BANK POLICY INSTITUTE

December 14, 2020

Via Electronic Submission

Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Attn: Comment Intake

Re: Small Business Advisory Review Panel for the Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking - Outline of Proposals Under Consideration and Alternatives Considered

To Whom It May Concern:

The Bank Policy Institute[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's outline of proposals to implement the small business lending data collection requirements pursuant to Section 1071 of the Dodd-Frank Act (the "Proposals"), which are under consideration by the Small Business Advisory Review Panel ("SBREFA").[2] BPI members are deeply committed to enabling small businesses to have access to the credit they need and, collectively, make nearly half of the nation's small business loans. We are appreciative of the CFPB's continued efforts to expand access to credit for small businesses, including to women- and minority-owned small businesses.

As a general principle, the CFPB should take a pragmatic approach in proposing and finalizing its Small Business Data Collection Rule. With this in mind, our comments reflect suggested methods by which the CFPB would meet the goals of Section 1071 to collect robust and accurate data of the small business lending market, while also minimizing an increased burden to borrowers and lenders due to a new data collection. Specifically, BPI urges the CFPB to take the following steps:

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[1] The Bank Policy Institute is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] CFPB, *Small Business Advisory Review Panel for CFPB Small Business Lending Data Collection Rulemaking – Outline of Proposals under Consideration and Alternatives Considered* (Sept. 15, 2020), *available at* https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf.

- The CFPB should ensure that the scope of any proposed rule continues to remain narrowly tailored, providing for clear and easily definable definitions for key terms and limiting reportable data to those fields provided under Section 1071.

- To allow for robust and accurate data, the CFPB should consider how best to ensure that all types of institutions that engage in small business lending activities are included in the Section 1071 data reporting efforts.

- Lenders should be permitted to rely on borrower-provided information for reporting purposes and should be granted flexibility with respect to the time period for collection of the information.

- The scope of covered and excluded loan products should be tailored and clearly defined.

- The CFPB should ensure maximum transparency and flexibility as it continues to consider its approaches to the Section 1071 firewall requirements, public disclosure of the data and the relevant implementation period.

I. Any Proposed Rule Should Be Narrowly Tailored with Respect to the Key Terms and Reportable Data Required under Section 1071.

A. Any proposed rule should clearly define the key terms of "small business," "women-owned" and "minority-owned".

BPI is supportive of the CFPB's approach to collect information related to those businesses that are defined as "small businesses," including "identifying women-owned and minority-owned businesses within that pool." This approach will ensure a more accurate picture of lending to women- and minority-owned small businesses by allowing for a comparison of the small business lending occurring across financial institutions. BPI also supports an approach that allows for the terms "women-owned," "minority-owned" and "small business" to be easily defined and determinable for reporting purposes, including as it relates to the principal owner of the business and the collection of demographic variables.

With respect to the definition of "small business," in the Proposals, the CFPB offers three alternative approaches for a simplified size standard: (i) only gross annual revenue of the applicant business in the prior year, with a threshold of $1 million or $5 million; (ii) a maximum of 500 employees for manufacturing and wholesale industries and a maximum of $8 million in gross annual revenue for all other industries; or (iii) gross annual revenue or the number of employees based on a size standard in each of 13 two-digit NAICS code categories that apply to the largest number of firms within each two-digit NAICS code category. Among these options, the CFPB should use a more streamlined definition of small business—one that adopts a threshold of gross revenue of $1 million or less in the preceding calendar year and includes the revenue of affiliates, guarantors, holding companies or subsidiaries.[3] Such a threshold would both streamline reporting obligations and appropriately focus on the small businesses for which the CFPB seeks to collect information.[4] Further, the CFPB should consider harmonizing any such threshold with other relevant statutes, such as the Community Reinvestment Act

[3] To the extent the CFPB chooses a different threshold, it should be no greater than $5 million in gross annual revenue for the prior calendar year.

