This document is scheduled to be published in the
Federal Register on 05/31/2023 and available online at
federalregister.gov/d/2023-07230, and on **govinfo.gov**

4810-AM-P

CONSUMER FINANCIAL PROTECTION BUREAU

12 CFR Part 1002

[Docket No. CFPB-2021-0015]

RIN 3170-AA09

Small Business Lending under the Equal Credit Opportunity Act (Regulation B)

AGENCY: Consumer Financial Protection Bureau.

ACTION: Final rule.

SUMMARY: The Consumer Financial Protection Bureau (CFPB or Bureau) is amending 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 (Dodd-Frank Act). Consistent with section 1071, covered financial institutions are required to collect and report to the CFPB data on applications for credit for small businesses, including those that are owned by women or minorities. The final rule also addresses the CFPB's approach to privacy interests and the publication of data; shielding certain demographic data from underwriters and other persons; recordkeeping requirements; enforcement provisions; and the rule's effective and compliance dates.

DATES: *Effective date*: This final rule is effective **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Compliance dates: Covered financial institutions must comply with the final rule beginning October 1, 2024, April 1, 2025, or January 1, 2026, as set forth in § 1002.114(b).

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https://reginquiries.consumerfinance.gov/. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION:

I. Summary of the Final Rule

In 2010, Congress passed the Dodd-Frank Act. Section 1071 of that Act[1] amended ECOA[2] to require that financial institutions collect and report to the CFPB certain data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071's statutory purposes are to (1) facilitate enforcement of fair lending laws, and (2) enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the CFPB to require any additional data that it determines would aid in fulfilling section 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of underwriters and other persons to certain data; recordkeeping; publication of small business lending data; and modifications or deletions of data prior to publication in order to advance a privacy interest.

Section 1071 directs the CFPB to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and permits it to adopt exceptions to any requirement or to exempt financial institutions from the requirements of section 1071 as it deems necessary or appropriate to carry out the purposes of section 1071. The CFPB is adding a new subpart B to Regulation B to implement the requirements of section 1071. Key aspects of the CFPB's final rule are summarized below.

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[1] Pub. L. 111-203, tit. X, section 1071, 124 Stat. 1376, 2056 (2010), codified at ECOA section 704B, 15 U.S.C. 1691c-2.

[2] 15 U.S.C. 1691 *et seq.*

As envisioned by Congress, the small business lending rule will create our nation's first consistent and comprehensive database regarding lending to small businesses, including small farms. This will fulfill section 1071's statutory purposes by allowing Federal, State, and local enforcement agencies to assess potential areas for fair lending enforcement and by enabling a range of stakeholders to better identify business and community development needs and opportunities for small businesses, including women-owned and minority-owned small businesses. The database, again as dictated by Congress, will not reveal privacy-protected information about any particular small business applicant, and small businesses will retain control over how much of their demographic information they choose to divulge. In addition, the CFPB believes that its final rule will help to sharpen competition in credit supply by creating greater transparency around small business lending.

Scope. The CFPB is requiring financial institutions to collect and report data regarding applications for credit for small businesses, including those that are owned by women and minorities. The CFPB is not requiring financial institutions to collect and report data regarding applications for women-owned and minority-owned businesses that are *not* small. Because more than 99 percent of women-owned and minority-owned businesses are small businesses, covering small businesses necessarily means nearly all women-owned and minority-owned businesses will also be covered. The CFPB believes that this scope is consistent with the statute and will allow the rule to carry out section 1071's purposes without requiring collection of data that would be of limited utility.

Covered financial institutions. Consistent with language from section 1071, a "financial institution" is defined to include any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. The rule thus applies to a variety of entities that engage in small business lending, including depository institutions (*i.e.*, banks, savings associations, and

credit unions),[3] online lenders, platform lenders, community development financial institutions (both depository and nondepository institutions), Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit nondepository lenders.[4]

The rule uses the term "covered financial institution" to refer to those financial institutions that are required to comply with its data collection and reporting requirements. A covered financial institution is defined as a financial institution that originated at least 100 covered credit transactions (rather than 25, as proposed) for small businesses in each of the two preceding calendar years. The CFPB is not adopting an asset-based exemption threshold for depository institutions, or any other general exemptions for particular categories of financial institutions.

The final rule also permits creditors that are not covered financial institutions to voluntarily collect and report small business lending data in certain circumstances.

Covered credit transactions. Covered financial institutions are required to collect and report data regarding covered applications from small businesses for covered credit transactions. A "covered credit transaction" is one that meets the definition of business credit under existing Regulation B, with certain exceptions. Transactions within the scope of the rule include loans, lines of credit, credit cards, merchant cash advances, and credit products used for agricultural purposes. The CFPB is excluding trade credit, public utilities credit, securities credit, and

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[3] For purposes of this document, the Bureau is using the term depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*, as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*; there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). To facilitate analysis and discussion, the Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this document, unless otherwise specified.

[4] The Bureau's rules, including this final rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

incidental credit as proposed. In addition, the CFPB has added exclusions for transactions that are reportable under the Home Mortgage Disclosure Act of 1975 (HMDA)[5] and insurance premium financing. Consistent with the CFPB's proposal, factoring, leases, and consumer-designated credit that is used for business or agricultural purposes are also not covered credit transactions. In addition, the CFPB has made clear that purchases of originated covered credit transactions are not reportable.

Covered applications. A "covered application"—which triggers data collection, reporting, and related requirements when submitted by a small business—is defined as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. This definition of covered application is largely consistent with the existing Regulation B definition of that term. However, certain circumstances are not covered applications for purposes of this rule, even if they are considered applications under existing Regulation B. Specifically, covered applications for purposes of this rule do not include (1) reevaluation, extension, or renewal requests on existing business credit accounts, unless the request seeks additional credit amounts; or (2) inquiries and prequalification requests.

Small business definition. A covered financial institution is required to collect and report data on a covered application from a "small business," which the rule defines in accordance with the meaning of "business concern or concern" and "small business concern" under the Small Business Act[6] and Small Business Administration (SBA) regulations. However, in lieu of using the SBA's size standards for defining a small business concern, the definition in this final rule looks to whether the business had $5 million or less in gross annual revenue for its preceding fiscal year. The CFPB believes that a straightforward $5 million threshold strikes the right balance in terms of broadly covering the small business credit market to fulfill section 1071's

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[5] 12 U.S.C. 2801 *et seq.*

[6] 15 U.S.C. 631 *et seq.*

statutory purposes while meeting the SBA's criteria for an alternative size standard.[7] The final rule also anticipates updates to this size standard, not more than every five years, to account for inflation. The SBA Administrator has approved the CFPB's use of this alternative size standard pursuant to the Small Business Act.[8]

Data to be collected and reported. The rule addresses the data points that must be collected and reported by covered financial institutions for covered applications from small businesses. Congress specifically enumerated many of these data points in ECOA section 704B(e)(2); for the others, the Congress granted the CFPB express authority in 704B(e)(2)(H) to require financial institutions to compile and maintain, along with enumerated data points, a record of "any additional data that the Bureau determines would aid in fulfilling the purposes" of section 1071. Certain of these data points are or could be collected from the applicant; other data points are based on information within the financial institution's control. Covered financial institutions must not discourage an applicant from responding to requests for applicant-provided data and must otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response; when collecting data directly from the applicant, the rule identifies certain minimum provisions that must be included within financial institutions' procedures in order for them to be considered "reasonably designed." The rule also addresses what financial institutions should do if, despite having such procedures in place, they are unable to obtain certain data from an applicant. Furthermore, the rule makes clear that a financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. If the financial institution verifies particular information, however, it must report that verified information. Financial institutions are permitted to reuse previously collected data in certain circumstances, rather than having to request it from the applicant for each covered application.

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[7] *See* 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

[8] *See* 15 U.S.C. 632(a)(2)(C).

As noted above, the rule includes data points that are, or could be, provided by the applicant. Some data points specifically relate to the credit being applied for: the credit type (which includes information on the credit product, types of guarantees, and loan term); the credit purpose; and the amount applied for. There are also data points that relate to the applicant's business: census tract based on an address or location provided by the applicant; gross annual revenue for the applicant's preceding full fiscal year; the 3-digit North American Industry Classification System (NAICS) code for the applicant; the number of workers that the applicant has; the applicant's time in business; and the number of principal owners the applicant has.

There are also applicant-provided data points on the demographics of the applicant's ownership: first, whether the applicant is a minority-owned business or a women-owned business, along with a new data field capturing whether the applicant is an LGBTQI+-owned business; and second, the ethnicity, race, and sex of the applicant's principal owners. The CFPB refers to these data points collectively as an applicant's "protected demographic information." Principal owners' ethnicity and race will be collected from applicants using aggregate categories as well as disaggregated subcategories. Principal owners' sex/gender will be collected from applicants without using pre-defined response categories.

The CFPB is not finalizing its proposed requirement to have financial institutions collect race and ethnicity via visual observation or surname if an in-person applicant does not provide any ethnicity, race, or sex information for any principal owners; instead, the final rule requires that these data be reported based only on information provided by the applicant.

The CFPB is providing lenders with a sample data collection form, in both digital and paper form, to assist them in collecting protected demographic data from applicants. Although the contents of the sample form reflect certain legal requirements that financial institutions must follow, their use of the sample form is not itself required under the final rule. Rather, it is an available resource to financial institutions.

In addition, the rule includes data points that will be generated or supplied solely by the financial institution. These data points include, for all applications: a unique identifier for each application for or extension of credit; the application date; the application method (that is, the means by which the applicant submitted the application); the application recipient (that is, whether the financial institution or its affiliate received the application directly, or whether it was received by the financial institution via a third party); the action taken by the financial institution on the application; and the action taken date. For denied applications, there is also a data point for denial reasons. For applications that are originated or approved but not accepted, there is a data point for the amount originated or approved, and a data point for pricing information (which includes, 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).

Firewall. The CFPB's rule implements a requirement in section 1071 that certain data collected from applicants be shielded from underwriters and certain other persons (or, if a firewall is not feasible, a notice is given instead); the CFPB refers to this as the "firewall."

Generally, an employee or officer of a financial institution or a financial institution's affiliate that is involved in making any determination concerning a covered application is prohibited from accessing the applicant's responses to the inquiries about protected demographic information that the financial institution makes pursuant to the rule. This prohibition does not apply to an employee or officer, however, if the financial institution determines that employee or officer should have access to an applicant's responses to its inquiries regarding the applicant's protected demographic information and the financial institution provides a notice to the applicant regarding that access. The notice must be provided to each applicant whose information will be accessed or, alternatively, the financial institution could provide the notice to all applicants. The final rule does not require specific language for this notice but does provide sample language that

a covered financial institution may use. The final rule also clarifies several key points of the firewall provision.

Reporting data to the CFPB; publication of data by the CFPB and other disclosures; and privacy considerations. Financial institutions must collect small business lending data on a calendar year basis and report it to the CFPB on or before June 1 of the following year. Financial institutions reporting data to the CFPB are required to provide certain identifying information about themselves as part of their submission. The CFPB is releasing, concurrently with this final rule, technical instructions for the submission of small business lending data in a Filing Instructions Guide.[9]

The CFPB will make available to the public, on an annual basis, the application-level data submitted to it by financial institutions, subject to modifications or deletions made by the CFPB, to advance privacy interests. To ease burden on covered entities, CFPB publication of application-level data will satisfy financial institutions' statutory obligation to make data available to the public upon request. At this time, the CFPB is not making a final decision on the best way to protect privacy interests through pre-publication modification and deletion of reported data. Assessing the many comments it received in this area, the CFPB is preliminarily of the view that its privacy assessment will focus primarily on whether (and, if so, how) small business lending data, individually or in combination with other data, pose re-identification risk for small businesses and, as a result, for their owners. The CFPB also anticipates taking account of compelling risks to financial institution privacy interests. The CFPB does not anticipate that it can carry out the necessary analysis of pre-publication modifications and deletions without at least one full year of application-level data. The CFPB intends to further engage with stakeholders on the issue of data publication before it resolves on a particular approach to protecting privacy interests through modifications and deletions. Finally, the CFPB anticipates

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[9] *See* CFPB, *Small Business Lending Filing Instructions Guide*, https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.

publishing select aggregate data—*i.e.*, data that does not include application-level information—before it publishes application-level data.

In addition, the final rule prohibits a financial institution or third party from disclosing protected demographic information, except in limited circumstances. Specifically, the final rule prohibits financial institutions from disclosing or providing to third parties the protected demographic information collected pursuant to the rule, except to further compliance with ECOA or Regulation B or as required by law. The final rule also limits third parties' disclosure of protected demographic information.

Recordkeeping, enforcement, and severability. The rule addresses issues related to recordkeeping, enforcement of violations, and severability. The CFPB is also finalizing provisions regarding treatment of bona fide errors under the rule in general along with several safe harbors for particular kinds of errors. Relatedly, as explained in part VII below, covered financial institutions will also have a 12-month grace period during which the CFPB—for institutions under its jurisdiction—will not assess penalties for errors in data reporting, and will conduct examinations only to assist institutions in diagnosing compliance weaknesses, to the extent that these institutions engaged in good faith compliance efforts.

Effective and compliance dates, transitional provisions. This final rule will become effective 90 days after publication in the *Federal Register*. The CFPB is adopting a tiered compliance date schedule because it believes that smaller and mid-sized lenders would have particular difficulties complying within the single 18-month compliance period proposed in the NPRM. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026. Covered financial institutions may begin collecting applicants' protected demographic information one year prior to their compliance date to help prepare for coming into compliance with this final rule. The CFPB is

also adopting a new provision to permit financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use reasonable methods to estimate their volume of originations to small businesses for this purpose.

Compliance and technical assistance. The CFPB is supporting small business lenders with a variety of compliance and technical tools to help them determine if they are covered by this new rule, and if so when their obligations arise. For lenders that are covered, the agency is also making available a range of resources to assist with effective implementation of the rule, including a small entity compliance guide. These materials are available at https://www.consumerfinance.gov/compliance/compliance-resources/small-business-lending-resources/small-business-lending-collection-and-reporting-requirements. The CFPB is also launching a dedicated regulatory and technical support program that can provide oral and written assistance in response to stakeholder questions about collection and reporting obligations, and a range of technical resources to make it easier to report data to the CFPB. The support program and related materials are available at https://www.consumerfinance.gov/data-research/small-business-lending-data/. To further assist covered financial institutions that serve small business customers in their preferred languages, the CFPB will make the sample data collection form available in several languages. The CFPB is also planning to develop resources to help small businesses understand how their data are treated, the availability of the dataset, and the broader purposes of the rule.

Use of technology partners and industry consortia for accurate, cost-efficient data collection and reporting. The final rule broadly permits financial institutions to work with third parties, including industry consortia, to develop services and technologies to aid in collecting and reporting data. So long as they meet the obligations stated in the rule, including collecting data in a manner that does not discourage small businesses from providing it, financial institutions are free to work with third parties to assist them with their compliance obligations, whether that is

with respect to data collection, maintenance or reporting. The CFPB plans to work with consortia or other entities seeking to assist financial institutions to deploy industry-identified solutions. For example, the CFPB plans to provide Application Programming Interfaces in an open-source environment to assist financial institutions' technology partners to develop accurate and efficient data reporting tools.

II. Background

As discussed above, in 2010, Congress enacted the Dodd-Frank Act. Section 1071 of the Dodd-Frank Act, which amended ECOA, requires financial institutions to collect and report to the CFPB data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071 was adopted for the dual purposes of facilitating fair lending enforcement and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of such businesses. Section 1071 complements other Federal efforts to ensure fair lending and to promote community development for small businesses, including through ECOA, the Community Reinvestment Act of 1977 (CRA),[10] and the Community Development Financial Institutions (CDFI) Fund.[11]

The collection and subsequent publication of more robust and granular data regarding credit applications for small businesses will provide much-needed transparency to the small business lending market. The COVID-19 pandemic has shown that transparency is essential, particularly at a time of crisis, when small businesses are in urgent need of credit to recover from economic shocks.

In addition to informing policymaking, data collected under the final rule can help creditors identify potentially profitable opportunities to extend credit. As a result, small business owners stand to benefit from increased credit availability. More transparency will also allow

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[10] 12 U.S.C. 2901 *et seq.*

[11] The Riegle Community Development Banking and Financial Institutions Act of 1994, 12 U.S.C. 4701 *et seq.*, authorized the Community Development Financial Institution Fund (CDFI Fund). The CDFI Fund is discussed in more detail in part II.F.2.ii below.

small business owners to more easily compare credit terms and evaluate credit alternatives, helping them to find the credit product that best suits their needs at the best price. In these different ways, the data will help stakeholders to enhance business and community development, boosting broad-based economic activity and growth. Furthermore, in the years and decades to come, the collection and publication of these data will be helpful in identifying potential fair lending violations and otherwise facilitating the enforcement of anti-discrimination laws.

Overview

Small businesses are a cornerstone of the U.S. economy. There were over 33 million small businesses in the U.S. in 2019, employing almost half of all private sector employees.[12] Small businesses, particularly start-ups, also generated 62 percent of new jobs since 1995.[13] Small businesses were hit hard by two major shocks in the last two decades. First, the Great Recession, which began in 2007, disproportionately affected small businesses.[14] Between 2007 and 2009, employment at businesses with under 50 employees fell by 10.4 percent, compared with 7.5 percent at larger firms,[15] while between 2008 and 2011, lending to small firms fell by 18 percent, compared with 9 percent for all firms.[16] Small businesses suffered again because of

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[12] Off. of Advocacy, Small Bus. Admin., *2022 Small Business Profile*, at 2, 4 (Aug. 2022), https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/30121338/Small-Business-Economic-Profile-US.pdf (estimating 33.2 million small businesses in the United States, accounting for 46.4 percent of employees) (2022 Small Business Profile).

[13] Off. of Advocacy, Small Bus. Admin., *Frequently Asked Questions About Small Business*, at 1 (Dec. 2021), https://cdn.advocacy.sba.gov/wp-content/uploads/2021/12/06095731/Small-Business-FAQ-Revised-December-2021.pdf (SBA OA 2021 FAQs). *See generally* Cong. Rsch. Serv., *Small Business Administration and Job Creation* (updated Jan. 4, 2022), https://fas.org/sgp/crs/misc/R41523.pdf (discussing small business job creation); John Haltiwanger *et al.*, *Who Creates Jobs? Small Versus Large Versus Young*, 95 Rev. Econ. Stat. 347, 347-48 (May 2013), https://direct.mit.edu/rest/article/95/2/347/58100/Who-Creates-Jobs-Small-versus-Large-versus-Young (finding that young firms, which are generally small, contribute disproportionately to both gross and net job creation).

[14] Jason Dietrich *et al.*, CFPB, *Data Point: Small Business Lending and the Great Recession*, at 9 (Jan. 23, 2020), https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf (finding that small business lending fell sharply during the Great Recession and recovered slowly, still not reaching pre-Recession levels by 2017).

[15] Ayşegül Şahin *et al.*, Fed. Rsrv. Bank of N.Y., 17 Current Issues in Econ. & Fin., *Why Small Businesses Were Hit Harder by the Recent Recession*, at 1 (2011), https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci17-4.pdf.

[16] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did the Financial Crisis Affect Small Business Lending in the United States?*, at 25-26 (Nov. 2012), https://www.microbiz.org/wp-content/uploads/2014/04/SBA-SmallBizLending-and-FiscalCrisis.pdf.

the COVID-19 pandemic. Around 40 percent of small businesses were at least temporarily closed in late March and early April 2020, due primarily to demand shocks and employee health concerns.[17] Across the first year of the pandemic, some 200,000 more businesses exited the market relative to historic levels.[18] It took until July 2021 for non-farm private sector jobs at establishments with fewer than 50 employees to recover to pre-pandemic levels.[19] As of mid-2022, small business loan approvals (other than for government emergency programs) still remained below pre-pandemic levels.[20]

During the last two decades, the small business lending landscape has also transformed. Traditional providers—namely banks—consolidated, leading to branch closures. The number of banks in the U.S. has declined from over 18,000 in 1986 to under 4,800 as of June 30, 2022 and the number of branches declined by 14 percent from 2009 to 2020.[21] Meanwhile, new providers and products, such as online lenders and merchant cash advances, have become increasingly prevalent in the small business lending market. Financing by merchant cash advance providers is

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[17] Alexander W. Bartik *et al.*, *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 Proc. Nat'l Acad. Sci. 17656, 17656 (July 2020), https://www.pnas.org/content/pnas/117/30/17656.full.pdf.

[18] Leland D. Crane *et al.*, Bd. of Governors of the Fed. Rsrv. Sys., Finance and Economics Discussion Series, 2020-089, *Business Exit During the COVID-19 Pandemic: Non-Traditional Measures in Historical Context*, at 4 (2020), https://www.federalreserve.gov/econres/feds/files/2020089r1pap.pdf (estimating excess establishment exits and analyzing other estimates of small business exits during the pandemic). The paper defines "exit" as permanent shutdown and calculates "excess" exits by comparing the number of exits during the 12-month period from March 2020 to February 2021 with previous years. *Id.* at 2-4. *See also* Ryan A. Decker & John Haltiwanger, Bd. of Governors of the Fed. Rsrv. Sys., FEDS Notes, *Business Entry and Exit in the COVID-19 Pandemic: A Preliminary Look at Official Data* (May 6, 2022), https://www.federalreserve.gov/econres/notes/feds-notes/business-entry-and-exit-in-the-covid-19-pandemic-a-preliminary-look-at-official-data-20220506.html (estimating excess establishment exits to be roughly 181,000).

[19] ADP Rsch. Inst., *ADP National Employment Report*, https://adpemploymentreport.com/ (last visited Mar. 20, 2023) (seasonally adjusted non-farm private sector jobs at establishments with between 1-49 employees as of July 1, 2021 as compared to March 1, 2020).

[20] Biz2Credit, *Biz2Credit Small Business Lending Index Finds April 2021 Non-PPP Loan Approval Rates Move Little for All Types of Lenders* (Apr. 2021), https://www.biz2credit.com/small-business-lending-index/april-2021; Biz2Credit, *Biz2Credit Small Business Lending Index Finds Business Loan Approval Rates Rose at Small Banks, dipped at Big Banks in July 2022* (July 2022), https://www.biz2credit.com/small-business-lending-index/july-2022 (approvals as of July 2022).

[21] Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues*, at 6 (Aug. 20, 2019), https://fas.org/sgp/crs/misc/R45878.pdf (decline since 1986); Fed. Deposit Ins. Corp., *Quarterly Banking Profile*, at 6 (Aug. 2022), https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2022jun/qbp.pdf (number of banks as of June 30, 2022); Bruce C. Mitchell *et al.*, Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations* (Mar. 2021), https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/ (branch closures).

estimated to have increased from $8.6 billion in volume in 2014 to $15.3 billion in 2017.[22] From 2017 to 2019, the volume may have increased further to $19 billion.[23] Meanwhile, financing provided by online "fintech"[24] lenders is estimated to have increased from $1.4 billion[25] in outstanding balances in 2013 to approximately $25 billion[26] in 2019.

Regarding trends in the small business financing landscape, the shift away from traditional providers of small business credit toward newer types of providers gives rise to both potential harm and opportunity. In terms of potential harms, bank closures may have made it more difficult for small businesses, particularly those that are already underserved, to access credit and remain open—especially in low- and moderate-income areas and rural communities. Newer providers, often offering newer products, have less experience complying with both Federal and State lending laws and regulations than traditional providers. Differences in funding models may also make non-traditional credit providers less resilient than depository banks or

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[22] PYMNTS, *How Long Can MCAs Avoid the 'Loan' Label?* (Jan. 20, 2016), https://www.pymnts.com/in-depth/2016/how-long-can-mcas-avoid-the-loan-label/.

[23] Paul Sweeney, *Gold Rush: Merchant Cash Advances are Still Hot*, deBanked (Aug. 18, 2019), https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/. Although the article does not specify one way or the other, estimates by the underlying source, Bryant Park Capital, appear to reference origination volumes rather than outstanding balances. *See* Nimayi Dixit, S&P Glob. Mkt. Intel., *Payment Fintechs Leave Their Mark On Small Business Lending* (Aug. 28, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/research/payment-fintechs-leave-their-mark-on-small-business-lending. Depending on credit multiplier effects, the value of annual origination volumes could be smaller or greater than outstanding balances. Without information on outstanding balances and for the purposes of calculating a market size for small business financing in 2019, the Bureau assumes in this paper a 1:1 ratio between annual origination volumes and outstanding balances for merchant cash advance products. See part II.D below for discussion of credit multiplier effects and for market size calculations for merchant cash advance and other small business financing products in 2019.

[24] "Fintechs" have been defined as "technology companies providing alternatives to traditional banking services, most often exclusively in an online environment," and may overlap in part with other categories of financial institutions, such as commercial finance companies and/or providers of specialized products, including factoring and merchant cash advances. Brett Barkley & Mark Schweitzer, *The Rise of Fintech Lending to Small Businesses: Businesses' Perspectives on Borrowing*, 17 Int'l J. Cent. Banking 35, 35-36 (Mar. 2021), https://www.ijcb.org/journal/ijcb21q1a2.pdf.

[25] *Id.* (citing Katie Darden *et al.*, S&P Glob. Mkt. Intel., *2018 US Fintech Market Report*, at 5, https://www.spglobal.com/marketintelligence/en/documents/2018-us-fintech-market-report.pdf (2018 US Fintech Market Report)). This figure annualizes $121 million in estimated 2013 quarterly originations to $484 million in annual originations and scales up to estimated outstanding balances using the ratio between the FFIEC Call Report and the CRA data discussed in part II.D below.

