide protection for discrimination related to sexual orientation and gender identity. Although this ruling said nothing about ECOA, the Bureau issued an interpretive rule articulating that the Bureau considers ECOA's prohibition on sex discrimination will now include sexual orientation discrimination and

¹⁹ 140 S.Ct. 1731.

gender identity discrimination, including discrimination based on nonconformity with sex- or gender-based discrimination.²⁰

Neither Congress nor the U.S. Supreme Court has taken specific action to change the scope of the prohibition against sex discrimination in ECOA to include concepts of sexual orientation and gender identity. With this in mind, AFSA urges the Bureau to give financial institutions the option to collect this information without imposing a mandate requiring collection of information relating to the sexual orientation of principal owners.²¹

AFSA urges the Bureau to consider the practical effects of forcing financial institutions to make highly personal inquiries in connection with an effort to collect business information.

b. Collecting information about incomplete or withdrawn applications

The Bureau asked for comment on whether financial institutions should collect data on incomplete or withdrawn applications.

To serve the purposes of §1071 relating to enforcement of the fair lending laws, the Bureau should focus its attention on applications that lead to consummated transactions, and applications that are declined. Collecting information regarding other scenarios does not serve the purpose of the statute and creates additional operational burdens on financial institutions.

c. Collecting information on transactions that are not covered credit transactions

The Bureau asked for comment regarding whether reporting should be required for scenarios in which an applicant applies for a covered credit transaction, but the transaction that is consummated falls outside the scope of the Rule.

AFSA agrees with the Bureau's observation that collecting information about transactions that are outside the purview of the Rule will negatively affect data quality. Financial institutions should only be required to collect and manage §1071 data for transactions that are subject to §1071. AFSA also requests clarification that if a financial institution collects §1071 data for a transaction the financial institution anticipates will be a covered financial transaction, such collection of data by the financial transaction has not violated Regulation B if the transaction is not a covered financial transaction when consummated.

d. Credit line increases and other modifications to business credit accounts

The Bureau asked for comment regarding how the Rule should treat credit line increases.

As discussed above, commercial credit arrangements such as floor plan or inventory finance are specialized programs that feature highly flexible payment terms, including rapid changes to credit limits to respond to business conditions. If such plans will be within the scope of the Rule, AFSA requests clarification that credit line increases and other modifications be excluded from the requirements to collect and manage §1071 information. Such modifications to these accounts are simply too rapid and frequent to accommodate §1071 inquiries.

²⁰ 86 Fed. Reg. 14363 (March 15, 2021).

²¹ Yet again, a government-sponsored and maintained database completely alleviates AFSA's concerns.

Similarly, customer-initiated credit line increases, including those related to credit card accounts, should be excluded from the coverage of the Rule. These credit line increases follow a streamlined application process as compared to new account creation. The processing of credit line increases is typically fast and automated, making them low-risk for discriminatory practices. Introducing §1071 data collection requirements to these transactions would severely slow the process, perhaps reducing the number of financial institutions that would offer customer-initiated line increases. This could negatively impact access to credit, and AFSA asks the Bureau to exempt these transactions from the coverage of the Rule.

e. Data collection for transactions that are not covered credit transactions

The Bureau seeks comment on whether to permit financial institutions to collect §1071 data for transactions that are not covered by the Rule.

Financial institutions are concerned that opening the door to data collection for transactions that are not covered by the Rule will reduce the quality of data collected. While most financial institutions will only collect the amount required, some may collect more broadly and selectively. This will create an uneven playing field among financial institutions and contribute to misinterpretations of the data by observers.

f. Leases

AFSA agrees with the exclusion of leases from the Rule. With regard to voluntary reporting of §1071 data for leases, AFSA urges the Bureau issue a rule that treats financial institutions similarly. Allowing some financial institutions to report §1071 data for leases on a voluntary basis will degrade the quality of data collected and lead to misrepresentations of the data.

g. Consumer-designated credit

AFSA agrees with the Rule's approach to exclude from coverage consumer-designated credit. One area where AFSA asks for additional clarification is with regard to retail installment sales contracts. As discussed above, retail installment sales contracts are entered into between dealers and buyers to finance those transactions.

In determining whether credit is excluded as consumer-designated credit, AFSA asks the Bureau to confirm that financial institutions can rely on the Official Interpretation for the 12 C.F.R. §1002.2(g) definition of Business Credit, which provides that, "a creditor may rely on the applicant's statement of the purpose for the credit requested."

h. Originations threshold

The Bureau seeks comment regarding whether the Rule's proposed 25 originations threshold is the correct level for triggering the Rule's obligations. AFSA members would prefer the highest possible threshold amount. AFSA asks the Bureau to set the limit at 500 originations to align with the current threshold for HMDA reporting for open-end loans and to focus attention on financial institutions that have a robust amount of business credit originations. Setting the threshold too low will be entirely too costly and burdensome on small institutions, and some may conclude that exiting the business credit market is preferable when compared to the costs and burdens of managing the compliance obligations for a small number of transactions.

