Via Electronic Mail January 6, 2022

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

Re: Notice of Proposed Rulemaking - Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B) (Docket No. CFPB–2021–0015; RIN 3170–AA09)

Ladies and Gentlemen:

The Bank Policy Institute[1] appreciates the opportunity to comment on the notice of proposed rulemaking ("NPR," the "proposed rule," or the "Small Business Data Collection Rule")[2] issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to amend Regulation B to implement changes to the Equal Credit Opportunity Act ("ECOA") made by section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").

I. Executive Summary

BPI fully supports the goals of section 1071 to facilitate the enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned and small businesses. The collection of applicant data under the Small Business Data Collection Rule can help promote fair lending and help financial institutions identify and better serve the needs of small business credit applicants, including women- and minority-owned small businesses. At the same time, the Small Business Data Collection Rule should not become so burdensome and unwieldy that it limits access to credit, discourages small business owners from seeking credit, or erects barriers that inhibit financial institutions from offering small business credit, which would undermine the purposes of section 1071.

To strike the right balance, BPI believes that the Small Business Data Collection Rule should be consistent with the following seven guiding principles: (1) adequate time to comply; (2) simplicity; (3) data accuracy, integrity, and quality; (4) respect for applicant preferences and choices; (5) appropriate tailoring of the rule's scope and coverage; (6) transparency; and (7) clear guidance and flexibility. We discuss these guiding principles in greater detail in Section I.B. below. Incorporating these guiding

[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] Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Fed. Reg. 56356 (Oct. 8, 2021).

principles into the final rule is the surest way to fulfill the statutory purposes of section 1071, promote compliance, and ensure the collection and reporting of accurate, reliable, high-quality data without undermining access to credit or compromising applicant privacy. We urge the Bureau to adhere to these principles in the final rule.

Certain parts of the proposed rule appropriately reflect these guiding principles. Where that is the case, BPI supports the Bureau's approach. Other parts of the proposed rule, however, depart from these guiding principles. In those instances, BPI encourages the Bureau to reconsider the proposed rule and recommends changes designed to better meet the objectives of section 1071. Accordingly, BPI respectfully requests that the Bureau revise the proposed rule as discussed in this letter.

A. Summary of Recommendations

BPI is providing the following nine key recommendations for how the Bureau could amend the proposed rule to better meet the objectives of section 1071 and to better adhere to the guiding principles described in Section I.B. The nine key recommendations, as well as other suggestions, are described in detail in Parts II-IX of this comment letter:

- First, due to the complexity of the rule, the Bureau should delay the mandatory compliance date until January 1 of a year that is at least three years after publication of the final rule to give institutions time to comply. Without adequate time to comply, financial institutions may be forced to pause small business lending. The Bureau should also commit to not pursuing enforcement actions related to technical compliance deficiencies for the first two years that the rule is in effect, as it did when it adopted the 2015 HMDA amendments.

- Second, the Bureau should revise the proposed rule to allow institutions to rely on data provided by the applicant, without verification, in *all* circumstances, whether such data is provided in the application, documents supporting the application, or the data collection form used to collect highly sensitive data.

- Third, the CFPB should not require financial institutions to determine the ethnicity or race of an applicant's principal owners based on visual observation or surname for in-person or video enabled interactions if the applicant chooses not to voluntarily provide that information. Such a requirement would undermine the statutory right granted to any applicant under section 1071 to refuse to provide any information requested.[3] Moreover, data collection by visual observation or surname would put a financial institution's employees in the position of making subjective judgments about individuals that reflect their own perceptions and biases. Such judgments are inappropriate in credit underwriting scenarios and would result in the collection and reporting of inaccurate, unreliable, and flawed data. Finally, such a requirement shows a lack of respect for applicant preferences in choosing what information they are willing to provide.

- Fourth, the Bureau should include trade credit granted by a financial institution in the trade credit exclusion and exclude from the collection and reporting requirements credit line increases, all HMDA-reported transactions, overdraft lines of credit, private label and co-branded credit transactions, and indirect lending transactions. In addition, the Bureau should

[3] 15 U.S.C. § 1691c-2(c).

clarify that the final rule does not apply to non-operating entities, such as trusts, special purpose vehicles, pass-through and single-asset entities, and other non-operating entities established as wealth management vehicles, in addition to holding companies that are not organized for profit. In general, the Bureau should retain the current approach of applying the rule to a broad range of covered financial institutions to generate a comprehensive set of small business lending data and create a level playing field. The Bureau should also align the definition of "principal owner" with the definition of "beneficial owner" in the Financial Crimes Enforcement Network's ("FinCEN's") Customer Due Diligence ("CDD") regulations.[4]

- Fifth, the Bureau should retain in the final rule (i) the simplified gross annual revenue threshold of no more than $5 million (including the revenues of subsidiaries and affiliates) for determining which applicants are small businesses, and (ii) the proposed definition of "covered financial institution," which covers entities that originated at least 25 covered credit transactions in each of the two prior calendar years.

- Sixth, the Bureau should not require the collection and reporting of multiple, non-statutory data points. Although certain of the non-statutory data points, such as North American Industry Classification system ("NAICS") code and time in business, may provide helpful context for understanding the basis for credit decisions, most of the proposed non-statutory data points add unnecessary burden and complexity without helping to advance the purposes of section 1071. Some data points would require the collection or reporting of data that is not currently collected or classified in the manner proposed. The Bureau should eliminate most of the non-statutory data points from the final rule or, in the alternative, provide additional clarity, flexibility, and/or safe harbors regarding the collection and reporting of certain data points.

- Seventh, the Bureau should be transparent about the data points it intends to publish, including by issuing for public notice and comment the data points it intends to publish, and identify in the final rule and on the sample data collection form the data points it will and will not make public. Such transparency would alleviate applicants' privacy concerns and enhance the accuracy and reliability of the data reported by applicants.

- Eighth, the Bureau should state in the final rule that a financial institution has discretion to determine when the firewall provisions in the proposed rule are or are not "feasible" or, in the alternative, the Bureau should provide clarity and guidance on when the firewall provisions in the proposed rule are or are not "feasible."

- Ninth, the Bureau should revise or clarify the sample section 1071 data collection form to provide covered financial institutions with greater flexibility in soliciting applicant responses.

B. Guiding Principles

As previewed above, the seven guiding principles set forth below should guide the development of the final rule and provide the surest way to fulfill the statutory purpose of section 1071, promote compliance, and ensure the collection and reporting of accurate, reliable, high-quality data without undermining access to credit or compromising applicant privacy. These seven guiding principles form

[4] *See* 31 C.F.R. § 1010.605(a).

the basis for BPI's recommendations to the Bureau to amend the proposed rule, as set forth in Parts II-IX below.

1. Adequate Time to Comply

BPI requests that the Bureau establish a mandatory compliance date of January 1 in a year that is at least three years after publication of the final rule in the Federal Register. The proposed rule is broader in scope than what the Bureau published for consideration in the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), which featured a two-year implementation period. Imposing greater industry burden, as discussed in this letter, while affording less time to comply, is arbitrary and unreasonable. Most importantly, providing adequate implementation time will allow financial institutions the opportunity to make the changes necessary to achieve the statutory purpose and the Bureau's goals for section 1071 data collection and reporting.

The proposed 18 month implementation date does not give financial institutions adequate time to achieve compliance given the sweeping changes this rule will introduce. Financial institutions need adequate time, after the final rule is issued, to understand the final rule's requirements and the implications of those requirements for various business units, design new or modify existing processes, build and test systems, train employees, and implement procedures and controls to ensure compliance with the new small business data collection regime. Many institutions make covered small business loans across a variety of different business units using various channels, so this effort will require changes across different business units, systems, and channels. Without adequate time to implement the final rule, some financial institutions may cease making small business loans for a period of time until they can meet the final rule's compliance requirements.

2. Simplicity

BPI believes that simplicity is key to crafting a section 1071 rule that fulfills the statutory objectives of collecting and reporting accurate, reliable, high-quality data that is comparable across a broad range of small business borrowers and lending products, not susceptible to misinterpretation, and useful for monitoring for potential discrimination in small business lending. Simplicity also facilitates small business access to credit by limiting the steps necessary to apply for and obtain credit.

Covered financial institutions need clear, simple rules to establish which applicants, applications, and products are in scope of the requirements of the rule. In particular, section 1071 compliance will require the bifurcation of small business lending based on whether financial institutions are required to ask demographic data or are prohibited from doing so. A rule that is relatively simple to implement will promote industry compliance and encourage applicants to provide the requested data voluntarily by limiting the friction of the collection process and mitigating privacy concerns. Such a rule should also result in the collection and reporting of more data; more accurate, reliable, and higher-quality data; and contribute to appropriate, fact-based fair lending analyses that are comparable across various types of small business lenders and reveal opportunities for further investment in small businesses, consistent with the purposes of section 1071.

The touchstones for maintaining simplicity in the Small Business Data Collection Rule are: (1) adopting, as proposed, a simplified size threshold for determining what businesses qualify as small businesses based on gross annual revenues; (2) permitting financial institutions to collect and report applicant-provided data, without verification, in *all* circumstances; and (3) limiting the non-statutory

data points that financial institutions will be required to collect and report. BPI supports the Bureau's proposal to adopt a simplified size threshold for determining what businesses qualify as small businesses based on gross annual revenues, as well as the Bureau's incorporation of existing statutory and regulatory definitions from section 1071, the ECOA and Regulation B, and other laws and regulations.

BPI is concerned, however, that some aspects of the proposed rule introduce unnecessary complexity that will increase compliance burdens, reduce applicant participation, and produce inaccurate, unreliable, and poor-quality data that does not contribute to the fair lending goals of section 1071. BPI specifically objects to the provisions that would require financial institutions to collect and report:

- Principal owner race and ethnicity data based on visual observation or surname for in person interactions (including visual electronic media) where the applicant does not provide the data voluntarily;

- Numerous data points not mandated by section 1071, including detailed and complex loan pricing information and denial reasons; and

- Data on small business loans that are already reported under the Home Mortgage Disclosure Act ("HMDA") and Regulation C, credit line increases, and private label and co-branded credit transactions.

3. Data Accuracy, Integrity, and Quality

BPI urges the Bureau to focus on ensuring the collection and reporting of high-quality data that maximizes data accuracy and reliability in finalizing the section 1071 rule. Inaccurate, unreliable, and poor-quality data could undermine the purposes of 1071, which are intended to prevent discrimination against small business credit applicants. Instead, inconsistent and inaccurate data could lead to misguided and factually unsupported fair lending allegations, which could damage the reputations of responsible financial institutions and subject them to unnecessary investigative burdens and lawsuits. Similarly, the Bureau's reliance on flawed data in fair lending enforcement and policy actions could undermine the Bureau's credibility and waste the Bureau's time and limited resources. Accordingly, BPI respectfully requests that the Bureau, in the final rule, eliminate provisions discussed in this letter which would undermine the collection of accurate, reliable, high-quality data.

4. Respect for Applicant Preferences and Choices

The proposed rule generally permits financial institutions to rely on applicant-provided data without verification. BPI supports this approach and requests that the Bureau clarify in the final rule that financial institutions can rely on applicant-provided data that may be provided on an application, in supporting documents, or on the section 1071 data collection form used to collect the most sensitive information (in all cases, "applicant-provided data") in *all* circumstances, without verification. For all applicant-provided data, the Bureau should provide a broad safe harbor from liability if financial institutions collect and report data provided by applicants that is incorrect or inaccurate.

The proposed rule, however, does not allow financial institutions to rely on applicant-provided data in all circumstances. BPI objects to the proposed requirement to collect and report data on the race and ethnicity of at least one principal owner by visual observation or surname if the institution

meets in person with an applicant (including via visual electronic media) and the applicant does not provide the data voluntarily. This aspect of the proposed rule is flawed.

Section 1071 gives small business applicants an express statutory right to refuse to provide information: "Any applicant for credit may refuse to provide any information requested [of women-owned, minority-owned, or small business applicants] in connection with any application for credit."[5] The Bureau's proposal to require data collection by visual observation and surname undermines this statutory right. HMDA, in contrast, does not provide applicants with a comparable right of refusal. Visual observation and surname-based collection would require financial institution employees to consider and make judgments about factors, such as the race and ethnicity of the principal owners of applicants, that they are required to ignore in credit decision making.

In the final rule, the Bureau should eliminate the requirement for visual observation and surname-based collection, consistent with the statutory right of applicants to refuse to provide the information requested,[6] and respect the decision of certain applicants not to provide race or ethnicity data on the principal owner.

