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Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: CFPB Small Business Lending Data Collection Rulemaking

Dear Sir or Madam:

The Credit Union National Association (CUNA) represents America's credit unions and their 120 million members. On behalf of our members, we are writing in response to the Consumer Financial Protection Bureau's (CFPB) "Outline of Proposals under Consideration and Alternatives Considered" (the Outline) for its small business lending data collection rulemaking released in September 2020.¹

General Comment

Credit unions are unique in the financial services industry as not-for-profit financial cooperatives with a statutory mission to promote thrift and provide access to credit for provident purposes. The member-owned structure of credit unions ensures we provide products and services to our members in a manner that is fundamentally different than for-profit financial service providers. In fact, in many cases, the credit union may have been formed to meet the specific financial needs of their geographic community, select employer group, or other field of membership. As a result, credit unions have a vested interest in helping the members and small businesses they serve succeed by meeting their credit needs and providing low-cost financial services.

Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) is intended to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities for women-owned, minority-owned, and small businesses.² Credit unions support the goals of section 1071 and seek to provide all members with fair and equitable financial opportunities. That said, we are concerned about the potential for unintended consequences and substantial costs of compliance associated with the creation of a broad data collection where one does not currently exist. In addition, as entities bound to serve a specific field of membership, the data collected from credit unions would likely be incomparable to other lenders that are legally permitted serve anyone walking through its doors or accessing its websites.

¹ Consumer Fin. Protection Bureau, Small Business Review Panel for Small Business Lending Data Collection Rulemaking: Outline of Proposals Under Consideration and Alternatives Considered (September 15, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf.

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, section 1071, 124 Stat. 1376, 2056 (2010).

As community-based financial institutions, the section 1071 data collection will likely add substantial strain on credit unions' finite compliance resources but provide an unknown tangible benefit. It is important for the Bureau to keep its rule as simple and tailored as possible to avoid creating unintended barriers for small business borrowers seeking credit while also ensuring community lenders can maintain the privacy of their members' data.

Special Commercial Lending Considerations for Credit Unions

Credit unions have different requirements and rules for business lending than for-profit financial institutions. In 1998, Congress passed the Credit Union Membership Access Act, which capped credit unions' ability to offer member business loans (MBLs).³ While credit unions operate in every U.S. state and provide an array of financial services, not all credit unions provide business loans and the choice to do so is based on the regulatory environment and the individual credit unions' membership. While the National Credit Union Administration (NCUA) and relevant state regulators have made positive changes to business lending rules over the years, credit unions' business loans are nevertheless subject to additional hurdles and limitations that other lenders are not.

Despite these limitations, NCUA has noted credit unions' "long history of meeting [the] business lending needs of their members," and such commitment proved essential in the period from 2007 to 2010.⁴ This trend continues to this day as credit unions have stepped up to serve struggling businesses during the COVID-19 pandemic.

Scope of Proposed Rule

Based on the CFPB's Outline, lenders would collect and report lending data for all applicants that satisfy the rule's definition of a small business, including identifying women-owned and minority-owned businesses within that pool, but would not be required to collect and report section 1071 data for women-owned and minority-owned businesses that are not "small." We agree a business' status as a "small business" is the most germane factor when considering the intent and purpose of section 1071 and we support the CFPB's proposed scope. In addition, given the highly complex nature of lending to businesses that are not "small," we believe the Bureau's rulemaking is better suited focusing exclusively on the small business lending market.

Definition of "Financial Institution" (Lender Coverage)

The Bureau is considering defining "financial institution" in a manner that would extend the rule's data collection and reporting requirements to a variety of entities engaged in small business lending including banks, savings associations, credit unions, online lenders/platform lenders, Community Development Financial Institutions (CDFIs), lenders involved in equipment and vehicle financing, commercial finance companies, governmental lending entities, and non-profit non-depository institution lenders. As a starting point, we support the CFPB's proposed definition of "financial institution." The Bureau's rulemaking should ensure all types of entities offering commercial loans are initially covered so as not to favor one business model or charter type over another, which would create an uneven playing field and affect the lending market.

³ Pub. L. 105-219.

⁴ 81 Fed. Reg. at 13,532 (stating "while lending at banks contracted during the recent recession, credit unions continued to lend").

Exemptions

As the CFPB moves forward, we believe it should ensure credit unions remain well-positioned to provide access to safe and affordable loans to small businesses. When rules make it expensive or difficult to access safe and affordable products and services from credit unions, consumers pay the price. We recommend the CFPB use its exemption authority in a meaningful way and exempt all credit unions from collecting and reporting 1071 data. Credit unions have no pattern of unfair lending and alternatively, are seeking ways to provide more business loans to consumers, not fewer.