AFSA also asks the Bureau to establish a cut-off for transactions that exceed the Small Business Administration statutory maximum loan size, currently \$750,000. Observing this threshold will help financial institutions align their existing processes with the Rule and focus attention on routine credit extensions for small businesses that are critical to their credit needs.

i. Gross annual revenue trigger

The Bureau seeks comment on its proposed definition of a small business, including the \$5 million gross annual revenue size standard. AFSA agrees that the use of gross annual revenue as a measurement is clear and convenient for industry. AFSA members would like to see the \$5 million trigger be reduced to \$1 million, consistent with the Community Reinvestment Act definition of a small business. A trigger of \$1 million is also familiar to financial institutions from the rules for adverse action notices for business credit applicants in Regulation B.²²

j. Definition of application recipient

The Rule proposes requiring financial institutions to collect the application recipient, which is not a data field required by the statute. AFSA disagrees that collecting this data point will aid in fulfilling the purposes of §1071. The Bureau's contentions regarding the benefits of having this data fail to consider or address the privacy concerns of businesses that use different strategies to compete for business. Whether or not a financial institution takes applications in-person, electronically, or with the assistance of intermediaries reflects strategic business decisions and investments. Financial institutions will suffer confidentiality and trade-secrets harms if these strategic decisions are made public.

k. "Incomplete" application status

The Rule proposes several categories for reporting the outcome of credit applications, including "incomplete." The Bureau seeks comments on whether additional subcategories should be established to capture a wider variety of application outcomes. AFSA agrees with the Bureau's proposal to categorize all incomplete applications with the single category of "incomplete." Creating additional subcategories will create additional confusion and difficulty for financial institutions.

l. Pricing information

The Bureau seeks comment on how to reduce misinterpretations of disparities in pricing that are likely to arise once the Rule is in effect. AFSA commends the Bureau for raising this issue, as it reflects a concern shared by financial institutions. Commercial finance offerings in the United States market have evolved to serve a highly diverse and specialized group of business customers. The financing needs, financial resources, and pace of business activity are different for various business segments, and these differences are reflected in the widely divergent pricing and other terms that characterize business lending.

For example, consider a restaurant that finances kitchen equipment as compared to a powersports dealer that finances snowmobiles for inventory. Both are businesses that rely on access to credit, but the purpose of lending, the collateral, the lending terms, and therefore the pricing will be different. The restaurant will use the financed

²² 12 C.F.R. §1002.9(a)(3)(i).

equipment steadily for several years, and presumably has a steady cashflow. The powersports dealer needs inventory of snowmobiles to sell during the winter months, but then in spring may pivot to stocking marine equipment.

The commercial finance industry has developed specialized credit programs to meet business needs. These programs are trade secrets and must be confidentially maintained. Once the Rule is in effect, the pricing data will likely show wide variances in pricing due to the unique characteristics of the borrower's business and type of credit sought. Prior to using §1071 data to pursue fair lending claims, AFSA asks the Bureau and others who will analyze published §1071 data to carefully consider the highly specialized nature of business credit to avoid acting based on misleading data. AFSA asks the Bureau to refrain from requiring collection and reporting of pricing data, but, if the Bureau requires the pricing data, then AFSA members would request that the pricing data be limited to the interest rate and origination fees that are required to be paid at the inception of the financing facility and that these data fields be exempt from publication.

m. Collecting the NAICS code

The Bureau proposes requiring financial institutions to collect the NAICS code that corresponds to the applicant's business. While Congress contemplated that the definition of "small business" would be the same as "small business concern" under the Small Business Act (15 USC 632), which relies on the NAICS code, we think it clear that Congress did not contemplate that the NAICS code would be compiled and maintained by the financial institution.²³ We applaud the action by the Bureau to utilize a gross annual revenue test as the definition for a small business which is consistent with Congressional intent but provides a much simpler test for both the financial institution and the business applicant to apply. We ask that the Bureau not impose the onerous obligations to use NAICS codes in the data collection context. Financial Institutions do not know or collect NAICS codes as part of the application process, and we expect that many small business applicants will not know it either.

The Bureau seeks comment on whether to require delivery of the 6-digit NAICS code with a safe harbor for errors so long as the first two digits are correct, or whether to require delivery of only the first three digits of the NAICS code with no safe harbor. We say neither. The Rule should be clear that there is no requirement upon financial institutions to guess at the applicant's NAICS code. At most, financial institutions should be entitled to rely upon, without verification, the applicant's statement of its NAICS code or to indicate that no NAICS code was provided.

n. Minority- and women-owned business status questions

The Bureau seeks comment regarding whether applicants for credit are likely to "have difficulty understanding and determining the information they are being asked to provide" regarding minority- and women-owned status. In the context of business credit, asking questions regarding the ethnicity or gender of business owners is completely contrary to the expectations of financial institutions and borrowers alike. It is likely that applicants will be perplexed why such inquiries are being made and they will generally decline to respond. Despite the efforts of the Bureau to create a sample data collection form in the Rule that provides context for these intrusive requests, financial institutions remain concerned that §1071 inquiries will harm relationships between financial institutions and their customers. A government database could alleviate these concerns.

²³ Once again, a government database would alleviate the concerns expressed in this paragraph.