5. Appropriate Tailoring of the Rule's Scope and Coverage

BPI commends the Bureau for proposing to create a level playing field with regard to small business data collection and reporting across a broad spectrum of relevant financial institutions. BPI supports the Bureau's proposed definition of "covered financial institution" as consistent with creating a level playing field. We believe this definition ensures coverage of non-bank fintech lenders, including online and platform lenders. We also support the proposed activity-based threshold of originating at least 25 covered credit transactions in each of the two prior calendar years. BPI does not believe that a size-based exemption serves the fair lending purposes of section 1071.[7]

BPI generally supports the proposed definitions of "covered application" and "covered credit transaction." We believe the proposed rule includes appropriate, but incomplete, lists of excluded transactions and circumstances that would not be covered applications. Specifically, BPI urges the Bureau to exclude from the definition of "covered application" applications for credit line increases and to exclude from the definition of "covered credit transaction" the following: (i) all HMDA-reported transactions; (ii) overdraft lines of credit; (iii) all forms of trade credit; (iv) private label and co-branded credit transactions; and (v) indirect lending transactions. We also urge the Bureau to clarify that the proposed definition of "small business" excludes non-operating entities, such as trusts, special purpose vehicles, pass-through and single-asset entities, and other non-operating entities that were established as wealth management vehicles, in addition to holding companies that are not organized for profit.

[5] 15 U.S.C. § 1691c-2(c).

[6] *Id.*

[7] The size of a financial institution has no bearing on whether that institution may engage in prohibited discrimination against women- and minority-owned small business applicants. Moreover, a size-based exemption could lead some covered financial institutions to partner with small financial institutions as pass-through originators to underwrite substantial volumes of small business applications in order to avoid section 1071 compliance obligations.

6. Transparency

BPI urges the Bureau to be more transparent about its plans for implementing section 1071. BPI disagrees with the Bureau's decision to defer consideration of what data it will make public and what data it will withhold for privacy reasons and its stated plans for announcing those decisions in a later, non-binding policy statement after applying a "balancing test" to make those determinations. Such an approach fails to afford applicants the information they need to make informed decisions about whether to provide the data and fails to give financial institutions adequate notice as well. Applicant privacy concerns are heighted by the Bureau's proposal to collect and potentially publish numerous non-statutory data points, which increases the risk of re-identification.

BPI requests that the Bureau publish for notice and public comment the data elements that it plans to make public, and specify in the final rule which data elements it will and will not make public. Small business applicants should know in advance what data will and will not be published so they can make informed decisions about the privacy risks of self-reporting. Each additional data point that is published further increases the risk of re-identification and small business applicants will want to be fully informed of that risk before self-reporting. BPI also urges the Bureau to amend the sample collection form to disclose to applicants which data elements will be published to enable applicants to make informed decisions.

7. Clear Guidance and Flexibility

The final rule should provide clear guidance to facilitate compliance and provide flexibility to give regulated entities options for satisfying the rule's requirements. BPI appreciates much of the guidance the Bureau has included in the proposed rule and the flexibility afforded to financial institutions by certain provisions. In a number of areas, however, the proposed rule lacks sufficient guidance or adequate flexibility. Throughout this comment letter, BPI recommends additional guidance or flexibility to ensure that the final rules are clear, free of compliance ambiguities, and not rigid. For example, while we appreciate the safe harbors from liability proposed for the reporting of incorrect data for certain data points, BPI believes that the Bureau should adopt a similar safe harbor applicable to all applicant-provided data.

II. The Bureau should provide more time for compliance with the final rule and provide a grace period from enforcement.

The proposed 18 month implementation date is inadequate, and BPI urges the Bureau to delay the rule's mandatory compliance date until January 1 that is at least three years after the final rule is published in the Federal Register. Three years after finalization of the rule is the minimum time necessary for institutions to be able to comply with the rule. BPI also requests that the Bureau provide a grace period during which it will not take enforcement actions pursuant to section 112(a) of the proposed rule for at least two years after the mandatory compliance date in the final rule to give institutions the ability to work through technical challenges without the threat of enforcement.

The proposed rule represents a fundamental change from the current environment where data collection about sensitive information such as sex and race is prohibited to a new regime of mandatory data collection and reporting for a broad range of small business loans. As a result, there are no vendors with off-the-shelf products for small business data collection. For this reason, there is no merit to the idea of providing a shorter compliance deadline for larger financial institutions. Regardless of the

institution's size, all systems and processes for compliance with the section 1071 rules will need to be built from scratch. All financial institutions therefore will need adequate time, after the final rule is issued, to understand the final rule's requirements and the implications of those requirements for various business units, design changes to processes, build and test systems, train employees, and implement procedures and controls to ensure compliance with the new small business data collection regime. Failure to allow financial institutions of all sizes adequate implementation time will limit access to small business credit, which could have a negative impact on the economy.

In addition, many institutions make covered small business loans across a variety of different business units using various channels. Therefore, implementing the section 1071 reporting regime will require multiple sets of changes across different business units, systems, and channels. Implementation of the section 1071 rule differs from the HMDA reporting regime, which has been in effect since 1976, where reporting typically only impacts a limited number of business units and financial institutions have established programs and processes in place to comply with Regulation C requirements.

When the Bureau revised Regulation C in October 2015 to implement section 1094 of the Dodd-Frank Act, which added several new reporting requirements and clarified several existing requirements, the Bureau provided more than two years for compliance until January 1, 2018.[8] Unlike the changes made to Regulation C, the proposed rule is a completely new data collection and reporting requirement that covers multiple credit products and systems currently built to prohibit the collection of key data points. It would be inconsistent and impractical for the Bureau to provide over two years to implement changes to existing HMDA reporting requirements, but only 18 months for implementation of the section 1071 rules and this net-new reporting regime.

As noted by the Bureau in the proposed rule, a majority of stakeholders that commented on the SBREFA outline of proposals noted that the two-year implementation period suggested by the SBREFA outline would be adequate.[9] Other stakeholders noted, however, that they would need more than two years to implement the proposed rule's reporting regime.[10] As noted in the proposed rule, some stakeholders that "do not have primarily online operations and do not have experience with other federal data reporting regimes such as HMDA said it would be hard to project how long implementation would take, but that it could potentially take three years or more."[11] In addition, "[s]everal trade associations representing community banks and credit unions asserted that two years was inadequate for smaller financial institutions that had no experience with HMDA or similar reporting regimes."[12] We also note that the proposed rule would expand the number of data points that would have to be collected compared to those considered in the SBREFA outline and would add other complicating features, such as unexpectedly detailed pricing data and the collection of race and ethnicity of the principal owner by visual observation or surname. These burdensome changes require more time to implement than the two years suggested by some SBREFA commenters. Accordingly, BPI urges the Bureau to establish a mandatory compliance date of January 1 that is at least three years after

[8] *See* 80 Fed. Reg. 66128, 66128 (Oct. 28, 2015).

[9] 86 Fed. Reg. at 56507.

[10] *Id.*

[11] *Id.*

[12] *Id.*

publication of the final rule in the Federal Register to provide financial institutions with adequate time to comply with the rule and implement systems that will produce accurate and reliable data.

Subsequent to publication of the final HMDA rule revisions, the Bureau announced that it would not take enforcement actions for the first two years after the revised Regulation C collection requirements took effect.[13] BPI believes that the Bureau should follow the same approach in the section 1071 final rule. Such an approach would give institutions the opportunity to identify and self-correct issues with the section 1071 collection efforts without facing the threat of enforcement actions for inevitable technical and other challenges that will arise during initial collection efforts This request is consistent with stakeholder feedback provided to the Bureau in response to the SBREFA outline of proposals.[14]

lll. Covered financial institutions should be permitted to rely on applicant-provided data without verification in all circumstances; institutions should not be required to determine and report a principal owner's race or ethnicity based on visual observation or surname.

BPI supports the general approach that the CFPB has taken in section 107(b) of the proposed rule. Proposed section 107(b) provides that "[u]nless otherwise provided in this subpart, the financial institution may rely on statements of the applicant when compiling data unless it verifies the information provided, in which case it shall use the verified information."[15] BPI also appreciates the CFPB's acknowledgement, in the preamble to the proposed rule, that "[s]ection 1071 does not impose any requirement for a financial institution to verify the information provided by an applicant."[16] As the CFPB noted, "requiring verification of applicant-provided data points would greatly increase the operational burden of the 1071 rule, and that relying on applicant-provided data would ensure sufficient accuracy to carry out the purposes of section 1071."[17] Proposed comment 107(b)-1 explains that "[a] financial institution may rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting data pursuant to [the section 1071 rule] for applicant-provided data; the financial institution is not be required to verify those statements."[18]

BPI is concerned, however, that the Bureau's proposed rule does not apply this approach consistently and permit financial institutions to rely on applicant-provided data in *all* circumstances. As discussed below, the proposed rule currently provides that "[i]f a financial institution meets in person with one or more of an applicant's principal owners and the applicant does not provide ethnicity, race,

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[13] CFPB, Statement with respect to HMDA implementation (Dec. 21, 2017) *available at* https://files.consumerfinance.gov/f/documents/cfpb_statement-with-respect-to-hmda-implementation_122017.pdf.

[14] *See* 86 Fed. Reg. at 56507 ("Some stakeholders requested a grace period associated with the first year of implementation. A few SERs suggested that the Bureau adopt a grace period of some kind during which financial institutions would not be penalized for erring in trying to comply with the section 1071 regulation. This grace period would be akin to the first year in which the 2015 revisions to Regulation C were effective, when examinations were used to troubleshoot and perfect data reporting rather than penalize reporters. Two other industry stakeholders similarly requested a safe harbor for any data collection errors for the first one or two years following the rule's effective date.")

[15] *Id.* at 56578.

[16] *Id.* at 56484.

[17] *Id.* at 56485.

[18] *Id.* at 56601.

or sex information for at least one principal owner, the financial institution must report at least one principal owner's ethnicity and race (but not sex) based on visual observation, surname, or a combination of both visual observation and surname."[19] For the reasons discussed more fully below, BPI finds the visual observation or surname provisions inconsistent with section 1071's statutory right for applicants to refuse to provide such information, and with the general rule of permitting reliance on applicant-provided data.[20]

Covered financial institutions should also be able to rely exclusively on applicant-provided data without having to verify or reconcile responses from different sources or forms of documentation even if the applicant provides inconsistent data. For example, an applicant may provide a NAICS code to an institution that is inconsistent with the code reflected on the applicant's tax returns or on Consolidated Reports of Financial Condition ("Call Reports"). The final rule should make clear that institutions may rely on any applicant-provided data for the NAICS code, are not required to verify or reconcile an applicant's responses with other data provided by the applicant, such as tax returns, Call Reports or other government records, and will not be held liable if the applicant provides a NAICS code that does not match the code reflected in other documents the institution may have provided.

Lastly, the Bureau has proposed limited safe harbors from liability and enforcement for the incorrect reporting of four data points, including the NAICS code.[21] BPI supports the proposed safe harbors. At the same time, BPI urges the Bureau to create a broader safe harbor from liability and enforcement that applies to *all* applicant-provided data points collected and reported by financial institutions without verification. Applicants are in the best position to know, for example, the number of workers and principal owners they have, their time in business, and whether they are a minority-owned or women-owned small business. Financial institutions should be able to rely on the information applicants provide regarding these and other items, including if the information was part of previously collected data that the institution is relying on pursuant to section 107(c)(2). Therefore, in the final rule, the Bureau should adopt a broader safe harbor so that institutions are not held liable if applicants report incorrect data on these and other data points.

For the foregoing reasons, BPI recommends that the CFPB go further than proposed section 107(b) and provide in the final rule that institutions may rely on applicant-provided data in *all* circumstances, in accordance with the principles set forth in proposed section 107(b), and create a broader safe harbor from liability and enforcement in proposed section 112(c) for all applicant-provided data.

As noted above, the proposed rule provides that "[i]f a financial institution meets in person with one or more of an applicant's principal owners and the applicant does not provide ethnicity, race, or sex information for at least one principal owner, the financial institution must report at least one principal owner's ethnicity and race (but not sex) based on visual observation, surname, or a combination of both visual observation and surname."[22] BPI strongly objects to this requirement to collect and report

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[19] *Id.* at 56600.

[20] 15 U.S.C. § 1691c-2(c).

[21] 86 Fed. Reg. at 56580 (including safe harbors for incorrect entries for census tract, incorrect entries for NAICS code, incorrect determination of small business status and incorrect application date).

[22] *Id.* at 56600.

information about the principal owner(s) based on visual observation or surname. BPI believes this aspect of the proposal is deeply flawed for the following four reasons.