That said, to mitigate its broad approach to lender coverage, the Bureau is considering whether to include a size-based or activity-based exemption for determining when a lender must collect and report 1071 data. The Bureau is – rightfully – concerned that the rule’s potentially high cost of compliance may result in a decrease in credit availability for small businesses as smaller lenders pull out of or minimize their presence in the business lending market.

While we believe the CFPB should consider exempting *all* credit unions from the rulemaking, we would support the Bureau adopting an exemption for smaller lenders in the market. In this regard, the best path forward, based on the options offered in the Outline, would be to adopt both Option B (i.e. \$200 million in assets) for the size-based exemption and Option 3 (i.e. originations of at least 100 loans or \$10 million) for the activity-based exemption. While adopting either of these options would be helpful to small lenders, we believe taking the hybrid approach would safeguard continued credit availability for the small businesses served by community-based lenders. For example, a community-based lender may be over \$200 million in assets but, due to a small volume, the cost of compliance on a per loan basis could mean an asset-based exemption alone is insufficient and could cause the lender to reduce its small business credit offerings. The same can be true for an activity-based only exemption, which may not properly account for a small-size lender that focuses on small business lending needs of its members.

In regard to entities that are not the lender of record, the Bureau is considering where more than one party is involved on the lender side of a single small business loan or application, the 1071 requirements would be limited in the same manner as in Regulation C, which implements the Home Mortgage Disclosure Act (HMDA). We caution against the use of HMDA as guide *in this context* because, although familiar to most mortgage lenders, mortgage lending and small businesses lending are completely different product lines with different structures and complexities. In the credit union context, which includes the authority to conduct loan participations, we believe the 1071 requirements should fall on the originating lender which would be in the best position to have relevant information on the borrower. In fact, participating lenders would be hard pressed to comply with 1071 given their distance from the borrower, and the data they provide would likely be duplicative of the originating lender.

Definition of “Small Business” Applicants

The Bureau is considering three alternative approaches for a simpler size standard to determine the meaning of a “small business.” These potential approaches to determining whether an applicant is small include: (1) only gross annual revenue; (2) either the number of employees or average annual receipts/gross annual revenue, depending on whether the business is engaged in either manufacturing/wholesale or services; or (3) size standards across 13 industry groups that correspond to two-digit NAICS code industry groupings. Of the three options currently being considered, Option 3 is preferred. However, if the Bureau chooses to adopt Option 3, then it should provide substantial compliance guidance for determining a business’ industry classification and how to classify businesses that may fall into more than one category.

We would be concerned Option 1, gross annual revenue, would not properly account for regional differences in business size. In addition, Option 2 and its use of number of employees or annual

receipts/gross revenue – depending on the business type – would be overly complex and potentially confusing.

Definitions of “Women-Owned Business,” “Minority-Owned Business,” and “Minority Individual”

The Bureau is considering proposing 1071 guidance that would mirror the HMDA aggregate categories and clarify that a minority individual is a natural person who is Black or African American, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino. In this regard, we support the use of HMDA as a guide for developing the 1071 definition of minority individual and encourage the Bureau to create regulatory consistency where appropriate.

Regarding control, the Bureau also is considering clarifying the definition of “women-owned business” and “minority-owned business” by using simple language that mirrors the concepts of ownership and control that are set forth in the Financial Crimes Enforcement Network’s (FinCEN) customer due diligence (CDD) rule. As most credit unions are familiar with the CDD rule, we support the use of these concepts to determine ownership and control to create regulatory consistency and ease compliance.

Product Coverage

The Bureau is considering proposing that a covered product under section 1071 is one that meets the definition of “credit” under ECOA, including term loans, lines of credit, and business credit cards. We support the proposed product coverage as these products represent the most common business financing products used by small businesses and their inclusion would assist in fulfilling the purposes of section 1071.

The proposal also contemplates the express exclusion of consumer credit used for business purposes, leases, trade credit, factoring, and merchant cash advances (MCAs). We agree with the exclusion of these products, especially consumer credit used for business purposes. While some of the smallest businesses may blur the line between personal credit and business credit, the inclusion of consumer credit within the scope of section 1071 could vastly expand the scope of the data collected beyond usefulness and also greatly increase the costs of compliance.

Definition of an “Application”

Section 1071(b) requires that financial institutions collect and report to the Bureau certain information regarding any application to a financial institution for credit. As a result, the Bureau is considering proposing to define an “application” largely consistent with the Regulation B definition of that term. That is, as “an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested.”⁵ We support adopting a definition that is consistent with Regulation B, which would be helpful for training purposes, rather than creating a wholly new definition specific to the 1071 rulemaking.