Regarding the sample data collection form proposed in the Rule, the Bureau should make revisions to better align the form with the statute and Rule. This form should include as its first point a statement that no applicant for credit is required to provide responses to questions posed. Secondly, the form should ask whether the applicant is a small business based on the gross annual revenue threshold for the applicants and its affiliates. Only if the applicant chooses to complete the form and qualifies as a small business should the form invite the applicant to complete the form.

o. Collecting sex data

The Bureau is proposing expanding the scope of its collection of sex data for §1071 purposes. AFSA urges the Bureau to take a measured approach when it comes to inserting highly personal questions into business lending processes. Inviting a person to reveal personal, intimate details in the context of a business transaction presents a huge paradigm shift for financial institutions and customers alike, and AFSA urges the Bureau to delay including queries regarding highly personal information until stakeholders have an opportunity to understand the purpose of these questions in connection with business lending.²⁴

p. Collecting ethnicity and race by observation

The Rule proposes that in the event an applicant declines to provide ethnicity and race information and the financial institution meets in person (or virtually in a manner that shares video) with one or more of the applicant's principal owners, the financial institution is obligated to report ethnicity and race information based on visual observation or surname. While similar obligations to visually observe race and ethnicity have been present in the mortgage industry for some time, the implementation of a similar requirement for small business credit is very concerning.

Under the scheme created by Congress, while financial institutions are required to make certain inquiries of small business lending applicants, those applicants have an absolute right to decline to answer those questions. The Rule's proposal to require collection by observation effectively requires a financial institution to disregard and overrule the applicant who chooses, for whatever reason, not to provide §1071 data. Forcing financial institutions to circumvent the will of the customer who chooses not to provide such data is inappropriate and contrary to the customer's statutory rights, regardless of whether similar obligations apply in other contexts where there is no express provision giving applicants the right to refuse to provide the requested data.

q. Verification of §1071 data

The Rule proposes that financial institutions are able to rely on statements by the applicant regarding responses to §1071 queries. AFSA commends the Bureau for taking this approach. AFSA agrees that requiring verification of §1071 data is very burdensome and provides no business benefit, as §1071 is not used for underwriting purposes. The Bureau also seeks comment regarding whether financial institutions should be required to indicate whether particular data points have been verified. As neither the statute nor the Rule require financial institutions to perform verification of §1071 data received from applicants for credit, the Bureau should not obligate financial institutions to indicate whether data has been verified. As stated above in Section V. of this letter, AFSA asks the Bureau to distinguish between expectations for treatment of data collected in connection with the Rule and data collected for underwriting or other business purposes.

²⁴ Again, the government database wherein the government and not the financial institution is collecting this sensitive data would alleviate these concerns.

r. Reporting by multiple financial institutions

The Bureau seeks comment on whether, in the event an application for credit is withdrawn or denied by a given financial institution, the financial institution can determine if another financial institution made the transaction. AFSA members have no ability to determine credit extended by other financial institutions. In the Rule, the Bureau speculated that:

...if an applicant applies to Financial Institutions A and B, and then withdraws an application with Financial Institution A, then Financial Institution A should be able to ascertain whether the applicant obtained credit from Financial Institution B.²⁵

Financial institutions are not privy to data about credit extensions made by competitors and are prohibited under existing law from sharing nonpublic personally identifiable information (including the existence of an account) with other financial institutions absent an exception.²⁶ This is further compounded in indirect financing transactions in which the original creditor often offers the completed retail contract to multiple financial institutions. Each of those financial institutions would be required to compile, maintain, and submit the data required by the rulemaking. Only one of the financial institutions will ultimately purchase the retail contract, but all of them to whom it is sent will be subject to the obligations of the proposed rule.

s. Use of third parties to create and submit the annual loan/application register

The Bureau seeks comment on whether third parties such as financial software vendors should be allowed to submit a small business lending application register on behalf of a covered financial institution. AFSA members rely on third party vendors for many important business processes, and the contributions of such companies to support financial institution innovation is important. Third party vendors should be encouraged to develop solutions to assist financial institution clients meet §1071 obligations.

t. Effective and compliance dates

The Bureau seeks comment on proposed timing for the Rule to go into effect and for financial institutions to come into compliance with the Rule. As the Bureau observed, this Rule imposes obligations on financial institutions who have not previously had Federal data reporting obligations. Also, the Rule requires development of processes, staff training, system development, and comprehensive end-to-end testing in order to operate an effective and reliable §1071 system. Monitoring will be required. In addition, there are several open issues of scope and coverage that are unresolved, such as the involvement of dealers that are exempt from Bureau rulemaking and for whom there is currently no other mechanism to compel participation in §1071 processes.

With these considerations in mind, AFSA strongly urges the Bureau afford more time for implementation than the 18 months proposed. AFSA supported the agency's prior SBREFA proposal of at least two years after the publication of an eventual final rule. The additional discretionary data points and visual observation requirements introduced for the first time in this proposed Rule certainly warrant additional time beyond the two-year minimum. AFSA requests that the Bureau provide a compliance date that is January 1 of the first calendar year that begins two years after the effective date of the Rule. This would allow time for implementation work by financial institutions and allow them time to track originations of covered transactions and small business status

²⁵ 86 Fed. Reg. 56495.