First, a guiding principle of this rulemaking should be to respect applicant preferences and choices, including the choice not to provide data. As previously noted section 1071 expressly provides applicants a right to refuse to provide any information.[23] Integral to this statutory right of refusal is a final rule that respects applicant preferences and choices by not second-guessing responses provided or not provided by applicants. The proposed rule appropriately provides that when an applicant self-reports that it is a minority- or women-owned business, or that its principal owner is of a particular race or ethnicity, the financial institution is *not permitted* to second-guess or override the applicant's self-identification.[24] However, the Bureau's proposal to require institutions to collect and report a principal owner's ethnicity and race based on visual observation and/or surname for in-person (including video-enabled) interactions where the applicant chooses not to provide the race and ethnicity of at least one principal owner shows a lack of respect for the owner's and applicant's preference and choice not to provide that data – and in fact, undermines the choice to protect their privacy. Moreover, some applicants may find data collection via visual observation or surname offensive and the provision could negatively affect customer relationships.

Second, requiring the collection and reporting of data regarding a principal owner's ethnicity and race based on visual observation and/or surname would result in inaccurate, unreliable, and flawed data. Data collection based on visual observation is inherently subjective and unreliable. This problem becomes more acute as the American population increasingly reflects a diverse mix of racial and ethnic backgrounds. Surname-based classifications also pose a significant risk of misclassification.[25] We note that, unlike mortgage lending which still largely consists of in-person transactions, most small business lending involves credit cards or other products where the application process is conducted entirely in a digital (and non-visual) format where visual observation and/or surname-based collection would not be required. Further, authorized representatives of small businesses who are not owners may also apply. As a result, the requirement to collect principal owner data by visual observation and/or surname may represent a small percentage of applications and the collection of data by such means would not provide a meaningful contribution to the resulting data set while introducing inconsistency and lack of comparability into the data collected.

Third, requiring the collection and reporting of data regarding a principal owner's ethnicity and race based on visual observation and/or surname is an inappropriate and outmoded method of collecting data that would introduce discretionary considerations that should be excluded from the lending process. Using visual observation and surname classification to determine a principal owner's race and ethnicity would require an institution's employees to make judgments about and exercise discretion regarding the race and ethnicity of an applicant's principal owners. Such judgments and

[23] 15 U.S.C. § 1691c-2(c).

[24] 86 Fed. Reg. at 56600.

[25] If the CFPB chooses to keep the visual and/or surname requirement, BPI recommends that the CFPB provide a uniform surname classification standard to prevent potential inconsistencies in surname classification based on judgement and discretion of financial institutions.

discretion inevitably would reflect the biases of employees.[26] Visual observation and/or surname-based data collection would require employees of institutions to consider factors, such as someone's name or how they look, that the ECOA requires creditors to ignore during the application and decision-making process.[27] The ECOA and Regulation B are designed to eliminate discretionary biases from the credit granting process, while the proposed rule's visual observation and/or surname-based collection requirement would re-introduce factors that should not be considered.

BPI believes that data collection by visual observation and/or surname is an antiquated method of collecting data that has outlived its usefulness. We urge the Bureau not to follow the outmoded approach to data collection used in the HMDA and Regulation C,[28] which was enacted decades ago, and instead adopt and align with the more current approaches of other government agencies. For example, in May 2021, the USDA repealed its policy of allowing the use of visual observation and identification as a method for collecting race or ethnicity data in the Child and Adult Care Food Program and Summer Food Service Program because the USDA received credible reports that certain eligible participants did not want others to determine their race or ethnicity and found that a third party's observation of an individual's appearance was not a reliable means to capture how a participant self-identifies their own racial or ethnic identity.[29] Similar to the USDA program participants, some small business owners may not want to have their race or ethnicity determined for them and may perceive discriminatory treatment if it is, which is contrary to the purpose of the ECOA. Some small business owners may avoid applying for credit if it means that a financial institution will determine their race and ethnicity for them. BPI therefore urges the CFPB to follow the USDA's approach and eliminate from the final rule the requirement that an institution rely on visual observation and/or surname to determine a principal owner's race and ethnicity if the institution has an in person or video meeting with the principal owner(s) and the owner(s) or applicant choose not to provide the data.

Fourth, BPI believes that the CFPB's concerns about applicants not providing race and ethnicity data on principal owners are misplaced and that a data collection and reporting program that respects the preferences and choices of applicants will produce both sufficient data and accurate, reliable, high-quality data. The CFPB noted in the preamble to the proposed rule that self-reporting rates for ethnicity and race would be lower than that for the HMDA reporting requirements, which requires visual observation or surname-based collection of race and ethnicity in the absence of voluntary self-reporting.[30] The Bureau also noted that without the visual observation and/or surname requirement "meaningful analysis of the 1071 principal owner race and ethnicity data could be difficult, significantly undermining section 1071's fair lending purpose."[31]

We believe that the Bureau's analogy to HMDA is unsound. Unlike section 1071, HMDA does not provide an applicant the statutory right to refuse to provide information. In addition, HMDA is

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[26] We believe that some institutions may choose to report based on surname alone to avoid having front-line employees engaged in lending activities collect principal owner data based on visual observation based on their personal judgments about race and ethnicity.

[27] *See* 15 U.S.C. § 1691(a); 12 C.F.R. §§ 1002.4(a) and (b), 1002.5(b), and 1002.6(b)(1) and (9).

[28] *See* 12 U.S.C. Chapter 29; 12 C.F.R. Part 1003.

[29] USDA, Collection of Race and Ethnicity Data by Visual Observation and Identification (May 17, 2021) *available at* https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission.

[30] 86 Fed. Reg. at 56483.

[31] *Id.*

customarily linked to a one-time transaction; in contrast, many of the loans reportable under section 1071 involve long-term relationships. These relationships could be strained by requiring institutions to speculate about a principal owner's racial and ethnic background where the owners have indicated their desire not to provide such data to preserve their privacy. Such relationships could be destroyed if an institution misclassifies the principal owner's ethnicity and/or race.

The CFPB also noted that the "demographic response rates in the SBA's PPP are much lower when compared to ethnicity, race, and sex response rates in HMDA data."[32] BPI believes the analogy to the low PPP response rate is misplaced. The PPP was an emergency program in which borrowers rushed to apply for limited funding and lenders rushed to submit those applications to the SBA. In this emergency environment, reporting of demographic information may not have been a focus in the same way it would be under normal circumstances. Additionally, the PPP borrowers included a wider range of businesses than the small business borrowers covered by the proposed rule.

Section 1071 is sufficiently distinguishable from the PPP program and HMDA such that the data collection and reporting experiences of those programs should not be used as a basis for requiring data collection and reporting based on visual observation and/or surname under section 1071.

IV. The Bureau should revise the scope of the rule to exclude certain entities and transactions.

BPI commends the Bureau for proposing a rule that would create a level playing field with regard to small business data collection and reporting across a broad spectrum of relevant financial institutions, including non-bank fintechs. We believe that the proposed definition of "covered financial institution" is appropriate to establish consistent small business data collection and reporting requirements across financial institutions and necessary to advance the fair lending purposes of section 1071.

BPI generally supports the proposed definitions of "covered application" and "covered credit transaction." We believe the proposed rule includes appropriate, but incomplete, lists of excluded transactions and circumstances that are not covered applications. At the same time, BPI urges the CFPB to revise the scope of the rule to exclude from the definition of "covered application" applications for credit line increases. BPI also urges the Bureau to exclude from the definition of "covered credit transaction" the following: (i) all HMDA-reported transactions (ii) overdraft lines of credit; (iii) all forms of trade credit; (iv) private label and co-branded credit transactions; and (v) indirect lending. We request that the CFPB retain the simplified gross annual revenue threshold for determining whether a business is a "small business" and clarify that the proposed definition of "small business" excludes non-operating entities, such as trusts, special purpose vehicles, pass-through and single-asset entities, and other non-operating entities that were established as wealth management vehicles, in addition to holding companies that are not organized for profit. Finally, we ask the Bureau to align the definition of "principal owner" with FinCEN's definition of "beneficial owner" in the CDD regulations.

A. Covered Financial Institution

BPI supports the Bureau's proposed definition of "covered financial institution" because we believe it will result in a comprehensive small business lending data set across a broad set of small business lenders and create a level playing field for bank and non-bank small business lenders. We urge

[32] *Id.*

the Bureau to retain this approach in the final rule and minimize exemptions to the definition of "covered financial institution" to preserve a level playing field. We believe the proposed definition would ensure that the final rule under section 1071 applies equally to non-bank fintech lenders, including online and platform lenders, and not just to banks.

We also support the proposed activity-based threshold of originating at least 25 covered credit transactions in each of the two prior calendar years. BPI does not believe that a size-based exemption is necessary or warranted. A sized-based exemption would provide an opportunity for disruptors to enter the market by partnering with small financial institutions and engage in small business lending without complying with section 1071. Further, just because an institution is small does not mean that it is incapable of discriminating against small business applicants and the purpose of collecting and reporting data under the Small Business Data Collection Rule is to prevent discrimination. Thus, any size-based exemption would create an un-level playing field and undermine the statute's anti-discrimination purpose.

B. Covered Application; Exclude Applications for Credit Line Increases

BPI generally supports the proposed definition of "covered application." We also agree that the Bureau appropriately identified certain circumstances that are not covered applications, including reevaluation, extension, or renewal requests on an existing business account, inquiries, and prequalification requests. We believe, however, that the exclusion for reevaluation, extension, or renewal requests on an existing business account should include requests that seek additional credit amounts, including credit line increases.

Proposed comments 103(b)-2 and 3 currently provide that an applicant's request for changes to account terms, including extending the duration of a loan, is not a covered application, but that "[a]n applicant's request for additional credit amounts on an existing account that is a covered credit transaction constitutes a covered application," using a line increase on an existing line of credit as an example.[33] BPI opposes covering line increases on existing lines of credit under the section 1071 rule. Proposed section 103(b)(1) should be revised to delete the phrase "unless the request seeks additional credit amounts." Proposed comment 103(b)-2 should also be revised to clarify that additional credit amounts may be requested on an existing business credit account without triggering a covered application and proposed comment 103(b)-3 should be deleted.[34]

Requests for credit line increases typically are handled through very fast, largely automated processes and often do not require an applicant to complete and submit an application form or other documentation. Line increases also pose a low risk of discrimination given how they are typically processed. Interposing a data collection requirement would slow down these processes and potentially discourage some small businesses from seeking line increases, especially in the credit card space, which could harm small businesses that need timely access to additional credit.

[33] 86 Fed. Reg. at 56589.

[34] In the alternative, if the Bureau decides not to exempt applications for credit line increases, BPI requests that the Bureau grandfather existing accounts and exempt any existing accounts from the requirement. Technology build-outs may be much more complicated for existing accounts, and existing clients not used to such a burdensome process for credit line increases may be frustrated by the process.

Stakeholders noted in response to the SBREFA outline that line increases should be excluded from the rule because "financial institutions may not require a new application for such requests and [ ] underwriting a line increase request for new credit is substantively distinct from underwriting a request for new credit because a line increase extensively relies on past performance data and prior relationships," which may "skew 1071 data, causing misinterpretations."[35] Additionally, because the line increase process is fast and largely automated, it would be burdensome and complicated for institutions to have to determine whether or not a line increase was initiated by a customer or by the institution and then determine whether or not it has to be reported under the 1071 regime. The lack of certainty relating to customer-initiated line increases may result in some financial institutions eliminating the option for existing customers to request credit line increases. Therefore, BPI recommends that the Bureau exclude all credit line increases from the definition of a "covered application" to promote simplicity in the final rule and to make it easier to for institutions to comply.

If the Bureau includes credit line increases initiated by an applicant within the definition of "covered application" in the final rule, BPI requests a streamlined data collection process for line increases. For example, lenders should be permitted to rely on a small business applicant's prior answers to the required section 1071 questions, regardless of when such responses were provided, unless they have reason to believe the data are inaccurate, as provided in proposed section 107(c)(2)(ii). This recommendation would expand the Bureau's proposal to allow institutions to rely on information collected in connection with a prior application during the same calendar year.

C. Covered Credit Transactions and Excluded Transactions

BPI generally supports the proposed definition of "covered credit transaction." The list of excluded transactions enumerated in the proposed rule is appropriate but incomplete, for the reasons discussed below, and should be expanded. It is not clear why the Bureau has listed four exclusions in the proposed rule (trade credit, public utilities credit, securities credit, and incidental credit),[36] but only addressed other exclusions solely in the commentary (factoring, leases, consumer-designated credit, and credit secured by certain investment properties).[37] We recommend that the Bureau list all exclusions in section 104(b) of the final rule for consistency with any clarifications of those exclusions set out in the commentary. We also request that the Bureau broaden the scope of the trade credit exclusion so that all trade credit receives consistent treatment. We urge the Bureau to add exclusions to the final rule covering all HMDA-reported transactions, overdraft lines of credit, private label and co-branded credit transactions, and indirect lending transactions, as discussed below.