Data Points

Section 1071(b) requires lenders to inquire whether an applicant for credit is a women-owned, minority-owned, or small business, and to maintain a record of the responses to that inquiry separate from the application and accompanying information. If the answer is yes, then the statute requires lenders to clearly and conspicuously collect several items enumerated in the statute. The Bureau refers to these items as “mandatory data points.”

⁵ 12 CFR 1002.2(f).

As a general principle, we believe the Bureau should finalize a rule that sticks to the statutorily required data points and avoid adding discretionary data points that may not further the purposes of section 1071 in a material way.

CUNA has several comments and suggestions for the proposed mandatory data points:

i. Whether the applicant is a women-owned business, a minority-owned business, and/or a small business

Yes, credit unions determine ownership and percentage of ownership for their small business members. This determination usually occurs during the application process and gathering of supporting materials.

ii. Application/Loan Number

Although exact procedures vary among institutions, some credit unions use application numbers that are system-generated. The CFPB should provide some flexibility in satisfying this data point to account for the wide range of practices in the industry. In addition, the CFPB should be cautious not to require the reporting of consumers' personal information.

iii. Application Date

The Bureau is considering proposing that lenders report the application date using either (i) the date shown on a paper or electronic application form; or (ii) the day on which a credit request becomes an "application." We support this proposal and recommend the Bureau adopt a "grace period" of several days on either side of the date to simplify compliance.

iv. Loan/Credit Type

No comment on this mandatory data point. However, the Bureau should provide clear guidance in its rulemaking about how reporters are expected to determine and report this data point.

v. Loan/Credit Purpose

The loan/credit purpose is generally gathered during the application process and referenced in the credit memorandum. However, many credit unions would need to modify systems to create custom fields to capture this data for purposes of section 1071 reporting. The Bureau would need to clarify the "purpose" information that needs to be captured and reported.

vi. Credit Amount/Limit Applied For

Credit applicants may request a range or "up to," and the final approved amount may depend on appraisals or other factors. We suggest the Bureau adopt several options based on credit ranges as opposed to requiring a specific credit amount to be reported. This data point should also include an option of "not applicable" for instances where a small business borrower does not specify an amount of credit or limit applied for. In addition, we are concerned the "Credit Amount/Limit Applied For" data point could be misconstrued as a denial of the original amount when considered against the approved credit amount/limit.

vii. Credit Amount/ Limit Approved

The Bureau is considering proposing that lenders report: (1) the amount of the originated loan for a closed-end origination; (2) the amount approved for a closed-end loan application that is approved but not accepted; and (3) the amount of the credit limit approved for open-end products (regardless of whether the open-end product is originated or approved but not accepted). For consistency with the "Credit Amount/Limit

Applied For” data point, we suggest the Bureau adopt several options based on ranges as opposed to requiring a specific credit amount/limit to be reported.

viii. Type of Action Taken

The Bureau is considering proposing five categories for reporting “action taken”: 1) loan originated; 2) application approved but not accepted; 3) application denied; 4) incomplete application (closed or denied); and 5) application withdrawn by applicant. We believe the Bureau should further explain the difference between Category 3 and 4, which both cover “denied” applications. In addition, the categories should account for other common circumstances, such as when an applicant is merely rate shopping with multiple lenders. We do not support additional reporting of denial reasons as such information could lead to substantial consumer privacy concerns. For example, the borrower could lack sufficient cash flow to support a loan request.

ix. Action Taken Date

The Bureau should permit a “grace period” of several days for reporting the specific “Action Taken Date,” similar to the “Application Date” data point, to ease compliance burden.

x. Census Tract (Principle Place of Business)

Many credit unions do not currently capture or track census tract, but location information could be received on certain loans during the appraisal process or be found using free software. However, requiring the reporting of a census tract will add a step to the lending process, and credit unions would need a field created to capture and save this information. Credit unions typically collect a borrower’s address of record but in some cases, the funds may be used at a different location. The Bureau would need to clarify which location information needs to be captured and reported.

xi. Gross Annual Revenue

The Bureau is considering proposing that lenders report the gross annual revenue of the applicant during its last fiscal year. In some cases, small businesses serviced by community-based lenders may not know their specific gross annual revenue for section 1071 reporting purposes because either the business is a start-up or the business is extremely small and simple. That said, in many credit unions’ loan processes, the borrower often reports gross revenue and the reported figure is usually verified with tax returns or audited financial statements. We recommend the Bureau permit lenders to report revenue based on ranges as opposed to requiring a specific gross annual revenue amount for the borrower to be reported.

xii. Race, Sex, and Ethnicity of Principal Owner(s)

Section 1071(e)(2)(G) requires financial institutions to collect and report “the race, sex, and ethnicity of the principal owners of the business.” As stated above, for regulatory consistency and ease of compliance, we support the use of the HMDA aggregate race, sex, and ethnicity categories to define “minority individual” and the FinCEN CDD rule ownership and control requirements to determine “principle owner.” In addition, we strongly support this data point being based solely on the applicant’s self-reporting, as opposed to visual observation, surname or another less reliable criteria.