²⁶ On the other hand, were the Bureau to sponsor and maintain the database AFSA proposes, the Bureau could observe when different financial institutions report applications for or extensions of credit by small businesses.

of applicants. Most importantly, providing adequate implementation time will allow financial institutions the opportunity to make the changes necessary to achieve the statutory purpose and Bureau's goals for §1071 data collection and reporting.

u. Privacy concerns relating to publishing §1071 data

The Rule details the Bureau's plans to make public disclosure of §1071 data collected by financial institutions. AFSA commends the Bureau for identifying the privacy concerns of financial institutions and business customers that are raised by the planned disclosure. AFSA agrees that disclosure of §1071 data may reveal the identity of small businesses and their principal owners, the business strategies of financial institutions, and confidential and secret details of pricing and credit terms relating to actual transactions. In its efforts to create data that supports the goals of §1071 reporting, the Bureau must consider how to protect privacy for small businesses as well as financial institutions' proprietary business strategy, pricing, and risk decisions. Failing to do so will result in leaked trade secrets and confidential information that is harmful to financial institutions and their customers.

Many financial institutions that will be covered by the Rule do not currently participate in another federal data collection program. These financial institutions are concerned with how §1071 data will be safeguarded by the Bureau. AFSA asks the Bureau to explain how it will maintain the confidentiality of §1071 information it receives from financial institutions, especially when external parties request §1071 data through Freedom of Information Act (FOIA) requests, discovery demands in litigation, or through other means. For example, once the Rule is effective, the Bureau will have significant amounts of data regarding individual credit transactions, financial institutions, and their customers, including personal demographic information about small business owners. AFSA members would like to understand how the Bureau will respond to FOIA requests or other demands for information in the Bureau's possession (including information that the Bureau does not plan to publish) regarding financial institutions and/or small business credit applicants.

v. Claimed benefits of disclosure of §1071 data

The Rule articulates several potential benefits to users of §1071 data, including facilitating the enforcement of fair lending laws and identifying business and community development needs and opportunities of certain small businesses. While financial institutions fully support the enforcement of fair lending laws and strive to work transparently with governmental regulators, the Rule places too much emphasis on usage of §1071 data by non-governmental entities such as "researchers, economists, industry, and community groups."

The Rule compels financial institutions to ask invasive questions of business customers, and to report proprietary information about private credit transactions in order to create a data source for a wide range of parties. While AFSA understands the legal basis of §1071 and the Bureau's obligation under the statute to create a rule implementing the statute, the current proposal will empower observers to draw critical conclusions about small business lending based on incomplete and misleading data.

One comment from the Rule is particularly illustrative of this point. The Rule states:

One commenter expressed the view that robust data collection would allow the public to gain a much greater understanding of gaps in lending to borrowers in the marketplace, and easily identify unmet borrowing needs.²⁷

While financial institutions understand enforcement of consumer financial protection laws from government agencies tasked with their enforcement, the Rule's emphasis of the benefits to non-governmental organizations suggests that those parties intend to engage in enforcement of fair lending laws themselves, with support by the Bureau as the source of data. This outcome would be very problematic for financial institutions and their customers.

As stated above, business credit markets have evolved over time to offer a wide range of flexible terms in different business segments, for different types of credit, with different collateral, to customers with different levels of credit worthiness, leading to varying pricing terms. Supervision and enforcement by professional governmental agencies, tasked with authority under applicable statutes, is capable of providing appropriate governance to covered institutions. AFSA asks the Bureau to consider the harms to industry and customers of providing data to the general public without context that allows the data to be understood.

w. Privacy enhancing tools and techniques

AFSA commends the Bureau for its detailed consideration of tools and techniques it can use to obfuscate certain published §1071 data in order to protect the privacy of borrowers and financial institutions. AFSA urges the Bureau to use such opportunities liberally in order to protect the privacy interests of market participants. AFSA also asks the Bureau to continue frequent consultation with financial institutions as it designs and implements §1071 practices to gather industry perspectives.

x. Amount of pricing information collected

AFSA commends the Bureau for its efforts to balance the goals of §1071 with privacy interests of market participants, while recognizing that publication of §1071 will inevitably create misinterpretations of disparities in business finance. The burden of these misinterpretations will fall on financial institutions, who will be wasting resources fighting false accusations of wrongdoing, and customers, who will face fewer options for credit. That being said, the Rule seeks comment on additional information could help reduce misinterpretations of disparities in pricing. While AFSA agrees that fighting these misinterpretations is of critical importance, the best path is not to add information to this compilation of data. The answer is to constrain parties interpreting the data from making assumptions regarding business lending without consultation with market participants to understand the basis for perceived disparities. AFSA asks the Bureau to refrain from requiring financial institutions to collect and report pricing data, but, if the Bureau requires the pricing data, then AFSA members ask that the pricing data be limited to the interest rate and origination fees that are required to be paid at the inception of the financing facility.