1. All HMDA-Reported Transactions

BPI requests that the Bureau exclude from the definition of "covered credit transaction," as well as the definition of a "covered application," transactions that are reported under HMDA. Our request focuses on HMDA-reported loans, not HMDA-reportable loans (i.e., loans subject to the HMDA data collection and reporting requirements), to emphasize that we oppose duplicative reporting of the same application or transaction under multiple collection regimes and make clear that the exclusion should apply only to transactions actually reported under HMDA. As proposed, both the HMDA and section

[35] 86 Fed. Reg. at 56400.

[36] *See id.* at 56577.

[37] *See id.* at 56589.

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 institutions to collect from applicants and report to the Bureau two different sets of information for the same transaction and the same application. It also would create a very poor experience for small business credit applicants to be asked to provide similar data twice in connection with the same application and same transaction.

In the preamble to the proposed rule, the Bureau noted that it considered excluding HMDA reportable transactions, however it chose not to exclude such transactions because of certain identified concerns.[38] BPI respectfully disagrees with the Bureau's concerns, and addresses each of them in turn below.

The Bureau noted that it is concerned that requiring institutions to exclude HMDA reportable loans would actually be a greater compliance burden for institutions because they would have to "find and delete from databases that supply their 1071 submission only those transactions that also appear in HMDA . . . "[39] To the contrary, if HMDA reported loans were excluded from the scope of section 1071, such loans would not appear in the section 1071 databases because financial institutions would design the application process to ensure separate data collection for HMDA reported loans and section 1071 transactions. For example, financial institutions would collect gross annual revenue for section 1071 reporting but not for HMDA reporting. Further, collecting section 1071 data for HMDA reported loans would actually create unnecessary complexity because financial institutions would have to review HMDA reported loans and section 1071 applications for potential errors under two different reporting regimes, given the compliance risk of reporting errors on two reporting forms, rather than only having to review loans for compliance with one set of reporting requirements.

Additionally, the Bureau noted that excluding HMDA reportable applications would mean institutions below the HMDA reporting threshold would not report such loans at all.[40] However, if the Bureau tailored the exception to applicants that *are* reported under HMDA, not applications that *could be* reported under HMDA, institutions not subject to the HMDA reporting regime would still have to report HMDA-eligible applications under section 1071 because they would not actually report such applications under HMDA.

Lastly, the Bureau also expressed concern that an exclusion for HMDA reportable applications would be "at odds with the statutory purpose of section 1071."[41] The statutory purpose of section 1071 is to facilitate the enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned and small businesses.[42] Reporting information under HMDA fulfills the statutory purpose of 1071 because HMDA "data help show whether lenders are serving the housing needs of their communities; they give public officials information that helps them make decisions and policies; and

[38] *See id.* at 56407-56408.

[39] *Id.* at 56407.

[40] *Id.* at 56408.

[41] *Id.*

[42] *Id.* at 56356.

they shed light on lending patterns that could be discriminatory."[43] Therefore, for the slice of the small business lending market subject to HMDA, HMDA data facilitates the enforcement of fair lending laws and enables communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned and small businesses.

Proposed comment 104(b)-4 would exclude from the definition of "covered credit transaction" credit secured by certain investment properties, specifically credit secured by one to four individual dwelling units that the applicant (or one or more of its principal owners) does not or will not occupy. In practice, this exclusion applies to credit extended to small landlords for investment purposes and functions as a partial HMDA exemption for credit extended to small landlords. Although BPI supports this exclusion, we believe that a more coherent and consistent approach would be to expand the exclusion to apply to all HMDA-reported transactions.

If the Bureau determines to include HMDA-reported loans in the definition of a covered credit transaction in the final rule, BPI requests that the CFPB create a sample data collection form for scenarios where HMDA and section 1071 both apply to simplify compliance and allow applicants to fill out a single form.

2. Overdraft Lines of Credit

The Bureau asked in the supplementary information to the proposed rule whether an overdraft line of credit should be considered a product separate from a line of credit for purposes of section 1071.[44] We do not believe that overdraft lines of credit should be considered a separate product category. In fact, BPI requests that the Bureau exclude overdraft lines of credit from the final rule.

Overdraft lines of credit are an add-on to a deposit product, such as a business checking account. Overdraft lines of credit for business deposit accounts typically do not require a separate application from the deposit account application. As a result, a requirement to collect section 1071 data for overdraft lines of credit would significantly expand the data collection requirements for small business deposit account applications because most such deposit accounts have an option to obtain an overdraft line of credit. In addition, banks conduct little, if any, underwriting when extending overdraft lines of credit on small business deposit accounts. Therefore, a requirement to collect data on overdraft lines of credit would not further section 1071's purpose of preventing discrimination against small business credit applicants.

3. Trade Credit

Proposed section 104(b)(1) generally excludes trade credit from the definition of a covered credit transaction and 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."[45] Proposed comment 104(b)(1)-1 further states that "**an extension of business**

[43] CFPB, Mortgage Data (HMDA), About HMDA *available at* https://www.consumerfinance.gov/data-research/hmda/.

[44] 86 Fed. Reg. at 56443, 56446

[45] *Id.* at 56577.

credit by a financial institution other than the supplier for the financing of such items **is not trade credit**."[46]

BPI believes that all forms of trade credit, not just in-house trade credit, should be exempt from the section 1071 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 also 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 to prevent the creation of an un-level regulatory playing field and to promote competition in the market for 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 the type of information required under section 1071 for trade credit. By drawing an arbitrary distinction between these two forms of trade credit, the proposal may push more business transactions into a less regulated environment without the oversight offered by financial institutions. Not all suppliers, however, have the ability 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 suppliers' in-house solutions prove too challenging to implement and trade credit offered by financial institutions becomes unattractive to some would-be purchasers as a result of section 1071 data collection and reporting requirements, suppliers may have no other options and reduce the amount of trade credit accessible 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 section 1071 data collection and reporting. Meanwhile, trade credit programs offered by financial institutions that provide the very same service would need to implement the requirements of this proposal that some purchasers will find unfamiliar, unwelcome, and more burdensome. Such a result is inconsistent with the stated goals of the Bureau and the Administration to promote and foster competition.

Finally, the data gathered from only the trade credit programs offered by financial institutions would have limited value to the Bureau because most trade credit is extended "in-house" and would not be subject to the section 1071 data collection and reporting requirements in any event. Such partial and incomplete data collection and reporting on trade credit would not offer meaningful insights into the market for trade credit and would not advance the statutory purposes of section 1071. Accordingly, BPI respectfully requests that the Bureau strike the third sentence of proposed comment 104(b)(1)-1 from the final rule.

4. Private Label and Co-Branded Credit Transactions

BPI requests that the Bureau create an exemption in the final rule for *all* private label credit and co-branded commercial credit transactions to preserve the appeal and availability of commercial private

[46] *Id.* at 56589 (emphasis added).

label and co-branded credit, whether conducted in store or via digital means.[47] Alternatively, the Bureau could achieve the same result by excluding small business private label and co-branded credit applications from the definition of "covered application."

Retail merchants offer commercial loans (e.g., installment loans and business credit cards) in partnership with financial institutions to their customers. Private label and co-branded credit provides an effective method for retailers to improve sales without creating bottlenecks in their store, and it provides potential applicants a way to "apply and buy" with relative ease. This ease for applicants and retailers is the result of retailers and banks working to blend the credit application process seamlessly into the retail environment without creating pain points for retailers or their customers. Private label and co-branded credit can be provided to applicants online or at point-of-sale.

The Bureau's proposed rule creates a risk that both retailers and potential applicants will find the private label and co-branded credit process burdensome, reducing both the supply of and demand for private label and co-branded commercial credit. From the retailer's perspective, the proposed rule would add many more data fields and accompanying explanations to the credit applications than currently exist. Applications would also become more complicated with segregated forms and detailed questions about sensitive topics such as race, ethnicity, and sex. Not only would the application process become longer, but it would introduce topics that are not appropriate in a retail environment. For example, potential applicants may ask store associates questions about the credit application, which could include questions regarding race, ethnicity, and sex. Store associates are likely not the personnel that should be tasked with managing these types of questions. Retailers must also weigh the risk of claims of discrimination in the event an application is declined. Therefore, the proposed rule would increase the time and friction of private label and co-branded credit transactions and retailers may opt to not offer small business credit or not promote the program if the retailer wants to avoid issues at the point of sale, customer service desk, sales floor, or anywhere else a private label or co-branded credit application may be taken. Further, applicants may be less willing to provide sensitive information about race, ethnicity, and sex in the public setting of a retail environment.

Likewise, if the proposed rule were to be adopted as currently written, applications for private label and co-branded commercial credit would likely decline. The application would require an increased amount of data, multiple forms, and an understanding of various definitions, and create challenges for retailers as applicants respond to questions on race, ethnicity, and sex. What was once a quick and simple application process would become laborious and complicated.

These issues are relevant in all circumstances, but especially for programs that rely on in-store interactions between small business credit applicants and retail employees. Although some programs are transitioning to a digital experience, those transitions may take place gradually over time and many private label and co-branded credit programs rely on in-store application processes and will continue to do so. In-store application processes may be paper-based or use an oral, interview style. In these circumstances, retail employees of the merchant, not employees of the reporting financial institutions, would be required to provide applicants with the required section 1071 data collection form and

[47] Although this discussion focuses primarily on transactions in a physical brick and mortar environment, creditors will not necessarily know the physical location of the applicant as applications are increasingly digital and involve the applicant's own device (even in store). Although many applications will continue to be taken in store, creditors will not necessarily be able to distinguish in store applications from digital applications. The concerns discussed in this section apply to both in-store and digital application scenarios.

disclosures. In an oral, interview-style application process, retail employees then may have to ask applicants for the required section 1071 data points at the point-of-sale or at a customer service counter. Such interactions would be inefficient, burdensome, public, and potentially awkward. It is reasonable to require an entry-level retail employee who may be a part-time, seasonal, or young worker to provide an applicant with a self-explanatory application and disclosure packet. It is not reasonable, however, to expect such retail employees to ask applicants, in interview-style applications, about the applicant's status as a small business or a women- or minority-owned business and the race, ethnicity, and sex of the principal owner(s) of the applicant. Another consideration is that store locations are determined by the retailer and may attract a customer base that does not reflect demographic diversity. Further, in-store data collection may heighten concerns about applicant privacy and data quality.

BPI recognizes that the CFPB believes that "financial institutions can develop procedures to accommodate collection in this setting, including . . . by using the sample collection form developed by the Bureau" and that no "specialized knowledge is necessary to collect 1071 data."[48] However, BPI respectfully disagrees. The Bureau's observation does not take into account oral, interview-style application processes. More generally, retail employees who are not familiar with reporting regimes similar to section 1071, and who do not understand the purpose of such reporting, do not have the appropriate experience to ensure the accuracy of the data they would have to collect during an in-store transaction.

If the Bureau includes private label and co-branded transactions in the final rule, BPI requests that the final rule only require the collection and reporting of private label and co-branded transactions over $50,000. Such a rule aligns with the reporting threshold for FinCEN's CDD regulations.[49] While BPI recognizes that the Bureau did not recommend such a threshold in the proposed rule because of differences between the section 1071 reporting and FinCEN's CDD regulations,[50] BPI respectfully disagrees with the Bureau's analysis of the comparison to FinCEN's CDD regulations. Private label and co-branded transactions below $50,000 have a low risk of discrimination because they are largely approved or denied quickly based on the application of automated rules based on information provided by the applicant. In addition, larger transactions, whether made online or at point-of-sale, are more likely to require review by a manager or other more experienced retail employee who would be better able to navigate the data collection process. Therefore, private label and co-branded and transactions or, alternatively, transactions below $50,000 should be excluded from any final rule.

5. Indirect Lending Transactions

Similar to private label and co-branded credit transactions, indirect lending transactions should be excluded from the section 1071 data collection and reporting requirements. Indirect lending includes vendor finance, inventory finance, and equipment finance. In the indirect lending model, a small business applicant interacts solely with a dealer (and, in some cases, with a manufacturer), which takes the credit application and collects information from the applicant. The covered financial institution does not engage directly with the small business owner. In the indirect lending model, covered financial institutions receive applications from dealers or through online portals.

[48] 86 Fed. Reg. at 56487.

[49] *See* 13 C.F.R. § 1010.230(h)(1)(i).

[50] 86 Fed. Reg. at 56487-56488.

The fair lending purpose of section 1071 is to determine whether covered financial institutions discriminate against small business applicants. Section 1071 does not focus on how dealers and manufacturers treat such applicants, unless those entities qualify as covered financial institutions. Section 1071's fair lending purpose would not be furthered by requiring covered financial institutions to report data that would be collected by equipment dealers or manufacturers. Therefore, the Bureau should exclude indirect lending from the scope of the final rule. Such an exclusion would be consistent with the Bureau's recognition in proposed section 1002.101(a) and proposed comment 1002.105(a)-2 that auto dealers engaged in indirect auto lending to small business applicants are exempt from the requirements of section 1071.