Discretionary Data Points

It is not evident how the proposed discretionary data points would benefit the Bureau or consumers to justify the cost and resources required for their collection. In fact, the addition of unnecessary discretionary data

points may ultimately add to the already significant privacy concerns of both lenders and small business borrowers. The Bureau can look as far as recent history, with the 2015 HMDA Rule, to find a situation where the addition of unnecessary discretionary data points created substantial costs of compliance. Those discretionary data points are now under review for possible reduction.⁶

In developing an entirely new data collection, as a starting point, the Bureau should limit its data set to data points that are statutorily required, and not add discretionary data points merely for the sake of collecting more data. In doing so, the Bureau could revisit its data set in the future and, if the collection of additional data proves to be justified, build out additional data points from there. In the alternative, the Bureau could consider providing an exemption from discretionary data point collecting and reporting for certain small 1071 reporters – like the partial data point exemption approach taken in the HMDA context.

Shielding Data from Underwriters and Other Persons (Firewall)

Section 1071(d) includes two provisions that require a lender to limit internal access to certain information collected under section 1071. As a result, the Bureau is considering proposing that lenders would need to limit access to an applicant's responses to specific inquiries regarding women-owned and minority-owned business status and the race, sex, and ethnicity of principal owners. The Bureau is also considering proposing that an applicant's response to the 1071(b) inquiry regarding small business status need not be firewalled off from underwriters and others pursuant to 1071(d)(1). Additionally, the Bureau is considering proposing to permit lenders to give underwriters, employees, and officers access to the responses if the individual lender determines that such access is needed for the underwriter, employee, or officer to perform his or her usual and regularly assigned job duties.

We understand the intent behind firewalling certain section 1071 data collection information from any staff considering and making credit decisions. However, credit unions and other community-based lenders may find it difficult to comply with arbitrary firewall requirements given their small staff size. For example, according to CUNA research, nearly half of all credit unions have five or fewer full-time employees. We caution the Bureau against adopting a rulemaking that requires firewalling information without also establishing additional reasonable accommodations for lenders with a small number of employees. Not doing so would require lenders to either hire additional staff, outsource additional duties to vendors, or limit their business lending offerings.

Compiling, Maintaining and Reporting 1071 Data to the Bureau

The Bureau is considering proposing that the section 1071 data collection be completed on a calendar year basis and submitted to the Bureau by a specified date following the end of each calendar year. We generally support calendar year collecting and reporting. However, we caution the Bureau against aligning the annual reporting dates for section 1071 with the reporting dates for HMDA – for many small reporters, complying with two large complex data collection and reporting regimes at the same time could ultimately strain finite resources.

Privacy Considerations Involving Bureau Publication of 1071 Data

CUNA has concerns about broad collection of financial data about consumers that could be used in ways not intended by the Dodd-Frank Act. For example, since not all credit unions participate in commercial lending, any localized data made available to the public may be traceable to consumers in certain areas. A consumer seeking a small business loan to create a startup, or for another reason, may have concerns about

⁶ Home Mortgage Disclosure (Regulation C) Data Points and Coverage, 84 Fed. Reg. 20049 (May 8, 2019).

their information becoming public. For example, this could be a concern if the consumer is employed elsewhere while building their business. To mitigate these concerns, the Bureau should only publicly release lending data at the state-wide level and in aggregated form.

Furthermore, requiring the encrypting of this data could present liability and cost concerns to credit unions that could harm their participation in this market. Data breaches and protecting members' privacy are a top priority of credit unions, and new regulations making this issue more complex could negatively impact credit unions and their members.

Implementation Period

The Bureau is considering proposing that financial institutions have approximately two calendar years for implementation following the Bureau's issuance of its eventual 1071 rule. Depending on the complexity of the final rule, we believe two years – but no less than two years – could be a sufficient period of time for vendors to adjust their products and services, and for covered entities to update or revise their systems and processes, and make additional changes necessary to meet the requirements of the new section 1071 rule. However, during the period prior to implementation, the Bureau should regularly communicate with vendors and covered entities to ensure compliance preparations are progressing as expected and consider extensions if issues that could affect industry preparedness arise.

Conclusion

We look forward to working with the Bureau as it continues to develop its small business lending data collection rulemaking. On behalf of America's credit unions and their 120 million members, thank you for your consideration. If you have questions or require additional information related to our feedback, please do not hesitate to contact me at (202) 508-3629 or amonterrubio@cuna.coop.

Sincerely,



Alexander Monterrubio
Senior Director of Advocacy & Counsel