y. Benefits of presenting pricing information in bins

The Rule asks for comment on modifying pricing data to present data into bins rather than presenting actual values. AFSA agrees that presenting pricing information in bins rather than presenting actual figures will help

²⁷ 86 Fed. Reg. 56515.

protect the proprietary interests of market participants without harming the value of the data in promoting the goals of §1071.

z. Census tract disclosure

The Rule proposes disclosing census tract data attributable to borrowers as part of the §1071 data. While census tract is a data element included in §1071, AFSA urges the Bureau to consider using a different geographic designation that financial institutions already have. As AFSA previously commented, AFSA members do not collect or report the census tract in which the principal place of business of the applicant is located, though they do receive the applicant's address in the credit application. Translating the address to the applicable census tract will be an additional burden on financial institutions with no clear benefit. Given the greater granularity of census tract data compared to other available geographic designations, revealing census tract data of borrowers, along with the other proposed data, raises risks that borrowers will be identified by observers of §1071 data. This outcome is an undesirable side effect of §1071 data publication. In order to prevent this, AFSA supports the Bureau's suggestion that it report geographic data by disclosing at the state level only.

aa. Gross annual revenue disclosure

The Bureau seeks comment regarding whether it would be advisable to report gross annual revenue data in bins rather than actual amounts. AFSA supports publication of gross annual revenue in bins in order to protect the privacy of market participants.

bb. NAICS code disclosure

The Bureau seeks comment regarding whether it would be advisable to report the full NAICS code or whether a less specific alternative is preferable. AFSA supports publication of the initial two (2) digits of the NAICS code in order to protect the privacy of market participants.

cc. Number of non-owner workers

The Bureau seeks comments regarding plans to disclose the number of non-owner workers employed by small businesses. This information is not particularly useful for drawing conclusions about credit applicants given the difficulties in counting part-time and seasonal employees. Also, the number of employees represents an element of competitive business strategy for credit applicants. AFSA urges the Bureau to refrain from publishing this data. Publication is not necessary to achieve the aims of §1071, and the Bureau should modify the data and publish it in bins rather than directly.

dd. Time in business disclosure

The Bureau seeks comment regarding plans to disclose the time that small business credit applicants have been in business. AFSA urges the Bureau to refrain from publishing this data, as it is an unnecessary disclosure of applicant's information that may reveal the applicant's identity in conjunction with other data being published. If publication is necessary to achieve the aims of §1071, the Bureau should modify the data and publish it in bins rather than directly.

ee. Disclosing responses regarding sex

The Bureau is considering whether to require financial institutions to ask detailed questions regarding the sexual orientation and gender identity of small business owners. As discussed above, this information is outside the scope of lending, and AFSA members are concerned about the privacy implications of such inquiries. When it comes to making public disclosures regarding this information, AFSA asks the Bureau to reconsider and not make any public disclosures along these lines. It is not clear that the Bureau has thoroughly weighed the privacy interests of business owners who may be willing to make intimate disclosures to support the aims of §1071, yet are not fully aware that those responses will be publicly available. AFSA therefore asks the Bureau to consult with small business owners regarding this sensitive area prior to finalizing any publication of sex data. AFSA asks the Bureau to refrain from requiring collection and reporting of this data by financial institutions.

ff. Financial institution identifying information

The Rule contemplates publishing financial institution identifying information, such as:

(1) Its name; (2) its headquarters address; (3) the name and business contact information of a person who may be contacted with questions about the financial institution's submission; (4) its Federal prudential regulator, if applicable; (5) its Federal Taxpayer Identification Number; (6) its LEI; (7) its RSSD ID, if applicable; (8) parent entity information, if applicable; (9) the type of financial institution that it is, indicated by selecting the appropriate type or types of institution from the list provided or entering free-form text; and (10) whether the financial institution is voluntarily reporting covered applications for covered credit transactions.²⁸

The Bureau plans to publish most of this information, with the exception of personal contact information in (3) above. In assessing risk and benefits of publishing this information, the Bureau has overlooked how this data could be used for social engineering, identity theft and other cyber attacks. Whether or not this information is available elsewhere, publishing this information creates serious risks to financial institutions as bad actors could use this information to launch phishing campaigns by creating communications that appear to come from legitimate sources. While financial institutions have made great efforts to protect themselves from such attacks, the fact remains that making this information readily available increases risk. AFSA asks the Bureau not to publicly disclose these data elements in light of current and future cyber security risks.

As the Bureau designs the format for publication of 1071 data, AFSA asks that the Bureau engage with financial institutions and other stakeholders to incorporate feedback regarding the manner in which 1071 data will be published.

gg. Privacy considerations for captive wholesale finance

The Bureau seeks comment regarding whether there are instances in which captive wholesale finance companies lend exclusively to businesses that are branded in a manner that can be easily matched to the identity of the financial institutions. AFSA confirms that this is the case, and that segment of financial institutions should receive additional protection from re-identification risks.