D. "Small Business" Definition

The proposed rule defines a "small business" to "[have] the same meaning as the term "small business concern" in 15 U.S.C. 632(a), as implemented in 13 CFR 121.101 through 121.107. Notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of this subpart, a business is a small business if and only if its gross annual revenue, as defined in § 1002.107(a)(14), for its preceding fiscal year is $5 million or less."[51] SBA regulation 13 C.F.R. § 121.103(a)(6) provides that "[i]n determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."[52] Additionally, the SBA's standard operating procedures for its lender and development company loan programs provide that in order to be considered a small business "the [a]pplicant when combined with its affiliates, must not exceed the size standard designated for either the primary industry (defined in 12 CFR § 121.107) of the [a]pplicant alone or the primary industry of the [a]pplicant and its affiliates, whichever is higher."[53] Therefore, it appears that affiliate revenues should be included in determining if a business is a "small business" under the proposed section 1071 rule.

BPI strongly supports and greatly appreciates the Bureau's proposed approach for determining whether a business credit applicant meets the definition of a "small business" under section 1071 by using a simplified gross annual revenue dollar threshold. BPI believes the Bureau's proposed approach is the only feasible means of implementing the statute given the different types of size-based criteria and numerous industry-specific size thresholds set forth in SBA regulations. Any attempt to follow the SBA size standards beyond the requirement that affiliate revenues should be aggregated would massively complicate the data collection process, lead to the introduction of errors that would undermine data accuracy, and interfere with financial institutions' ability to extend credit to business applicants in a prompt and efficient manner.

BPI urges the Bureau to retain the simplified gross annual revenue threshold as the basis for determining which business applicants qualify as small businesses for purposes of section 1071 and to set the gross annual revenue threshold no greater than $5 million, including revenues from subsidiaries

[51] 86 Fed. Reg. at 56577.

[52] 13 C.F.R. § 121.103(a)(6).

[53] SBA, SOP 50 10 6, Lender and Development Company Loan Programs (effective Oct. 1, 2020) *available at* https://www.sba.gov/document/sop-50-10-lender-development-company-loan-programs-0.

and affiliates.[54] Additionally, BPI agrees with SBA rules and guidance that affiliate revenues should be included when making the size determinations required by the definition of "small business." For example, data collection should not be required for an applicant that is a subsidiary or affiliate, including joint ventures, of a large corporation or other entity with aggregate affiliate revenues in excess of the gross annual revenue threshold because such an entity would not be a small business. Therefore, an applicant should aggregate its receipts, which is "all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances,"[55] as defined in 13 C.F.R. § 121.103. As a result, subsidiaries of large companies should be excluded from the definition of "small business" if the aggregate revenues for *all* affiliates, as defined in 13 C.F.R. § 121.103, exceed the gross annual revenue threshold.

Proposed comment 107(a)(14)-3, however, notes that if a financial institution does not normally collect information on affiliate revenue, then it reports only the applicant's revenue. BPI recommends deleting this language or, alternatively, revising it to clarify that a lender that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions. Specifically, the comment should be revised to read as follows: "for example, if the financial institution does not normally collect information on affiliate revenue *for a particular applicant type,* the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information."

Finally, BPI requests that non-operating entities, such as trusts, special purpose vehicles, pass-through and single-asset entities, and other non-operating entities that were established as wealth management vehicles, in addition to holding companies that are not organized for profit, be expressly excluded from the scope of the final rule.

E. "Principal Owner" Definition

BPI requests that the Bureau align the definition of "principal owner" with the definition of "beneficial owner" in the FinCEN's CDD regulations, rather than creating a different standard solely for purposes of section 1071.[56] The use of different definitions for ownership would likely cause confusion among applicants who will be asked to provide information about the principal owners under both the CDD and the section 1071 regulations at approximately the same point in the application process. For

[54] Some BPI members support the $5 million gross annual revenue threshold for determining whether a business applicant is a small business, while other BPI members believe that the proposed gross annual revenue threshold is too high and should be lowered to $1 million to avoid bringing within the scope of the rule larger, corporate-type businesses. Regulation B already makes a distinction between business credit applicants with gross annual revenues of $1 million or less and those with gross annual revenues in excess of $1 million for purposes of the adverse action notice provisions. *See* 12 C.F.R. 1002.9(a)(3). Some members believe the $1 million threshold used for adverse action notices provides the appropriate threshold for a small business and should be applied to section 1071 reporting because a $1 million threshold would impact fewer lines of business, simplify compliance efforts, and reduce the time necessary to comply, whereas a $5 million threshold would impact more business lines.

[55] 13 C.F.R. § 121.104(a).

[56] *See* 31 C.F.R. § 1010.605(a).

simplicity and to minimize applicant confusion, we ask the Bureau to align the "principal owner" definition with the definition of "beneficial owner" in the CDD regulations.

The Bureau considered aligning the definition of "principal owner" with the "beneficial owner" definition in FinCEN's CDD regulations, but believed it would be challenging to trace indirect ownership of a legal entity or trust for purposes of collecting race, ethnicity, and sex of the principal owner(s).[57] BPI is not convinced that is the case because the CDD regulations already require legal entity applicants to trace the indirect ownership of natural persons that own 25 percent or more of the equity of the entity. Extending that concept of indirect ownership to the section 1071 rule should be very familiar to small business applicants structured as legal entities. For small business applicants that are sole proprietorships or otherwise not structured as legal entities, these applicants likely would not have complicated equity structures.

V. The Bureau should not require the collection and reporting of multiple, non-statutory data points; in the alternative, the Bureau should provide additional guidance, flexibility, and safe harbors regarding the collection and reporting of certain data points.

Proposed section 107(a) lists 21 separate data points that covered financial institutions would be required to collect and report to the Bureau. Some of the data points are mandated by section 1071, while other data points are proposed by the Bureau under its authority to require the collection and reporting of additional data it determines would aid in fulfilling the statutory purposes of section 1071.[58]

BPI urges the Bureau not to require the collection and reporting of multiple, non-statutory data points absent a determination by the Bureau that collecting such additional data "would aid in fulfilling the purposes" of section 1071.[59] We note that the express purpose of section 1071 is "to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[60] Although a few of the proposed non-statutory data points, such as NAICS code and time in business, potentially may provide helpful context for evaluating the basis for credit decisions and conducting an accurate, fact-based fair lending analysis, most of the proposed non-statutory data points would not aid in fulfilling the statutory purposes of section 1071. Requiring the collection and reporting of these additional data points would impose unnecessary burden and complexity on financial institutions; reduce the accuracy, reliability, and quality of the data collected and reported; lead to misinterpretation of the reported data or create a misleading impression of discrimination; and raise privacy concerns among applicants.

Some of the proposed non-statutory data points would mandate the collection and reporting of information that is not currently collected by financial institutions, is not classified in the manner proposed, or requires calculations that may be subject to interpretation. For example, lenders do not customarily calculate total origination charges and there is not a settled method of calculating such charges.

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[57] 86 Fed. Reg. at 56487-56488.

[58] 15 U.S.C. § 1691c-2(e)(2)(H).

[59] *See id.*

[60] 15 U.S.C. § 1691c-2(a).

BPI notes that several of the proposed non-statutory data points, such as number of workers, time in business, and NAICS code, must be obtained from applicants, but are not listed on the sample data collection form. Except for the data points required to be collected on the sample data collection form and kept separate from other information, the final rule should expressly permit covered financial institutions to collect required data from applicants through a variety of means, including, without limitation, on the application form, supplemental documents or forms, or the sample data collection form.

BPI also reiterates that the Bureau should revise the final rule to make clear that covered financial institutions can rely on applicant-provided data in *all* circumstances through any applicant-provided means without verification and restates its opposition to any requirement to collect data about race and ethnicity of the principal owner(s) of an applicant through visual observation or surname. If an applicant provides data that is inconsistent with data provided in supporting documents or outside the application process, an institution should be able to rely on the data provided by the small business applicant on the application or other form used in the application process without having to reconcile data provided by the applicant in supporting documents or outside the application process. For example, an applicant could provide a NAICS code on an application or a section 1071 collection form used in the application process that differs from the NAICS code an applicant previously or separately provided on an IRS tax return. Therefore, the Bureau should make it clear in the final rule that the institution can rely solely on the data provided by the applicant on an application or other form used in the application process. Additionally, the proposed safe harbors from liability for reporting incorrect data in proposed section 112(c), which BPI supports, should be expanded to apply to all applicant-provided data. In all instances, institutions should be held to a reasonable efforts standard for attempting to obtain the requested information.

For the reasons stated herein, BPI urges the Bureau to eliminate from the final rule most of the additional, non-statutory data points contained in the proposed rule. These additional data points increase the burden and complexity of compliance without any demonstrable need to collect and report these data points to fulfill the purposes of section 1071. A simpler rule with fewer data points to collect and report would facilitate compliance by financial institutions and provide more accurate, reliable, and consistent data for the Bureau and other interested parties to evaluate. At most, the Bureau should only add limited data points that are considered by financial institutions in the credit underwriting process, such as NAICS code or time in business. If, however, the Bureau decides to include most or all of the additional, non-statutory data points in any final rule, BPI requests that the Bureau provide additional guidance, flexibility, and safe harbors regarding the collection and reporting of certain data points, as discussed below.[61]

A. Unique Identifier

Proposed section 107(a)(1) would implement the statutory requirement that covered financial institutions report the number of the application. The Bureau's proposal to require the reporting of a unique identifier is a reasonable and appropriate means of implementing the statutory requirement.

[61] If the Bureau decides that any other data points not specified in the proposed rule should be collected and reported under section 1071, it should only do so after providing notice and comment for those data points.

B. Application Date

BPI appreciates the flexibility the Bureau has provided to report the statutorily-mandated application date based on the "date the covered application was received by the financial institution or the date shown on a paper or electronic application form."[62] BPI supports the proposed provision as a reasonable and appropriate means of implementing the statute.

C. Application Method

BPI requests that the Bureau eliminate from the final rule the requirement to report the application method data point in proposed section 107(a)(3). This non-statutory data point serves little purpose other than to track which applications may require data collection of a principal owner's race or ethnicity via visual observation or surname for applications that take place in person or over visual media where the principal owner(s) or applicant declines to provide the race or ethnicity of at least one principal owner. For the reasons discussed in Section III above, BPI opposes any data collection by visual observation or surname. Therefore, neither the application method data point nor the visual observation or surname collection requirement should be included in the final rule. If the Bureau decides to include the application method data point, BPI asks the Bureau to clarify that the initial client contact determines application method for section 1071 data collection and reporting, so that financial institutions have clear requirements when, for example, a client that applies digitally but later provides additional information telephonically.

D. Application Recipient

BPI requests that the Bureau eliminate from the final rule the requirement to report the non-statutory application recipient data point in proposed section 107(a)(4). This non-statutory data point could be misleading because it provides no indication of the role of the recipient. Some application recipients may simply refer or pass along small business credit applications. Other application recipients may be creditors that, in various contexts, engage in substantial underwriting and have independent reporting obligations under section 1071. Therefore, BPI does not see how requiring the collection and reporting of the application recipient fulfills the statutory purposes of section 1071.

E. Credit Type

Proposed section 107(a)(5) would implement the statutory requirement that covered financial institutions collect and report the type of credit applied for or originated. BPI requests that the Bureau simplify this data point by eliminating the required collection of the types of guarantees obtained for an extension of credit, or that would have been obtained if the covered credit transaction had been originated. The statute does not require the collection of information about guarantees and we do not believe that institutions should be required to report what guarantees would have been obtained if the transaction had been originated. Such a requirement extends beyond fact into mere speculation, and would undermine the accuracy, reliability, and consistency of the data collected and reported. Accordingly, we urge the Bureau to limit the credit type data point to the following factual information — credit product and loan term, if applicable.

[62] 86 Fed. Reg. at 56577.

F. Credit Purpose

Proposed section 107(a)(6) would implement the statutory requirement that covered financial institutions collect and report the credit purpose. Proposed comment 107(a)(6)-1 provides that financial institutions comply with this requirement if institutions select one of several enumerated credit purposes.[63] The enumerated credit purposes include options for institutions to choose either "not provided by applicant and otherwise undetermined" or "not applicable."[64] BPI requests that the Bureau clarify in the final rule the circumstances when institutions should use "not provided by applicant and otherwise undetermined" versus "not applicable."