[26] 2018 US Fintech Market Report at 6. This figure scales up $9.3 billion in estimated 2019 credit originations for small- to medium-sized enterprise borrowers to outstanding balances using the ratio methodology discussed in part II.D below.

credit unions during shocks to the financial system such as the onset of the COVID-19 pandemic.[27] Additionally, they may use complex algorithms and artificial intelligence, which may create or heighten "risks of unlawful discrimination, unfair, deceptive, or abusive acts or practices . . . or privacy concerns."[28] Opaque product terms and high costs can also trap business owners in cycles of debt. In terms of opportunity, some newer approaches may help applicants with low or nonexistent personal or business credit scores—including women and minorities who own or seek to start small businesses but on average have lower personal credit scores than male and white business owners[29]—to access credit.[30] Non-traditional credit providers as well as digital offerings by traditional financial institutions may also help offset decreases in lending associated with the closure of bank branches.[31]

The precise impacts of these broader trends are not well understood at present because there are no comprehensive, comparable, and application-level data across the fragmented and complex small business lending market. Some small business lending data exist, provided in data reported to Federal regulators, but available data are incomplete in certain ways. Some do not

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[27] Itzhak Ben-David *et al.*, Nat'l Bureau of Econ. Res., *Why Did Small Business Fintech Lending Dry Up During March 2020*, at 1-7 (Sept. 2021), https://www.nber.org/system/files/working_papers/w29205/w29205.pdf (discussing how nondepository lenders faced a credit crunch in March 2020 that impaired their ability to continue funding small business borrowers despite increased demand due to the COVID-19 shock).

[28] 86 FR 16837, 16839 (Mar. 31, 2021); *see also* Rohit Chopra, CFPB, *Remarks of Director Rohit Chopra at a Joint DOJ, CFPB, and OCC Press Conference on the Trustmark National Bank Enforcement Action* (Oct. 22, 2021), https://www.consumerfinance.gov/about-us/newsroom/remarks-of-director-rohit-chopra-at-a-joint-doj-cfpb-and-occ-press-conference-on-the-trustmark-national-bank-enforcement-action/ (discussing risks of discriminatory bias from black box underwriting algorithms).

[29] Geng Li, Bd. of Governors of the Fed. Rsrv. Sys., *FEDS Notes: Gender-Related Differences in Credit Use and Credit Scores* (June 22, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/gender-related-differences-in-credit-use-and-credit-scores-20180622.htm (finding that single women on average have lower credit scores than single men); Alicia Robb, Off. of Advocacy, Small Bus. Admin., *Minority-Owned Employer Businesses and their Credit Market Experiences in 2017*, at 4 (July 22, 2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/07/22172533/Minority-Owned-Employer-Businesses-and-their-Credit-Market-Experiences-in-2017.pdf (finding that Black and Hispanic small business borrowers are disproportionately denied credit or discouraged from applying for credit on the basis of their credit score).

[30] *See* Jessica Battisto *et al.*, *Who Benefited from PPP Loans by Fintech Lenders?*, Liberty St. Econ. (May 27, 2021), https://libertystreeteconomics.newyorkfed.org/2021/05/who-received-ppp-loans-by-fintech-lenders.html (Who Benefited from PPP Loans) (showing that online lenders were an important source of credit for Black owners during the COVID-19 pandemic).

[31] *See* Cong. Rsch. Serv., *Fintech: Overview of Innovative Financial Technology and Selected Policy Issues*, at 1 (Apr. 28, 2020), https://crsreports.congress.gov/product/pdf/R/R46332.

include lending by certain categories of institutions, such as smaller depository institutions. And none include lending by nondepository institutions, which comprises almost half of all small business financing.[32]

The datasets that do exist both over- and underestimate small business lending in certain respects by including small dollar loans to non-small businesses and by excluding larger loans to small businesses.[33] Further, these datasets almost exclusively concern originated loans; they do not include information on applications that do not result in originated loans. Nor do they generally include borrower demographics. Other public, private, and nonprofit datasets offer only partial snapshots of particular areas of the market. Finally, much of the publicly available data are aggregated, which does not permit more granular, loan- or application-level analysis that would facilitate fair lending or business and community development analysis by stakeholders other than those that collected the data. See part II.B below for a detailed discussion on existing data on small business financing.

The remainder of this part II focuses on several broad topics that explain, in more detail, the need for the small business lending data that the CFPB's rule to implement section 1071 will provide: (A) improved understanding of the role of small businesses in the U.S. economy; (B) existing data on small business financing; (C) the landscape of small business financing; (D) estimating the size of the small business financing market despite limited data; (E) the particular challenges faced by women-owned, minority-owned, and LGBTQI+-owned small businesses; and (F) the purposes and impact of section 1071.

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[32] The Bureau estimates that nondepository private business financing totaled approximately $550 billion out of around $1.2 trillion in total private outstanding balances in 2019 (47 percent). This $550 billion figure includes estimated financing by fintechs (around $25 billion), commercial finance companies (around $160 billion), nondepository CDFIs (around $1.5 billion), merchant cash advance providers (around $19 billion), factors (around $100 billion), equipment leasing providers (around $160 billion), nondepository mortgage lenders originating loans for 5+ unit residential developments (around $30 billion), and non-financial trade creditors (around $50 billion). There may additionally be lending that is not captured here by equipment and vehicle dealers originating loans in their own names. Public lenders include SBA, the Federal Housing Administration, Fannie Mae and Freddie Mac, and the Farm Credit System, with public lending totaling around $210 billion in traditional lending programs plus $1 trillion in emergency COVID-19 SBA lending programs. See part II.D below for methodology and sources regarding market size estimates for each lending category.

[33] *See* part II.B below.

A. Small Businesses in the United States

Small businesses are an important, dynamic, and widely diverse part of the U.S. economy. They are critical to employment, innovation, and economic growth and stability, both overall and specifically for minority, women, and LGBTQI+ entrepreneurs.

The Small Business Act, as implemented by the Small Business Administration (SBA), defines a small business using size standards that generally hinge on the average number of employees or average annual receipts of the business concern and are customized industry by industry across 1,012 six-digit North American Industry Classification System (NAICS) codes.[34] Size standards based on average number of employees are used in all industries in the manufacturing and wholesale trade sectors, as well as in certain industries across a variety of other sectors. Employee-based size standards range from 100 employees (used almost entirely in certain industries within the wholesale trade sector) to 1,500 employees (used in industries across a variety of sectors including, for example, petroleum refineries, automobile manufacturing, and greeting card publishers).[35] Size standards based on average annual receipts are used in nearly all other industries, and range from $2.25 million (used in several industries in the crop production and animal production and aquaculture subsectors) to $47 million (used in industries across a variety of sectors including, for example, passenger car leasing, television broadcasting, and general medical and surgical hospitals).[36]

Simpler definitions of what constitutes a small business are used in certain contexts. For example, in certain annual research releases the SBA Office of Advocacy defines a small

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[34] *See* Small Bus. Admin., *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (effective Mar. 17, 2023), https://www.sba.gov/sites/default/files/2023-03/Table%20of%20Size%20Standards_Effective%20March%2017%2C%202023%20%281%29%20%281%29_0.pdf.

[35] *See id.*

[36] A small number of industries use a size standard based on a metric other than average annual receipts or average number of employees. For example, the commercial banking industry (NAICS 522110) is subject to an asset-based size standard. *See id.*

business as one that has fewer than 500 employees.[37] According to the Office of Advocacy, and based on this definition of a small business, in 2018 there were 32.5 million such businesses in the U.S. that represent 99.9 percent of all U.S. firms and employ over 60 million Americans.[38] Over six million of these small businesses have paid employees, while 26.5 million are non-employer businesses (*i.e.*, the owner(s) are the only people involved in the business).[39] From 1995 to 2020, small businesses, particularly young businesses and start-ups, created 12.7 million net new jobs in the U.S., while large businesses created 7.9 million.[40]

Nearly one third of all businesses are minority-owned and more than one third are women-owned, though minorities and women own a smaller share of employer firms. As of 2019, minorities owned around 1.1 million employer firms in the U.S. (amounting to 18.7 percent of all employer firms)[41] and, as of 2018, approximately 8.7 million non-employer firms (33.6 percent of all non-employer firms).[42] Likewise, as of 2019, women owned about 1.2 million employer firms (20.9 percent of all employer firms)[43] and, as of 2018, approximately 10.9 million non-employer firms (41.0 percent of all non-employer firms).[44] Additionally, in

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[37] *See* SBA OA 2021 FAQs at 1.

[38] *See id.*

[39] *See id.*

[40] *See id.*; *see also* Haltiwanger *et al.*, 95 Rev. Econ. Stat. at 347-48 (finding that young firms, which are generally small, contribute disproportionately to both gross and net job creation).

[41] *See* Press Release, U.S. Census Bureau, *Census Bureau Releases New Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses* (Oct. 28, 2021), https://www.census.gov/newsroom/press-releases/2021/characteristics-of-employer-businesses.html (Census Bureau 2021 Minority- and Women-Owned Businesses Data).

[42] Minority Bus. Dev. Agency, U.S. Dep't of Com., *All Minority-Owned Firms: Fact Sheet* (June 10, 2022), https://www.mbda.gov/sites/default/files/2022-06/All%20Minority%20Owned%20Firms%20Fact%20Sheet%20-%20FINAL%206.10.2022.pdf (stating that the nearly 8.7 million minority non-employer firms in the U.S. generated $306.1 billion in revenues in 2018).

[43] *See* Census Bureau 2021 Minority- and Women-Owned Businesses Data.

[44] *See* Press Release, U.S. Census Bureau, *Nonemployer Statistics by Demographics* (Dec. 16, 2021), https://www.census.gov/newsroom/press-releases/2021/nonemployer-statistics-by-demographics.html (also stating that these firms collectively generated $300 billion in annual receipts). In 2017, nearly half of all women-owned non-employer firms generated less than $10,000 in annual receipts, while only 0.05 percent generated $1 million or more in receipts. *See* Press Release, Nat'l Women's Bus. Council, *NWBC Shares 2017 Nonemployer Statistics by Demographics Estimates for Women-Owned Businesses* (Dec. 17, 2020), https://www.nwbc.gov/2020/12/17/nwbc-shares-2017-nonemployer-statistics-by-demographics-estimates-for-women-owned-businesses/.

2016 there were an estimated 1.4 million LGBTQI+ business owners in the United States.[45]

Businesses are legally structured in several ways. In 2018, 87 percent of non-employer businesses were sole proprietorships, which means that the business is not distinguishable from the owner for tax and legal purposes; the owner receives profits directly but is also legally responsible for the business's obligations.[46] Seven percent of non-employer businesses were partnerships, which can be structured to limit the personal liability of some or all owners; limited partners may exchange control for limited liability, while general partners that run the business may remain personally liable.[47] Six percent of non-employer businesses were structured as corporations—4.5 percent are S-corporations and 1.5 percent are C-corporations—which are independent legal entities owned by shareholders who are not personally liable for the corporation's obligations.[48] In 2018, most small employer businesses were corporations, with 52.1 percent choosing to be S-corporations and 15.3 percent preferring C-corporation status, although sole proprietorship and partnership structures remained relatively popular at 13.7 percent and 11.9 percent, respectively.[49] By contrast, in 2017, 74.2 percent of large employer businesses chose to be C-corporations, with 9.3 percent preferring a partnership structure and 8.1 percent S-corporation status.[50]

Small businesses are particularly important in specific sectors of the economy. In 2019, in the services sector, small businesses supplied 9.2 million healthcare and social services jobs (44 percent of all healthcare and social services jobs), 8.8 million accommodation and food

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[45] Nat'l Gay & Lesbian Chamber of Com., *America's LGBT Economy: The Premiere Report on the Impact of LGBT-Owned Businesses*, at 2 (Jan. 2017), https://nglcc.org/wp-content/uploads/2022/02/REPORT-NGLCC-Americas-LGBT-Economy-1-1.pdf.

[46] *See* SBA OA 2021 FAQs at 3.

[47] *Id.* at 4.

[48] *Id.*

[49] *Id.*

[50] Off. of Advocacy, Small Bus. Admin., *Frequently Asked Questions About Small Business*, at 4 (Oct. 2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf (SBA OA 2020 FAQs).

services jobs (61 percent), and 5.7 million construction jobs (81 percent).[51] In the same year, in manufacturing, small businesses supplied 5.1 million manufacturing jobs (42 percent of all manufacturing jobs).[52] Finally, in 2016, family farms with annual gross sales under $500,000 totaled over 91 percent out of 2.2 million farms,[53] and small businesses provided over 137,000 agriculture, forestry, fishing and hunting jobs (84 percent of all agriculture, forestry, fishing and hunting jobs).[54] As such, the financial health of small businesses is essential to the U.S. economy, especially to the supply of critical and basic goods and services—from producing food to serving it at restaurants, and from home building to healthcare.

Small businesses were especially hard-hit by the onset of the COVID-19 pandemic. At one point in the pandemic in April 2020, 20 percent of self-employed workers had temporarily exited the labor market.[55] Industries in which small businesses played a large role have been particularly impacted. For example, comparing April 2020 with April 2019, employment declined by almost 50 percent in the leisure and hospitality businesses (also declining by almost 50 percent among food services and drinking establishments within the leisure and hospitality industry), in which small businesses employ over 60 percent of workers.[56] Women-, minority-, and LGBTQI+-owned small businesses were hit particularly hard. Between February and April 2020, some 373,000 jobs were lost in child daycare services, a sector in which women-

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[51] *See* 2022 Small Business Profile at 4.

[52] *Id.*

[53] Nat'l Inst. of Food & Agric., U.S. Dep't of Agric., *Family Farms*, https://nifa.usda.gov/family-farms (last visited Mar. 20, 2023) (classifying family farms as any farm organized as a sole proprietorship, partnership, or family corporation. Family farms exclude farms organized as non-family corporations or cooperatives, as well as farms with hired managers).

[54] 2022 Small Business Profile at 4.

[55] Daniel Wilmoth, Off. of Advocacy, Small Bus. Admin., *The Effects of the COVID-19 Pandemic on Small Businesses* (Issue Brief No. 16), at 5 (Mar. 2021), https://cdn.advocacy.sba.gov/wp-content/uploads/2021/03/02112318/COVID-19-Impact-On-Small-Business.pdf.

[56] *Id.* at 4. By the third quarter of 2020 many of these jobs had since returned as mandatory closure orders ended and the economy began to recover. *Cf.* Robert W. Fairlie *et al.*, Nat'l Bureau of Econ. Res., *Were Small Businesses More Likely to Permanently Close in the Pandemic*, at 3, 14 (July 2022), https://www.nber.org/system/files/working_papers/w30285/w30285.pdf (finding a sharp increase in California business closures in the first and second quarters of 2020 that reversed in the third quarter of 2020). However, small businesses still appear to have suffered more than large businesses. *See id.* (finding that small businesses experienced substantially higher closure rates than large businesses).

ownership predominates and minority-ownership is very significant. Only 54 percent of these jobs were recovered by the end of 2020.[57] In 2021, 85 percent of LGBTQI+-owned small businesses reported the pandemic was having a negative effect on their business, compared to 76 percent of non-LGBTQI+-owned small businesses.[58] Since 2022, small businesses have faced different economic shocks, including inflation and a shortage of labor, as the economy reopened and resurgent consumer demand has stretched still-fragile supply chains.[59]

B. Existing Data on Small Business Lending

While small businesses are a critical part of the U.S. economy and require financial support, it is still true—as it was in 2017 when the CFPB published its White Paper on small business lending—that it is not possible with current data to confidently answer basic questions regarding the state of small business lending. This limitation is especially the case with regard to the ethnicity, race, and sex of small business owners, applications as opposed to originations, and for small business financing products that are not currently reported in Call Report data.[60]

Data on small business lending are fragmented, incomplete, and not standardized, making it difficult to conduct meaningful comparisons across products and over time. Against this background, it is not hard to see why Congress believed that the collection of small business application data would serve to identify business and community development needs and

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[57] Bureau of Labor Stat., *COVID-19 Ends Longest Employment Recovery and Expansion in CES History, Causing Unprecedented Job Losses in 2020* (June 2021), https://www.bls.gov/opub/mlr/2021/article/covid-19-ends-longest-employment-expansion-in-ces-history.htm. An estimated 90 percent of childcare businesses are women-owned and over half of these owners are minority women. Cindy Larson & Bevin Parker-Cerkez, *Investing in Child Care Fuels Women-owned Businesses & Racial Equity*, Loc. Initiatives Support Corp. (Mar. 8, 2022), https://www.lisc.org/our-stories/story/investing-child-care-fuels-women-owned-businesses-racial-equity/.

[58] Spencer Watson *et al.*, *LGBTQ-Owned Small Businesses in 2021*, Ctr. for LGBTQ Econ. Advancement & Rsch. And Movement Advancement Project, at 9 (July 2022), https://www.lgbtmap.org/file/LGBTQ-Small-Businesses-in-2021.pdf (using data from the Federal Reserve's Small Business Credit Survey, which began collecting demographic data on LGBTQ small business ownership in 2021).

[59] *See* William C. Dunkelberg & Holly Wade, *Small Business Economic Trends*, Nat'l Fed'n of Indep. Bus., at 2, 11, 19 (Aug. 2022), https://assets.nfib.com/nfibcom/SBET-August-2022.pdf (finding that, out of 622 small businesses polled, 29 percent considered inflation their biggest problem, 49 percent had at least one unfilled job opening, and 32 percent reported that supply chain disruptions had a significant impact on their business).

[60] CFPB, *Key dimensions of the small business lending landscape*, at 39-40 (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf (White Paper).

opportunities. The lack of data hinders attempts by policymakers and other stakeholders to understand the size, shape, and dynamics of the small business lending marketplace, including the interaction of supply and demand, as well as potentially problematic lending practices, gaps in the market, or trends in funding that may be holding back some communities.[61] For example, absent better data, it is hard to determine if relatively lower levels of bank loans to small businesses in the decade before the pandemic began were reflective of a net relative decline in lending to small businesses as compared to large businesses or rather a shift within small business lending from banks to nondepository lenders.[62] To the extent there may have been a relative decline, it is difficult to assess if that decline affected certain types of small businesses more than others, including women-owned and minority-owned small businesses.[63]

The primary sources of information on lending by depository institutions are the Federal Financial Institutions Examination Council (FFIEC) and National Credit Union Administration (NCUA) Consolidated Reports of Condition and Income (Call Reports), as well as reporting under the Community Reinvestment Act (CRA). Under the FFIEC and CRA reporting regimes, small loans to businesses of any size are used in whole or in part as a proxy for loans to small businesses. The FFIEC Call Report captures banks' outstanding number and amount of small loans to businesses (that is, loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000).[64] The CRA currently requires banks and savings associations with assets over a specified threshold to report loans in original amounts of

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[61] While Call Report and CRA data provide some indication of the level of supply of small business credit, the lack of data on small business credit applications makes demand for credit by small businesses more difficult to assess, including with respect to local markets or protected classes.

[62] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?*, at 26 (Jan. 2018), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf (showing a decline in bank loans to small businesses from 2008 to 2015 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012-13 that represented the lowest amount of lending since 2005. Fed. Deposit Ins. Corp., *Quarterly Banking Profile*, https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx (last visited Mar. 20, 2023).

[63] White Paper at 40.

[64] *See* Fed. Fin. Insts. Examination Council, *Reporting Forms 31, 41, and 51* (last updated Mar. 16, 2023), https://www.ffiec.gov/ffiec_report_forms.htm (FFIEC Call Report).

$1 million or less to businesses; reporters are asked to indicate whether the borrower's gross annual revenue is $1 million or less, if they have that information.[65] The NCUA Call Report captures data on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size.[66] There are no similar sources of information about lending to small businesses by nondepository institutions. The SBA also releases loan-level data concerning some of its loan programs, but these typically do not include demographic information, and cover only a small portion of the overall small business financing market.

These public data sources provide some of the most extensive information currently available on small business lending. However, they suffer from four material limitations: namely that the data capture only parts of the market, are published at a high level of aggregation, do not permit detailed analysis across the market, and lack standardization across different agencies.

First, these datasets exclude entire categories of lenders. For example, banks under $1.384 billion in assets, as of 2022, do not have to report under the CRA.[67] The FFIEC and NCUA Call Reports and CRA data do not include lending by nondepository financial institutions, which the CFPB estimates to represent 37 percent of the small business financing market and is rapidly growing.[68]

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[65] *See* Fed. Fin. Insts. Examination Council, *A Guide to CRA Data Collection and Reporting*, at 11, 13 (2015), https://www.ffiec.gov/cra/pdf/2015_CRA_Guide.pdf (2015 FFIEC CRA Guide). Small business loans are currently defined for CRA purposes as loans whose original amounts are $1 million or less and that were reported on the institution's Call Report or Thrift Financial Report as either "Loans secured by nonfarm or nonresidential real estate" or "Commercial and industrial loans." Small farm loans are currently defined for CRA purposes as loans whose original amounts are $500,000 or less and were reported as either "Loans to finance agricultural production and other loans to farmers" or "Loans secured by farmland." *Id.* at 11. The Federal agencies responsible for implementing the CRA have proposed to amend the CRA regulations to adopt the Bureau's definition of small business. 87 FR 33884 (June 3, 2022).

[66] *See* Nat'l Credit Union Admin., *Call Report Form 5300 Instructions*, at 74-84 (Mar. 31, 2022), https://www.ncua.gov/files/publications/regulations/call-report-instructions-march-2022.pdf (Call Report Form 5300 Instructions).

[67] Joint Press Release, Bd. of Governors of the Fed. Rsrv. Sys. & Fed. Deposit Ins. Corp., *Agencies Release Annual Asset-Size Thresholds Under Community Reinvestment Act Regulations* (Dec. 16, 2021), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm.

[68] Nondepository lending is estimated to total approximately $550 billion out of $1.5 trillion in total lending, excluding $1 trillion in COVID-19 emergency program lending. *See* part II.D below (providing a detailed breakdown and methodology of estimates across lending products).

Second, Federal agencies publish summary data at a high level in a manner that does not facilitate independent analysis by other agencies or stakeholders. The FFIEC and NCUA Call Reports and the CRA data are all available at a higher level of aggregation than loan-level, limiting fair lending and detailed geographic analyses since ethnicity, race, and sex as well as business location data are rarely disclosed.

Third, the detailed data collected by these Federal sources have significant limitations as well, preventing any analysis into certain issues or types of borrowers, even by the regulators possessing these data. Neither Call Report nor CRA data include applications, which limits insights into any potential discrimination or discouragement in application processes as well as into the interaction between credit supply and demand. The FFIEC Call Report and CRA data separately identify loans of under $1 million in value and, among loans of under $1 million in value, CRA data also identify loans to businesses with annual revenues of $1 million or less (if the lender collects borrower revenue information).[69] However, the Call Report definition of "small business loans" as those with a loan size of $1 million or less at origination is both overinclusive, as it counts small loans to businesses of all sizes, and underinclusive, as it excludes loans over $1 million made to small businesses. Credit unions report any loans under $50,000 as consumer loans and not as commercial loans on the NCUA Call Report,[70] potentially excluding from measurement an important source of funding for many small businesses, particularly the smallest and often most underserved.

Finally, the Federal sources of small business lending data are not standardized across agencies and cannot be easily compared. For example, as noted above, the FFIEC Call Report collects small loans to businesses as a proxy for small business lending, whereas the NCUA Call

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[69] Fed. Fin. Insts. Examination Council, *Schedule RC-C, Part II Loans to Small Businesses and Farms* (2017), at 1, https://www.fdic.gov/regulations/resources/call/crinst-031-041/2017/2017-03-rc-c2.pdf (detailing the Call Report loan size threshold of $1 million at origination for loans to small businesses); 2015 FFIEC CRA Guide at 11 (detailing the CRA size thresholds of $1 million both for loan amount at origination and for revenue of small business borrowers).

[70] Call Report Form 5300 Instructions at 44.

Report collects loans to members for commercial purposes above $50,000 but with no upper limit. The loan-level data for the Paycheck Protection Program offer an unprecedented level of insight into small business lending, but this dataset is a one-off snapshot into the market for a specific lending program at an acute moment of crisis and is also limited in utility by relatively low response levels to demographic questions concerning borrowers.[71]

The Federal government also conducts and releases a variety of statistics, surveys, and research reports on small business lending through the member banks for the Federal Reserve System, the FDIC, CDFI Fund, and the U.S. Census Bureau. These data sources offer insights into broad trends and specific small business lending issues but are less useful for detailed fair lending analyses or identification of specific areas, industries, or demographic groups being underserved. Periodic changes in survey methodology, sample sizes, and questions can also limit comparability and the ability to track developments over time.

There are also a variety of non-governmental data sources, issued by both private and nonprofit entities, that cover small businesses and/or the small business financing market. These include datasets and surveys published by commercial data and analytics firms, credit reporting agencies, trade associations, community groups, and academic institutions. Certain of these data sources are publicly available and track specific topics, such as small business optimism,[72] small business employment,[73] rates of small business credit application approvals,[74] and small business

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[71] Zachary Warmbrodt, *Tracking the Money: Bid to Make Business Rescue More Inclusive Undercut by Lack of Data*, Politico (Mar. 2, 2021), https://www.politico.com/news/2021/03/02/businesses-inclusive-coronavirus-relief-money-data-472539 (reporting that 75 percent of Paycheck Protection Program loan recipients did not report their ethnicity and 58 percent did not reveal their gender); *see also* Rachel Atkins *et al.*, *Discrimination in Lending? Evidence from the Paycheck Protection Program*, 58 Small Bus. Econ. 843, 844 (Feb. 2022), https://link.springer.com/article/10.1007/s11187-021-00533-1 (finding that borrower business owner race was reported for only 10 percent of Paycheck Protection Program loans).

[72] Nat'l Fed'n of Indep. Bus., *Small Business Optimism Index* (July 2022), https://www.nfib.com/surveys/small-business-economic-trends/.

[73] ADP Rsch. Inst., *Employment Reports*, https://adpemploymentreport.com/ (last visited Mar. 20, 2023).