²⁸ 86 Fed. Reg. 56538.

hh. Disclosing the name and contact information of individuals

The Bureau seeks comment regarding its proposal to refrain from publishing the name and contact information of individuals who can field questions regarding the financial institution's §1071 data. AFSA agrees with the Bureau's proposal not to publish that information.

ii. Disclosing free-form data

The Bureau seeks comment regarding its proposal to refrain from publishing free-form §1071 data in light of the enhanced risk to privacy considerations. AFSA agrees that refraining from publishing free-form data is the correct decision.

jj. Litigation and reputational risks to covered financial institutions

The Rule makes several references to concerns about increased litigations and reputational risks to covered financial institutions based on the disclosure of §1071 data. AFSA shares these concerns. The publication of this data will lead to scrutiny based on incomplete and misleading data. The data will be incomplete because credit applicants have a statutory right to decline to provide information in response to §1071 inquiries. The data will be misleading because characteristics of different credit types will be widely divergent based on risk and other economic factors.

kk. Costs to small businesses

The Bureau seeks comment regarding potential costs to small businesses based on the rule. Both small business applicants and small financial institutions will be affected by this Rule.

Starting with the former, small business applicants will face limited direct costs, as the statute specifically authorizes them to decline to answer §1071 inquiries. However, they will very likely face more limited credit availability, as well as an increased cost of credit. AFSA agrees with the Bureau's assessment that the significant compliance costs for covered financial institutions will increase the costs of credit to small business applicants. In some cases, financial institutions may decide to cease offering small business credit in light of the burdensome nature of compliance obligations under the Rule and the burden of managing scrutiny based on misinterpretations of §1071 data.²⁹ Moreover, depending on how and what data is released to the public, small business applicants could face privacy violations.

Regarding the latter – small financial institutions – they will have increased costs and challenging compliance burdens, as many small financial institutions discussed during the Bureau's SBREFA panel.

II. Benefits to certain financial institutions

The Bureau seeks comment on the Rule's effects on certain financial institutions with \$10 billion or less in total assets. AFSA does not believe the Rule provides any significant benefit to any financial institutions, and will likely harm both financial institutions and borrowers. Commercial lending in the United States market has evolved

²⁹ Again, a government sponsored database alleviates many of these concerns.

over time to support a wide range of business financing needs. Commercial lending is a very competitive business, with established financing sources competing with new entrants vying to attract and retain customers. The Rule as currently proposed will take resources and attention away from extending credit to customers and introduce friction to existing processes. The challenges of building §1071 data collection and reporting systems will fall most heavily on small institutions, who have fewer resources than larger finance sources. For these reasons, AFSA asks the Bureau to refrain from requiring financial institutions with less than \$10 billion in total assets to collect and report §1071 data.

mm. Compliance costs to small entities

Compliance costs to small entities will be particularly burdensome. The Rule directs covered financial institutions to capture and manage data that is outside the scope of existing business lending practices. While third-party service providers may, in time, offer products or services to help financial institutions manage §1071 compliance obligations, those providers have not yet had time to develop those offerings. AFSA members have had difficulty making compliance cost estimates due to the novel requirements of the Rule and the brief duration of this comment period.

Generally speaking, implementation of the Rule for a covered financial institution will require:

- Redesign of credit application processes to allow for making §1071 data inquiries,
- Creating firewalled systems to take and hold §1071 data,
- Creating mechanisms to capture discretionary §1071 data from existing business systems (*e.g.*, pricing data) and make it available to firewalled systems for §1071 reporting purposes,
- Testing of systems to ensure the accuracy of §1071 data and suitable access controls,
- Training staff on the originations side to understand §1071 data collection requirements,
- Training staff who will work with the §1071 data to properly collect and manage the data,
- Training staff who will compile the §1071 data for submission to the Bureau,
- Training staff to respond to inquiries, investigative demands, and litigation alleging violations of law by the financial institution based on the §1071 data made available to the public, and
- Training staff to respond to media inquiries based on the §1071 data made available to the public.

All financial institutions falling under the Rule will need to develop or purchase systems to perform the tasks contemplated by the Rule. Small entities will need to devote a relatively larger proportion of their resources to develop the processes and systems necessary to collect and report §1071 information when compared to larger companies who likely have more resources at their disposal.

We again note that many of these concerns are removed by the government sponsoring and maintaining a database, and simply requiring financial institutions to report the applicant's unique identifier and such additional data fields as only the financial institution would know based upon its existing application data collection used for decision making.

X. Conclusion

AFSA appreciates the careful consideration that the Bureau has given this rulemaking. We commend the Bureau for attempting to balance the interests of financial institutions, credit applicants, and others while fulfilling the purposes of §1071. There are many instances in which the Rule strikes the right balance, but also several areas where additional attention is required.

This rule will affect small businesses throughout the country, and it is crucial that it improve their credit availability, not limit it. We look forward to continuing to work with the Bureau on this rulemaking. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,



Celia Winslow
Senior Vice President
American Financial Services Association

APPENDICES

1. Indirect Vehicle Financing

Financial institutions purchase completed retail installment sale contracts entered into between retail customers and motor vehicle dealers for the sale and financing of vehicles. When a customer purchases 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 the vehicle with the dealer, the dealer is the original creditor and negotiates the terms of the retail contract with the customer.