G. Amount Applied For

Proposed section 107(a)(7) would implement the statutory requirement that covered financial institutions report the amount of credit for which the applicant applied with proposed comment 107(a)(7)-1 noting that the requirement focuses on the initial amount requested and proposed comment 107(a)(7)-2 noting that, in many cases, no amount is requested . Proposed comment 107(a)(7)-3 addresses the amount to report as the amount applied for in the context of firm offers of credit that specify an amount or limit. BPI requests that the Bureau clarify in the final rule how institutions should report the amount applied for when a firm offer of credit specifies a range of possible amounts, for example, amounts between $20,000 - $40,000. We believe such offers should be deemed not to specify an amount or limit and that institutions should be able to report the amount underwritten as the amount applied for. Reporting the top of the range as the amount applied for in these circumstances could be misleading because many applicants likely will not qualify for amounts at the top of the range.

H. Amount Approved or Originated

Proposed section 107(a)(8) would implement the statutory requirement that covered financial institutions report the amount approved or originated. BPI supports the proposed provision as a reasonable and appropriate means of implementing the statutory requirement.

I. Action Taken and Action Taken Date

Proposed sections 107(a)(9) and 107(a)(10) would implement the statutory requirements that covered financial institutions report, respectively, the action taken and the action taken date. BPI supports these two proposed provisions as a reasonable and appropriate means of implementing the statute.

J. Denial Reasons

Proposed section 107(a)(11) would require covered financial institutions to report the denial reasons for small business loan applications that it denies. BPI requests that the Bureau eliminate from the final rule the requirement to report the denial reasons data point in proposed section 107(a)(11). This non-statutory data point is drafted in a rigid, inflexible manner that is unlikely to produce accurate or reliable data. Further, financial institutions already provide or are prepared to provide denial reasons

[63] *Id.* at 56592.

[64] *Id.*

under the ECOA adverse action notice requirements, so the Bureau and other regulatory agencies have access to this information in the absence of a new data collection and reporting requirement.

In the event the Bureau retains the denial reasons data point, the Bureau should provide more flexibility and allow financial institutions, for consistency, to report the same reason(s) it provided to the applicant in an ECOA adverse action notice, or provided, or was prepared to provide, in response to a subsequent request for specific reasons for the denial of the application.

The Bureau has proposed a prescriptive list of nine reasons for denial of an application that covered financial institutions must use, plus a tenth catch-all "other" reason.[65] Financial institutions, however, may not necessarily deny an application based on the reasons enumerated by the Bureau, which could result in heavy reliance on the "other" reason category. Additionally, the approach proposed in section 107(a)(11) is incompatible with the Bureau's flexible approach to providing adverse action reasons in ECOA adverse action notices. As noted in Appendix C to Regulation B:

> The sample forms are illustrative and may not be appropriate for all creditors. They were designed to include some of the factors that creditors most commonly consider. If a creditor chooses to use the checklist of reasons provided in one of the sample forms in this appendix and if reasons commonly used by the creditor are not provided on the form, the creditor should modify the checklist by substituting or adding other reasons.[66]

Senior Bureau officials have recognized that the ECOA adverse action framework "has built-in flexibility," specifically noting that "neither ECOA nor Regulation B mandate the use of any particular list of reasons" and that "the regulation provides that creditors must accurately describe the factors actually considered and scored by a creditor even if those reasons are not reflected on the current sample forms. This latitude may be useful to creditors when providing reasons that reflect alternative data sources and more complex models."[67]

BPI notes that the reasons for credit denials continue to evolve as financial institutions incorporate new data into the credit underwriting process and enhance credit underwriting systems to expand access to credit and promote fair and accurate credit decisions. As a result, many financial institutions do not use a static set of denial reasons but refresh and reassess their denial reasons periodically. In such a dynamic environment, proposed section 107(a)(11) is simply too prescriptive in establishing a list of detailed reasons for institutions to use when reporting why it denied an application.[68]

Therefore, BPI urges the Bureau to maintain consistency between the denial reasons reported to applicants in the connection with taking adverse action and the denial reasons reported under

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[65] *See id.* at 56594-56595.

[66] 12 C.F.R. part 1002, App. C, instruction 3.

[67] Patrice Alexander Ficklin, Tom Pahl, Paul Watkins, CFPB, Innovation spotlight: Providing adverse action notices when using AI/ML models (July 7, 2020) *available at* https://www.consumerfinance.gov/about-us/blog/innovation-spotlight-providing-adverse-action-notices-when-using-ai-ml-models/.

[68] *See* 86 Fed. Reg. at 56594-56595.

section 1071. BPI asks the Bureau to afford financial institutions the same flexibility for collecting and reporting denial reasons under section 1071 that apply in the context of the ECOA adverse action notice requirements.

In addition, BPI notes that the denial reasons provided in section 1071 are not consistent with the denial reasons provided in HMDA reporting, as outlined in Appendix A below. These differences provide further support for BPI's request that the Bureau exclude HMDA reported transactions from the final rule to avoid creating inconsistencies in information reported under the two regimes for the same transaction.

Finally, BPI urges the Bureau to commit to not publishing the reported denial reasons publicly. If denial reasons were published, it may be relatively easy for a person to identify which applicant was denied a loan and why by using the denial reasons as a means of reverse engineering. This raises serious privacy concerns. In addition, if the applicant can identify their own denied application, the applicant may be confused by the differences between the reported denial reasons and the adverse action denial reasons.

K. Pricing Information

Proposed section 107(a)(12) would require financial institutions to report information regarding the pricing of an originated or approved covered credit transaction, including as applicable: interest rate, total origination charges, broker fees, initial annual charges, additional cost for merchant cash advances or other sales based financing, and prepayment penalties.[69] BPI urges the Bureau to eliminate from the final rule the requirement to report the pricing data points in proposed section 107(a)(12).

As proposed, BPI does not believe that requiring the collection of pricing data "would aid in fulfilling the [fair lending] purposes of" section 1071. These non-statutory data points lack essential contextual information necessary to explain pricing differences on a non-discriminatory basis; potentially could result in inaccurate fair lending assessments, allegations, and unjustified reputational harm to institutions; and significantly increase the cost, burden, and complexity of the rule across various types of products. The proposed pricing data points therefore do not provide an accurate or reliable basis for identifying fair lending concerns in the absence of substantially more contextual information that would explain the pricing variations. The contextual information necessary to evaluate pricing data would include, for example, the pricing structure for the product (i.e., indexed or non-indexed), the nature and value of the collateral, credit scores, the size of the down payment, compensating deposit balances, and the presence of other financial services bundled with the loan. In the absence of such context, BPI, like many of the commenters on the SBREFA outline, is concerned that the pricing data points could be taken out of context to distort or misinterpret the reported information and make inaccurate and unjustified fair lending allegations.[70] Any of the factors described above, for example, the nature and value of collateral securing a loan, can materially impact loan pricing. Similarly, the pricing structures for static/non-indexed products and indexed products significantly differ and the pricing of static/non-indexed products could be misconstrued if taken out of context.

[69] *Id.* at 56577.

[70] *Id.* at 56455.

BPI emphasizes that it is *not* suggesting that the Bureau require the collection and reporting of additional data points to provide context for the pricing data. What we are suggesting is that pricing data, along with relevant contextual information, is more appropriate to request and evaluate in connection with a fair lending examination or investigation, rather than as part of an annual data collection process, where the regulator can simultaneously obtain relevant contextual information about the loans under review. We note that community group support for the collection of pricing information has focused on high-cost loans targeted to minority communities and borrowers,[71] rather than on all forms of small business lending. There is no justification in the proposed rule for burdening all small business lenders with the collection and reporting of pricing data points related to fair lending concerns arising in relatively narrow markets and market segments.

BPI also points out the significant burdens associated with collecting and reporting the pricing data points. Some of the pricing data, such as total origination charges, is not currently generated at institutions and could be very difficult to obtain from third parties, such as loan brokers, who may be reluctant to provide such information to lenders. The pricing data that would be required to be collected and reported by the proposed rule is not business-as-usual pricing information.

Finally, BPI opposes the publication of the pricing data points based on the data's lack of context and susceptibility to misinterpretation, the consequences to institutions of such misinterpretations in terms of fair lending actions and reputational harm, and applicant privacy concerns. Further, the publication of pricing data could potentially be traced back to particular small business applicants and expose private data on small business credit worthiness to data mining and other uses beyond the purposes of section 1071. If pricing data points are retained in the final rule, we urge the Bureau to commit not to publishing the pricing data points to avoid misinterpretation that could lead to misguided fair lending allegations and to protect applicants' privacy.

L. Census Tract

Proposed section 107(a)(13) would implement the statutory requirement that covered financial institutions report the census tract in which the small business credit applicant is located. Proposed section 112(c)(1) and proposed comment 107(a)(13)-4 create a safe harbor from administrative enforcement and civil liability if a financial institution reports an incorrect entry for census tract if the institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau.

BPI welcomes and appreciates the Bureau's proposed safe harbor from liability for proper use of a geocoding tool provided by the FFIEC or the Bureau. The proposed safe harbor, while a good start, would not fully protect institutions from liability. A geocoding tool provided by the FFIEC or the Bureau may not provide an exact match with the address provided by the applicant. In situations where the FFIEC or CFPB geocoding tool does not provide an exact match for the address provided by an applicant, BPI requests that the Bureau expand the proposed safe harbor to apply when a financial institution uses a reasonable process for determining the census tract. A reasonable process, for example, may include using another coding software or documented process comparing another mapping system to the online maps on those sites. Liability for accurate reporting of the census tract data point should not depend exclusively on securing an exact match in one of two third-party geocoding tools.

[71] *Id.*

BPI also requests that the Bureau create an exclusion from the census tract collection and reporting requirement if the applicant only provides a P.O. Box or other mailbox that is not connected to a physical address of the business. In such a situation, a financial institution could not determine the census tract of the applicant and the collection and reporting of the census tract data point would be impossible.

Further, BPI requests that the Bureau clarify whether the census tract should match the mailing address of the applicant or the physical address of the applicant.

M. Gross Annual Revenue

Proposed section 107(a)(14) would implement the statutory requirement that covered financial institutions collect and report the gross annual revenue of the applicant for its preceding full fiscal year prior to the data collection. BPI requests a number of clarifications regarding the collection and reporting of the gross annual revenue data point.

First, BPI requests that the final rule allow financial institutions to use extrapolated or estimated data to determine an applicant's gross annual revenue. Although the Bureau noted that it "does not currently believe that estimation or extrapolation would likely result in sufficiently accurate data for reporting,"[72] the Bureau allows extrapolation or estimation for the threshold determination of whether a business qualifies as a small business.[73] For consistency, BPI believes the Bureau should allow financial institutions to extrapolate or estimate an applicant's gross annual revenue, just as it allows institutions to rely on extrapolated or estimated revenue data for determining whether or not a business is a small business.

Second, BPI requests that the Bureau clarify in the final rule that the reportable gross annual revenue is the gross annual revenue of both the applicant and all of its affiliates. Currently, proposed comment 107(a)(14)-3 provides that a financial institution is "permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well."[74] As noted in Section IV.D above, under SBA regulations, the revenues of the applicant and its affiliates must be considered together to determine if an applicant meets the size threshold for a small business concern. For consistency, the gross annual revenue data point should be the same revenue figure used to determine whether a business is a "small business" as defined in the statute and the rule.

Third, BPI requests that the Bureau include in the final rule a clarifying statement providing that different business units within the financial institution may use different methods to determine gross annual revenue, as long as the methods are used consistently within each business unit.

Fourth, BPI requests clarification regarding how to collect and report gross annual revenue for start-up businesses. Start-up businesses may not have any revenue. BPI requests that the Bureau clarify that small businesses with $0 of gross annual revenue are covered businesses and covered applications

[72] *Id.* at 56466.

[73] *Id.*

[74] *Id.* at 56596.

under the final rule. Further, if a business has no revenue, the Bureau should clarify that the financial institution may report gross annual revenue as "$0."[75]

N. NAICS Code

Proposed section 107(a)(15) would require the collection and reporting of the six-digit NAICS code appropriate for the applicant. BPI acknowledges that this non-statutory data point could potentially be helpful in demonstrating a non-discriminatory basis for credit decisions with respect to applicants in different industries.

BPI appreciates that proposed comments 107(a)(15)-3 and -4 permit financial institutions to rely on statements or information provided by the applicant or other information from company profiles or business credit reports when collecting and reporting the NAICS code. BPI is concerned, however, that the NAICS codes reported by or for an applicant may not be the same in different documents. For example, the NAICS code reported on an IRS tax return may not be the same code reported by an applicant on an application or data collection form or reflected on a financial institution's Call Reports. Therefore, as mentioned in Section III above, BPI urges the Bureau to make it clear in the final rule that a financial institution may rely on and report the NAICS code provided by the applicant on an application, supporting documentation, such as an applicant's IRS tax return, section 1071 data collection form, or other reliable sources, such as company profiles or business credit reports without verification. The Bureau also should clarify that financial institutions are not required to reconcile an applicant's self-reported NAICS code with the NAICS codes listed on other documents provided by the applicant, such as tax returns, or other records.