[74] Biz2Credit, *Biz2Credit Small Business Lending Index*, https://www.biz2credit.com/small-business-lending-index (last visited Mar. 20, 2023).

lending and delinquency levels.[75] Other databases have more granularity and provide detailed information on individual businesses, including revenue, credit utilization, industry, and location.[76]

While these non-public sources of data on small businesses may provide a useful supplement to existing Federal sources of small business lending data, these private and nonprofit sources often do not have lending information, may rely in places on unverified self-reporting or research based on public internet sources, and/or narrowly limit use cases for parties accessing data. Further, commercial datasets are generally not free to public users and can be costly as well as have restrictions on their use, raising equity issues for stakeholders who cannot afford access or are not permitted to use the data for their desired purposes.

C. The Landscape of Small Business Finance

Notwithstanding the lack of data on the market, it is clear that financing plays an important role in enabling small businesses to grow and contribute to the economy. When it is available, financing not only provides resources for small businesses to smooth cash flows for current operations, but also affords business owners the opportunity to invest in business growth. A study by a small business trade group found a correlation between small business owners' ability to access credit and their ability to hire.[77] This same study found that, while not the sole cause, the inability to secure financing may have led 16 percent of small businesses to reduce their number of employees and approximately 10 percent of small businesses to reduce employee benefits. Lack of access to financing also contributed to a further 10 percent of small businesses being unable to increase store inventory in order to meet existing demand.[78]

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[75] PayNet, *Small Business Lending Index*, https://sbinsights.paynetonline.com/lending-activity/ (last visited Mar. 20, 2023).

[76] *See, e.g.*, Dun & Bradstreet, https://www.dnb.com/ (data provider and credit reporter); Data Axle, https://www.data-axle.com/ (data provider); Equifax, https://www.equifax.com/business/product/business-credit-reports-small-business/ (credit reporter); Experian, https://www.experian.com/small-business/business-credit-reports (credit reporter).

[77] White Paper at 17.

[78] *Id.*

To support their growth or to make it through harder times, small businesses look to a variety of funding sources. Especially when starting out, entrepreneurs often rely on their own savings and help from family and friends. If a business generates a profit, its owners may decide to reinvest retained earnings to fund further growth. However, for many aspiring business owners—and their personal networks—savings and retained earnings may not be sufficient to fund a new venture or grow it, leading owners to seek other sources of funding. This is particularly true for minority households and women-led households, which on average have less wealth than white households and male-led households.[79]

One such source of funding comes from others besides family and friends, whether high net worth individuals or "angel investors," venture capital funds, or, in a more recent development usually facilitated by online platforms, via crowdsourcing from retail investors. Often, these early investments take the form of equity funding, which business owners are not obligated to repay to investors. However, equity funding requires giving up some ownership and control to investors, which some entrepreneurs may not wish to do. For small businesses, equity funding also tends to be somewhat more expensive than debt financing in the long run. This is for a number of reasons, including that loan interest payments, unlike capital gains, are tax-deductible.[80] Finally, equity investments from others besides family and friends are available to only a small fraction of small businesses.

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[79] Emily Moss *et al.*, *The Black-White Wealth Gap Left Black Households More Vulnerable*, Brookings Inst. (Dec. 8, 2020), https://www.brookings.edu/blog/up-front/2020/12/08/the-black-white-wealth-gap-left-black-households-more-vulnerable/ (detailing wealth gaps in 2019 by race and sex that show white male households with more wealth than white female or Black male or female households at all age brackets). *See also* Erin Ruel & Robert Hauser, *Explaining the Gender Wealth Gap*, 50 Demography 1155, 1165 (Dec. 2012), https://read.dukeupress.edu/demography/article/50/4/1155/169553/Explaining-the-Gender-Wealth-Gap (finding a gender wealth gap of over $100,000 in a longitudinal study over 50 years of a single age cohort in Wisconsin); Neil Bhutta *et al.*, Bd. of Governors of the Fed. Rsrv. Sys., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm (finding median white family wealth in 2019 of $188,200 compared with $24,100 for Black families and $36,100 for Hispanic families).

[80] Jim Woodruff, *The Advantages and Disadvantages of Debt and Equity Financing*, CHRON (updated Mar. 4, 2019), https://smallbusiness.chron.com/advantages-disadvantages-debt-equity-financing-55504.html.

Many small businesses instead seek debt financing from a wide range of providers. These providers include depository institutions, such as banks, savings associations, and credit unions,[81] as well as online lenders and commercial finance companies, specialized providers of specific financing products, nonprofits, and a range of government and government-sponsored enterprises, among others.

In the past, small businesses principally sought credit from banks; however, as banks have merged and consolidated, particularly in the wake of the Great Recession, they have provided less financing to small businesses.[82] As noted earlier, the number of banks has declined significantly since a post-Great Depression peak in 1986 of over 18,000 institutions to under 4,800 institutions as of June 30, 2022,[83] while 13,500 branches closed from 2009 to mid-2020, representing a 14 percent decrease.[84] Although nearly half of counties either gained bank branches or retained the same number between 2012 and 2017, the majority lost branches over this period.[85] Out of 44 counties that were deeply affected by branch closures, defined as having 10 or fewer branches in 2012 and seeing five or more of those close by 2017, 39 were rural

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[81] For purposes of this document, the Bureau is using the term depository institution to mean any bank or savings association defined by section 3(c)(1) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act; there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). The Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this document, unless otherwise specified, to facilitate analysis and discussion.

[82] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?*, at 26 (Jan. 2018), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf (showing a decline in bank loans to small businesses from 2008 to 2015 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012-13 that represented the lowest amount of lending since 2005. Fed. Deposit Ins. Corp., https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx (last visited Mar. 20, 2023).

[83] Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues*, at 6 (Aug. 20, 2019), https://fas.org/sgp/crs/misc/R45878.pdf (decline since 1986); Fed. Deposit Ins. Corp., *Quarterly Banking Profile*, at 7 (Aug. 2022), https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2022jun/qbp.pdf (number of banks as of June 30, 2022).

[84] Bruce C. Mitchell *et al.*, Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations*, at 6 (2020), https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/ (stating that in 2009 there were 95,596 brick and mortar full-service branches or retail locations but, as of June 30, 2020, that number had fallen to 82,086).

[85] Bd. of Governors of the Fed. Rsrv. Sys., *Perspectives from Main Street: Bank Branch Access in Rural Communities*, at 1, 3-4, 19 (Nov. 2019), https://www.federalreserve.gov/publications/files/bank-branch-access-in-rural-communities.pdf.

counties.[86] Of rural counties, just over 40 percent lost bank branches in that period; the rural counties that experienced substantial declines in bank branches tend to be lower-income and with a higher proportion of African American residents relative to other rural counties,[87] raising concerns about equal access to credit.

As banks have merged and the number of branches reduced, the share of banking assets has also become increasingly concentrated in the largest institutions, with banks of over $10 billion in assets representing 86 percent of all industry assets in 2021, totaling $20.3 trillion out of $23.7 trillion.[88] Nevertheless, banks of under $10 billion in assets continue to hold approximately half of all small business loans (using the FFIEC Call Report definition of loans of under $1 million), highlighting the importance of smaller banks to the small business lending market.[89] Since smaller bank credit approvals have traditionally been close to 50 percent, while large banks approve only 25-30 percent of applications, bank consolidation may have implications for small business credit access.[90] Since institutions under $1.384 billion in assets currently are not required to report on lending under the CRA,[91] it is difficult to precisely quantify the negative impact of bank consolidation and shuttered branches on small business

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[86] *Id.*

[87] *Id.*

[88] Fed. Deposit Ins. Corp., *Bank Data and Statistics*, https://www.fdic.gov/bank/statistical/ (last visited Mar. 20, 2023); *see also* Cong. Rsch. Serv., *Small Business Credit Markets and Selected Policy Issues*, at 6 (Aug. 20, 2019), https://fas.org/sgp/crs/misc/R45878.pdf (stating that banks over $10 billion held 84 percent of all industry assets in 2018).

[89] Speech by Board Governor Lael Brainard: *Community Banks, Small Business Credit, and Online Lending* (Sept. 30, 2015), https://www.federalreserve.gov/newsevents/speech/brainard20150930a.htm. Banks with under $10 billion in assets are often referred to as "community banks." Cong. Rsch. Serv., *Over the Line: Asset Thresholds in Bank Regulation*, at 2-3 (May 3, 2021), https://fas.org/sgp/crs/misc/R46779.pdf (noting that the Board of Governors of the Federal Reserve System (Board) and the Office of the Comptroller of the Currency (OCC) define community banks as having under $10 billion in assets, although there may be other criteria, with the FDIC considering also geographic footprint and a relative emphasis on making loans and taking deposits as opposed to engaging in securities and derivatives trading).

[90] Biz2Credit, *Biz2Credit Small Business Lending Index*, https://www.biz2credit.com/small-business-lending-index (last visited Mar. 20, 2023). These historical approval rates are reflected in pre-pandemic Small Business Lending Index releases by Biz2Credit. *See, e.g.*, Biz2Credit, *Small Business Loan Approval Rates at Big Banks Remain at Record High in February 2020: Biz2Credit Small Business Lending Index*, https://www.biz2credit.com/small-business-lending-index/february-2020 (last visited Mar. 20, 2023) (showing large bank approvals of 28.3 percent in February 2020 and of 27.2 percent in February 2019 and smaller bank approvals of 50.3 percent in February 2020 and of 48.6 percent in February 2019).

[91] *See* part II.B above.

lending and access to credit in local areas.[92] Qualitatively, community banks typically receive high satisfaction scores among small business borrowers, reflecting their greater commitment to relationship banking, a model of banking "used to serve families, businesses, and communities as individuals, with an emphasis on providing customized help, rather than assembly line service."[93]

In contrast to banks, credit unions increased their small business lending from $30 billion in 2008 to $71 billion in 2021.[94] Like community banks, credit unions typically receive high satisfaction scores among small business borrowers, reflecting more high-contact, relationship-based lending models.[95]

Certain banks and credit unions choose to be mission-based lenders, as CDFIs or minority depository institutions.[96] Mission-based lenders focus on providing credit to

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[92] Bruce C. Mitchell *et al.*, Nat'l Cmty. Reinvestment Coal., *Relationships Matter: Small Business and Bank Branch Locations* (Mar. 2021), https://ncrc.org/relationships-matter-small-business-and-bank-branch-locations/.

[93] Rohit Chopra, CFPB, *Prepared Remarks of CFPB Director Rohit Chopra in Great Falls, Montana on Relationship Banking and Customer Service* (June 14, 2022), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-in-great-falls-montana-on-relationship-banking-and-customer-service/; *see also* 87 FR 36828, 36829 (June 21, 2022) (stating that relationship banking is "an aspirational model of banking that meets its customers' needs through strong customer service, responsiveness, and care"); Cong. Rsch. Serv., *Over the Line: Asset Thresholds in Bank Regulation*, at 3 (May 3, 2021), https://fas.org/sgp/crs/misc/R46779.pdf (stating that community banks are more likely to engage in relationship-based lending).

[94] Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?*, at 51 (Jan. 2018), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf ($30 billion in lending in 2008); Calculated from NCUA Call Report data accessed on October 18, 2022 ($71 billion in lending in 2021). The Bureau notes that, as discussed in part II.B above, credit unions only report credit transactions made to members for commercial purposes with values over $50,000. The Bureau uses this value as a proxy for small business credit. The Bureau acknowledges that the true value of small business credit extended by credit unions may be different than what is presented here. For example, this proxy may overestimate the value of outstanding small business credit because some members are taking out loans for large businesses. Alternatively, this proxy may underestimate the value of outstanding small business credit if credit unions originate a substantial number of small business loans with origination values of under $50,000. For this analysis, the Bureau includes all types of commercial loans to members except construction and development loans and multifamily residential property. This includes loans secured by farmland; loans secured by owner-occupied, non-farm, non-residential property; loans secured by non-owner occupied, non-farm, non-residential property; loans to finance agricultural production and other loans to farmers; commercial and industrial loans; unsecured commercial loans; and unsecured revolving lines of credit for commercial purposes.

[95] Fed. Rsrv. Banks, *Small Business Credit Survey, 2021 Report On Employer Firms*, at 28 (2021), https://www.fedsmallbusiness.org/survey/2021/report-on-employer-firms.

[96] Minority depository institutions are depository institutions that are majority-owned by socially and economically disadvantaged individuals or that have a majority-minority board of directors and serve a predominantly minority community. Fed. Deposit Ins. Corp., *Minority Depository Institutions: Structure, Performance, and Social Impact*, at 1 (2019), https://www.fdic.gov/regulations/resources/minority/2019-mdi-study/full.pdf. Minority depository

traditionally underserved and low-income communities and individuals to promote community development and expand economic opportunity, making them a relatively smaller by dollar value but essential part of the small business lending market. There were almost 1,400 CDFIs (over half of which are depository institutions) as of August 2022 and over 140 minority depository institutions as of March 2022.[97]

During a period in which depository institutions have been providing relatively less funding to small businesses,[98] some small businesses have increasingly relied on nondepository institutions for financing. Since nondepositories typically do not report their small business financing activities to regulators, there are no authoritative sources for either the number of such entities or the dollar value of financing they provide to small businesses.[99] However, what data are available make clear that nondepository online lenders are increasing their share of the small business financing market.[100]

Whether depository or nondepository, each provider of small business financing may assess a variety of different criteria to determine whether and on what terms to grant an extension of credit or other financing product, including business and financial performance, the credit history of the business and its owner(s), the time in business, and the industry, among other factors. Protections such as guarantees, collateral, and insurance can mitigate perceived risks,

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institutions focus more than other banks on minority and low- and moderate-income communities. *See id.* at 1, 5. *CDFI* banks are certified through the U.S. Department of the Treasury by demonstrating they serve low-income communities. CDFI Fund, *CDFI Certification*, https://www.cdfifund.gov/programs-training/certification/cdfi (last visited Mar. 17, 2023).

[97] CDFI Fund., *CDFI Certification*, https://www.cdfifund.gov/programs-training/certification/cdfi (last visited Mar. 20, 2023); Fed. Deposit Ins. Corp., *Minority Depository Institutions Program* (last visited Mar. 20, 2023), https://www.fdic.gov/regulations/resources/minority/mdi.html.

[98] *See* Rebel A. Cole, Off. of Advocacy, Small Bus. Admin., *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?*, at 26 (Jan. 2018), https://cdn.advocacy.sba.gov/wp-content/uploads/2019/05/09134658/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf (showing a decline in bank loans to small businesses from 2008-15 from $710 billion to $600 billion). The level of bank lending to small businesses has recovered somewhat since a trough in 2012-13 that represented the lowest amount of lending since 2005. *See also* Fed. Deposit Ins. Corp., https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx (last visited Mar. 20, 2023) (tabulating outstanding balances for credit extended to small- and non-small business lending by banks and thrifts over time).

[99] *See* part II.B above.

[100] *See* part II.D below.

potentially enabling a lender to offer better terms or facilitating an extension of credit that would otherwise not meet lending limit or underwriting criteria. Often, government agencies—including the SBA, Federal Housing Administration, and USDA—guarantee or insure loans to encourage lenders to provide credit to borrowers that may not otherwise be able to obtain credit, either on affordable terms and conditions or at all.[101] Different lenders also employ diverse methods for assessing risk, with smaller banks generally relying more on traditional underwriting methods and typically managing multi-product relationships. Online lenders increasingly use complex algorithms, automation, and even artificial intelligence to assess risk and make underwriting decisions, with originations typically being less relationship-based in nature.

As well as diversity in underwriting methodology and criteria, there are also considerable differences across small business financing products and providers with respect to pricing methods and repayment structures. As a result, it can be challenging to compare the competitiveness of product pricing and terms. Term loans, lines of credit, and credit cards typically disclose annualized interest rates; leases often take into account depreciation; factoring products discount an invoice's value and add a fee; and merchant cash advances apply a multiple to the value of the up-front payment.[102] Moreover, providers may add additional fees that are not standardized within industries, much less across them.

D. Estimating the Size and Scope of the Small Business Financing Market

In light of the lack of data and the heterogeneity of products and providers within the small business financing market, it can be difficult to get a clear sense of the size and scope of the market. In this part, the CFPB describes its estimates of the total outstanding balances of

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[101] Cong. Rsch. Serv., *Small Business Administration 7(a) Loan Guaranty Program* (updated June 30, 2022), https://fas.org/sgp/crs/misc/R41146.pdf (discussing the SBA's flagship 7(a) loan guarantee program); U.S. Dep't of Hous. & Urban Dev., *Descriptions Of Multifamily Programs*, https://www.hud.gov/program_offices/housing/mfh/progdesc (last visited Mar. 20, 2023) (listing Federal Housing Administration mortgage insurance programs for 5+ unit residential developments); Farm Serv. Agency, U.S. Dep't of Agric., *Guaranteed Loan Program Fact Sheet* (Mar. 2020), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/guaranteed_loan_program-factsheet.pdf (discussing the USDA's Farm Service Agency guaranteed loan program).

[102] See part II.D below for definitions of the different product categories.

credit in the market, the number of institutions that are active in the small business financing market, and how the CFPB arrived at these estimates. Where possible, the CFPB tries to estimate the state of the small business financing market at the end of 2019 in order to estimate the state of the market during the year prior to the onset of the COVID-19 pandemic.

One challenge is that some of the data report the dollar value of originations and some report outstanding balances. For the purposes of this exercise and for most, but not all, products, the CFPB assumes that for every $1 originated in the market in a given year, there is approximately a corresponding $3 of outstanding balances. This assumption is based on the ratio of the 2019 FFIEC Call Report data, which totaled $721 billion in outstanding balances on bank loans to small businesses and small farms, and the 2019 CRA data, which recorded $264 billion in bank loan originations to small businesses and small farms.[103] This assumption is limited by the extent to which other small business financing products differ from loans and lines of credit, which make up the majority of financing products captured by the FFIEC Call Report data and the CRA data.[104]

As detailed in this section, the CFPB estimates that the market for small business financing products totaled $1.4 trillion in outstanding balances in 2019. The CFPB estimates that small business financing by depository institutions makes up just over half of small business financing by private institutions. In 2020 and 2021, COVID-19 emergency lending programs

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[103] FFIEC Call Report data records outstanding balances on loans with origination amounts less than $1 million across Commercial & Industrial, Nonfarm Nonresidential, Agricultural, and Secured by Farmland lending categories. *See* FDIC Quarterly Banking Profile Time Series, https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/timeseries/small-business-farm-loans.xlsx (last visited Mar. 20, 2023).

[104] FFIEC Call Report data and CRA data on small business credit products also include business credit card products, but loans and lines of credit made up $713 billion out of $775 billion in outstanding balances on bank, savings association, and credit union loans to small businesses in 2019. One important caveat to this assumption is that products with materially shorter average term lengths, for example credit cards, factoring products, and merchant cash advances, may have an inverse ratio of originations to outstanding balances. For example, top issuers of general-purpose credit cards recorded purchase volumes of two to seven times their outstanding balances in 2020. Nilson Report, Issue 1192, at 6 (Feb. 2021), https://nilsonreport.com/publication_newsletter_archive_issue.php?issue=1192. If business-purpose credit cards, factoring products, and merchant cash advances behaved similarly with respect to the ratio of originations to outstanding balances, then for every $1 originated in the market in a given year, there could be a corresponding $0.14-0.50 in outstanding balances for such products ($1 divided by two to seven).

added a further $1 trillion to this value, bringing the overall size of the small business financing market up to $2.4 trillion. However, by July 2022, over $740 billion in Paycheck Protection Program loans had been forgiven, bringing the total market size back below $1.7 trillion.[105] Below, the CFPB estimates the market share for different small business financing products.

Since the available data regarding depository institutions' small loans to businesses address term loans, lines of credit, and credit cards together, the respective shares of these three products in the overall small business financing market are difficult to assess. As detailed in this part, the CFPB estimates that together, private term loans and lines of credit constitute the largest small business credit product by value, totaling approximately $770 billion in outstanding balances in 2019. As of July 2022, outstanding balances for Economic Impact Disaster Loan Program and Paycheck Protection Program loans totaled $260 billion, bringing the total value of all outstanding loans and lines of credit to around $1 trillion.[106]

Lending by banks, saving associations, and credit unions comprises the largest part of this total amount for private term loans and lines of credit. Using FFIEC Call Report data for December 2019, the CFPB estimates that banks and savings associations accounted for a total of about $721 billion in outstanding credit to small businesses and small farms as of December 2019.[107] Using NCUA Call Report data for December 2019, the CFPB estimates that credit unions accounted for a total of about $55 billion in outstanding credit to members for commercial purposes.[108] From this value, the CFPB subtracts $62 billion in credit card lending to

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[105] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.

[106] *Id.*

[107] Calculated from FFIEC Call Report data accessed on October 18, 2022. The CFPB notes that, as discussed in part II.B above, these estimates rely on small loans to businesses as a proxy for loans to small businesses. As such, the CFPB acknowledges that the true outstanding value of credit extended to small businesses by such institutions may be different than what is presented here. For example, the small loans to businesses proxy would overestimate the value of outstanding credit if a significant number of small loans to businesses and farms are to businesses or farms that are actually large. Alternatively, the proxy would underestimate the value of outstanding credit to small businesses if a significant number of businesses and farms that are small under the rule take out loans that are larger than $1 million or $500,000, for businesses and farms, respectively.

[108] Calculated from NCUA Call Report data accessed on October 18, 2022.

arrive at $713 billion in outstanding balances for term loans and lines of credit. From this value, the CFPB further subtracts $134 billion in SBA guaranteed loans to arrive at $580 billion in outstanding balances for private term loans and lines of credit extended by depository institutions (*i.e.*, banks, savings associations, and credit unions) as of December 2019.

The remaining $190 billion in outstanding balances for private term loans and lines of credit was extended by various nondepository institutions, namely commercial finance companies, online lenders, and nondepository CDFIs.[109]

Commercial finance companies specialize in financing equipment and vehicle purchases. The CFPB estimates that the value of outstanding balances on credit extended by commercial finance companies totaled approximately $160 billion. Using data from the Board's Finance Company Business Receivables data on owned assets as of December 2019, the CFPB estimates commercial finance companies outstanding credit for commercial purposes as the value of retail motor vehicle loans plus equipment loans and other business receivables, which totaled about $215 billion.[110] The CFPB further assumes that about 75 percent of this value, or $162 billion, can be attributed to loans to small businesses.[111]

Typical "fintech" providers are characterized primarily by providing financial services exclusively in an online environment.[112] The CFPB estimates that total outstanding loan balances for such providers reached around $25 billion in 2019. Using this estimate, the CFPB scales up an estimated $9.3 billion in credit originations by online platform lenders to small and medium enterprises in 2019 to $25 billion in estimated outstanding balances, under the assumptions

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[109] There may additionally be lending that is not captured here by equipment and vehicle dealers originating loans in their own names.

[110] Bd. of Governors of the Fed. Rsrv. Sys., *Finance Companies—G.20* (updated Aug. 17, 2022), https://www.federalreserve.gov/releases/g20/hist/fc_hist_b_levels.html. The Bureau does not include leases, since they are already counted within the product category of equipment and vehicle leasing, or wholesale loans, which it assumes are typically made to non-small businesses.

[111] This methodology is consistent with the approach taken by Gopal and Schnabl (2020).

[112] Barkley & Schweitzer, 17 Int'l J. Cent. Banking at 35-36.

discussed above.[113] At the beginning of the COVID-19 pandemic and associated financial crisis, these lenders originated around $22 billion in Paycheck Protection Program loans to small businesses from March to August 2020[114] and likely continued to originate billions more during the third wave of Paycheck Protection Program loans in 2021, which represents an almost 90 percent increase or more in outstanding balances since 2019.[115] This follows already rapid growth from $1.4 billion in estimated outstanding balances in 2013.[116]

The CFPB estimates the value of outstanding balances on credit extended by nondepository CDFIs to small business borrowers to be around $1.5 billion. Using reporting by the CDFI Fund for 2019, the CFPB scales down the outstanding balances for loan funds of $13.8 billion and for venture capital funds of $0.3 billion by the proportion of all CDFI lending attributable to business borrowers, which totaled $15.4 billion out of $141.2 billion.[117]

Categorized here separately so as to distinguish residential from non-residential loans, the

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[113] *See* 2018 US Fintech Market Report at 6. The Bureau notes that this figure may underestimate the total value of such lending because it focuses on platform lenders and may overestimate the value of lending to small businesses because it also includes credit to medium businesses. Additionally, the Bureau notes that fintechs often offer products besides loans and lines of credit, and that there is no clear demarcation between fintech, commercial finance company, and merchant cash advance provider, limiting the precision of market size estimates. Finally, fintechs often sell loans once originated to other entities, securitize their originations, or purchase loans that banks have originated, which may further present challenges to the precision of market size estimates for this market segment.

[114] Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through 12 PM EST Apr. 16, 2020), https://www.sba.gov/sites/default/files/2020-06/PPP%20Deck%20copy-508.pdf; Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through Aug. 8, 2020), https://www.sba.gov/sites/default/files/2020-08/PPP_Report%20-%202020-08-10-508.pdf.

[115] Per the program's intent, many Paycheck Protection Program loans have been forgiven since the program began, which likely means that outstanding balances on Paycheck Protection Program loans extended by online lenders have since declined. *See* Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf (reporting that $742 billion in Paycheck Protection Program loans had been forgiven by July 2022).

[116] Barkley & Schweitzer, 17 Int'l J. Cent. Banking at 35-36 (citing 2018 US Fintech Market Report at 5). This figure annualizes $121 million in estimated 2013 quarterly originations to $484 million in annual originations and scales up to estimated outstanding balances using the ratio between the FFIEC Call Report and the CRA data discussed above.