[4] For example, this threshold also would include traditional Small Business Administration loans.

or the Institution Call Report.[5]

B. The CFPB should limit any reportable data to the statutorily mandated data fields.

The CFPB should limit its initial Section 1071 rulemaking to the statutorily mandated data points.[6] While we understand the purpose behind seeking collection of additional discretionary data points, the size and scale of the Section 1071 data collection undertaking and the lack of certainty as to what actionable insights the data collection may yield, raises the need for a more measured pace. We encourage the CFPB to undertake the collection and analysis of the statutorily-mandated data points in the first instance, take the necessary time to understand and analyze the resulting data, and then determine, based on actual experience, what, if any, additional data points should be collected, prior to engaging in a rulemaking to collect additional data points.

Notwithstanding the above, should the CFPB decide to move forward with the inclusion of a narrow set of discretionary data fields, BPI recommends that the CFPB exclude the collection of the relevant NAICS code. Outside of certain specific instances (*e.g.,* with respect to traditional SBA lending), lenders may not readily collect the granular information that corresponds with the NAICS codes. Furthermore, ensuring the NAICS codes correspond with the applicant's business would represent a significant increase in the burden on lenders that could translate to increased costs to the borrower.

II. To Ensure a Robust and Accurate Picture of Small Businesses Lending, the CFPB Should Consider How Best to Ensure that All Types of Institutions that Engage in Small Business Lending are Incorporated into the Section 1071 Data Collection Efforts, and, at Minimum, Adopt an Activities-Based Approach to Exempting Financial Institutions from Reporting Requirements.

The SBREFA Proposals provide for several options to exempt certain financial institutions from reporting under any final rule. These exemptions range from an activity-based exemption to a size-based exemption, with another option being a combination of the two. While we understand the need to tailor data collection efforts to minimize the significant burdens on potential reporting institutions, we would urge the CFPB to engage in appropriate consideration of the burdens of any potential rulemaking on reporting institutions equally. The benefit of doing so is to enhance the ability for the CFPB to meet the twin goals of Section 1071—facilitating enforcement of fair lending and demonstrating the credit needs for women-owned, minority-owned, and small businesses—in a consistent manner across the small business lending market.

In determining its approach with respect to those financial institutions that may be exempt from a final rule, we would encourage the CFPB to ensure a consistent approach for large and small reporting institutions. Specifically, excluding institutions solely based on the number of loans in which they engage (activity-based exemption) or their asset size (size-based exemption) could have the effect of

[5] 12 U.S.C. § 2901; 12 C.F.R. 52, 208, 304.

[6] The statutorily-mandated data points include: (1) the number of the application and the date on which the application was received; (2) the type and purpose of the loan or other credit being applied for; (3) 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; (4) the type of action taken with respect to such application, and the date of such action; (5) the census tract in which is located the principal place of business of the women-owned, minority-owned, or small business loan applicant; (6) the gross annual revenue of the business in the last fiscal year of the women-owned, minority owned, or small business loan applicant precedent the date of the application; and (7) the race, sex, and ethnicity of the principal owners of the business.

minimizing data accuracy and also could limit the CFPB's ability to truly assess the nature of small business lending across financial institutions. Rather, as the CFPB makes its determination regarding the types of institutions that would be excluded from reporting, it should consider the relative, aggregated risks to small businesses that may be posed institutions, regardless of the type or size.

To the extent that the CFPB moves forwards with one of these two approaches (or a combination of the two), BPI would be more supportive of the CFPB taking an activity-based approach in making its determination of excluded reporting entities. As a general matter, an activity-based approach would provide a clearer picture of the level of small business lending activity by a given institution, thus allowing those institutions that make a sizeable amount of small business loans to continue to be required to report. To this end, BPI would encourage the CFPB to adopt the measure of "activity" to be based on a de minimis number of small business loans originated by a given institution.

III. Any Proposed Rule Should Provide Reporting Institutions with Flexibility to Collect Borrower-Provided Information and Determine the Time and Place of Collection of Reportable Data.