BPI strongly supports the proposed safe harbor from liability for incorrect entries of NAICS codes provided by the applicant or obtained from another source in proposed section 112(c)(2) and proposed comment 107(a)(15)-5. As noted above, we urge the Bureau to extend this approach to other applicant-provided data points and adopt a broad safe harbor from liability for the reporting of all applicant-provided data.

Finally, BPI opposes the publication of the NAICS code data point because it could be used to identify the applicant. We urge the Bureau to commit publicly to not publishing such data point to protect applicants' privacy.

O. Number of Workers

Proposed section 107(a)(16) would require the collection and reporting of the number of non-owner workers of the applicant. BPI requests that the Bureau eliminate from the final rule the number of non-owner workers data point in proposed section 107(a)(16). This non-statutory data point would be burdensome to collect, would not produce accurate or reliable data, and would be irrelevant for businesses that have no non-owner employees. In addition, the number of workers data point would not "aid in fulfilling the [fair lending] purpose" of section 1071 since the Bureau has proposed to make

[75] This request is consistent with interagency Community Reinvestment Act guidance on small business lending that requires financial institutions to report gross annual revenue of $0 for start-up businesses. *See* 81 Fed. Reg. 48506, 48552 (July 25, 2016).

the small business determination under a simplified size threshold standard based on gross annual revenues without reference to the number of workers.

Proposed comment 107(a)(16)-1 would require covered financial institutions to provide applicants with detailed instructions regarding which individuals applicants should count as reportable workers (e.g., exclude owners and volunteers, but include full-time, part-time, seasonal, and certain contractor workers). BPI believes some applicants may have difficulty providing an accurate number, particularly applicants operating in cyclical or seasonal businesses that experience significant variations in employment levels over the course of a calendar year. The proposed exclusion of affiliate employees is also problematic as some of these employees may perform substantial services for the applicant.

For the reasons stated above, BPI requests that the Bureau eliminate from the final rule the proposed requirement to collect and report the number of non-owner workers of an applicant. If the number of workers data point is retained in the final rule, BPI requests that the Bureau include in the final rule an express regulatory safe harbor from liability for reporting the number of workers provided by the applicant, which should be part of a global safe harbor for the reporting of all applicant-provided data or, alternatively, a safe harbor similar to those in section 112(c) of the proposed rule.

Finally, BPI opposes the publication of the number of workers data point based on the variability of the data, its susceptibility to misinterpretation, and the potential for the data to be used to identify the applicant. If the number of workers data point is retained in the final rule, we urge the Bureau to commit to not publishing such data point publicly to avoid misinterpretation and to protect applicants' privacy.

P. Time in Business

Proposed section 107(a)(17) would require the collection and reporting of the applicant's time in business, in whole years, as relied on or collected by the financial institution. BPI recognizes that this non-statutory data point could be helpful in demonstrating a non-discriminatory basis for different credit decisions. BPI is concerned, however, that, as currently proposed, the time in business data point could be misinterpreted, particularly when comparing covered credit transactions reported by different covered financial institutions.

Where a financial institution evaluates and relied on an applicant's time in business in credit underwriting, proposed comment 107(a)(17)-2 permits the institution to collect and report the number of years the applicant has existed or the number of years of experience the applicant's owners have in the current line of business, whichever is applicable.[76] Although BPI appreciates the flexibility provided in proposed comment 107(a)(17)-2, some institutions may consider *both* the applicant's time in business *and* the experience of the principal owners in the current line of business. The proposed comment provides no guidance on how to report in those circumstances. Further, the resulting time in business data point would not be comparable across financial institutions (or even some business units within financial institutions) that follow different approaches to relying on time in business in underwriting.

For financial institutions that do not rely on time in business in the credit underwriting process, and must collect it from applicants solely for purposes of section 1071, proposed comment 107(a)(17)-4 provides that "[w]hen the applicant has multiple owners with different numbers of years operating that

[76] 86 Fed. Reg. at 56597.

business, the financial institution collects and reports the greatest number of years of any owner. (However, the financial institution does not need to comply with this instruction if it collects and relies on the time in business by another method in making the credit decision.)"[77] The proposed comment creates a data collection disparity between creditors that consider time in business for underwriting and those that do not. BPI believes that the introduction of this type of data disparity could adversely impact the overall quality and consistency of the data.

Further, BPI does not believe that financial institutions should have less flexibility when collecting data from applicants than they have when relying on data used for credit underwriting. Such an approach would skew the resulting time in business data and produce inaccurate data that could be misinterpreted. For example, a time in business calculation based on the experience of the principal owner may or may not accurately represent the time in business for family-owned businesses in which ownership has passed from one generation to the next. Family-owned businesses make up a large portion of small businesses and frequently have loyal customers and goodwill that remain with the business through generational transfers in ownership.

Given the challenges with the time in business data point noted above, BPI requests that the Bureau eliminate from the final rule the proposed requirement to collect and report time in business. In the alternative, BPI requests that the Bureau allow all financial institutions to report the *applicant's* time in business, whether used in credit underwriting or collected from the applicant, and to rely on the information provided by the applicant. BPI also requests that the Bureau include in the final rule a safe harbor from liability for reporting the applicant-provided time in business, which should be part of a global safe harbor for the reporting of all applicant-provided data or, alternatively, a safe harbor similar to those in section 112(c) of the proposed rule.

Finally, BPI opposes the publication of the time in business data point based on the variability of the data, its susceptibility to misinterpretation, and the potential for the data to be used to identify the applicant. If the time in business data point is retained in the final rule, we urge the Bureau to commit to not publishing such data point publicly to avoid misinterpretation and to protect applicants' privacy.

Q. Minority-Owned Business Status and Women-Owned Business Status

Proposed sections 107(a)(18) and (19) would implement the statutory requirements that covered financial institutions collect and report, respectively, the minority-owned business status and the women-owned business status of small business applicants. Proposed appendix F provides instructions for collecting and reporting minority-owned and women-owned business status.

BPI supports the Bureau's approach to the collection and reporting of minority-owned and women-owned business status and believes the Bureau should apply this approach to the collection and reporting of data about the principal owners as well. Specifically, the proposed comments to sections 107(a)(18) and (19) appropriately require financial institutions to rely on applicant-provided data that applicants self-report on the section 1071 data collection form without verification and with no requirement to collect data based on visual observation or surname if the applicant chooses not to provide such data.[78] We firmly believe that the Bureau will obtain more accurate, reliable, and higher-

[77] *Id*.

[78] *Id.* at 56597-98 (proposed comments 107(a)(18)-1, -4, -5, and -6 and 107(a)(19)-1, -4, -5, and -6).

quality data by respecting the applicant's preferences and choices regarding whether or not to provide data and not require the institution to make judgments when an applicant exercises its statutory right not to provide any requested data. We also support the proposal to permit, but not require, institutions to report previously collected data for the business status.

R. Ethnicity, Race, and Sex of Principal Owners

Proposed section 107(a)(20) would implement the statutory requirement that covered financial institutions collect and report the ethnicity, race, and sex of the applicant's principal owners. Proposed appendix G provides instructions for collecting and reporting the race, ethnicity, and sex of the principal owners.

Unfortunately, the proposed rule goes beyond the statutory requirement and would require financial institutions to collect and report the race and ethnicity of at least one principal owner of the business by visual observation or surname – and to report collection by such means – where the applicant exercises their statutory right to refuse to provide such data and the institution meets in person or by video with a principal owner. Consistent with BPI's opposition to the adoption of any requirement to collect and report data on the principal owner(s) of an applicant by visual observation or surname, BPI requests that, in the final rule, the Bureau revise proposed section 107(a)(20) to remove the reference to collecting and reporting data based on visual observation or surname, delete propose comments 107(a)(20)-9 and -10, and delete paragraphs 17-22 from proposed appendix G.

BPI separately comments below in Section IX on the sample section 1071 data collection form and the collection of specific data about the race, ethnicity, and sex of the principal owner(s) of an applicant.

S. Number of Principal Owners

Proposed section 107(a)(21) would require financial institutions to collect and report the number of principal owners of an applicant. This non-statutory data point has no relevance to the statutory purpose of section 1071 unless the Bureau intends to engage in (or permit others to engage in) second-guessing the veracity of the applicant-provided data on minority-owned or women-owned business status or require financial institutions to collect and report race, ethnicity, and sex data on *all* principal owners.

BPI requests that the Bureau eliminate from the final rule the proposed requirement to collect and report the number of principal owners of an applicant. If the number of principal owners data point is retained in the final rule, BPI requests that the Bureau include in the final rule an express regulatory safe harbor from liability for reporting the number of principal owners provided by the applicant, which should be a global safe harbor for the reporting of all applicant-provided data or, alternatively, a safe harbor similar to those in section 112(c) of the proposed rule.

Finally, BPI opposes the publication of the number of principal owners data point based on the potential for the data to be used to identify the applicant. If the number of principal owners data point is retained in the final rule, we urge the Bureau to commit to not publishing such data point publicly to protect applicants' privacy.

VI. The Bureau should be transparent about the publication of section 1071 data and commit to the early publication of its Filing Instructions Guide.

BPI is concerned by the lack of transparency in the proposed rule regarding the section 1071 data that the Bureau intends to publish and the lack of commitment regarding when the Bureau will publish its Filing Instructions Guide. Understanding both what data will be published and the Filing Instructions, is integral to financial institutions' ability to comply with the rule and provide accurate and reliable data. In order to promote transparence to increase applicants' willingness to self-report, BPI requests that the Bureau identify in the final rule the section 1071 data it intends to make public and that the Bureau publish its Filing Instruction Guide at least six months in advance of any required collection so institutions have time to incorporate the Guide into their systems and processes for complying with section 1071.

A. Publication Standards

BPI does not agree with the Bureau's approach of deferring consideration of what data it will make public and what data it will withhold for privacy reasons. We respectfully disagree with the stated plans for announcing those decisions in a later, non-binding policy statement. We urge the Bureau to be transparent about what data it will and will not publish, seek public feedback through notice and public comment on which data elements should and should not be made public, and state definitively in the final rule which data elements will and will not be made public.

Transparency by the Bureau about data publication is necessary to protect the privacy interests of small business applicants and assure applicants that their privacy will be protected. Small business applicants should know in advance what data they provide will be made public so they can make informed decisions about how much data to provide voluntarily based on their own privacy concerns. To that end, the sample data collection form should be amended to disclose to applicants which data elements will be made public so applicants can evaluate in real-time the privacy risks of self-reporting and make informed decisions about how much data to provide. As the proposed rule stands now, applicants cannot make an informed decision about the risks of providing data.

The lack of transparency for applicants about what data will be published could reduce the amount of data that applicants voluntarily provide based on concerns they may have about re-identification and privacy. Applicant self-reporting is central to achieving the objectives of section 1071. Such a response from applicants was evident during round two of the SBA's PPP funding, where publication of the PPP round one loan and applicant information likely lead to low applicant response rates in round two.

Further, we believe that transparency regarding the publication of section 1071 data would serve the Bureau's own interests and protect the Bureau from the type of litigation the SBA has faced in connection with the PPP.[79] In the litigation resulting from the PPP, the SBA was required to produce the names, addresses, and precise loan amounts of all individuals and entities that obtained PPP loans.[80]

[79] *See e.g. WP Company LLC d/b/a The Washington Post, et al., v. U.S. Small Business Administration*, 502 F. Supp. 3d 1 (D.D.C. Nov. 5, 2020).

[80] *Id.*

We also disagree with the Bureau's use of a "balancing test" to assess the risks and benefits of public disclosure. BPI agrees with the SER feedback that the Bureau received on the SBREFA outline that the balancing test would not adequately protect privacy interests because it would "be subjective, dependent on the limitations of agency expertise, and subject to change."[81]

For the foregoing reasons, BPI respectfully requests that the Bureau publish for notice and public comment the data elements that it plans to make public and specify both in the final rule and in the sample section 1071 data form which data elements it will and will not make public. The Bureau's promulgation of definitive and transparent data publication standards, developed after notice and public comment, would give the public confidence in the integrity of the section 1071 data collection process, help applicants make informed decisions about what data to self-report (hopefully by alleviating their privacy concerns), and contribute to more accurate, reliable, and higher-quality data. Such a transparent approach to data publication is more consistent with good public policy than deferring consideration of what data to publish to a later date without soliciting public input and applying a "balancing test" to decide what data elements to publish.