[117] CDFI Fund, *CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2019*, at 17, 22 (Oct. 2020), https://www.cdfifund.gov/sites/cdfi/files/2021-01/ACR-Public-Report-Final-10292020-508Compliant.pdf. To the extent that CDFI loan funds and venture capital funds extend credit to business customers at different rates than CDFI banks and credit unions, this calculation may over- or underestimate the value of lending to small businesses by nondepository CDFIs. This figure also assumes that all CDFI lending is for small businesses.

CFPB estimates outstanding balances for loans on 5+ unit residential dwellings to total over $30 billion.[118] The CFPB scales up $11 billion in 2019 annual originations on loans of under $1 million in value at origination for 5+ unit residential dwellings to $30 billion in estimated outstanding balances, using the ratio between the FFIEC Call Report and the CRA data discussed above.[119]

Also categorized separately from depository institution totals so as to distinguish private from government and government-sponsored loans, the CFPB estimates that outstanding balances for loans extended by the SBA and the Farm Credit System totaled around $200 billion in 2019.[120]

The SBA, through its traditional 7(a), 504, and microloan programs as well as the Economic Impact Disaster Loan Program and funding for Small Business Investment Companies, is the largest governmental lender by value, with $143.5 billion in outstanding balances at the end of fiscal 2019.[121] As part of the Federal government's response to the COVID-19 pandemic, during 2020 and 2021 SBA lending increased in size by over $1 trillion due to the Paycheck Protection Program, which totaled almost $800 billion, and the Economic

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[118] Depository institutions, discussed above, extend a sizeable proportion of loans for 5+ unit residential dwellings; both nondepository and depository institutions are included in the total for 5+ unit outstanding balances.

[119] *See* Mortg. Bankers Ass'n, *Annual Report on Multi-Family Lending—2019*, at 5 (2020), https://www.mba.org/store/products/research/general/report/2019-annual-report-on-multifamily-lending. This includes both private loans, estimated at around $18 billion, and loans extended by Fannie Mae, Freddie Mac, and the Federal Housing Administration, estimated at around $13 billion. The share of 5+ unit residential dwelling loans of all sizes extended by governmental or government-sponsored entities was 41 percent. The Bureau assumes for the purposes of this exercise that the same share is reflected in loans of under $1 million in value at origination, although arguably this share would be higher if government and government-sponsored entities extended disproportionately smaller dollar value loans on average. There is also a substantial market for commercial real estate besides 5+ unit residential dwellings not captured here due to a lack of data on loans of small size or to small businesses. *See* Mortg. Bankers' Ass'n, *MBA: Commercial, Multifamily Mortgage Bankers Originated $683B in 2021; Total Lending Tally Reaches $891B* (Apr. 15, 2022), https://newslink.mba.org/mba-newslinks/2022/april/mba-newslink-friday-apr-15-2022/mba-commercial-multifamily-mortgage-bankers-originated-683b-in-2021-total-lending-tally-reaches-891b/ (estimating the volume of commercial real estate lending of any size to be $890.6 billion in 2021, of which multifamily lending accounted for $376 billion).

[120] The grand total for lending by government and government-sponsored entities would be approximately $210 billion, including 5+ unit residential dwelling loans extended by Fannie Mae, Freddie Mac, and the Federal Housing Administration, which are separately recorded within the 5+ unit residential dwelling loan product category.

[121] Small Bus. Admin., *Small Business Administration Loan Program Performance* (effective Mar. 31, 2022), https://www.sba.gov/document/report-small-business-administration-loan-program-performance. SBA guaranteed loans comprised $134 billion out of this total, which amount has been deducted from the totals for depository institutions to avoid double counting.

Impact Disaster Loan Program, which totaled $210 billion.[122] However, as noted above, over $740 billion in Paycheck Protection Program loans had been forgiven as of July 2022, bringing SBA outstanding loan balances back down.[123]

The Farm Credit System is another important government-related part of the small business credit landscape. The CFPB estimates that Farm Credit System lenders had around $55 billion in outstanding balances of credit extended to small farms in 2019. Using the same small loan to farms proxy as is used in the FFIEC Call Report, the CFPB estimates credit to farms with an origination value of less than $500,000. Based on the Farm Credit System's 2019 Annual Information Statement of the Farm Credit System, the CFPB estimates that outstanding balances of such small credit to farms totaled $55 billion at the end of 2019.[124] The CFPB notes that, as with the FFIEC Call Report proxy, this number may include credit to non-small farms and may exclude larger credit transactions extended to small farms. Considering credit extended with an origination value of between $500,000 and $5 million would increase the market size by $86 billion to $141 billion.[125]

Mostly extended by depository institutions, the CFPB estimates that the market for small business credit cards totaled over $60 billion in outstanding balances for 2020.[126] Using data

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[122] Small Bus. Admin., *Paycheck Protection Program (PPP) Report* (approvals through May 31, 2021), https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf; Small Bus. Admin., *Disaster Assistance Update—Nationwide COVID EIDL, Targeted EIDL Advances, Supplemental Targeted Advances* (June 3, 2021), https://www.sba.gov/sites/default/files/2021-06/COVID-19%20EIDL%20TA%20STA_6.3.2021_Public-508.pdf; Small Bus. Admin., *Disaster Assistance Update—Nationwide EIDL Loans* (Nov. 23, 2020), https://www.sba.gov/sites/default/files/2021-02/EIDL%20COVID-19%20Loan%2011.23.20-508_0.pdf.

[123] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.

[124] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System*, at 54 (Feb. 28, 2020), https://www.farmcreditfunding.com/ffcb_live/investorResources/informationStatements.html.

[125] *Id.*

[126] *See* Bd. of Governors of the Fed. Rsrv. Sys., Report Forms FR Y-14M, https://www.federalreserve.gov/apps/reportingforms/Report/Index/FR_Y-14M (last updated Sept. 12, 2022). The Board's data are received from bank holding companies over $50 billion in assets, which represent 70 percent of outstanding balances for consumer credit cards; the corresponding percent of balances captured for small business cards is not known, so the total small business-purpose credit card market could be substantially higher or lower. *See* CFPB, *The Consumer Credit Card Market*, at 18 (Aug. 2019), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2019.pdf.

from Y-14 Form submissions to the Federal Reserve Board, the CFPB estimates the value of outstanding balances for small business credit card accounts where the loan is underwritten with the sole proprietor or primary business owner as an applicant.[127]

Equipment and vehicle leasing, whereby businesses secure the right to possess and use a piece of equipment or vehicle for a term in return for consideration, is another important product category that is estimated to value roughly $160 billion in outstanding balances in 2019. The CFPB estimates the total size of the equipment and vehicle leasing market for all sized businesses in 2019 to be approximately $900 billion.[128] The CFPB further assumes that small businesses comprise around 18 percent of the total equipment and vehicle leasing market.[129]

Factoring is a similarly significant product type, estimated at around $100 billion in market size for 2019.[130] In a factoring transaction, factors purchase, at a discount, a legally enforceable claim for payment (*i.e.*, accounts receivables or invoices) for goods already supplied or services already rendered by a business for which payment has not yet been made in full; hence, a factor's risk related to repayment lies with the business's customer and not the business itself. In most cases, specific companies, called factors, provide factoring products.

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[127] Off. of Mgmt. & Budget, *Instructions for the Capital Assessments and Stress Testing Information Collection (Reporting Form FR-Y14M)*, OMB No. 7100-0341, at 148 (Mar. 2020), https://omb.report/icr/202101-7100-006/doc/108187801.

[128] *See* Equip. Leasing & Fin. Found., *Horizon Report*, https://www.leasefoundation.org/industry-resources/horizon-report/ (last updated Apr. 22, 2021).

[129] *See* Karen Mills, Harvard Bus. Sch., *State of Small Business Lending*, at 29 (July 2014), https://www.hbs.edu/ris/Supplemental%20Files/15-004%20HBS%20Working%20Paper%20Chart%20Deck_47695.pdf (estimating equipment leasing outstanding balances for small business borrowers at approximately $160 billion at Dec. 31, 2013); Monitor Daily, *SEFI Report Finds Strong Performance Despite Challenges* (Oct. 21, 2014), https://www.monitordaily.com/news-posts/sefi-report-finds-strong-performance-despite-challenges/ ($903 billion market in 2014, commensurate with an 18 percent market share for small business borrowers at the time of the Karen Mills report).

[130] *See* Secured Fin. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report*, at 7 (June 2019), https://www.sfnet.com/docs/default-source/data-files-and-research-documents/sfnet_market_sizing___impact_study_extract_f.pdf?sfvrsn=72eb7333_2. This study estimated the total volume of the U.S. factoring market to be $101 billion. To the extent that factoring volumes differ from outstanding balances, the value of outstanding balances may be higher or lower than this estimate. Also, this estimate captures factoring for business borrowers of all sizes, not just small business borrowers. The CFPB assumes that most factoring is provided to small business customers.

The market for merchant cash advances continues to develop rapidly and data are even more scarce than for other segments of the small business lending market. This limits the reliability of estimates as to the merchant cash advance market's size. The CFPB estimates the 2019 market size to be around $20 billion.[131] The merchant cash advance market is also of particular significance for smaller and traditionally underserved businesses that may not qualify for other types of credit.[132] Merchant cash advances are typically structured to provide a lump sum payment up front (a cash advance) in exchange for a share of future revenue until the advance, plus an additional amount, is repaid. Unlike the majority of other small business financing products, merchant cash advances typically purport to be for short durations.[133] The CFPB understands that merchant cash advances also tend to be relatively high-cost products.[134] Several States, including New York and California, are implementing laws that will require providers of "sales-based financing," such as merchant cash advances, as well as other nondepositories to provide disclosures (including estimated APR in some States) similar to those

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[131] Paul Sweeney, *Gold Rush: Merchant Cash Advances are Still Hot*, deBanked (Aug. 18, 2019), https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/. BPC estimates appear to reference origination volumes rather than outstanding balances. *See* Nimayi Dixit, S&P Glob. Mkt. Intel., *Payment Fintechs Leave Their Mark On Small Business Lending* (Aug. 28, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/research/payment-fintechs-leave-their-mark-on-small-business-lending. Depending on credit multiplier effects, the value of annual origination volumes could be smaller or greater than outstanding balances. Without information on outstanding balances and for the purposes of calculating a market size for small business financing in 2019, the CFPB assumes in this paper a 1:1 ratio between annual origination volumes and outstanding balances for merchant cash advance products. See above for discussion of credit multiplier effects.

[132] *Cf.* Barbara Lipman & Ann Marie Wiersch, Bd. of Governors of the Fed. Rsrv. Sys., *Uncertain Terms: What Small Business Borrowers Find When Browsing Online Lender Websites*, at 3 (Dec. 2019), https://www.federalreserve.gov/publications/files/what-small-business-borrowers-find-when-browsing-online-lender-websites.pdf (observing that online lenders, including providers of merchant cash advance products, position themselves as offering financing to borrowers underserved by traditional lenders).

[133] *See id.* (stating that merchant cash advances are generally repaid in three to 18 months).

[134] *Id.* (stating that annual percentage rates on merchant cash advance products can exceed 80 percent or rise to triple digits). *See also* Fed. Trade Comm'n, *'Strictly Business' Forum, Staff Perspective*, at 5 (Feb. 2020), https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf (observing stakeholder concern about the high-cost of merchant cash advances that can reach triple digit annual percentage rates).

required under the Truth in Lending Act (TILA),[135] which generally only applies to consumer credit.[136]

Finally, trade credit is another significant market, which the Bureau estimates to total $51 billion in outstanding balances in 2019. The Bureau estimates the trade credit market size by adding the total accounts payable for businesses under $1 million in annual revenue.[137] Considering the total value of accounts payable for businesses between $1 million and $5 million would increase the market size by $88 billion.[138] Trade credit is an often informal, business-to-business transaction, usually between non-financial firms whereby suppliers allow their customers to acquire goods and/or services without requiring immediate payment.

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[135] 15 U.S.C. 1601 *et seq.*

[136] New York State law requires that providers of "sales-based financing" provide disclosures to borrowers that include calculations of an estimated annual percentage rate in accordance with the CFPB's Regulation Z, 12 CFR part 1026. *See* N.Y. S.898, section 803(c) (signed Jan. 6, 2021) (amending S.5470-B), https://legislation.nysenate.gov/pdf/bills/2021/s898. The New York Department of Financial Services is currently developing regulations to implement the law. *See* N.Y. Dep't of Fin. Servs., *Proposed Financial Services Regulations*, https://www.dfs.ny.gov/industry_guidance/regulations/proposed_fsl. Similarly, California's Department of Financial Protection and Innovation has adopted regulations to implement a California law requiring disclosures by commercial financing companies, including those providing sales-based financing. *See* 10 Cal. Code Reg. 900(a)(28) (effective Dec. 9, 2022) (defining sales-based financing as "a commercial financing transaction that is repaid by a recipient to the financer as a percentage of sales or income, in which the payment amount increases and decreases according to the volume of sales made or income received by the recipient" and including "a true-up mechanism"); 10 Cal. Code Reg. 914 and 940 (requiring sales-based financing providers disclosure estimated annual percentage rate according to Regulation Z, 12 CFR part 1026). Under these laws, providers of commercial financing generally will be required to disclose: (1) the total amount financed, and the amount disbursed if it is different from the total amount financed; (2) the finance charge; (3) the APR (or the estimated APR for sales-based financing and factoring transactions), calculated in accordance with TILA and Regulation Z; (4) the total repayment amount; (5) the term (or the estimated term for sales-based financing) of the financing; (6) periodic payment amounts; (7) prepayment charges; (8) all other fees and charges not otherwise disclosed; and (9) any collateral requirements or security interests. *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B. Other States, including Virginia and Utah, have passed commercial financing disclosure laws that do not require disclosure of the APR. *See* Virginia H. 1027 (enacted Apr. 11, 2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516; Utah S.B. 183 (enacted Mar. 24, 2022), https://le.utah.gov/~2022/bills/static/SB0183.html.

[137] *See* Fundbox/PYMNTS.com, *The Trade Credit Dilemma*, at 11 (May 2019), https://www.pymnts.com/wp-content/uploads/2019/05/Trade-Credit-Dilemma-Report.pdf (estimating accounts payable for businesses with revenue of under $250,000 at $6.7 billion and for businesses with revenue of $250,000 to $999,000 at $44.6 billion).

[138] *Id.* The trade credit market is estimated to total $1.6 trillion across all business sizes in the United States. In the overall $1.4 trillion market size total for all small business financing products, the CFPB has included only the trade credit market for businesses of up to $1 million in revenue for consistency with its White Paper.

The CFPB estimates that there were approximately 8,200 financial institutions extending small business financing in 2019, almost 80 percent of which were depository institutions.[139]

Based on FFIEC Call Report data for December 2019, the CFPB estimates that about 5,100 banks and savings associations were active in the small business lending market, out of a total of about 5,200 banks and savings associations.[140] The CFPB assumes that a bank or savings association is "active" in the market if it reports a positive outstanding balance of small loans, lines of credit, and credit cards to businesses.

Based on the NCUA Call Report data for December 2019, the CFPB estimates that about 1,200 out of 5,300 total credit unions were active in the small business lending market.[141] The CFPB defines a credit union as "active" in the market if it reported a positive number of originations of loans, lines of credit, and credit cards to members for commercial purposes in 2019.

The CFPB estimates that there were about 1,900 nondepository institutions active in the small business financing market in 2019,[142] accounting for around $550 billion in outstanding

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[139] This number has increased from 8,100 financial institutions estimated in the NPRM for two reasons related to the number of nondepository financial institutions participating in the credit market for 5+ unit residential dwellings in 2019. First, the CFPB revised its methodology for excluding depository institutions from the total number of participants active in the credit market for 5+ unit residential dwellings, as detailed below. Second, the NPRM total for all financial institutions active in the small business financing market included only those nondepository financial institutions participating in the credit market for 5+ unit residential dwellings estimated to be covered by the proposed rule rather than all those active in the market at all.

[140] Calculated from FFIEC Call Report data accessed on October 18, 2022. Although 2019 figures are used here for consistency across types of lenders, consolidation among depository institutions has continued since 2019. As of June 30, 2022, 4,692 commercial banks or savings associations and 1,575 credit unions reported a positive outstanding balance of small loans, lines of credit, and credit cards to businesses. Calculated from FFIEC Call Report data accessed on October 14, 2022.

[141] Nat'l Credit Union Admin., *2019 Call Report Quarterly Data*, https://www.ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data (last updated Mar. 8, 2023). (One hundred twelve credit unions were not federally insured as of December 2019 but are included here as depository institutions. Calculated from NCUA Call Report data accessed on June 8, 2021.) Although 2019 figures are used here for consistency across types of lenders, consolidation among depository institutions has continued since 2019. As of June 30, 2022, 1,120 credit unions reported a positive number of originations of loans, lines of credit, and credit cards to members for commercial purposes during the first half of 2022. This number was calculated from NCUA Call Report data accessed on October 14, 2022.

[142] There may also be cooperative or nonprofit lenders as well as equipment and vehicle finance dealers originating in their own name that are not captured by the CFPB in these figures. For example, by searching Uniform Commercial Code (UCC) filings, Manasa Gopal and Philipp Schnabl identified 19 cooperative lenders that originated at least 1,500 loans over the period from 2006 to 2016. Manasa Gopal & Philipp Schnabl, *The Rise of Finance Companies and FinTech Lenders in Small Business Lending*, N.Y.U. Stern Sch. of Bus., at 18 (May 13,

credit to small businesses. This total number of nondepository institutions includes approximately 300 commercial finance companies, 30 or more online lenders, 340 nondepository CDFIs, 150 nondepository mortgage lenders in the multifamily market, 100 merchant cash advance providers, 700-900 factors, at least 100 government lenders, and 72 Farm Credit System institutions.

The Bureau estimates that about 300 commercial finance companies were engaged in small business lending in 2019.[143] The Bureau also estimates there to be about 30 or more online lenders that were active in the small business lending market in 2019, not including merchant cash advance providers.[144]

The Bureau estimates that 340 nondepository CDFIs were engaged in small business lending in 2019. Both depository and nondepository institutions can be CDFIs. Depository CDFIs are counted in the numbers of banks, savings associations, and credit unions engaged in small business lending. According to the CDFI Fund, 487 nondepository funds (*i.e.*, loan funds

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2020), https://ssrn.com/abstract=3600068. Additionally, these figures do not include trade creditors, which are non-financial companies that extend credit by allowing customers a period of time in which to pay and which are much greater in number since the practice is widespread across the economy. This number has increased from 1,800 financial institutions estimated in the NPRM for two reasons related to the number of nondepository financial institutions participating in the credit market for 5+ unit residential dwellings in 2019. First, the CFPB revised its methodology for excluding depository institutions from the total number of participants active in the credit market for 5+ unit residential dwellings, as detailed below. Second, the Notice of Proposed Rulemaking total for all nondepository financial institutions active in the small business financing market included only those nondepository financial institutions participating in the credit market for 5+ unit residential dwellings that were estimated to be covered by the proposed rule rather than all those active in the market at all.

[143] *See id.* By searching UCC filings, Manasa Gopal and Philipp Schnabl identified almost 300 commercial finance companies, including both independent and captive finance companies, with at least 1,500 small business loans between 2006 and 2016. This figure combines 192 independent finance companies with 95 captive finance companies. Since this estimate captures only those commercial finance companies averaging at least 150 loans per year over the 2006 to 2016 period, it may exclude smaller volume lenders and should be considered conservative.

[144] *Id.* Using the same methodology as for commercial finance companies, Gopal and Schnabl identified 19 fintech companies. The CFPB conservatively increases this estimate to 30 to account for rapid growth in the industry from 2016 to 2019. Since this estimate captures only those fintechs averaging at least 150 loans per year over the 2006 to 2016 period, it may exclude smaller volume lenders and should be considered conservative. On the other hand, since 2019, the COVID-19 economic shock may have led to some fintechs scaling back or exiting the small business financing market. *See, e.g.*, Ingrid Lunden, *Amex Acquires SoftBank-backed Kabbage After Tough 2020 for the SMB Lender*, TechCrunch (Aug. 17, 2020), https://techcrunch.com/2020/08/17/amex-acquires-softbank-backed-kabbage-after-tough-2020-for-the-smb-lender/ (noting that Kabbage temporarily shut down credit lines to small businesses during April 2020 and then spun off its small business loan portfolio when it was subsequently acquired by American Express).

and venture capital funds) reported as CDFIs in 2019.[145] Of these, 340 institutions reported that business finance or commercial real estate finance were a primary or secondary line of business in 2019.[146]

The Bureau estimates that about 150 nondepository mortgage lenders participated in the credit market for 5+ unit residential dwellings in 2019.[147] In its *2019 Multifamily Lending Report*, the Mortgage Bankers Association lists annual multifamily lending volumes by institution, including a distinction for loans of under $1 million in value at origination.[148] Using the same small loan to business proxy as is used in the FFIEC Call Report, the Bureau estimates the number of nondepository mortgage lenders by counting the number of institutions that appear on this list that are not depository institutions and that extended at least two loans in 2019.[149]

Data from UCC filings indicates that about 100 institutions were active in the market for providing merchant cash advances to small businesses in 2021.[150]

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[145] CDFI Fund, *CDFI Annual Certification and Data Collection Report (ACR): A Snapshot for Fiscal Year 2019*, at 8 (Oct. 2020), https://www.cdfifund.gov/sites/cdfi/files/2021-01/ACR-Public-Report-Final-10292020-508Compliant.pdf.

[146] *Id.* at 15-16.

[147] Nondepository lenders providing financing for commercial real estate transactions besides 5+ unit residential dwellings are not separately captured here but often overlap with those lenders providing financing for 5+ unit residential dwellings. *See* Com. Prop. Exec., *Top 20 Commercial Mortgage Banking and Brokerage Firms of 2022* (Jan. 3, 2022), https://www.commercialsearch.com/news/top-20-commercial-mortgage-banking-and-brokerage-firms-of-2022/ (listing top commercial real estate lenders and identifying sectors financed by lender).

[148] *See* Mortg. Bankers Ass'n, *Annual Report on Multi-Family Lending—2019*, at 9-66 (2020), https://www.mba.org/store/products/research/general/report/2019-annual-report-on-multifamily-lending. In the Notice of Proposed Rulemaking, the CFPB had estimated nondepository financial institutions participating in the credit market for 5+ unit residential dwellings by excluding financial institutions included in the above-cited report with the word "bank" or "credit union" in the institution name and further manually removing around ten more institutions that appeared to be depository institutions at first glance. To improve accuracy, for the Final Rule the CFPB has manually coded all 2,588 institutions in the above-cited report to exclude any institutions that are banks, savings associations, credit unions, or farm credit associations but which do not have the word "bank" or "credit union" in the institution name as recorded in the report. As a result, the total number of nondepository financial institutions active in this market fell from 270 to 150.

[149] The CFPB counts institutions extending at least two loans of any size in order to estimate institutions extending at least one small loan, based on the assumption that some 50 percent of these loans may have been for values greater than $1 million.

[150] deBanked, *UCC-1 and UCC-3 Filings by Merchant Cash Advance Companies & Alternative Business Lenders*, https://debanked.com/merchant-cash-advance-resource/merchant-cash-advance-ucc/ (last visited Mar. 20, 2023).

The Bureau estimates the number of factors in 2019 to be between 700-900 and assumes that most factors were providing financing to small business.[151]

Finally, many government agencies and government-sponsored enterprises provide or facilitate a significant proportion of small business credit. As the flagship government lender, the SBA managed in 2019 a portfolio of over $140 billion in loans to small businesses, to which it added over $1 trillion in loans extended as part of the COVID-19 emergency lending programs. (As noted above, over $740 billion in Paycheck Protection Program loans had been forgiven as of July 2022, bringing SBA outstanding loan balances back down.[152]) Across Federal, State, and municipal governments, the Bureau estimates that there are likely over 100 government small business lending programs.[153] Additionally, the Farm Credit System reports that, as of December 2019, the Farm Credit System contained a total of 72 banks and associations.[154] All of these Farm Credit System institutions were engaged in lending to small farms in 2019.[155]

E. Challenges for Women-Owned, Minority-Owned, and LGBTQI+-Owned Small Businesses

Within the context of small business financing, women-owned, minority-owned, and LGBTQI+-owned small businesses often face relatively challenges than their counterparts to obtain credit. In line with congressional purpose, information collected about these businesses

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[151] *See* Secured Fin. Found., *2019 Secured Finance: Market Sizing & Impact Study Extract Report*, at 15 (June 2019), https://www.sfnet.com/docs/default-source/data-files-and-research-documents/sfnet_market_sizing___impact_study_extract_f.pdf?sfvrsn=72eb7333_2 (estimating the number of factors at between 700 and 900).

[152] Pandemic Response Accountability Comm., *Paycheck Protection Program: Loan Forgiveness by the Numbers* (July 2022), https://www.pandemicoversight.gov/media/file/ppp-loan-forgiveness-fact-sheet-july-2022-updatepdf.

[153] In addition to several Federal small business lending programs, States and major municipalities also often have one or more programs of their own. One State and one municipal program in each State would already total 100 government lending programs across Federal, State, and municipal governments.

[154] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System*, at 7 (Feb. 28, 2020), https://www.farmcreditfunding.com/ffcb_live/serve/public/pressre/finin/report.pdf?assetId=395570. The CFPB notes that Farm Credit System banks do not report FFIEC Call Reports and are thus not counted in the number of banks and savings associations discussed above.

[155] Calculated from Young, Beginning, and Small Farmer Report data accessed on June 17, 2022, https://reports.fca.gov/CRS/search-institution.aspx.

may provide opportunities for community development lending, and the information collected may be particularly important to support fair lending analysis and enforcement.