A. Lenders should be permitted to solely rely on borrower representations.

Reporting institutions should be permitted to rely exclusively on the responses of applicants with respect to the data to be gathered from the applicant, such as the demographic information of the principal owners, and whether an applicant is a women- or minority-owned small business.

While the CFPB, in its SBREFA outline, provides for lenders to rely on borrower-provided information, any proposed rule should provide that reporting institutions would not have any obligation to engage in additional due diligence or verification regarding the information provided by the borrower, including (i) whether the applicant is a women-owned business or minority owned business; (ii) the demographic information of the principal owners of the small business; or (iii) the amount of the gross revenue provided by an applicant. The CFPB should clearly articulate this approach in any proposed rulemaking and provide lenders with a safe harbor in circumstances where they do not intend to engage in further verification of this information.

Finally, the CFPB should include, in any proposed rulemaking, a safe harbor for lenders to rely on borrower representations of business revenue in the process of determining whether the institution would fall within the definition of "small business."

B. Flexibility for the time period to collect borrower-provided information is needed to ensure greater accuracy in reported data.

BPI supports the CFPB's approach to allow reporting institutions flexibility regarding the time period to solicit information from the applicant. In any proposed rule, the CFPB should continue to ensure that reporting institutions are permitted the discretion to set the time period by which to request the information during the point in the lending process that is most feasible for the lender, including potentially collecting borrower-provided information when the loan application closes.[7]

[7] For example, the CFPB could consider taking a similar approach to that of FinCEN's Customer Due Diligence ("CDD") Rule, which allows for information collection at the time of closing. Customer Due Diligence Requirements for Financial Institutions, 81 Fed. Reg. 29397 (May 11, 2016) (codified at 31 C.F.R. pts. 1010, 1020, 1023, 1024, & 1026).

One example where such flexibility is needed is in the context of private-label or co-brand credit, where retailers offer their small business customers the ability to obtain private-label or co-brand credit through a bank partner. While private-label credit is similar to other types of credit, the application process and environment differs from other types of small business credit in a variety of ways and raises a number of policy considerations. Typically, private-label credit applications occur at the point-of-sale of the retail partner, and there is no uniform manner by which this process is operationalized from one retail partner to another. In addition, unlike a more traditional small business lending process, the applicant for private-label credit is not necessarily the owner or other senior executive of the business, but often the person likely to be making purchases using the account, which means they may be unable to respond to many of the specific data points required under Section 1071. Furthermore, in the point-of-sale environment, the individual assisting the applicant is the retailer's employee, not a bank employee or agent, which limits the ability for the borrower to receive correct information regarding the requested data points. The concerns, therefore, of collecting Section 1071 data for private-label credit cards, include (i) potential data accuracy issues due to the nature of the application process; (ii) potential incorrect assumptions regarding the lending activities of the bank, as the data is more likely to reflect the demographic and geographic composition of the retail partner; and (iii) potential challenges to borrowers in reporting data at the point-of-sale, which could lead to an increase in delayed and abandoned applications. Therefore, we strongly urge the CFPB to continue to weigh the unique aspects of private-label credit and act to ensure that the Section 1071 data collection requirements do not unintentionally impede access to credit in this regard.

IV. The Scope of Covered and Excluded Products, in Certain Instances, Should Be More Clearly Defined and Tailored.

BPI generally is supportive of the definition of covered products proposed, however, we would suggest the following are areas for further consideration by the CFPB.

- *First*, the CFPB should consider more expressly excluding certain other types of products, such as, but not limited to, purchased loans from an originating creditor or loans made to foreign-owned and publicly traded companies.[8]

- *Second*, BPI commends the Proposals' exclusion of creditor-initiated reviews of existing credit extensions from the scope, and we would ask that any proposed rule clearly define the exclusion for proactive credit line increases initiated by the creditor.

- *Third*, the CFPB should consider more explicitly excluding those situations where a customer initiates a credit line increase for open-end credit products. The application process for such requests is generally streamlined and imposing data collection requirements could make making such requests much more cumbersome.