B. Filing Instruction Guide

BPI also requests that the Bureau provide institutions with its Filing Instructions Guide at least six months in advance of any required collection of section 1071 data. The Bureau noted in section 109(c) of the proposed rule that it will "make available a *Filing Instructions Guide*, containing technical instructions for the submission of data to the Bureau pursuant to this section, as well as any related materials, available at [a designated Bureau website]."[82] The Filing Instructions Guide will contain critical guidance for building compliant systems and operationalizing the data collection requirement. Financial institutions need the Bureau to publish the Filing Instructions Guide well before the mandatory compliance data and commencement of the collection and reporting requirement in order for the Guide to assist financial institutions comply with the rule. Early release of the Filing Instructions Guide will allow institutions to better comply with the requirements of the rule and provide the Bureau with high-quality and more accurate data. Accordingly, BPI respectfully requests that the Bureau publicly commit in the final rule to publishing the Filing Instructions Guide at least six months in advance of any required collection of section 1071 data.

VII. The firewall provisions do not provide sufficient clarity on when a firewall is not feasible.

Proposed section 108(b) provides that officers and employees of a financial institution involved in making any determination concerning an applicant's application cannot have access to an applicant's responses to inquiries regarding whether the applicant is a minority-owned or women-owned business or the race, ethnicity, or sex of the principal owners.[83] This section requires institutions to implement firewalls to ensure that such officers and employees do not have access to that information.

Proposed section 108(c) contains an exception to the firewall requirement, providing that the prohibition in 108(b) does not apply to an employee or officer "if the financial institution determines

[81] 86 Fed. Reg. at 56511.

[82] *Id.* at 56579.

[83] *Id.* at 56578.

that it is not feasible to limit that employee's or officer's access to an applicant's responses."[84] Neither the proposed rule nor the related commentary provide guidance regarding when the creation of a firewall would not be considered feasible.

Proposed section 108(c) suggests that a financial institution can make the determination that compliance with the firewall requirements in section 108(b) is not feasible. BPI is concerned, however, that regulators may second-guess a financial institution's determination and make their own determinations about when a firewall is and is not feasible. To avoid creating a compliance ambiguity, BPI respectfully requests that the CFPB clarify in the final rule, or a comment to the final rule, that a financial institution's determination that a firewall is not feasible is a decision left to the sole and exclusive discretion of financial institutions, effectively creating a safe harbor for institutions' determinations of feasibility. In the alternative, BPI requests additional guidance or examples from the Bureau in the final rule on when the firewall is and is not feasible. For example, BPI notes that the final rule will apply to various lines of business, including small or specialized business units. In such circumstances, BPI requests that the Bureau provide an example in the commentary that a financial institution may determine that a firewall is not feasible to implement for a particular line of business or business unit if additional staff would need to be hired in the line of business or business unit to support data collection behind a firewall.

VIII. The reporting obligations for transactions involving multiple financial institutions are not sufficiently clear.

Proposed section 109(a)(1) provides for annual reporting of the small business lending application register by financial institutions on or before June 1 following the calendar year for which the data are compiled and maintained.[85] Proposed section 109(a)(2) also provides that each covered financial institution must complete a separate small business lending application register, even if one institution is a subsidiary of the other; however, the parent may submit both registers to the Bureau.[86]

BPI supports a yearly submission requirement, consistent with similar reporting frameworks, such as that established under HMDA. BPI requests, however, that the submission deadline be revised to July 1, rather than June 1, in the final rule to provide time between the HMDA reporting deadline and the section 1071 reporting deadline given that financial institutions may rely on overlapping systems and staff for both reporting regimes. BPI has no objection to proposed sections 109(a)(1) and (a)(2).

Proposed section 109(a)(3) sets forth the reporting obligations when multiple financial institutions are involved in a single covered credit transaction. The proposed rule provides that if a covered application results in an origination, only one covered financial institution shall report the covered credit transaction.[87] If more than one financial institution is involved in the origination of a covered credit transaction, the financial institution that makes the final credit decision approving the application shall report the loan as an origination (if that financial institution is a covered financial institution).[88] If there was no origination, then any covered financial institution that made a credit

[84] *Id.*

[85] *Id.* at 56578-56579.

[86] *Id.* at 56579.

[87] *Id.*

[88] *Id.*

decision shall report the application for credit.[89] Regarding the obligations of originating and non-originating financial institutions, the proposed commentary states that:

> [i]f more than one financial institution approved an application prior to closing or account opening and one of those financial institutions purchased the covered credit transaction after closing, the financial institution that purchased the covered credit transaction after closing reports the covered credit transaction as an origination. If a financial institution reports a transaction as an origination, it reports all of the information required for originations, even if the covered credit transaction was not initially payable to the financial institution that is reporting the covered credit transaction as an origination.[90]

Proposed section 109(a)(3) presumes that coordination among the multiple financial institutions involved in a credit transaction is feasible. At the same time, the Bureau acknowledged that "under certain lending models as they operate today, financial institutions may not always be aware of whether another financial institution originated a credit transaction . . . "[91] The Bureau also requested comment on whether, "particularly in the case of applications that a financial institution is treating as withdrawn or denied, the financial institution can ascertain if a covered credit transaction was originated by another financial institution without logistical difficulty or significant compliance cost."[92]

BPI is concerned about the complexity and feasibility of proposed section 109(a)(3) and recommends that the Bureau adopt a simpler approach to the reporting of covered applications where multiple financial institutions are involved in a single application that accounts for situations where coordination among multiple financial institutions is not feasible. BPI requests that, where a loan is originated, only the creditor to whom the obligation is initially payable should be required to collect and report data. The originating creditor is in the best position to collect and report all of the required data points. For similar reasons, if the application does not lead to an origination, then only the financial institution that initially received the application should be required to collect and report the required data.

IX. The sample form for collecting section 1071 data requires further guidance and clarification.

Appendix E contains a sample form for collecting data required under subpart B of the proposed rule. If finalized, this sample data collection form could be used by covered financial institutions to collect required information about the applicant and its principal owners. BPI appreciates the Bureau's providing this form as an example of how institutions may request that borrowers provide information that would be required by the final rule.

BPI requests additional guidance and clarification on a number of points related to the sample collection form, as described below, to ensure that institutions request information from borrowers in the clearest manner possible. BPI's requests are consistent with several of the overarching principles

[89] *Id.*

[90] *Id.* at 56603-56604.

[91] *Id.* at 56495.

[92] *Id.*

BPI highlighted in the Executive Summary that should guide the Bureau's implementation of section 1071, including the importance of data integrity and consistency, transparency, and institutions' need for clear guidance and flexibility.

First, as previously discussed in Section IV, BPI recommends that the Bureau create an exemption for HMDA-reported loans so that loans that are reported under HMDA are not also required to be reported under the section 1071 framework. However, if the Bureau does not adopt this recommended exemption, then we respectfully request that the Bureau create a separate sample data collection form that would be used when both data collection regimes are triggered so that data can be collected from applicants once and reported consistently by institutions across both frameworks.

Second, as previously discussed in Section VI, the rule and reporting form should disclose to applicants which data elements will be published to enable applicants to make informed decisions about providing requested information. Transparency by the Bureau regarding data publication should mitigate applicants' privacy concerns and enhance the accuracy and quality of reported data. *Ex ante* transparency regarding the scope of data publication also may protect the Bureau from the type of litigation the SBA has faced in connection with the PPP regarding what borrower data may be provided to the public versus kept confidential by the agency.[93]

Third, BPI requests additional guidance and clarity regarding the manner in which the questions and response options in the sample data collection form may be asked or presented to applicants. Flexibility to adjust the order in which the questions and responses may be presented would assist institutions in implementing the requirements of the rule across different formats and channels. Therefore, BPI requests clarification that institutions are not required to ask the questions in the order in which they appear in the sample form. We request that the Bureau clarify that institutions have discretion to ask or present the questions in any order of their choosing, combine questions, and vary the order of the multiple-choice responses provided for each question. For example, when asking questions about race, ethnicity, or sex, we request clarification that institutions have the flexibility to list the response "I do not wish to provide this information" as the first response option, as opposed to the last response option, as it now appears in all responses to questions set forth in the sample data collection form.

To optimize readability and comprehensibility of the data collection requests made in an electronic format, BPI also requests that the Bureau clarify that institutions are permitted to collapse the subcategories of questions so that the only subcategories appear once the borrower clicks on the question. Further, the Bureau should clarify if the lender is seeking the information requested by the form via telephone or through any other verbal means, whether an employee of that institution must read all of the categories of responses to the customer, even after the customer has responded to an earlier response option.

BPI has additional concerns about use of the sample data collection form when collecting data orally via telephone or in person. The model form contains long and complex words that some employees may find difficult to pronounce. In light of this operational challenge, BPI requests that the Bureau provide institutions with a safe harbor from liability for not using the language of the sample data collection form when collecting section 1071 information over the phone or in any other manner in

[93] *See, e.g., WP Company LLC d/b/a The Washington Post, et al., v. U.S. Small Business Administration*, 502 F. Supp. 3d 1 (D.D.C. Nov. 5, 2020).

which the employee is asking the questions orally and entering the customer's responses. Indeed, institutions should be held to a reasonable efforts standard for attempting to obtain the requested information.

Fourth, the Bureau requested comment on several questions related to the collection of data about the sex of the principal owner(s). Specifically, the Bureau asked for comment on whether:

- Whether the sample data collection form should list examples from which the applicant could choose when a principal owner self-identifies and an applicant writes in or otherwise provides additional information about the principal owner's sex, such as "intersex," "non-binary," or "transgender";

- Whether, alternatively, sex should be collected solely via the "I prefer to self-describe" option (with the ability to write in or otherwise provide additional information)—that is, without male and female being listed as options;

- Whether applicants should be restricted from designating more than one category for a principal owner's sex (e.g., from selecting both "Female" and "I prefer to self-describe"); and

- Whether financial institutions should be required to ask separate questions regarding sex, sexual orientation, and gender identity and, if so, what categories should be offered for use in responding to each question, for example, whether the sample data collection form should include the three questions and related responses (described above) from the Pulse Household Survey questionnaire, or a check box for "Principal owner identifies as LGBTQ+" with an accompanying space for providing additional information.[94]

The Bureau's proposed sample data collection form includes a section for collection information relating to the "sex" of the principal owners. The options presently in the proposed form include: (1) male; (2) female; (3) I prefer to self-identify as (free form field); and (4) I do not wish to provide this information. Free-form fields, like the one associated with "I prefer to self-identify as," have historically created data integrity issues. For example, an applicant may choose to self-describe as a "man" rather than selecting the option for "male" in the data collection form. (This concern is not hypothetical: BPI members have observed that the HMDA free-form field for race and ethnicity is frequently used for responses - such as "Caucasian American" or "Black American" - that plainly fit into an existing category.) Free-form fields diminish the accuracy and utility of the data because lenders report fewer applicants in the existing categories than is likely the case. Instead, including a broad third category, such as "non-binary," that could encompass most forms of self-identification outside of "male" and "female" would make the form more inclusive and improve data quality.

BPI cautions that adding multiple additional categories to an already lengthy form would introduce complexity to the collection process and increase the burden on financial institutions without enhancing the quality of the data collected and reported. Further, there is no clear indication of Congressional intent that the term "sex" as used in section 1071 encompasses the collection of data regarding sexual identity or sexual orientation. Accordingly, BPI does not endorse a mandate that would require financial institutions to collect and report detailed categories of sexual identity or sexual orientation data. Nevertheless, financial institutions should have the flexibility and discretion, but not

[94] 86 Fed. Reg. at 56509.

the obligation, to offer principal owners the option to provide further information by adding to the sample form an "I prefer to self-describe" option which would allow applicants to provide additional information regarding their sexual identity or sexual orientation.

* * * *

BPI appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at (703) 887-5229 or by email at *paige.paridon@bpi.com*.

Respectfully Submitted,

Paige P. Paridon

Paige Pidano Paridon
Senior Vice President, Associate General Counsel
Bank Policy Institute

Appendix A

Section 1071 Denial Reasons[95]	HMDA Denial Reasons[96]
Credit characteristics of the business	Debt-to-income ratio
Credit characteristics of the principal owner(s) or guarantor(s)	Employment history
Use of loan proceeds	Credit history
Cashflow	Insufficient cash (down payment, closing costs)
Collateral	Collateral
Time in business	Unverifiable information
Government criteria	Credit application incomplete
Aggregate exposure	Mortgage insurance denied
Unverifiable information	Other
Other	

[95] 86 Fed. Reg. at 56594-56595.

[96] 12 C.F.R. §1003.4(a)(16); 12 C.F.R. Supplement I to Part 1003 at 4(a)(16)-1 through 4; *see also* CFPB, Reportable HMDA Data: A Regulatory and Reporting Overview Reference Chart (Jan. 1, 2019) *available at* https://files.consumerfinance.gov/f/documents/cfpb_reportable-hmda-data_regulatory-and-reporting-overview-reference-chart-2019.pdf.