Women-owned, minority-owned, and LGBTQI+-owned small businesses have smaller cash reserves on average, leaving them less able to weather credit crunches. For example, in February 2021, 39 percent of women-owned businesses had one month or less in cash reserves, compared with 29 percent of men-owned firms.[156] And in around 90 percent of majority Black and Hispanic communities, most businesses have fewer than 14 days of cash buffer, while this is true of only 35 percent of majority white communities.[157] As a result, many small businesses, especially those owned by women, minorities, and LGBTQI+ individuals, may have a greater need for financing in general and particularly during economic downturns.

Policy responses to support small businesses in economic downturns may struggle to reach small businesses owned by women, minorities, and LGBTQI+ individuals. For example, although LGBTQI+-owned small businesses were more likely to apply for Paycheck Protection Program loans, they were less likely to receive all of the funds that they applied for, and more likely to have gotten none of the funding they applied for.[158]

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[156] Eric Groves, *Cash Strapped SMBs, While 75% Of PPP Is Still Available*, Alignable (Feb. 9, 2021), https://www.alignable.com/forum/alignable-road-to-recovery-report-february-2021.

[157] JPMorgan Chase Inst., *Place Matters: Small Business Financial Health in Urban Communities*, at 5 (Sept. 2019), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-place-matters.pdf. *See also* Diana Farrell *et al.*, JP Morgan Chase Inst., *Small Business Owner Race, Liquidity, and Survival*, at 5 (July 2020), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/institute-small-business-owner-race-report.pdf (finding in a sample of firms founded in 2013 and 2014 that after one year in business white-owned firms had on average 19 cash buffer days compared to 14 for Hispanic-owned firms and 12 for Black-owned firms).

[158] Spencer Watson *et al.*, *LGBTQ-Owned Small Businesses in 2021*, Ctr. for LGBTQ Econ. Advancement & Rsch. and Movement Advancement Project, at 8 (July 2022), https://www.lgbtmap.org/file/LGBTQ-Small-Businesses-in-2021.pdf (using data from the Federal Reserve's Small Business Credit Survey, which began collecting demographic data on LGBTQ small business ownership in 2021).

Established relationships between applicants and lenders were often critical to approvals in the earliest period of Paycheck Protection Program underwriting;[159] many minority-owned[160] and women-owned[161] businesses did not have such relationships. Minority borrowers with limited English proficiency may also have faced difficulties overcoming language barriers,[162] particularly during the first round of the Paycheck Protection Program in April 2020 when application materials had not yet been translated from English.[163] Further, many minority-owned and women-owned firms are sole proprietorships and independent contractors, both of which received delayed access to Paycheck Protection Program loans.[164]

Applicants whose owners belong to protected categories may have received different program outcomes when applying for Paycheck Protection Program loans, although limitations in demographic information for Paycheck Protection Program loans have hindered fair lending

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[159] Sara Savat, *Who you know matters, even when applying for PPP loans*, The Source, Newsroom, Wash. Univ. in St. Louis (Feb. 15, 2021), https://source.wustl.edu/2021/02/who-you-know-matters-even-when-applying-for-ppp-loans/ (previous lender relationship increased likelihood of obtaining a Paycheck Protection Program loan by 57 percent). *See generally* 86 FR 7271, 7280 (Jan. 27, 2021) (noting that many lenders restricted access to Paycheck Protection Program loans to existing customers, which may run a risk of violating ECOA and Regulation B).

[160] Claire Kramer Mills, Fed. Rsrv. Bank of N.Y., *Double Jeopardy: COVID-19's Concentrated Health and Wealth Effects in Black Communities*, at 6 (Aug. 2020), https://www.newyorkfed.org/medialibrary/media/smallbusiness/DoubleJeopardy_COVID19andBlackOwnedBusinesses (arguing that a lack of strong banking relationships among Black-owned firms may have led to relatively lower rates of access to Paycheck Protection Program loans for such firms); Fed. Rsrv. Banks, *Small Business Credit Survey: 2021 Report on Firms Owned by People of Color*, at ii (Apr. 15, 2021), https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color (Small Business Credit Survey of Firms Owned by People of Color) (finding that "firms owned by people of color tend to have weaker banking relationships").

[161] *Cf.* Mariel Padilla, *'I feel like I'm drowning': Women Business Owners Keep Hitting New Barriers to Federal Loan Aid*, 19th (Apr. 23, 2021), https://19thnews.org/2021/04/women-small-businesses-loan/ (stating that historically higher rates of loan denials for women of color than for white men result in less established banking relationships and thereby reduced access to Federal support disbursed through banks).

[162] *See* Emily Ryder Perlmeter, Fed. Rsrv. Bank of Dallas, *How PPP Loans Eluded Small Businesses of Color* (Nov. 29, 2021), https://www.dallasfed.org/cd/communities/2021/1129 (detailing language barriers among small business owners of color seeking Paycheck Protection Program loans, particularly Hispanic and Asian owners who were not fluent in English).

[163] *See* Press Release, Rep. Judy Chu, *House Dems Urge SBA to Translate Resources into 10 Most Common Languages* (Apr. 9, 2020), https://chu.house.gov/media-center/press-releases/house-dems-urge-sba-translate-resources-10-most-common-languages.

[164] Greg Iacurci, *Coronavirus loan program delayed for independent contractors and self-employed workers*, CNBC (Apr. 3, 2020), https://www.cnbc.com/2020/04/03/delays-in-sba-loans-for-independent-contractors-self-employed-workers.html; *see also* Mariel Padilla, *'I feel like I'm drowning': Women Business Owners Keep Hitting New Barriers to Federal Loan Aid*, 19th (Apr. 23, 2021), https://19thnews.org/2021/04/women-small-businesses-loan/ (stating that non-employer businesses affected by restrictions on sole proprietor and independent contractor access to Paycheck Protection Program loans are disproportionately owned by women and minorities).

analyses.[165] Even for such firms that did obtaining Paycheck Protection Program loans, they may have faced different outcomes with respect to loan forgiveness.[166]

As demonstrated by the impact of the COVID-19 pandemic on small businesses, small business lending data are essential to better understand the small business financing landscape to maintain and expand support for this key part of the U.S. economy.

F. The Purposes and Impact of Section 1071

The Dodd-Frank Act sets forth the Bureau's purposes and mission. It provides that a key component of the Bureau's fair lending work is to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[167] And in passing section 1071, Congress articulated two purposes for requiring the Bureau to collect data on small business credit applications and loans—to "facilitate enforcement of fair lending laws" and to "enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[168] Although the Dodd-Frank Act does not further explain or clarify these dual statutory purposes, other Federal laws shed light on both purposes. That is, a set of existing Federal laws form the backdrop for the use of small business lending data collected and reported

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[165] Rocio Sanchez-Moyano, Fed. Rsrv. Bank of S.F., *Paycheck Protection Program Lending in the Twelfth Federal Reserve District* (Mar. 3, 2021), https://www.frbsf.org/community-development/publications/community-development-research-briefs/2021/february/ppp-lending-12th-district/ (citing matched-pair audit studies that found discouragement and provision of incomplete information for minority business owners seeking Paycheck Protection Program loans); 86 FR 7271, 7280 (Jan. 27, 2021) (noting that facially neutral Paycheck Protection Program policies such as limiting loans to businesses with pre-existing relationships may run a risk of violating ECOA and Regulation B due to a disproportionate impact on a prohibited basis).

[166] For example, Black-owned firms applied to fintechs for Paycheck Protection Program loans at a high rate and certain fintechs or banks that partnered with fintechs have also had a high rate of unforgiven Paycheck Protection Program loans. *See* Max Reyes, *Bank Behind Fintech's Rise Reels in Billions in Pandemic's Wake*, Bloomberg (Aug. 22, 2022), https://www.bloomberg.com/news/articles/2022-08-21/bank-behind-fintech-s-rise-reels-in-billions-in-pandemic-s-wake (reporting that, as of July 2021, the share of unforgiven Paycheck Protection Program loans at Kabbage, a fintech, and at Cross River, a bank that partnered with fintechs, was 34 percent and 16 percent, respectively); Who Benefited from PPP Loans (showing that Black-owned firms applied to fintechs at higher rates than other firms).

[167] *See* 12 U.S.C. 5493(c)(2)(A) (directing the Office of Fair Lending and Equal Opportunity to provide "oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau," including ECOA and the Home Mortgage Disclosure Act).

[168] ECOA section 704B(a).

pursuant to section 1071 to facilitate the enforcement of fair lending laws, and to identify business and community development needs and opportunities across the United States.

1. Facilitating Enforcement of Fair Lending Laws

Congress intended for section 1071 to "facilitate enforcement of fair lending laws,"[169] which include ECOA, the Home Mortgage Disclosure Act of 1975 (HMDA),[170] the Fair Housing Act,[171] and other Federal and State anti-discrimination laws.

i. Equal Credit Opportunity Act (ECOA)

ECOA, which is implemented by Regulation B, applies to all creditors. Congress first enacted ECOA in 1974 to require financial institutions and other firms engaged in the extension of credit to "make credit equally available to all creditworthy customers without regard to sex or marital status."[172] Two years later, Congress expanded ECOA's scope to include age, race, color, religion, national origin, receipt of public assistance benefits, and exercise of rights under the Federal Consumer Credit Protection Act.[173]

ECOA makes it unlawful for any creditor to discriminate against any applicant with respect to any aspect of a credit transaction (1) on the basis of race, color, religion, national origin, sex (including sexual orientation, gender identity, and sex characteristics),[174] marital

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[169] *Id.*

[170] 12 U.S.C. 2801 *et seq.*

[171] 42 U.S.C. 3601 through 3619.

[172] Pub. L. 93-495, tit. V, section 502, 88 Stat. 1500, 1521 (1974).

[173] *See* Equal Credit Opportunity Act Amendments of 1976, Pub. L. 94-239, section 701(a), 90 Stat. 251, 251 (1976).

[174] In March 2021, the CFPB issued an interpretive rule clarifying that the scope of ECOA's and Regulation B's prohibition on credit discrimination on the basis of sex encompasses discrimination based on sexual orientation and gender identity, including discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes and discrimination based on an applicant's associations. 86 FR 14363 (Mar. 16, 2021). *See also* Press Release, CFPB, *CFPB Clarifies That Discrimination by Lenders on the Basis of Sexual Orientation and Gender Identity Is Illegal* (Mar. 9, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-clarifies-discrimination-by-lenders-on-basis-of-sexual-orientation-and-gender-identity-is-illegal/. The interpretive rule states that an example of discriminatory sex-based or gender-based stereotyping occurs if a small business lender discourages a small business owner appearing at its office from applying for a business loan and tells the prospective applicant to go home and change because, in the view of the creditor, the small business customer's attire does not accord with the customer's gender. 86 FR 14363, 14365 (Mar. 16, 2021). As discussed further in the section-by-section analysis of § 1002.102(k) and (*l*), regarding the definitions of LGBTQI+ individual and LGBTQI+-owned

status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from any public assistance program; or (3) because the applicant has in good faith exercised any right under the Federal Consumer Credit Protection Act.[175]

Multiple Federal regulators can enforce ECOA and Regulation B and apply various penalties for violations. The enforcement provisions and penalties for those who violate ECOA and Regulation B are set forth in 15 U.S.C. 1691e(b) and 12 CFR 1002.16. Violations may also result in civil money penalties, which are governed by 12 U.S.C. 5565(c)(3). The CFPB and multiple other Federal regulators have the statutory authority to bring actions to enforce the requirements of ECOA.[176] These regulators have the authority to engage in research, conduct investigations, file administrative complaints, hold hearings, and adjudicate claims through the administrative enforcement process regarding ECOA. Regulators also have independent litigation authority and can file cases in Federal court alleging violations of fair lending laws under their jurisdiction. Like other Federal regulators who are assigned enforcement authority under section 704 of ECOA, the CFPB is required to refer matters to the Department of Justice (DOJ) when it has reason to believe that a creditor has engaged in a pattern or practice of lending discrimination.[177] Private parties may also bring claims under the civil enforcement provisions of ECOA, including individual and class action claims against creditors for actual and punitive damages for any violation of ECOA.[178]

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business, respectively, the CFPB interprets ECOA's and Regulation B's prohibitions on the basis of sex to also include sex characteristics, including intersex traits.

[175] 15 U.S.C. 1601 *et seq.*

[176] These regulators include the OCC, the Board, the FDIC, the NCUA, the Surface Transportation Board, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the Securities and Exchange Commission, the SBA, the Secretary of Transportation, the CFPB, and the FTC. *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a). Motor vehicle dealers are subject to the Board's Regulation B (12 CFR part 202); the CFPB's rules, including this rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

[177] *See* 15 U.S.C. 1691e(h).

[178] 15 U.S.C. 1691e(a); Regulation B § 1002.16(b)(1).

ii. Home Mortgage Disclosure Act (HMDA)

HMDA, implemented by the CFPB's Regulation C (12 CFR part 1003), requires lenders who meet certain coverage tests to report detailed information to their Federal supervisory agencies about mortgage applications and loans at the transaction level. These reported data are a valuable resource for regulators, researchers, economists, industry, and advocates assessing housing needs, public investment, and possible discrimination as well as studying and analyzing trends in the mortgage market for a variety of purposes, including general market and economic monitoring. There is potential overlap between what is required to be reported under HMDA and what is covered by section 1071 for certain mortgage applications and loans for women-owned, minority-owned, and small businesses.

A violation of HMDA and Regulation C is subject to administrative sanctions, including civil money penalties. Compliance is enforced by the CFPB, the U.S. Department of Housing and Urban Development (HUD), the FDIC, the Board, the National Credit Union Administration (NCUA), or the Office of the Comptroller of Currency (OCC). These regulators have the statutory authority to bring actions to enforce the requirements of HMDA and to engage in research, conduct investigations, file administrative complaints, hold hearings, and adjudicate claims through the administrative enforcement process regarding HMDA.

iii. Fair Housing Act

Title VIII of the Civil Rights Act of 1968, as amended (Fair Housing Act), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities because of race, color, religion, sex (including sexual orientation and gender identity),[179]

[179] *See* U.S. Dep't of Hous. & Urban Dev., *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf.

disability,[180] familial status, or national origin.[181] The Fair Housing Act[182] and its implementing regulations specifically prohibit discrimination in the making of loans,[183] the purchasing of loans,[184] and in setting the terms and conditions for making loans available,[185] without reference to consumers, legal entities, or the purpose of the loan being made, although these prohibitions relate exclusively to dwellings.[186]

The DOJ and HUD are jointly responsible for enforcing the Fair Housing Act. The Fair Housing Act authorizes the HUD Secretary to issue a Charge of Discrimination on behalf of aggrieved persons following an investigation and a determination that reasonable cause exists to believe that a discriminatory housing practice has occurred.[187] The DOJ may bring lawsuits where there is reason to believe that a person or entity is engaged in a "pattern or practice" of discrimination or where a denial of rights to a group of persons raises an issue of general public importance,[188] or where a housing discrimination complaint has been investigated by HUD, HUD has issued a Charge of Discrimination, and one of the parties to the case has "elected" to go to Federal court.[189] In Fair Housing Act cases, HUD and the DOJ can obtain injunctive relief,

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[180] The CFPB uses the term "disability" to refer to what the Fair Housing Act and its implementing regulations describe as a "handicap" because that is the preferred term. *See, e.g.*, *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1218 n.1 (11th Cir. 2016) (noting the term disability is generally preferred over handicap).

[181] 42 U.S.C. 3601 through 3619, 3631.

[182] 42 U.S.C. 3605(b) (noting that for purposes of 3605(a), a "residential real estate-related transaction" includes the making or purchasing of loans or providing other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling, or transactions secured by residential real estate).

[183] 24 CFR 100.120.

[184] 24 CFR 100.125.

[185] 24 CFR 100.130.

[186] A "dwelling," as defined by the Fair Housing Act, is any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof. 42 U.S.C. 3602(b).

[187] 42 U.S.C. 3610(g)(1) and (2).

[188] *See* 42 U.S.C. 3614(a).

[189] 42 U.S.C. 3612(o)(1).

including affirmative requirements for training and policy changes, monetary damages and, in pattern or practice cases, civil penalties.[190]

Upon receipt of a complaint alleging facts that may constitute a violation of the Fair Housing Act or upon receipt of information from a consumer compliance examination or other source suggesting a violation of the Fair Housing Act, Federal executive agencies forward such facts or information to HUD and, where such facts or information indicate a possible pattern or practice of discrimination in violation of the Fair Housing Act, to the DOJ.[191] Private parties may also bring claims under the civil enforcement provisions of the Fair Housing Act.[192]

iv. Other Fair Lending Laws

Several other Federal statutes seek to promote fair lending. The CRA affirmatively encourages institutions to help to meet the credit needs of the entire community served by each institution covered by the statute, and CRA ratings take into account lending discrimination by those institutions.[193] (See part II.F.2.i below for additional discussion of the CRA.) The Americans with Disabilities Act of 1990 prohibits discrimination against persons with disabilities in the provision of goods and services, including credit services.[194] Sections 1981[195] and 1982[196] of the Federal Civil Rights Acts are broad anti-discrimination laws that have been applied to many aspects of credit transactions.[197]

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[190] *See* 42 U.S.C. 3612, 3614.

[191] 59 FR 2939, 2939 (Jan. 17, 1994).

[192] *See* 42 U.S.C. 3613.

[193] *See* 12 U.S.C. 2901 *et seq.*

[194] *See* 42 U.S.C. 12101 *et seq.*

[195] 42 U.S.C. 1981(a).

[196] 42 U.S.C. 1982.

[197] *See, e.g.*, *Juarez v. Soc. Fin., Inc.,* No. 20-CV-03386-HSG, 2021 WL 1375868, at *7 (N.D. Cal. Apr. 12, 2021) (denying motion to dismiss section 1981 claim and finding that "the ECOA was not intended to limit any of the broad protections afforded by § 1981"); *Perez v. Wells Fargo & Co.*, No. 17-CV-00454-MMC, 2017 WL 3314797, at *3 (N.D. Cal. Aug. 3, 2017) (denying motion to dismiss for section 1981 claim and rejecting contention that ECOA superseded section 1981, noting that, although ECOA was a more specific statute, ECOA did not conflict with the section 1981 claims because "[a] creditor can comply with § 1981 and the ECOA by not discriminating on the basis of any of the categories listed in the two statutes"); *Jackson v. Novastar Mortg., Inc.*, 645 F. Supp. 2d 636 (W.D. Tenn. 2007) (motion to dismiss claim that defendants violated sections 1981 and 1982 by racial targeting and by offering credit on less favorable terms on the basis of race denied); *Johnson v. Equicredit Corp.*, No. 01-CIV-

Many States and municipalities have also enacted fair lending, fair housing, and/or civil rights laws (often modeled on their Federal counterparts) that broadly prohibit credit discrimination, including protections for business credit.[198]

v. Facilitating Enforcement

To achieve the congressionally mandated purpose of facilitating enforcement of fair lending laws, the Bureau must collect and make available sufficient data to help the public and regulators identify potentially discriminatory lending patterns that could constitute violations of fair lending laws. Financial regulators and enforcement agencies need a consistent and comprehensive dataset for all financial institutions subject to reporting in order to also use these data in their prioritization, peer analysis, redlining reviews, and screening processes to select institutions for monitoring, examination, or investigation. Data collected pursuant to section 1071 will facilitate more efficient fair lending examinations. For example, regulators will be able to use pricing and other data to prioritize fair lending examinations—without such data, some financial institutions might face unnecessary examination burden while others whose practices warrant closer review may not receive sufficient scrutiny.

5197, 2002 U.S. Dist. LEXIS 4817 (N.D. Ill. Mar. 22, 2002) (predatory lending/reverse redlining case brought pursuant to section 1981); *Hargraves v. Cap. City Mortg. Corp.*, 140 F. Supp. 2d 7 (D.D.C. 2000) (predatory lending/reverse redlining case brought under both sections 1981 and 1982), *reconsideration granted in part*, *denied in part*, 147 F. Supp. 2d 1 (D.D.C. 2001) (section 1981 claim dismissed for lack of standing, but not section 1982 claim); *Doane v. Nat'l Westminster Bank USA*, 938 F. Supp. 149 (E.D.N.Y. 1996) (mortgage redlining case brought under sections 1981 and 1982); *Fairman v. Schaumberg Toyota, Inc.*, No. 94-CIV-5745, 1996 U.S. Dist. LEXIS 9669 (N.D. Ill. July 10, 1996) (section 1981 suit over allegedly predatory credit scheme targeting African Americans and Hispanics); *Steptoe v. Sav. of Am.*, 800 F. Supp. 1542 (N.D. Ohio 1992) (mortgage redlining case brought under sections 1981 and 1982 and the Fair Housing Act); *Evans v. First Fed. Sav. Bank of Ind.*, 669 F. Supp. 915 (N.D. Ind. 1987) (section 1982 can be used in mortgage lending discrimination case); *Assocs. Home Equity Servs. v. Troup*, 778 A.2d 529 (N.J. 2001) (predatory lending/reverse redlining case brought pursuant to section 1981).

[198] *See, e.g.*, Cal. Civ. Code 51 and 51.5 and Cal. Gov't Code 12955; Colo. Rev. Stat. 24-34-501(3) and 5-3-210; Conn. Gen. Stat. 46a-81e, 46a-81f, and 46a-98; Del. Code Ann. tit. 6, 4604; D.C. Code 2-1402.21; Haw. Rev. Stat. 515-3 and 515-5; 775 Ill. Comp. Stat. 5/1-102, 5/1-103, 5/4-102, 5/3-102, and 5/4-103; Iowa Code 216.8A and 216.10; Me. Rev. Stat. tit. 5, 4553(5-C) and (9-C), 4595 to 4598, and 4581 to 4583; Md. Code Ann. State Gov't 20-705, 20-707, and 20-1103; Mass. Gen. Laws ch. 151B, 4(3B), (14); Minn. Stat. 363A.03 (Subd. 44), 363A.09(3), 363A.16 (Subds. 1 and 3), and 363A.17; N.H. Rev. Stat. Ann. 354-A:10; N.J. Stat. Ann. 10:5-12(i); N.M. Stat. Ann. 28-1-7; N.Y. Civ. Rights Law 40-c(2); N.Y. Exec. Law 296-A; Or. Rev. Stat. 174.100(7) and 659A.421; R.I. Gen. Laws 34-37-4(a) through (c), 34-37-4.3, and 34-37-5.4; Va. Code Ann. 6.2-501(B)(1), 15.2-853, and 15.2-965; Vt. Stat. Ann. tit. 8, 10403 and tit. 9, 2362, 2410, and 4503(a)(6); Wash. Rev. Code 49.60.030, 49.60.040 (14), (26), and (27), 49.60.175, and 49.60.222; Wis. Stat. 106.50 and 224.77. There are also a number of municipalities that have enacted credit discrimination ordinances. *See, e.g.*, Austin City Code 5-1-1 *et seq.*; N.Y.C. Admin. Code 8-101 and 8-107 *et seq.*; S.F. Police Code 3304(a) *et seq.*

Moreover, as discussed in part V below, the Bureau believes specific aspects of the rule offer particular benefits for the enforcement of fair lending laws. For example, the inclusion of pricing data such as interest rate and fees will provide information on disparities in pricing outcomes, and data such as gross annual revenue, denial reasons, and time in business will enable a more refined analysis and understanding of disparities in both underwriting and pricing outcomes. While these data alone generally will not establish compliance with fair lending laws, regulators, community groups, researchers, and financial institutions will be able to use the data to identify potential disparities in small business lending based on disaggregated categories of race and ethnicity. Overall, the data collected and reported under the rule will allow, for the first time, for comprehensive and market-wide fair lending risk analysis that enables a better understanding of disparities in both underwriting and pricing outcomes.

2. Identifying Business and Community Development Needs and Opportunities

The second congressionally mandated purpose of section 1071 is to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[199] While section 1071 does not expressly define the phrase "business and community development needs," other Federal statutes and regulations, including the CRA and the Riegle Community Development and Regulatory Improvement Act of 1994,[200] reference or define the phrases "business development" and "community development" and can help explain what it means to enable communities, governmental entities, and creditors to "identify business and community development needs and opportunities."

The Bureau believes, based on its consideration of these other Federal statutes and regulations, that its rule implementing section 1071 will provide more data to the public—including communities, governmental entities, and creditors—for analyzing whether financial

[199] ECOA section 704B(a).

[200] Pub. L. 103-325, tit. I, section 102, 108 Stat. 2160, 2163 (1994) (12 U.S.C. 4701 through 4719).

institutions are serving the credit needs of their small business customers. In addition, with data provided under this rule, the public will be better able to understand access to and sources of credit in particular communities or industries, such as a higher concentration of risky loan products in a given community, and to identify the emergence of new loan products, participants, or underwriting practices. The data will not only assist in identifying potentially discriminatory practices, but will contribute to a better understanding of the experiences that members within certain communities may share in the small business financing market.

Increased transparency about application and lending practices across different communities will improve credit outcomes, and thus community and business development. Lenders will be able to better understand small business lending market conditions and determine how best to provide credit to borrowers, where currently they cannot conduct very granular or comprehensive analyses because the data on small business lending are limited. As reduced uncertainty helps lenders to identify potentially profitable opportunities to extend responsible and affordable credit, small businesses stand to benefit from increased credit availability. Transparency will also allow small business owners to more easily compare credit terms and evaluate credit alternatives; without these data, small business owners are limited in their ability to shop for the credit product that best suits their needs at the best price.

i. Community Reinvestment Act (CRA)

The CRA, a part of the Housing and Community Development Act, was passed by Congress in 1977, which found that "regulated financial institutions have continuing and affirmative obligation to help meet the credit needs of the local communities in which they are chartered."[201] As such, one of the statutory purposes of the CRA is to encourage such institutions to help meet the credit needs of the local communities in which they are chartered consistent with the safe and sound operation of such institutions.[202]

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[201] 12 U.S.C. 2901(a)(3).

[202] 12 U.S.C. 2901(b).