- *Fourth*, the CFPB should reconsider the current exclusion of Merchant Cash Advances ("MCAs") in its Proposals.[9] While MCAs typically are not defined as "loans" or subject to most usury laws, they are short term loans that are commonly used in small business financing. Such data would provide a more accurate picture of overall small business lending, regardless of the type of

[8] Other types of exclusions could include, for example, those credit cards that are used for business purposes but are only reported to consumer reporting agencies.

[9] The CFPB could consider more narrowly tailoring the exclusion as one potential option.

financing, along with providing valuable insight into the extent women and minority owned small businesses are relying on these higher-cost credit products.

- *Fifth*, the CFPB should consider more clearly articulating that preapprovals would be excluded from the definition of application for these purposes.

Finally, regarding reporting for mandatory data fields, for those loan products that do not have an "applied-for" amount, a "Not Applicable" response should be permitted. A "Not Applicable" field also should be permitted for other products, such as business credit cards, which are used on an ongoing revolving basis and do not have a specific loan purpose.

V. As the CFPB Continues to Consider its Approaches to Privacy, Firewall and the Implementation of Any Final Rule, It Should Ensure Maximum Transparency and Flexibility.

A. Any proposed firewall requirements should ensure that the feasibility standard is determined in the discretion of the individual reporting institution.

Pursuant to subsection 704B(d), financial institutions should be given the discretion to determine, based on their internal systems and operations, whether preventing access to underwriting systems is "feasible." Ultimately, any proposed rulemaking by the CFPB should ensure that the individual institution determines the "feasibility" standard. If a reporting institution finds that it would not be "feasible" to institute a firewall, the reporting institution should be permitted to provide a notice to the applicant per Section 704B(d)(2) (*e.g.*, similar to that provided in HMDA Form 1003). This notice should be a model form provided by the CFPB that would operate as a safe harbor in such a situation or in situations where an institution does not have a clear view as to whether the data truly would be segregated. If a reporting institution determines that a controlled process is feasible, the CFPB should provide for a safe harbor for those institutions that have reasonable policies and procedures in place for this controlled process.[10]

B. The CFPB should undertake a transparent process for any public disclosure of reported data.

As the CFPB continues to consider the types of measures it intends to take with respect to public disclosure of Section 1071 data, the CFPB should ensure that public disclosure of reported data should be narrowly tailored and limited, and the agency should take a consistent and transparent approach to any such disclosure. If the CFPB intends to release any data publicly, it should appropriately and thoroughly consider the privacy implications and safeguards necessary to publicly release such information. In addition, prior to releasing any data publicly, the CFPB should consider whether any of this data is already readily available and whether combining existing data with the Section 1071 data would result in the ability to deanonymize the Section 1071 data.

C. The CFPB should consider an extended period for implementation of any proposed rule and a commensurate safe harbor.

Finally, given the costs incurred by institutions to begin the reporting process, the implementation period for any Section 1071 rulemaking should, at minimum, be no less than two years

[10] We also note that restrictions underwriters' access to § 1071 data could have a disproportionate impact on private-label credit. While automated underwriting plays a role in private-label lending, manual reviews of application files are not uncommon. If lenders are forced to choose between rebuilding data processes or streamlining the application process by eliminating the ability to appeal to a human, it may be that small business applicants lose their ability to appeal denied applications.

from the final rule's publication and potentially as long as three years (depending on the scope and nature of any proposed rule). Further, the CFPB should provide for an enforcement safe harbor for any data collection errors post-implementation for at least two years following the effective date of the rule. Given the significant operational costs imposed in any new data collection effort ample time will be needed for lenders to ensure appropriate implementation of any final rule.

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BPI appreciates the opportunity to comment and thanks the CFPB for its consideration. If you have any questions, please contact the undersigned by phone at (202) 589-2429 or by email at Naeha.Prakash@bpi.com.

Respectfully submitted,

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