Each customer that elects to finance the purchase of a vehicle with the dealer completes a credit application. If the dealer is requesting that a financial institution purchase the retail contract, the dealer submits the information from the credit application electronically to the financial institutions it would like to consider purchasing the retail contract. When a dealer completes a retail contract with a customer, the dealer often does not know which financial institution will purchase it, so the dealer offers it to multiple finance sources which may range from a few to upwards of ten or more. Only one of the financial institutions will ultimately purchase the retail contract, but all of them to whom it is sent by the dealer will have evaluated it for purchase.

The information from the credit application is typically sent to financial institutions through online systems, together with information about the terms of the retail contract. It is important to note that it is not the credit application itself completed by the customer that is submitted, but information from the credit application that the dealer provides to the financial institutions. This information may be submitted by the dealer while completing the retail contract with the customer or it may be submitted after the retail contract has already been completed and the customer has the vehicle.

After the information is obtained, the financial institutions evaluate it to determine whether to purchase the retail contract from the dealer. The decision process is based on an evaluation of the customer, the credit application information, the proposed terms of the retail contract, the credit bureau information, and other information. The evaluation emphasizes the customer's ability to pay and creditworthiness, focusing on payment, affordability, credit history and stability as key considerations. The creditworthiness of any co-buyer or guarantor is evaluated in a similar manner to the customer and is also considered when determining whether to approve the purchase of the retail contract.

If the purchase of the retail contract is approved by the financial institution, the dealers must submit the completed retail contract, signed by both the customer as the buyer and the dealer as the seller/creditor. After the dealer submits a completed retail contract, the financial institution confirms that the terms of the retail contract are consistent with what was approved and checks for errors apparent in the disclosures made by the dealer.

All contracts purchased are entered into the financial institution's originations and receivables systems and assigned a unique account number for their duration.

2. Data Elements Typically Collected in Indirect Vehicle Finance Transactions

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Unique Identifier	A code identifying the application or extension of credit.	Yes.	Yes.	AFSA members generally do assign application or loan numbers to new credit applications, but not necessarily to credit line increases. <i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Application date	The date the application was received or the date on the paper/electronic application form.	Yes.	Yes.	We appreciate the Bureau’s proposal of a grace period to reduce the compliance burden of pinpointing an exact date on which an application was received. <i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Application method	The means by which the applicant submitted the covered application directly or indirectly to the creditor.	Yes.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Application recipient	Whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party.	Yes.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Credit product	The credit product.	Yes.	Yes.	AFSA appreciates the inclusion of the categories, “other,” “unknown,” and “other/unknown” to facilitate compliance. <i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>

³⁰ For vehicle finance, “existing data flows” refers to data transmitted between dealer and finance company via RouteOne, DealerTrack, or similar platforms.