The legislative history for the CRA suggests that the concerns motivating its passage included certain practices by banks including redlining (*i.e.*, declining to extend credit in neighborhoods populated by ethnic or racial minorities)[203] and community disinvestment (*i.e.*, taking deposits from lower-income areas, often populated by ethnic or racial minorities, without extending credit or banking services to residents of those areas).[204] The CRA requires the "appropriate Federal financial supervisory agency" of a given depository institution to "prepare a written evaluation of the institution's record of meeting the credit needs of its entire community, including low- and moderate-income neighborhoods."[205] These requirements were first implemented by a 1978 rulemaking,[206] and were amended in 1995[207] and 2005.[208] These rulemakings, adopted by each of the agencies responsible for ensuring compliance with the CRA, established specific performance measures,[209] requiring banks to disclose information about their efforts to meet community credit needs via small business, small farm, and community development lending.[210]

The agencies tasked with ensuring compliance—including the OCC,[211] the Board,[212] and the FDIC[213]—evaluate each insured depository institution's record in helping meet the credit

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[203] *See* H.R. Rep. No. 561, 94th Cong., 1st Sess. 4 (1975) ("[The practice of redlining] increasingly has served to polarize elements of our society . . . . As polarization intensifies, neighborhood decline accelerates."), *reprinted in* 1975 U.S.C.C.A.N. 2303, 2305-06.

[204] Robert C. Art, *Social Responsibility in Bank Credit Decisions: The Community Reinvestment Act One Decade Later*, 18 Pac. L.J. 1071, 1076-77 & n.23 (1987) (citing 123 Cong. Rec. S8958 (daily ed. June 6, 1977), which stated that Sen. Proxmire, the congressional sponsor of the Act described redlining as "the fact that banks and savings and loans will take their deposits from a community and instead of reinvesting them in that community, they will invest them elsewhere, and they will actually or figuratively draw a red line on a map around the areas of their city," further noting that those lines are drawn "sometimes in the inner city, sometimes in the older neighborhoods, sometimes ethnic and sometimes black . . . .").

[205] 12 U.S.C. 2906(a)(1).

[206] 43 FR 47144 (Oct. 12, 1978).

[207] 60 FR 22156 (May 4, 1995).

[208] 70 FR 44256 (Aug. 2, 2005).

[209] 12 CFR 228.11.

[210] *See, e.g.*, 12 CFR 25.42, 228.11.

[211] 12 CFR part 25.

[212] 12 CFR part 228.

[213] 12 CFR parts 345, 195.

needs of its entire community.[214] Overall, the CRA and its regulations generate data that help agencies and the public at large identify instances of redlining, community disinvestment, and geographical areas that are "banking deserts."[215] The CRA regulations of the Board and the FDIC currently have the same definitions of "community development" that include banking and credit services that support the following: (1) affordable housing for low- and moderate-income individuals;[216] (2) community services for low- and moderate-income individuals;[217] (3) activities that promote economic development by financing small business and small farms;[218] and (4) activities that revitalize or stabilize low- and moderate-income geographies, disaster areas, and certain distressed or underserved middle-income areas based on other factors.[219]

In May 2022, the Board, FDIC and OCC issued an interagency notice of proposed rulemaking for amendments to update and expand the existing CRA regulations (2022 CRA NPRM).[220] In the 2022 CRA NPRM, these three agencies proposed a number of revisions to the agencies' CRA rules, including a number of key changes relating to how the agencies defined community development and how the agencies intended to measure the community development activity of depository institutions.[221]

In the 2022 CRA NPRM, the agencies recognized the value of data to be collected under the Bureau's small business lending rule for assessing efforts at addressing community small

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[214] Most specifically, that record is taken into account in considering an institution's application for deposit facilities, including mergers and acquisitions with other financial institutions and the opening of bank branches.

[215] OCC regulations define "CRA desert" as an area that has "significant unmet community development or retail lending needs" and where: (1) Few banks have branches or non-branch deposit-taking facilities, (2) There is "less retail or community development lending than would be expected based on demographic or other factors," or (3) The area "lacks community development organizations or infrastructure." 12 CFR 25.03.

[216] 12 CFR 228.12(g)(1), 345.12(g)(1).

[217] 12 CFR 228.12(g)(2), 345.12(g)(2).

[218] 12 CFR 228.12(g)(3), 345.12(g)(3).

[219] 12 CFR 228.12(g)(4), 345.12(g)(4).

[220] Bd. of Governors of the Fed. Rsrv. Sys.; Fed. Deposit Ins. Corp.; and Off. of the Comptroller of the Currency, Treasury, Community Reinvestment Act, Joint Proposed Rule, 87 FR 33884 (June 3, 2022).

[221] 87 FR 33884, 33885 (June 3, 2022).

business and small farm credit needs, proposing to incorporate aspects of the Bureau's rule into their CRA rules. First, the agencies proposed to define the terms "small business" and "small farm" consistent with the Bureau's proposal under section 1071, *i.e.*, as those having gross annual revenues of $5 million or less in the preceding fiscal year.[222]

Further, the 2022 CRA NPRM proposed to eliminate the current CRA small business and small farm data collection and reporting requirements,[223] to be replaced in the long term by the Bureau's small business lending data collection and reporting requirements.[224] The agencies noted that this proposed approach is responsive to various stakeholders' requests that the agencies coordinate the small business and small farm definitions across the CRA and section 1071 rulemakings. The agencies also observed that their proposal would reduce burden related to data collection and reporting, particularly if institutions could submit data for CRA purposes under the format of the Bureau's small business lending rule.[225] Data collected pursuant to section 1071 would be used to measure individual bank performance in CRA assessments, and to establish the agencies' benchmarks against which bank CRA performance would be measured for purposes of the small farm and small business portions of the retail lending tests.[226]

Finally, the agencies proposed that if both the CRA and section 1071 rulemakings were finalized, the agencies would make the compliance date for the CRA amendments that hinge upon the Bureau's section 1071 rulemaking similar to the compliance date for the Bureau's final rule.[227]

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[222] *Id.* at 33890.

[223] *Id.* at 33930.

[224] *Id.* at 33997.

[225] *Id.* at 33928

[226] *Id.* at 33941.

[227] *Id.* at 33930.

ii. Community Development Financial Institution Fund (CDFI Fund)

The Riegle Community Development and Regulatory Improvement Act of 1994 authorized the CDFI Fund.[228] In passing that statute, Congress found that many of the Nation's urban, rural, and Native American communities face "critical social and economic problems arising in part from the lack of economic growth, people living in poverty, and the lack of employment and other opportunities."[229]

To address these problems, Congress created the CDFI Fund to "promote economic revitalization and community development" through investment in and assistance to CDFIs, including enhancing the liquidity of CDFIs.[230]

The concept of community development is central to the operation of the CDFI Fund. While CDFI Fund regulations do not directly define that term, any entity applying for CDFI certification must have "promoting community development" as its "primary mission."[231] In making this determination, the CDFI Fund considers whether the activities of the entity are purposefully directed toward improving the social and/or economic conditions of underserved people, which may include low-income persons or persons who lack adequate access to capital and financial services and residents of economically distressed communities.[232]

The CDFI Fund collects data from the recipients of its financial and technical assistance, shedding some light on the extent of community development in the areas where CDFIs operate.[233] The CDFI Fund also publishes the data it receives with appropriate redactions to protect privacy interests.[234] However, given that CDFIs comprise a relatively small share of the

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[228] 12 U.S.C. 4701(b).

[229] 12 U.S.C. 4701(a)(1).

[230] 12 U.S.C. 4701(b).

[231] 12 CFR 1805.201(b)(1).

[232] *Id.*

[233] 12 CFR 1805.803(e) (requiring recipients of technical and financial assistance to provide to the CDFI Fund certain information and documentation).

[234] 12 CFR 1805.803(e)(4).

overall small business lending market, 1071 data will materially enhance understanding of the broader extent of community development outside of areas where CDFIs already operate. These data will also likely augment the data the CDFI Fund already receives.

In May 2020, the CDFI Fund issued a request for comment on several aspects of its CDFI program, including proposed changes to the application for certification, as well as proposed changes to the data collection and reporting processes of the CDFI Fund. The RFI proposed a number of other revisions to the data collection and reporting regime in May 2020, including the automation of key elements of existing reporting and improvements to data quality.[235]

In October and November 2022, the CDFI Fund announced that based on public comments, it had revised its proposed changes to the application for certification, and data collection and reporting requirements, subject to another round of public comment prior to the anticipated implementation of changes in April 2023.[236] The CDFI Fund released a preview of changes to the application requirements.[237] One change to the Primary Mission portion of the application, which asks whether an applicant is focused on the mission of community development, would be the addition of bright-line questions related to an organization's lending and financing practices.[238] Specifically, an applicant can be disqualified from CDFI certification if financial products or practices it offers are harmful to low-income and underserved communities.[239] The bright-line questions the new certification application would ask include whether, amongst other things, applicants consider a small business borrower's ability to repay a

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[235] CDFI Fund, *Annual Certification and Data Collection Report Changes* (2020), https://www.cdfifund.gov/sites/cdfi/files/documents/annual-certification-report-2020-final.pdf.

[236] The CDFI Fund released a preview of the final certification application, pending OMB approval. CDFI Fund, *CDFI Certification Application Preview* (Oct. 2022), https://www.cdfifund.gov/sites/cdfi/files/2022-10/CDFI_Certification_Application_Preview_Final_10322.pdf.

[237] CDFI Fund, *CDFI Fund Advance Look: Preview the Revisions to the New CDFI Certification Application* (Oct. 4, 2022), https://www.cdfifund.gov/news/487.

[238] CDFI Fund, *Community Development Financial Institution Certification Application: Overview of Final Revisions and Modifications* (Oct. 5, 2022), https://www.cdfifund.gov/sites/cdfi/files/2022-10/CDFI_Certification_Application_Overview_FINAL.pdf.

[239] *Id.* at 23-31.

loan on its terms,[240] whether they have accommodative or concessionary policies or programs for struggling borrowers, and whether loans priced above 36 percent APR meet certain safety and consumer protection standards.

In October 2022, the CDFI Fund also published revisions to the Target Market requirements of the application for CDFI certification.[241] Currently, an applicant must demonstrate that it serves at least one eligible Target Market (either an Investment Area or a Targeted Population). The revisions, if finalized, would eliminate the geographical boundaries and mapping requirements for most Target Markets, replacing these requirements with customized investment areas. In late October 2022, the CDFI Fund published a proposed list of pre-approved methodologies to identify target markets.[242] These methodologies include determining whether most recipients of a CDFI applicant's funds—whether individuals, for-profit entities, or non-profit entities—are members of certain demographic groups (African American, Hispanic, Native American, Native Hawaiian, Native Alaskan, Other Pacific Islanders, people with disabilities, certified CDFIs, low-income targeted populations).[243] These data are collected using a variety of overlapping methods specific to each demographic status, including self-reporting,[244] in-person or photo-identification-based visual observation,[245]

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[240] *Id.* at 27.

[241] CDFIs must service either certain investment areas or targeted populations.

[242] CDFI Fund, *CDFI Target Market Assessment Methodologies*, Notice and Request for Comment. 87 FR 63852 (Oct. 20, 2022). Comments were due by December 19, 2022. The notice refers to a separate document with the target market methodologies. CDFI Fund, Proposed Pre-Approved Target Market Assessment Methodologies (Oct. 19, 2022), https://www.cdfifund.gov/sites/cdfi/files/2022-10/Proposed_PreApproved_TM_Assessment_Methodologies_FINAL.pdf.

[243] *Id.*

[244] *See, e.g.*, *id.* at 1 (African American), 3 (Hispanic), 10 (non-Hawaiian Pacific Islander), 12 (disability status).

[245] *See, e.g.*, *id.* at 1 (African American), 3 (Hispanic), 12 (disability status).

surname analysis,[246] government-issued or Tribal-issued identification to demonstrate affiliation,[247] and/or income and residence or business location.[248]

The most recently published amendments to the application requirements remain under consideration by the CDFI Fund.[249]

3. Impact of Small Business Lending Data under Section 1071

The Bureau's implementation of section 1071 will provide on an annual basis application-level data on small business credit, including certain protected demographic information. This will include information on applications for credit that are originated, as well as those that are denied, withdrawn, incomplete, or approved by the financial institution but not accepted by the applicant. This information will enable stakeholders of all kinds in the small business lending market to gain insight into trends in small business lending. It will also provide insight into the interaction of supply and demand for small business credit over time.

In terms of facilitating fair lending enforcement, interested government agencies and other stakeholders will be able to use data collected and reported under this final rule to identify possible fair lending risks using statistical methods.

Regarding the identification of business and community development needs, small business lending data collected and reported under this final rule will help government entities and public and private lenders identify and target sub-segments of the market that remain

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[246] *See, e.g.*, *id.* at 3 (Hispanic); *see also List of Hispanic Surnames for OTP-Hispanic Pre-Approved Assessment Methodology*, https://www.cdfifund.gov/sites/cdfi/files/2022-10/OTP_Hisp_HispanicSurnameList_2010Census.xlsx (list of qualifying Hispanic surnames).

[247] *See, e.g.*, CDFI Fund, *Proposed Pre-Approved Target Market Assessment Methodologies*, at 1 (Oct. 19, 2022), https://www.cdfifund.gov/sites/cdfi/files/2022-10/Proposed_PreApproved_TM_Assessment_Methodologies_FINAL.pdf (reporting for African American recipients of funds).

[248] *Id.* at 14 (low-income individuals or entities).

[249] The CDFI Fund paused acceptance of new applications for CDFI certification in October 2022 and will reopen for new applications once the revisions to the application for certification and the transaction-level data collection and reporting regimes are finalized. While initially anticipating that it would finalize changes to the application process in April 2023 after receiving public comments, the CDFI Fund issued a statement in January 2023 that it had received a robust response to the request for comments on the revised application and reporting tools, and that consideration of these comments, while not requiring a lengthy delay, would require postponement of the new application and associated reporting tools beyond April 2023. CDFI Fund, *An Update on the CDFI Fund's Certification Application Review Process* (Jan. 24, 2023), https://www.cdfifund.gov/news/501.

underserved, facilitating entrepreneurship and business development in those communities. By reducing uncertainty about the conditions of the small business lending market, data collected under the final rule can help creditors identify potentially profitable opportunities to extend responsible and affordable credit, potentially increasing credit availability to small businesses. Increased transparency, in turn, will also help small business borrowers to understand what credit is available and on what terms, thereby improving their ability to access the credit they need and further serving community and business development goals.

The Bureau believes that small business lending data will come to play an important role for the small business lending market, as HMDA data have done for the mortgage market. HMDA data have provided lenders, community groups, and others the tools to identify and address fair lending risks and strengthen fair lending oversight and enforcement. In a similar way, these data will allow diverse stakeholders to analyze lending patterns that are potentially discriminatory. By identifying and addressing discriminatory small business lending practices, the Bureau will help to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[250]

HMDA data have also proven effective in creating transparency in the mortgage market that improves the understanding of credit needs, where they may remain unmet, and the relationship between mortgage lending and community development. The Bureau believes that small business lending data collected and reported under this final rule will provide the Bureau and other stakeholders with critical insights into the small business lending market. The COVID-19 pandemic has shown that transparency is essential at a time of crisis, when small businesses may be in urgent need of credit in order to recover from economic shocks.

The advancement of both statutory purposes of section 1071—facilitating fair lending enforcement and identifying business and community development needs—in turn will support

[250] *See* 12 U.S.C. 5493(c)(2)(A).

small businesses across all sectors of the economy, which are fundamental to the economic health of the U.S. and which have been hard hit by recent economic and financial crises. Given the critical importance of small businesses to economic growth and wealth creation, that will also help the economy as a whole.

III. Summary of the Rulemaking Process

In the years leading up to the release of the CFPB's NPRM to implement section 1071 of the Dodd-Frank Act, the CFPB held over 100 outreach meetings regarding the rulemaking with financial institutions, trade associations, community groups, researchers, governmental entities, and other stakeholders. The CFPB also took a number of other steps, beyond individual stakeholder meetings, to solicit feedback more broadly from the public on a rule to implement section 1071. Most recently, the CFPB received public comments on its NPRM. Each of these efforts are discussed in turn below.

A. Pre-Proposal Outreach and Engagement

Request for information, field hearing, and white paper on small business lending. On May 10, 2017, the CFPB published a request for information regarding the small business lending market[251] in which it sought public comment to understand more about the products that are offered to small businesses, the financial institutions that offer such credit, the small business lending data that currently are used and may be maintained by financial institutions, the potential complexity and cost of small business data collection and reporting, and privacy concerns related to the disclosure purposes of section 1071.[252] On the same date, the CFPB held a field hearing regarding section 1071 at which the request for information was announced and then-Director Richard Cordray noted the importance of a section 1071 rulemaking given the absence of

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[251] 82 FR 22318 (May 15, 2017).

[252] In response to the request for information, the CFPB received over 2,000 comments in total, and over 100 unique comments offering detailed substantive responses on the topics raised in the request for information. These comments from the public helped to inform the CFPB's approach in its SBREFA Outline. *See* CFPB, *Request for Information Regarding the Small Business Lending Market*, Docket ID CFPB-2017-0011, https://www.regulations.gov/docket/CFPB-2017-0011.

systematic data on how small businesses are faring and whether or how much they are being held back by financing constraints.[253] Finally, at the same time, the CFPB also published its White Paper on small business lending,[254] which reflected the initial findings of its research providing a preliminary understanding of the small business lending environment, with a particular emphasis on lending to women-owned and minority-owned small businesses.

1071 symposium. In November 2019, the CFPB held a symposium on section 1071 to assist it in its policy development process and to receive feedback from experts, including academic, think tank, consumer advocate, industry, and government experts in the small business lending arena.[255] The symposium had two panels. The first panel focused on the evolution in the small business lending marketplace. The second panel included a discussion surrounding the implementation of section 1071, including issues raised in response to the CFPB's request for information.

Small Business Advisory Review Panel. Under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[256] which amended the Regulatory Flexibility Act (RFA), the CFPB must convene and chair a Small Business Advisory Review Panel (Panel) if it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities.[257] The Panel considers the impact of the proposals under consideration by the CFPB and obtains feedback from representatives of the small entities that would likely be subject to the rule. The Panel is comprised of a representative from the CFPB, the Chief Counsel

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[253] *See* CFPB, *Prepared Remarks of CFPB Director Richard Cordray at the Small Business Lending Field Hearing* (May 10, 2017), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-small-business-lending-field-hearing/.

[254] CFPB, *Key dimensions of the small business lending landscape* (May 2017), https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf (White Paper).

[255] CFPB, *Symposium: Section 1071 of the Dodd-Frank Act* (held Nov. 6, 2019), https://www.consumerfinance.gov/about-us/events/archive-past-events/cfpb-symposium-section-1071-dodd-frank-act/.

[256] Pub. L. 104-121, 110 Stat. 857 (1996).

[257] 5 U.S.C. 609(b).

for Advocacy of the Small Business Administration (SBA), and a representative from the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). Representatives from 20 small businesses were selected as small entity representatives for this SBREFA process. These individuals represented small businesses that are financial institutions—including community banks, credit unions, community development financial institutions (CDFIs), financial technology firms, and commercial finance companies—that would likely be directly affected by a rule implementing section 1071.

On September 15, 2020, the CFPB issued its *Outline of Proposals under Consideration and Alternatives Considered* (SBREFA Outline) for its rulemaking pursuant to section 1071, a detailed document that discusses (1) the relevant law, (2) the regulatory process, (3) the rule proposals the CFPB was considering, and (4) an economic analysis of the potential impacts of those proposals on directly affected small entities.[258]

The CFPB convened the Panel for this proposed rule on October 15, 2020 and held a total of four meetings with small entity representatives during October 19-22, 2020, conducted online via video conference (Panel Outreach Meetings). In preparation for the Panel Outreach Meetings and to facilitate an informed and detailed discussion of the proposals under consideration, discussion questions for the small entity representatives were included throughout the SBREFA Outline.[259]

In advance of the Panel Outreach Meetings, the CFPB, SBA Office of Advocacy, and OIRA held a series of video conferences with the small entity representatives to describe the

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[258] CFPB, *Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking*, *Outline of Proposals Under Consideration and Alternatives Considered* (Sept. 15, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf (SBREFA Outline). *See also* CFPB, *Consumer Financial Protection Bureau Releases Outline of Proposals Under Consideration to Implement Small Business Lending Data Collection Requirements* (Sept. 15, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-outline-proposals-implement-small-business-lending-data-collection-requirements/.

[259] These questions also appeared in a shorter Discussion Guide for Small Entity Representatives. *See* CFPB, *Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking, Discussion Guide for Small Entity Representatives* (Sept. 15, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_discussion-guide_2020-09.pdf.

Small Business Review Process, obtain important background information about each small entity representative's current business practices, and begin discussions on selected portions of the proposals under consideration.

All 20 small entity representatives participated in the Panel Outreach Meetings. Representatives from the CFPB, SBA Office of Advocacy, and OIRA provided introductory remarks. The meetings were then organized around discussions led by the CFPB about each aspect of the proposals under consideration and the potential impact on small businesses. The CFPB also invited small entity representatives to submit written feedback by November 9, 2020; most did so.

On December 15, 2020, the CFPB released the *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (SBREFA Panel Report).[260] This report includes a summary of the feedback received from small entity representatives during the panel process (including oral feedback received during the pre-Panel video conferences and Panel Outreach Meetings, as well as timely submitted written feedback) and findings and recommendations made by the Panel.[261] As required by the RFA, the CFPB considered the Panel's findings in its initial regulatory flexibility analysis, as set out in part VIII of the NPRM.

The CFPB also invited other stakeholders to submit feedback on the SBREFA Outline by December 14, 2020. The CFPB received approximately 60 submissions from a variety of other

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[260] CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (Dec. 14, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa-report.pdf (SBREFA Panel Report). *See also* CFPB, *Consumer Financial Protection Bureau Releases Report on Implementing the Dodd-Frank Act's Small Business Lending Data Collection Requirement* (Dec. 15, 2020), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-releases-report-on-implementing-the-dodd-frank-acts-small-business-lending-data-collection-requirement/. The CFPB's SBREFA Outline and related materials, as well as the CFPB's presentation slides framing the discussion during the Panel Outreach Meetings, are appended to the SBREFA Panel Report. *See* SBREFA Panel Report at app. C through F.

[261] The written feedback from small entity representatives is appended to the SBREFA Panel Report. *See id.* at app. A.

stakeholders, including financial institutions, trade associations, community groups, a think tank, and a government agency.[262]

The CFPB considered the feedback it received from small entity representatives, the findings and recommendations of the Panel, and the feedback from other stakeholders in preparing the NPRM. The feedback, findings, and recommendations were summarized throughout the NPRM where relevant.

One-Time Cost Survey. On July 22, 2020, the CFPB released a voluntary survey to measure the one-time costs of compliance with an eventual small business lending data collection rule.[263] The objective of the survey was to solicit, from institutions offering small business credit products that could potentially be covered by this rule, information about potential one-time costs to prepare to collect and report data. The deadline for responses was October 16, 2020. The CFPB received responses from 105 financial institutions.[264] The results of the survey inform the CFPB's analyses of the potential impacts of the rule as set out in parts IX and X below.

ECOA request for information. On July 28, 2020, the CFPB issued a request for information to seek public input on ECOA and Regulation B.[265] In this request for information, the CFPB sought public comment on a number of topics, including small business lending and the ways that the CFPB, in light of its authority under ECOA and Regulation B, might support efforts to meet the credit needs of small businesses, particularly those that are minority-owned and women-owned.[266]

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[262] Feedback received from these stakeholders on the SBREFA Outline is available on the public docket for the NPRM. *See* https://www.regulations.gov/docket/CFPB-2021-0015/document?documentTypes=Supporting%20%26%20Related%20Material.

[263] CFPB, *Survey: Small Business Compliance Cost Survey* (July 22, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-survey_2020-10.pdf.

[264] See part VI below for additional details regarding this survey.

[265] CFPB, *Consumer Financial Protection Bureau Requests Information on Ways to Prevent Credit Discrimination and Build a More Inclusive Financial System* (July 28, 2020), https://www.consumerfinance.gov/about-us/newsroom/cfpb-rfi-prevent-credit-discrimination-build-more-inclusive-financial-system/.

[266] 85 FR 46600, 46602 (Aug. 3, 2020).

B. Ongoing Outreach and Engagement

Ongoing outreach. The CFPB conducts outreach to industry and other stakeholders to understand their experiences with the small business finance market, economic conditions, and the collection and reporting of data regarding that market. A particular near-term priority in the CFPB's recent outreach has been the impacts of the pandemic and the effectiveness of the Federal government's response. Findings from outreach activities inform the CFPB on matters affecting the small business sector.

Technical outreach. In the months before the publication of the NPRM, the CFPB began conducting technical outreach with third-party software providers that serve financial institutions and software and technology staff from financial institutions that are likely to have to report small business lending data to the CFPB. With these software vendors and technical staff, the CFPB has held and, after publication of this final rule, will continue to hold discussions concerning the technical systems and procedures the CFPB will provide for financial institutions to submit their data. The CFPB intends to understand the technology solutions currently provided by vendors to support the small business lending activities of financial institutions, as well as their experience in providing financial institutions with technical support for previous data collection regulations. The CFPB believes this information will be helpful in informing the CFPB in its design and implementation of a platform for intake and processing of data to help the platform integrate, to the extent possible, with existing systems and data collection procedures. These discussions also serve to raise awareness of technology providers as to their potential future role in supporting the rule as well as the lead time that may be necessary for some or all affected financial institutions to come into compliance with the requirements of this final rule. This outreach process is ongoing and will continue after the publication of this final rule.

Sample data collection form usability testing. After the NPRM was released, the CFPB, after the appropriate notice in the *Federal Register*, and a 30-day comment period, sought and

received OMB approval to conduct several rounds of message and user testing research related to the sample form.[267] The CFPB conducted qualitative research to learn about the experience of filling out the sample data collection form and to explore design options. The CFPB engaged a vendor to conduct interviews with small business stakeholders and listening sessions with small business owners to test different versions of the introductory language on the sample data collection form. The CFPB also conducted qualitative user interviews with small business owners to test their reactions to different versions of the sample data collection form. In addition to comments received in response to the CFPB's proposed sample data collection form as part of the NPRM, the feedback gathered as part of these testing efforts was also considered by the CFPB in finalizing the sample data collection form issued with this final rule. The CFPB is releasing a report, simultaneously with the issuance of this final rule, summarizing the findings from all three rounds of qualitative research testing.[268]

C. Notice of Proposed Rulemaking

On September 1, 2021, the CFPB issued its proposal to implement section 1071. The NPRM was published in the *Federal Register* on October 8, 2021,[269] and the public comment period closed on January 6, 2022.[270] The CFPB received approximately 2,100 comments on the proposal during the comment period.[271] Approximately 650 of these comments were unique, detailed comment letters representing diverse interests. These commenters included lenders such as banks and credit unions, CDFIs, community development companies, Farm Credit System

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[267] 87 FR 37504 (June 23, 2022).

[268] CFPB, *User testing for sample data collection form for the small business lending final rule* (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

[269] 86 FR 56356 (Oct. 8, 2021).

[270] The CFPB set the length of the comment period on the proposal at 90 days from the date on which it was published in the *Federal Register*. The CFPB received several written requests to extend the comment period. The CFPB believes that the 90-day comment period set forth in the NPRM (along with the 38 days that elapsed between the CFPB's issuance of the NPRM on September 1, 2021 and its publication in the *Federal Register* on October 8, 2021) gave interested parties sufficient time to consider the CFPB's proposal and prepare their responses, and thus did not extend the comment period beyond January 6, 2022.

[271] *See* https://www.regulations.gov/docket/CFPB-2021-0015/comments.

lenders, online lenders, and others; national and regional industry trade associations; software vendors; business advocacy groups; community groups; research, academic, and other advocacy organizations; members of Congress; Federal and State government offices/agencies; small businesses; and individuals.

The remaining comments included some duplicate submissions (*i.e.*, letters with the same content from the same commenter submitted through multiple channels, or letters with the same content submitted by multiple people on behalf of the same commenting organization) as well as comments that were part of several comment submission campaigns organized by industry or community groups. Such comment campaigns typically advocated for or against particular provisions in the NPRM and urged additional changes. These comments were considered by the CFPB along with all other comments received, including any additional remarks included in otherwise identical comment letters.

In addition, the CFPB also considered comments received after the comment period closed via approximately 17 ex parte submissions and meetings.[272] Materials on the record, including all ex parte submissions and summaries of ex parte meetings, are available on the public docket for this rulemaking.[273]

The CFPB received comments on all aspects of the proposed rule, as well as on the proposed approach to protecting privacy interests via modification or deletion of data prior to publication, and on its analyses of the proposed rule's impacts. Relevant information received via comment letters, as well as ex parte submissions, is discussed below in the section-by-section analysis and subsequent parts of this document, as applicable. The CFPB considered all the comments it received regarding the proposal, made certain modifications, and is adopting the final rule as described in part V below. Comments relevant to the CFPB's approach to privacy are discussed in part VIII and regarding its impact analyses in parts IX to XI.

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[272] CFPB, *Policy on Ex Parte Presentations in Rulemaking Proceedings*, 82 FR 18687 (Apr. 21, 2017).

[273] See https://www.regulations.gov/docket/CFPB-2021-0015/comments.

IV. Legal Authorities

The Bureau is issuing this final rule pursuant to its authority under section 1071. Some aspects of this rule are also adopted under the Bureau's more general rulemaking authorities in ECOA. Congress enacted ECOA to prohibit discrimination against any applicant, regarding any aspect of a credit transaction, on the basis of, amongst other characteristics, race, color, religion, national origin, and sex.[274] The Bureau has certain oversight, enforcement, and supervisory authority over ECOA requirements and has rulemaking authority under the statute.

ECOA is implemented in Regulation B.[275] Among other things, Regulation B generally prohibits creditors from inquiring about an applicant's race, color, religion, national origin, or sex, with limited exceptions, including if it is required by law.[276]

As discussed above, in the Dodd-Frank Act Congress amended ECOA by adding section 1071, which directs the Bureau to adopt regulations governing the collection and reporting of small business lending data. Specifically, section 1071 requires financial institutions to collect and report to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses.[277] Congress enacted section 1071 for the purpose of (1) facilitating enforcement of fair lending laws and (2) enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[278] The Bureau often refers to these as section 1071's fair lending purpose and its business and community development purpose, respectively.

To advance these statutory purposes, section 1071 grants the Bureau general rulemaking authority for section 1071, providing that the Bureau shall prescribe such rules and issue such

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[274] 15 U.S.C. 1691(a)(1).

[275] 12 CFR part 1002.

[276] Regulation B § 1002.5(a)(2).

[277] ECOA section 704B.

[278] ECOA section 704B(a).

guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.[279] ECOA section 704B(g)(2) also permits the Bureau to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau principally relies on its 704B(g)(1) authority in this proposed rule and relies on 704B(g)(2) when proposing specific exceptions or exemptions to section 1071's requirements. Section 704B(g)(3) directs the Bureau to issue guidance designed to facilitate compliance with the requirements of section 1071.

In addition, section 703(a) of ECOA gives the Bureau broad authority to prescribe regulations to carry out the purposes of ECOA, including provisions that in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith. That section also states that the Bureau may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.

Section 1071 establishes requirements or obligations for financial institutions that the Bureau is implementing in this final rule. These provisions include the requirement in ECOA section 704B(b) that a financial institution shall inquire whether an applicant for credit is a women-owned, minority-owned, or small business; that a financial institution must maintain a record of responses to such inquiry, separate from the application; that an applicant may refuse to provide any information requested regarding the inquiry under 704B(b); that a financial institution must limit access of loan underwriters, or other officers or employees of the financial institution or any affiliate, to applicant responses to inquiries under 704B(b); and that if a financial institution determines that a loan underwriter or other officer or employee should have

[279] ECOA section 704B(g)(1).

access to any information provided by the applicant pursuant to a request under 704B(b) that the financial institution shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.[280]

ECOA section 704B(e)(1) directs financial institutions to compile and maintain, in accordance with regulations of the Bureau, records of the information provided by applicants for credit pursuant to a request under 704B(b). Section 704B(e)(2) requires that the information compiled and maintained under 704B(e)(1) be itemized in order to clearly and conspicuously disclose an enumerated list of data points. Section 704B(e)(2)(H) requires financial institutions to compile and maintain any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071.

Several provisions of section 1071 expressly refer to regulations to be promulgated by the Bureau to implement certain requirements, including in ECOA section 704B(e)(1) regarding how financial institutions must compile and maintain data pursuant to section 1071, and in 704B(f)(2)(B) and (C) regarding the form of information made available by financial institutions to the public and the form and manner in which the Bureau itself should make data available to the public generally.

Two provisions expressly give the Bureau discretion with respect to public availability of small business lending data. Specifically, ECOA section 704B(e)(4) states that the Bureau may, at its discretion, delete or modify data before making it available to the public if the Bureau determines that the deletion or modification of the data would advance a privacy interest. Section 704B(f)(3) gives the Bureau the discretion to compile and aggregate data for its own use, as well as to make public such compilations of aggregate data.

[280] ECOA section 704B(b)(1) and (2), (c), (d)(1) and (2).

V. Section-by-Section Analysis

Overview

In this *Overview* of part V, the CFPB first provides some background regarding section 1071, a discussion of the Home Mortgage Disclosure Act of 1975 (HMDA), and a brief summary of the final rule. Each regulatory provision of the final rule, along with its rationale and relevant feedback received through the public comment process, is discussed in detail in the section-by-section analyses that follow. The CFPB has made several major, and a number of minor, adjustments to the rule in response to comments received on the proposal. Major changes are noted in the summary of the final rule below; all changes are discussed in detail in the section-by-section analyses that follow.

Next, the CFPB discusses the high-level and general comments received in response to the NPRM. The CFPB also addresses several issues for which there is no corresponding regulatory text or commentary. Finally, the CFPB discusses the conforming amendments it is making to existing Regulation B.

A. Introduction to Section 1071

As discussed above, section 1071 of the Dodd-Frank Act requires that financial institutions collect and report to the CFPB certain data regarding applications for credit for women-owned, minority-owned, and small businesses. Section 1071's statutory purposes are to (1) facilitate enforcement of fair lending laws, and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the CFPB to require any additional data that it determines would aid in fulfilling section 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of underwriters and other persons to certain data and publication of data. In addition, section 1071 permits the

CFPB to modify or delete data prior to publication if it determines that such a deletion or modification would advance a privacy interest.

Section 1071 directs the CFPB to prescribe such rules, and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. It also permits the CFPB to adopt exceptions to any requirement or to exempt financial institutions from the requirements of section 1071 as it deems necessary or appropriate to carry out the purposes of section 1071. Section 1071 also directs the CFPB to issue guidance designed to facilitate compliance with the requirements of section 1071. As discussed in part IV above and throughout the section-by-section analyses in this part V, the CFPB's rule implements these statutory provisions.

B. Section 1071 and HMDA

HMDA is a data collection and reporting statute that requires certain depository institutions and for-profit nondepository institutions to collect, report, and disclose data about originations and purchases of mortgage loans, as well as mortgage loan applications that do not result in originations (for example, applications that are denied or withdrawn).[281] The CFPB's Regulation C, 12 CFR part 1003, implements HMDA. In light of certain similarities between section 1071 and HMDA as data collection and reporting statutes with different markets but similar fair lending enforcement and community development purposes, the CFPB's section-by-section analyses in this part V sometimes discusses how similar provisions are addressed in the context of HMDA. Of course, the markets to which HMDA and section 1071 apply are also different in significant respects, and those differences are reflected between the present rule and Regulation C, as discussed further in the section-by-section analyses in this part V.

HMDA and Regulation C's purposes are: (1) to help determine whether financial institutions are serving their communities' housing needs; (2) to assist public officials in

[281] 12 U.S.C. 2801 *et seq.*

distributing public investment to attract private investment; and (3) to assist in identifying potential discriminatory lending patterns and enforcing antidiscrimination statutes.

A covered institution for purposes of HMDA reporting is a depository or nondepository institution that meets the relevant coverage criteria set forth in the regulation. A covered transaction under HMDA is generally a loan or line of credit secured (or, for applications, proposed to be secured) by a lien on a dwelling, that is not specifically excluded under Regulation C § 1003.3(c). The data points generally required to be reported about each covered transaction can be grouped into four broad categories:[282] information about the applicants, borrowers, and underwriting process, information about the property securing the loan or proposed to secure the loan, information about the features of the loan, certain unique identifiers.

Covered institutions are required to submit their HMDA data by March 1 following the calendar year for which data are collected. Covered institutions with larger volumes of covered loans and applications are required to submit their HMDA data for each of the first three quarters of the year in addition to their annual submission.

Following the calendar year in which HMDA data are collected, a covered institution's disclosure statement[283] and modified loan/application register become publicly available on the FFIEC's HMDA Platform.[284] Aggregate reports for each Metropolitan Statistical Area and Metropolitan Division that show lending patterns by property location, age of housing stock, and

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[282] Under the Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. 115-174, 132 Stat. 1296 (2018), as implemented in Regulation C § 1003.3(d), certain HMDA-covered institutions may be eligible for partial exemptions from some of the HMDA reporting requirements and only certain covered loans and applications are covered under partial exemptions. If a covered loan or application is covered under a partial exemption, the covered institution is not required to collect, record, and report certain data points.

[283] A disclosure statement contains aggregated data derived from loan-level data.

[284] A HMDA loan/application register contains the record of information required to be collected and the record submitted annually or quarterly, as applicable. A modified loan/application register is a covered institution's loan/application register modified by the CFPB, on its website, to protect applicant and borrower privacy. The CFPB interprets HMDA, as amended by the Dodd-Frank Act, to call for the use of a balancing test to determine whether and how HMDA data should be modified prior to its disclosure to the public in order to protect applicant and borrower privacy while also fulfilling HMDA's public disclosure purposes. *See* 80 FR 66127, 66133-34 (Oct. 28, 2015). In December 2018, the CFPB issued final policy guidance describing the modifications the CFPB intends to apply to the loan-level HMDA data that covered institutions report before the data are disclosed publicly. *See* 84 FR 649 (Jan. 31, 2019).

income level, sex, ethnicity, and race are also publicly available on the same platform, which also allows users to create custom datasets, reports, and visualizations from the HMDA data.

HMDA data are the primary source of information for regulators, researchers, economists, industry, and advocates analyzing the mortgage market both for HMDA's purposes and for general market monitoring. HMDA data are used by the Federal supervisory agencies to support a variety of activities. For example, Federal supervisory agencies use HMDA data as part of their fair lending[285] examination process, and also use HMDA data in conducting CRA[286] performance evaluations. HMDA data provide the public with information on the home mortgage lending activities of particular reporting entities and on activity in their communities. These data are used by local, State, and Federal officials to evaluate housing trends and issues and by community organizations to monitor financial institution lending patterns.

C. Summary of the Final Rule

The CFPB is adding a new subpart B to Regulation B to implement the requirements of section 1071. The CFPB is also making some conforming amendments to existing Regulation B. The CFPB's final rule is summarized below, in the order of the section-by-section analyses in this part V that follow.

1. General Provisions (§§ 1002.5(a)(4), 1002.101, and 1002.102)

Changes to existing Regulation B. The CFPB is amending existing § 1002.5(a)(4) to expressly permit voluntary collection and reporting of information regarding the ethnicity, race, and sex of applicants' principal owners, or whether the applicant is a minority-owned, women-owned, or LGBTQI+-owned business, in certain circumstances.

The Bureau is also making other nonsubstantive conforming edits in existing Regulation B to maintain consistency and avoid confusion.

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[285] *See* ECOA (15 U.S.C. 1691 through 1691f), Regulation B (12 CFR part 1002), and the Fair Housing Act (42 U.S.C. 3605, 24 CFR part 100).

[286] 12 U.S.C. 2901 through 2908, and 12 CFR parts 25, 195, 228, and 345.

Authority, purpose, and scope (§ 1002.101). Section 1002.101 sets forth the authority, purpose, and scope for subpart B. Among other things, this section states section 1071's two statutory purposes of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Definitions (§ 1002.102). Section 1002.102 includes a number of definitions for terms used in subpart B, which generally fall into several categories. First, some definitions refer to terms defined elsewhere in subpart B—specifically, terms of particular importance including business, covered application, covered credit transaction, covered financial institution, financial institution, and small business. Second, some definitions refer to terms defined elsewhere in existing Regulation B (*i.e.*, business credit, credit, and State) or other regulations (*i.e.*, a portion of the definitions of small business and affiliate reference an SBA regulation). Finally, the remaining terms are defined in § 1002.102, including applicant, closed-end credit transaction, LGBTQI+ individual, LGBTQI+-owned business, minority-owned business, open-end credit transaction, principal owner, small business lending application register, women-owned business, and a portion of the definition of affiliate.

2. Coverage (§§ 1002.103 through 1002.106)

Covered applications (§ 1002.103). Section 1002.103 defines what is, and is not, a covered application under subpart B; this definition triggers data collection and reporting requirements under subpart B for covered financial institutions. The CFPB is defining a covered application in § 1002.103(a) as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. A covered application does not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests.

Covered credit transactions and excluded transactions (§ 1002.104). The CFPB is requiring that covered financial institutions collect and report data for all covered applications from small businesses for transactions that meet the definition of business credit under existing Regulation B, with certain exceptions. Section 1002.104(a) defines the term covered credit transaction as an extension of business credit that is not an excluded transaction under § 1002.104(b). Loans, lines of credit, credit cards, and merchant cash advances (including credit transactions for agricultural purposes) all fall within the scope of the rule. Section 1002.104(b) excludes from the requirements of subpart B trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. Factoring, leases, consumer-designated credit used for business or agricultural purposes, and credit transaction purchases, purchases in a pool of credit transactions, and purchases of a partial interest in a credit transaction also are not covered credit transactions.

Covered financial institutions and exempt institutions (§ 1002.105). The CFPB is defining in § 1002.105(a) the term financial institution, consistent with the definition in section 1071, as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. Under this definition, subpart B's requirements apply to a variety of entities that engage in small business lending, including depository institutions (*i.e.*, banks, savings associations, and credit unions), online lenders, platform lenders, CDFIs, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit nondepository lenders. Subpart B does not cover motor vehicle dealers.[287] Section 1002.105(b) defines the term covered financial institution as a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years.

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[287] Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 2004 (2010).

Only financial institutions that meet this loan-volume threshold are required to collect and report small business lending data under subpart B.

Business and small business definitions (§ 1002.106). Section 1002.106 adopts the SBA's definitions of "business concern or concern" and "small business concern" as set out in the Small Business Act and SBA regulations. Notwithstanding the small business size standards established by SBA regulations, for purposes of subpart B, a business is a small business if its gross annual revenue is $5 million or less for its preceding fiscal year. The SBA Administrator has approved the CFPB's use of this alternate small business size standard pursuant to the Small Business Act. Every five years after January 1, 2025, the need to adjust the gross annual revenue threshold for inflation or deflation will be determined using the Consumer Price Index for all Urban Consumers.

3. Compiling, Maintaining, and Reporting Small Business Lending Data (§§ 1002.107 through 1002.111)

Compilation of reportable data (§ 1002.107). Section 1002.107 addresses several aspects of collecting data on covered applications from small businesses. Section 1002.107(a) requires financial institutions to compile and maintain the data points enumerated in § 1002.107(a)(1) through (20). These data points must be collected and reported in accordance with the rule and the Filing Instructions Guide that the CFPB will provide for the appropriate filing year. Certain of these data points are or could be collected from the applicant (or otherwise determined based on information from appropriate third-party sources); other data points are based on information within the financial institution's control. Appendix E provides a sample data collection form for requesting protected demographic information. Although the form reflects a number of legal requirements applicable to collection, use of the form itself is not mandatory. It is intended as an available implementation resource for lenders, who can make use of it if they so choose.

Section 1002.107(c)(1) provides that covered financial institutions must not discourage an applicant from responding to requests for applicant-provided data and must otherwise

maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. Where data are collected directly from the applicant, § 1002.107(c)(2) identifies certain minimum provisions that must be included within financial institutions' procedures in order for them to be considered "reasonably designed." The rule also addresses what financial institutions should do if, despite having such procedures in place, they are unable to obtain certain data from an applicant. Pursuant to § 1002.107(b), financial institutions are permitted to rely on information from the applicant or appropriate third-party sources, although for most data points if the financial institution verifies the information provided it must report the verified information. Section 1002.107(d) permits financial institutions to reuse certain previously collected data in certain circumstances.

Firewall (§ 1002.108). Section 1002.108 implements section 1071's requirement that certain data collected pursuant to section 1071 be shielded from certain persons if feasible; the CFPB refers to this as the "firewall." Pursuant to § 1002.108(b), if an employee or officer of a covered financial institution or a covered financial institution's affiliate is involved in making any determination concerning a covered application from a small business, that employee or officer is prohibited from accessing the applicant's responses to regarding protected demographic information requested under this final rule.

However, pursuant to § 1002.108(c), this prohibition does not apply to an employee or officer if the financial institution determines that employee or officer should have access to the applicant's responses to the financial institution's inquiries regarding the applicant's protected demographic information, and the financial institution provides a notice to the applicant regarding that access. The notice must be provided to each applicant whose information will be accessed or, alternatively, the financial institution may also provide the notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants or all applicants for a specific type of product. The CFPB is

providing sample language that a financial institution can, but is not required to, use for this notice.

Reporting of data to the Bureau (§ 1002.109). Section 1002.109 addresses several aspects of covered financial institutions' obligations to report small business lending data to the CFPB. First, § 1002.109(a) provides that data must be collected on a calendar year basis and reported to the CFPB on or before June 1 of the following year. Section 1002.109(a) also addresses collection and reporting requirements of subsidiaries of financial institutions and reporting requirements of financial institutions where multiple financial institutions are involved in a transaction. Second, the CFPB lists in § 1002.109(b) the information that financial institutions are required to provide about themselves when reporting data to the CFPB, including the financial institution's name, headquarters address, contact person, Federal prudential regulator, institutional identifiers, parent entity information, as well as information on the type of financial institution it is, and whether it is reporting covered applications voluntarily. Finally, § 1002.109(c) addresses technical instructions for the submission of data to the CFPB, including information about the Filing Instructions Guide, which the CFPB will provide for the appropriate year.

Publication of data and other disclosures (§ 1002.110). Section 1002.110 addresses several issues regarding the publication of small business lending data. Section 1002.110(a) provides that the CFPB will make available to the public, on an annual basis, the data submitted to it by financial institutions. These data will be made available subject to deletions or modifications made by the CFPB, if the CFPB determines that such deletions or modifications would advance a privacy interest. Part VIII below discusses the CFPB's preliminary assessment of how best to determine appropriate pre-publication modifications and deletions, particularly in light of re-identification risk to small businesses and their owners. Section 1002.110(b) provides that the CFPB may compile and aggregate data submitted by financial institutions and may publish such compilations or aggregations.

Section 1002.110(c) requires a covered financial institution to publish on its website a statement that its small business lending data, as modified by the CFPB, are or will be available from the CFPB. Section 1002.110(d) sets forth when a covered financial institution shall make this statement available and how long the financial institution shall maintain the statement on its website. These requirements satisfy financial institutions' statutory obligation to make data available to the public upon request.

Finally, § 1002.110(e) prohibits a financial institution or third party from disclosing protected demographic information, except in limited circumstances. Section 1002.110(e)(1) prohibits a financial institution from disclosing or providing to a third party the protected demographic information it collects pursuant to the rule, except to further compliance with ECOA or Regulation B or as required by law. Section 1002.110(e)(2) prohibits a third party that obtains protected demographic information for the purpose of furthering compliance with ECOA and Regulation B from any further disclosure of such information, except to further compliance with ECOA and Regulation B or as required by law.

Recordkeeping (§ 1002.111). Section 1002.111 addresses several aspects of the recordkeeping requirements for small business lending data. First, § 1002.111(a) requires a covered financial institution to retain evidence of compliance with subpart B, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the CFPB pursuant to § 1002.109. Second, § 1002.111(b) requires a covered financial institution to maintain, separately from the rest of an application for credit and accompanying information, an applicant's responses to a financial institution's inquiries regarding the applicant's protected demographic information. Finally, § 1002.111(c) requires that, in compiling, maintaining, and reporting its small business lending application register, as well as the separately maintained protected demographic information pursuant to § 1002.111(b), a financial institution may not include any personally identifiable information concerning any individual who is, or is connected with, an applicant.

4. Other Provisions (§§ 1002.112 through 1002.114)

Enforcement (§ 1002.112). Section 1002.112 addresses several issues related to the enforcement of subpart B. First, § 1002.112(a) states that a violation of section 1071 or subpart B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA. Second, § 1002.112(b) provides that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. Such an error is presumed not to violate ECOA or subpart B if the number of such errors do not exceed the thresholds set forth in appendix F. Third, § 1002.112(c) identifies four safe harbors under which certain errors—specifically those regarding the application date, census tract, and NAICS code data point, along with incorrect determinations of small business status, covered transaction, and covered application—do not constitute violations of ECOA or subpart B. Relatedly, in part VII below, the CFPB discusses its intention to consider, for financial institutions subject to the CFPB's jurisdiction, good faith efforts to comply with the rule and will not generally assess penalties for errors in data reporting. The CFPB will conduct examinations on data during the grace period to assist institutions in diagnosing compliance weaknesses.

Severability (§ 1002.113). Section 1002.113 provides that any provision of subpart B, or any application of a provision, is stayed or determined to be invalid, it is the CFPB's intent that the remaining provisions shall continue in effect.

Effective date, compliance date, and special transitional rules (§ 1002.114). Section 1002.114 addresses several issues related to the rule's effective date, when covered financial institutions are required to comply with the rule, and associated transitional rules. Section 1002.114(a) provides that this final rule will become effective 90 days after publication in the *Federal Register*. However, pursuant to § 1002.114(b) compliance with the final rule is based on a tiered compliance date schedule. Compliance with the rule beginning October 1, 2024 is required for covered financial institutions that originate the most covered credit transactions for

small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026. Next, § 1002.114(c) provides certain transitional provisions that permit covered financial institutions to begin collecting protected applicants' demographic information beginning 12 months prior to their applicable compliance dates. Finally, § 1002.114(c) also permits financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use any reasonable method to estimate their volume of originations to small businesses for this purpose.

D. High-Level and General Comments

1. High-Level and General Comments on the NPRM

High-level and general comments received on the NPRM are discussed here, followed by a discussion of comments specifically addressing implementation issues and comments regarding section 1071's overlap with other data reporting regimes. Comments received on specific aspects of the Bureau's proposed rule are discussed in the section-by-section analyses that follow in this part V. Comments regarding the privacy analysis are addressed in part VIII below, and regarding the Bureau's analysis of impacts in parts IX through XI.

Comments Received

Support for section 1071's statutory purposes was nearly universal amongst commenters, at least at a high level of generality. (See also the section-by-section analysis of § 1002.101 below.) The vast majority of industry commenters praised the purposes of the rule, and the intentions behind section 1071 and ECOA generally, while offering criticisms of specific provisions of the proposed rule.