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Guarantees	The type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated.	No.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Loan term	The length of the loan in months, if applicable.	Yes.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Credit purpose	The purpose or purposes of the credit applied for or originated.	Yes.	Sometimes.	<p>We appreciate the flexibility of being able to select “other” and “unknown or unreported by the applicant.” FIs receive limited information on the type and purpose of financing from the applicant. For example, 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, but not necessarily much else. For other credit products—revolving credit lines, for example—there is no specific purpose. Different FIs collect different information about the “purpose” of the credit. Some FIs 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 FI 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 FI’s system of record.</p> <p><i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i></p>
Amount applied for	The initial amount of credit or the initial credit limit requested by the applicant.	Yes.	Sometimes.	<p>As the CFPB recognizes, applicants do not always request a particular amount. Thus, the ability to report “not applicable” is necessary.</p> <p><i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i></p>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Amount approved or originated	(i) For an application for a closed-end credit transaction that is approved but not accepted, the amount approved by the financial institution; or (ii) For a closed-end credit transaction that is originated, the amount of credit originated; or (iii) For an application for an open-end credit transaction that is originated or approved but not accepted, the amount of the credit limit approved.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Generally.	In light of the potential meaning of the statutory language, it is appropriate that the CFPB is considering proposing different standards for closed-end and open-end products. FIs 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 FI required 25%; or the applicant wanted a term of 3 years, but the FI countered with 5 years; or the applicant requested \$10,000 but the FI 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). <i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Action taken	The action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Action taken date	The date of the action taken by the financial institution.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Denial reasons	For denied applications, the principal reason or reasons the financial institution denied the covered application.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Pricing information: Interest rate	The following information regarding the pricing of a covered credit transaction that is originated or approved but not accepted, as applicable: (i) Interest rate. (A) If the interest rate is fixed, the interest rate that is or would be applicable to the covered credit transaction; or (B) If the interest rate is adjustable, the margin, index value, and index name that is or would be applicable to the covered credit transaction at origination.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Pricing Information: Total origination charges	The total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars.	Not part of application data collected by the dealer, but may be included by the finance source as part of the credit application decision response data.	Yes.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Pricing Information: Broker fees	The total amount of all charges included in paragraph (a)(12)(ii) of this section that are fees paid by the applicant directly to a broker or to the financial institution for delivery to a broker, expressed in dollars.	No.	When applicable.	<i>n/a to indirect vehicle transactions</i>
Pricing information: total annual charges	The total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction, expressed in dollars.	No.	When applicable.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Pricing information: Additional cost for merchant cash advances or other sales-based financing	For a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid, expressed in dollars.	N/A	When applicable.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>
Pricing information: prepayment penalties	Whether the financial institution could have included a charge for paying all or part of the transaction's principal before the date on which the principal is due; and whether the terms of the covered credit transaction do in fact include a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due.	No.	When applicable.	<i>Financial institutions will have this without needing the Federal Reserve to issue a §1071 rule.</i>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Census tract	The census tract in which is located: (i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or (ii) If the information in (i) above is unknown, the address or location of the main office or headquarters of the applicant; or (iii) If the information in both paragraphs (i) and (ii) is unknown, another address or location associated with the applicant. (iv) The financial institution shall also indicate which one of the three types of addresses or locations the census tract is based on.	No.	No.	AFSA members do not collect or report the census tract in which the principal place of business of the applicant is located, though they do receive the applicant's address in the credit application. <i>Financial institutions do not typically use census tract data for business purposes. Technical and process changes will be necessary to deliver this data.</i>
Gross Annual Revenue	The gross annual revenue of the applicant for its preceding full fiscal year prior to when the information is collected.	No.	Sometimes.	AFSA members may or may not collect the gross annual revenue of the business in the last fiscal year. In particular for smaller, asset-backed loans, FIs (e.g. floorplan lenders) do not generally collect this information. FIs may just ask for net income, depending on the type of account or creditor. It should also be clear that applicants have no obligation to provide this information. <i>Financial institutions do not all use gross annual revenue as a data point for business purposes. For those who do not, technical and process changes will be necessary to deliver this data.</i>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
NAICS Code	A 6-digit North American Industry Classification System (NAICS) code appropriate for the applicant.	No.	No.	<p>Financial institutions do not collect this information. To do so would be overly burdensome for applicants and very difficult to administer for financial institutions. Applicants would need be aware of and understand the NAICS regulations. The Table of Small Business Size Standards (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.</p> <p><i>Financial institutions do not typically use NAICS Codes for business purposes. In the event an applicant declines to provide its NAICS Code, the financial institution cannot determine it independently. Technical and process changes will be necessary to deliver this data.</i></p>
Number of workers	The number of non-owners working for the applicant.	No.	No.	<p>FIs do not always collect this information and it is unclear if an applicant would be able to provide it at the time of application. For example, would part-time employees count? What if it’s a family business and sometimes one of the children of the owner helps out during the summer?</p> <p><i>Financial institutions do not typically use number of workers for business purposes. Technical and process changes will be necessary to deliver this data.</i></p>
Time in business	The time the applicant has been in business, described in whole years, as relied on or collected by the financial institution.	No.	Sometimes.	<p>FIs do not always collect this information.</p> <p><i>Some financial institutions use time in business for business purposes. For those who do not, technical and business process changes will be necessary to collect this data.</i></p>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Minority-owned business status	Whether the applicant is a minority-owned business.	No.	No.	<p>AFSA members do not currently gather or report this information, except the few who do so for HMDA purposes. We agree with the Bureau's proposal that the collection and reporting of women-owned and minority-owned business status be based solely on applicant self-reporting. It should also be clear that applicants have no obligation to provide this information.</p> <p><i>Financial institutions cannot collect this information in indirect vehicle finance transactions, as dealers are prohibited under ECOA from asking about race, color, religion, national origin or sex. A §1071 rule by the Federal Reserve will be necessary for dealers to collect this information.</i></p>
Women-owned business status	Whether the applicant is a women-owned business.	No.	No.	<p>AFSA members do not currently gather or report this information, except the few who do so for HMDA purposes. We agree with the Bureau's proposal that the collection and reporting of women-owned and minority-owned business status be based solely on applicant self-reporting. It should also be clear that applicants have no obligation to provide this information.</p> <p><i>Financial institutions cannot collect this information in indirect vehicle finance transactions, as dealers are prohibited under ECOA from asking about race, color, religion, national origin or sex. A §1071 rule by the Federal Reserve will be necessary for dealers to collect this information.</i></p>

Field	Description	Is this data present in existing flows? ³⁰	Can a financial institution provide this data?	Comments
Ethnicity, race, and sex of principal owners	The ethnicity, race, and sex of the applicant's principal owners. The data compiled for purposes of this paragraph shall also include whether ethnicity and race are being reported based on visual observation or surname.	No.	No.	<p>AFSA members do not currently gather or report this information, except the few who do so for HMDA purposes. We agree with the Bureau's proposal that the collection and reporting of women-owned and minority-owned business status be based solely on applicant self-reporting. It should also be clear that applicants have no obligation to provide this information.</p> <p><i>Financial institutions cannot collect this information in indirect vehicle finance transactions, as dealers are prohibited under ECOA from asking about race, color, religion, national origin or sex. A §1071 rule by the Federal Reserve will be necessary for dealers to collect this information.</i></p>
Number of principal owners	The number of the applicant's principal owners.	No.	Yes.	<p><i>Financial institutions do not typically use number of principal owners for business purposes. Technical and process changes will be necessary to deliver this data.</i></p>