Broad support. A number of commenters offered general support for the rule, including its scope and its purposes. For example, a trade association stated its appreciation for the comprehensive nature of the proposed rule, noting that the Bureau conducted extensive outreach and worked at ensuring proper and effective rulemaking consistent with legislative intent while

allowing for technical improvements and practical considerations. A community group stated that to achieve the community development and fair lending purposes of the statute, the data collected and reported under the rule needs to be comprehensive in its coverage of lenders and must capture key credit underwriting factors as controls for analyses of gender and racial disparities in lending. The commenter also stated that the Bureau recognized that annual disclosure of lending data by the vast majority of small business lenders is a prerequisite for adequate oversight, given that existing data are insufficient. The commenter further explained that existing data consist of periodic surveys that are not usually lender specific and that are inconsistent in the amount of detail provided on key underwriting variables needed for analyses of community needs and fair lending compliance.

A number of commenters offered more specific support for the rule's purposes. One trade association noted that its members have been active in the development of policy supporting section 1071, including participation as small entity representatives during the SBREFA process. A number of banks, a credit union, and several trade associations expressed support for the statutory purposes of section 1071 and the Bureau's proposed rule. One trade association stated that the NPRM was a key opportunity to explore lending data and expand responsible small business lending, which was important to the financial well-being in the communities served by its members, as well as stability of the overall financial system.

A cross-sector group of lenders, community groups, and small business advocates stated that it is critical to require lenders to collect and report applicant data for as many small minority-owned and small women-owned businesses as possible, to uphold congressional intent and establish a comprehensive database.

Several commenters focused on the importance of the fair lending purpose of section 1071. One trade association stated its unequivocal agreement with the purpose of preventing discrimination on the basis of ethnicity, race, and sex, and noted that CDFI lenders share the

Bureau's core value of protecting consumers by providing fair and transparent financial products and services to all customers.

A number of commenters, including community banks, credit unions, and trade associations, offered their appreciation for the stated intentions of the rule in the NPRM—to support fair lending and business and community development—but expressed concern about the effect of the rule as proposed on lending and compliance costs. A bank stated that, while it supported the statutory goals of section 1071, the proposed rule would result in restricted, higher-priced credit for the groups the proposal is meant to benefit. A trade association for community banks likewise supported the proposed rule and the congressional intent behind section 1071, but asserted it was necessary to fine-tune specific proposed provisions to mitigate costs and ensure small business lenders remain active, particularly those serving the most underserved markets. Another trade association supported the goals of the NPRM, but worried that the proposed would unduly burden credit unions and would discourage them from offering business credit.

Broad criticisms. Some industry commenters expressed disagreement with the enactment of section 1071 and therefore opposed the rule in its entirety. One lender opposed the rule on the grounds that it already complies with fair lending laws, and that the rule would force a choice between compliance and market exit. Another argued that the Dodd-Frank Act may have intended that section 1071 create a HMDA-like data reporting mechanism, but warned that small business lending is not "cookie-cutter," is not automated, and is highly relationship driven. Another commenter claimed that it would be impossible to derive any meaningful or statistically valid conclusions from a comparison of small business loans.

A credit union stated that the publication of data collected and reported pursuant to section 1071 would not permit it to better identify its members' unmet small business lending needs aside from confirming if there is a significant difference in the number of business borrowers that are female or of a specific race.

One trade association noted that credit unions may only serve their members and are limited by Federal statute in their ability to offer business loans; as a result, data collected from them would not be comparable to data collected from lenders without similar limitations in who they may serve.

Other commenters, without specifically opposing the enactment of section 1071, expressed more general concerns about the NPRM. Trade associations for online lenders supported the policy goals of the NPRM and also believed that modifications should be made to support responsible innovation in banking without unintentionally stifling the efficiency and innovation that digital lending platforms can provide. A bank supported the enforcement of fair lending laws and appreciated the Bureau's dedication to better supporting small businesses, but was concerned about aspects of the NPRM. A One commenter inquired as to why the Bureau, in charge of consumer financial protection, was concerned with business loans, and claimed that the Bureau was engaged in overreach.

The role of online lenders. Two trade associations suggested that online and "fintech" lenders were important to expanding access to financing, particularly for Black- and Hispanic-owned businesses. These commenters expressed their support for greater transparency and expanding access to sustainable and fair credit in small business lending. They also asserted that women-owned and minority-owned small businesses were disadvantaged in applying for small business lending at traditional banks, and that nontraditional online lenders play a crucial role in modernizing financial services and improving access and outcomes for small businesses. One of the commenters noted that, in particular, the use of artificial intelligence, machine learning, and alternative data would expand lending to minority-owned small businesses.

Uniqueness of small business lending. One bank stated that it was hard to perform comparative analysis on small business loans because they are unique and manually unwritten. Further, the commenter stated that the absence of certain credit criteria or metrics—such as collateral, loan-to-value, debt-to-income, debt service coverage ratio and the like—in the data

points to be collected by the rule could cause reviewers of published data, such as consumer groups and agency examiners, to draw incorrect conclusions on variances in rates and terms of loans.

Data accuracy. A bank and a trade association asserted that the Bureau's final rule should focus on ensuring the collection and reporting of high-quality data that maximizes data accuracy and reliability. These commenters noted that inaccurate, unreliable, and poor-quality data could undermine the statutory purposes of section 1071, which the commenters said were to promote access to credit for minority-owned and women-owned small businesses. They further stated that poor data quality could also lead to misguided and factually unsupported fair lending allegations, which could damage the reputations of responsible lenders and subject them to unnecessary investigative burdens and lawsuits, all of which could undermine the Bureau's credibility and waste the Bureau's time and resources. Based on these premises, the commenters sought the elimination of certain provisions which they believed would undermine the collection of accurate, reliable, high-quality data (discussed in the applicable section-by-section analyses that follows).

Specific uses of small business lending data. Two trade associations urged the Bureau to explain how it would use the data collected under this rule, including how it would analyze data collected by the rule. One claimed that the NPRM did not outline potential uses for small business lending data, and asserted that the Bureau should provide notice and comment on potential uses of the rule, even after the issuance of the final rule. The commenter stated that it is important for the Bureau to issue guidance on how it plans to analyze data reported under the rule, including how it will assess whether lenders appropriately serve relevant markets, which can vary significantly by lending product.

The other commenter stated that the Bureau should clearly indicate how implementing the proposed framework will advance fairness and understanding of small business credit needs, that requirements should tie to satisfying stated objectives and designed no more broadly than

necessary to reduce unnecessary costs to small business lenders. The commenter stated its belief that by clearly indicating how it will use data it collects, including whether and how it will make such information public, the Bureau will allow stakeholders to assess better the costs and benefits of the overall framework. Additionally, the Bureau should carefully consider potential unintended consequences—especially related to data publication—that could reduce small business credit access and chill further innovation aimed at better serving small businesses.

Responses to Comments Received

The Bureau agrees with the general comments made in favor of keeping the scope of the proposed rule broad. In general, the Bureau believes that broad coverage of institutions and products as requested by a number of commenters is consistent with the statutory purposes of section 1071. The Bureau does not believe that a more limited approach to scope—including the various limitations on the coverage of certain types of financial institutions and products—would be consistent with the statutory purposes of section 1071. The Bureau addresses these issues directly in the section-by-section analyses of proposed §§ 1002.104 and 1002.105 below.

Broad support. Regarding the comment on the scope of the rule, that the Bureau should continue to monitor U.S. Census data to ensure that its definition of small business in this rule continues in the future to be inclusive enough such that the proportion of non-small minority-owned businesses do not exceed 1 percent of all businesses, the Bureau believes that its adoption of an inflation-adjustment for the gross annual revenue threshold in the definition of small business under § 1002.106(b) should help ensure that, over time, the proportion of businesses covered by the rule does not decline. In any case, the Bureau will monitor data concerning the prevalence of small businesses in the context of the economy at large.

Broad criticism. Regarding the comment of a lender that it already complies with fair lending laws, the Bureau notes that continuing enforcement of fair lending laws, and tools such as this data collection rule that facilitate such enforcement, remains necessary because while the commenter may comply with fair lending laws, some lenders may not and a subset of those may

repeatedly violate fair lending laws. Additionally, enabling identification of business and community development needs and opportunities is an independent purpose of the statute. Compliance with fair lending laws does not necessarily permit creditors, communities, and governmental entities to identify business and community development needs and opportunities. As to the assertion that the rule would force a choice between compliance and market exit, the Bureau's decision to increase the originations threshold from 25 to 100 transactions will mitigate any risk of such disruptions, even if slight or speculative. Regarding the comment that small business lending is more individualized and highly relationship driven, the Bureau agrees this is true for much small business lending and the final rule is crafted to acknowledge this, as discussed in the section-by-section analyses that follow. But that does not prevent small business lending data from facilitating fair lending enforcement and identifying business and community development needs and opportunities.

As to comments that quarrel with the statutory mandate and question the utility of the data in general terms, the Bureau is bound by the statute and congressional intent. Additionally, many described potentially helpful uses of the data.

Regarding the assertion that the Dodd-Frank Act was only intended to regulate larger institutions, and that smaller lenders should be exempted from the rule to avoid harming those the Act was intended to protect, the Bureau notes that while much of the Dodd-Frank Act explicitly addresses larger entities, section 1071 does not contain such limitations. Nonetheless, Bureau has made changes in the final rule in response to public comment that will have the effect of reducing compliance burden on small lenders. For example, the Bureau has raised the coverage threshold from 25 to 100 originations for purposes of determining which financial institutions must comply with the rule, provided longer compliance periods for lenders with lower volumes of small business lending, and provided for a variety of safe harbors and a good faith error provision which will provide some leeway to smaller-volume lenders. The Bureau implemented these changes in the final rule to limit its impact on institutions with lower volumes

of lending to small businesses. The Bureau has also complied with the Dodd-Frank Act requirements under SBREFA and the RFA to assess and mitigate any impact on smaller financial institutions.

The Bureau addresses the effect of the rule on lending and compliance costs, in its impact analyses in parts IX and X below. Regarding the commenter that stated that the rule would not meet its purposes and would result in restricted, higher-priced credit to the very groups the proposal is meant to benefit, the Bureau's analysis suggests that any changes in the cost of credit would be small and unlikely to lead to a significant change in the per-unit cost of loans to individual applicants even from the smallest lenders. The Bureau has made various changes from the proposal in finalizing this rule intended to mitigate costs for smaller-volume lenders serving small businesses in response to comments expressing concern that credit unions and other financial institutions remain active small business lenders.

Regarding the concern that data from credit unions would not be comparable to data collected from other kinds of lenders, the Bureau observes that, under § 1002.109(b), lenders must provide information on financial institution type. Credit unions thus must self-identify themselves in submitting data to the Bureau, and the various limitations on lending by credit unions can be taken into account in analyses of data collected and reported under this rule.

Regarding the comment that the rule should be modified to support responsible innovation in banking without unintentionally stifling the efficiency and innovation that online lenders may provide, the Bureau agrees that it does not wish to stifle responsible innovation. The Bureau has endeavored to be responsive to these concerns in the final rule; to the extent that specific concerns were raised, they are addressed in other provisions of this preamble. Regarding the comment that the rule as proposed was too complex even for most forward-leaning, technologically adept financial institutions, the Bureau disagrees, noting that while this rule is new, it is not dissimilar to other similar data collection regulations in complexity, such as those for HMDA, CRA, and the CDFI Fund. Further, the Bureau has made a number of changes to this

final rule to make compliance easier for smaller-volume lenders, or to exclude them from reporting requirements entirely.

Regarding the comment asserting that the Bureau was overreaching by regulating business loans, the Bureau notes that section 1071 explicitly requires the Bureau promulgate a rule to collect data on applications for business credit.

The role of online lenders. Regarding assertions made that nonbank online lenders were important to expanding access to financing for Black- and Hispanic-owned businesses in particular, that traditional lenders provided fewer loans to women-owned and minority-owned small businesses, and that technology improved access and outcomes for small businesses, the Bureau believes that the broader conclusion to draw from these assertions is that the data that will be collected under this rule is needed to assess and further analyze such claims.

Uniqueness of small business lending. Regarding the comment that it is not possible to perform comparative analysis on small business loans because they are unique and manually unwritten, the Bureau disagrees. Other commenters, as set out in the section-by-section analysis of § 1002.101, stated that the data points proposed in the NPRM are fulsome and can contribute to sophisticated analysis and comparison of small business loans. Regarding the comment that the Bureau cannot make comparisons absent additional credit metrics beyond those it proposed to collect and that other reviewers of published data could draw incorrect conclusions, the Bureau does not agree that additional credit metrics are necessary in order to draw meaningful analyses from the data. While the Bureau believes, all things equal, that additional data points would enrich the analysis for users of the data, the Bureau also believes that certain of these metrics can be derived, at least in part, from other data points, and it notes that other commenters varyingly opposed any data points proposed pursuant to ECOA section 704B9(e)(2)(H) or requested that the Bureau collect as few data points as possible. Industry comments were also contradictory on this point; while many commenters suggested the Bureau had proposed too many data points, commenters also asserted that the Bureau was not collecting enough data to

draw proper conclusions. The Bureau believes its final rule strikes an appropriate balance between comprehensiveness and minimizing burden and complexity to financial institutions.

Data accuracy. Regarding comments that the final rule should focus on ensuring the collection and reporting of high-quality data, the Bureau agrees. To this end, it has adjusted various provisions in the final rule in response to comments received. In addition, other changes, while made for other reasons, render moot certain comments on accuracy concerns. For example, the decision not to finalize the proposed visual observation and surname requirement, discussed in the section-by-section analysis of § 1002.107(a)(19)), moots the relevance of comments about the accuracy of visual observation.

Specific uses of small business lending data. Regarding the comment that the Bureau should have explained and provided an opportunity for notice and comment for its intended uses of the data collected under this rule, the Bureau disagrees, both that it did not explain what the data would be used for, and that it is obligated to identify specific uses of the data or to provide the public an opportunity to comment on proposed specific uses of the data. Initially, section 1071 itself establishes the intended purposes and uses of the collection and publication of the data—namely, the facilitation of fair lending enforcement and the identification of business and community development needs and opportunities. Next, while section 1071 requires the Bureau to collect and publish data on small business lending applications, it does not require the Bureau to identify its intended uses of the data. Moreover, even if the Bureau articulates specific uses of the data, as the statute explicitly provides, the Bureau is not the only intended user of the data. Enforcement of fair lending laws includes ECOA, which is enforced not only by the Bureau but by many other Federal agencies.[288] Further, for purposes of identifying business and community development needs and opportunities, the statute specifically names communities, governmental entities, and creditors as potential users of the data collected under this rule. Thus, even if the

[288] *See* 15 U.S.C. 1691c (listing Federal agencies with authority to enforce ECOA), 1691e (providing private attorneys, the Department of Justice, and the Department of Housing and Urban Development the authority to bring civil suits to enforce ECOA).

Bureau disclosed its intended uses—which could change over time depending on the data received and the needs identified—other stakeholders could make different use of the data.

Regarding comments about how the Bureau intends to make the data public, including whether and how it will make such information public, and that the Bureau should carefully consider potential unintended consequences especially related to data publication, the Bureau describes its intended privacy analysis in part VIII below. Regarding concerns that the Bureau might reduce small business credit access and chill further innovation aimed at better serving small businesses, the Bureau has considered various comments concerning access to credit and innovation, which it addresses throughout the section-by-section analyses below.

2. Comments regarding Implementation

Comments Received

Several commenters said that the Bureau should provide additional implementation or guidance resources about the final rule, specific parts of the rule, or regarding how the rule applies in specific situations. Some of these commenters requested specific forms of guidance or specific resources, such as frequently asked questions, guides, or templates. One commenter said that the final rule should have a table of contents. Some commenters said that the Bureau should provide training on collecting and reporting data or training on how to comply with the rule generally. One commenter said the Bureau should develop a data literacy program. Another commenter said that the Bureau should use all of its available tools to educate and support lenders and their vendors, including no-action letters, advisory opinions, webinars, guides, and other materials.

Some commenters requested specific content in implementation and guidance resources. Many commenters requested additional guidance on specific requirements or data points, and those comments generally are addressed in the relevant section-by-section analyses later in this part V. Additionally, one commenter said that the Bureau should develop materials showing how to do the research needed to find appropriate regulation sections and related commentary. The

same commenter said that implementation and guidance resources should provide examples. Another commenter said that implementation resources should address matters not typically addressed in supervision guides. A few other commenters said that implementation materials should be detailed and/or comprehensive.

A few commenters said that implementation materials and guidance should be provided at specific points in time. Two commenters requested that the Filing Instructions Guide be provided at least six months before data collection is required, and another commenter said that the Filing Instructions Guide should be provided early in the implementation process. This commenter also said that the compliance date should take into account the delayed availability of the Filing Instructions Guide. A different commenter said that guidance should be provided before, during, and after the compliance date.

A few commenters said that the Bureau should develop outreach programs or provide additional access to Bureau staff to address questions or issues that arise during implementation of the rule. One commenter said that the Bureau should commit to a formal request for comments on all facets of implementation and compliance with the rule. This commenter also said that the Bureau should dedicate staff to provide definitive answers to industry members that contact the Bureau and that it should not be possible for community banks to be criticized or penalized for following the instructions or answers obtained from Bureau staff. Another commenter said that, during the implementation period, the Bureau should regularly communicate with vendors and covered financial institutions and consider reasonable extensions of the rule's compliance date if issues that could affect industry preparedness arise.

Another commenter said that the Bureau should create a compliance liaison office that has the primary goal of supporting industry in their regulatory submissions and fair lending analyses. This commenter said that this liaison office would require multiple types of specialists in order to function properly and would need ties to other teams so that feedback loops work properly. This commenter further said that questions on specific data entry topics should be

saved and communicated to the Office of Regulations and others at the Bureau. The commenter said that Bureau guidance provided to individual industry members should be converted into frequently asked questions and tagged for purposes of amending existing regulations. The commenter further said providing verbal guidance is helpful, but slow, and potentially inconsistent. This commenter also alleged that the Bureau does not track data related to questions received and asserted that such lack of tracking limits the responsiveness of the Bureau in adapting regulations to properly include current industry practices. A different commenter said that the Bureau should consider holding a series of public meetings or hearings to take testimony from small businesses, lenders, and trade associations regarding the impact that implementation of the proposed rule will have on each group as well as on the privacy risks inherent in the proposed data collection and public reporting by the Bureau.

Finally, there were two comments on supervision and enforcement related issues. These commenters said that the Bureau should coordinate with other Federal agencies to develop model examination procedures in advance of the Bureau publishing a final rule. One of these commenters further predicted that, absent a clear description of the methodologies that might be employed to perform fair lending analysis, there would likely be a period where prudential regulators' examination expectations are in flux and, perhaps, materially inconsistent.

Responses to Comments Received

The CFPB aims to provide a wide variety of guidance about the legislative rules it issues pursuant to the Administrative Procedure Act. Although this guidance may include materials such as advisory opinions, interpretive rules, and general statements of policy, the CFPB's guidance more often includes other materials and activities that generally reiterate requirements or positions that previously have been announced in a legislative rule or elsewhere (hereinafter "implementation resources"). These implementation resources include such documents and materials as rule summaries, compliance guides, checklists, factsheets, frequently asked questions, institutional and transactional coverage charts, webinars, and other compliance aids

directed to regulated entities, the general public, or agency staff (*e.g.*, staff manuals). In recent years, the CFPB has developed a process for preparing and releasing these implementation resources. For rules such as this one, the CFPB generally engages in a phased approach and attempts to provide various implementation resources throughout the implementation period and for some period after the compliance date.

The CFPB has provided, simultaneously with this rule's release, a Filing Instructions Guide, an executive summary, and other resources to help financial institutions understand and comply with the final rule. These materials are available on the CFPB's website.[289]

Additionally, the CFPB is planning to release a Small Entity Compliance Guide. This Small Entity Compliance Guide will provide a detailed and comprehensive summary of the rule's requirements, will include examples, and will be separate from and different than any examination manuals or other supervisory materials. The CFPB also anticipates providing other written implementation resources to assist industry, vendors, and others. When providing implementation resources, the CFPB will consider all of its available tools and select the tool that it believes is best suited to the content that the CFPB is addressing in the guidance as well as the timing of the guidance. Individuals who would like to be notified when the CFPB releases additional implementation resources or other guidance can sign up to receive notifications. However, with regard to one commenter's request, the CFPB does not anticipate developing materials attempting to show members of industry how to conduct research. The CFPB believes that such materials are outside the scope of the CFPB's implementation and guidance function and are regularly provided by other sources.

With regard to the comments addressing outreach, the CFPB notes that it has and anticipates that it will continue to engage in ongoing outreach related to this rulemaking. As discussed in part III above, the CFPB engaged in considerable outreach to industry and other

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[289] See https://www.consumerfinance.gov/compliance/compliance-resources/small-business-lending-resources/small-business-lending-collection-and-reporting-requirements.

stakeholders in the years leading up to issuing this final rule, and intends to continue to engage with industry, along with vendors and other stakeholders, as they prepare to comply with the rule. With regard to one commenter's request that the CFPB hold a series of public meetings or hearings to take testimony from small businesses, lenders, and trade associations regarding the impact that implementation of the proposed rule will have on each group prior to issuance of the final rule, the CFPB did not believe this was needed given the number of substantive comment letters it received and the opportunity provided to stakeholders to submit comments on the proposed rule and its potential impact. Nonetheless, as described in part III.B above, the CFPB has been conducting technical outreach with third-party software providers that serve financial institutions and software and technology staff from financial institutions that are likely to have to report small business lending data to the CFPB. With these software vendors and technical staff, the CFPB has held and, after publication of this final rule, will continue to hold discussions concerning the technical systems and procedures the CFPB will provide for financial institutions to submit data. The CFPB expects that its outreach efforts will provide a channel of communication for industry, vendors, and other parties to constructively provide feedback on the CFPB's existing implementation resources as well as provide direction for future implementation resources.

As set out in more detail above, some commenters said that the CFPB should provide staff to address questions or issues that arise during implementation of the rule. One commenter suggested that the CFPB develop a compliance liaison office. Similar to what it has done with inquiries about HMDA/Regulation C, the CFPB anticipates that it will use its regulatory inquiries function to assist individual inquirers who have specific questions about the rule or how to submit data pursuant to the rule. This function is designed to provide inquirers with brief, informal assistance on regulatory or technical issues. However, in part because of Administrative Procedure Act constraints, the CFPB cannot provide binding or official interpretations through this informal function. In addition, there are other limits on the regulatory inquiries function and

on the CFPB's other implementation resources. For example, the CFPB does not provide legal advice through the regulatory inquiries function.

In addition, the CFPB already reviews the inquiries it receives and uses information gleaned from those reviews to help the CFPB prioritize provision of various other types of guidance. Thus, when the CFPB receives multiple individual inquiries about the same topic, the CFPB often prioritizes that topic for webinars and various forms of written guidance, potentially culminating in revisions to the Official Interpretations or the regulatory text after a notice-and-comment process. Thus, as requested by one commenter, the CFPB already tracks data regarding the inquiries it receives and, as appropriate given the nature of the inquiries and the CFPB's resources, uses them as a basis for frequently asked questions, other implementation resources, or other action. The CFPB anticipates doing the same with inquiries received about this rule.

With regard to the comments related to supervision, the CFPB notes that it will coordinate with other Federal agencies to develop examination procedures in connection with the rule, and anticipates publishing such procedures in advance of the rule's first compliance date.

3. Comments regarding Overlaps with Other Data Reporting Regimes

Comments Received

General comments. Several commenters cast the overlap between this rule and other Federal data collection rules in a positive light. A community group and a CDFI lender observed that small business lending data are collected piecemeal and haphazardly across multiple agencies—including the Federal bank agencies, the SBA, and the CDFI Fund—and that this rule could be used to consolidate small business lending data reporting across agencies to reduce administrative burden by satisfying requirements across programs for various CRA and fair lending uses.

Two commenters noted that the existence of other data collection regimes, including Federal reporting requirements and private-sector reporting (such as HMDA; the SBA 7(a), 504, and Community Advantage Loan programs; CDFI Fund reporting; the Wells Fargo Diverse

Community Capital Program; and the Paycheck Protection Program) suggested that compliance with this rule is feasible because these other data collections make this rule well-understood in conceptual, technological, and procedural terms. One commenter noted that these other data collections cover all but three of the data points in the NPRM (application method, application recipient, and denial reasons).

Several commenters stated their appreciation for the Bureau's attempts to harmonize this rule with others and avoid duplicative data reporting. One bank noted that avoiding duplicative reporting was critical for community banks, for which even slight differences in reporting rules would be burdensome, taking away from time that could be spent with customers.

Many other commenters, including lenders, trade associations, a business advocacy group, and a group of State banking regulators, noted the overlap between this rule and other data collection regimes, and requested that the Bureau harmonize this rule with other similar data reporting regulations, with which lenders were familiar, to minimize challenges, complexity, duplication, potential burden on lenders, and potential errors in the data. These commenters named HMDA/Regulation C, CRA, FFIEC Call Reports, Regulation B/ECOA, and FinCEN's Beneficial Ownership Rule as specific examples of other rules that the required harmonization with this rule and that, in many cases, the Bureau itself identified as overlapping.

Commenters argued that, by borrowing from existing frameworks or systems, the Bureau could reduce complexity and facilitate industry compliance, allowing financial institutions to leverage existing processes, training and institutional knowledge. For instance, some commenters suggested that the thresholds in this rule be aligned with those of HMDA and CRA. Other commenters suggested that the Bureau could adopt the framework in FinCEN's beneficial ownership rule for this rule's method of determining minority-owned and women-owned status, rather than layering on a new definition of "primary owners," which they suggested would add unneeded complexity to the loan origination process.

Industry commenters also asserted that by aligning this rule with existing rules, such as HMDA and CRA, the Bureau could avoid imposing inconsistent or duplicative reporting requirements to avoid errors from regulatory confusion and urged the Bureau to avoid requiring lenders to report different data for the same transaction.

Several other commenters identified other concerns with overlapping reporting. One bank noted that, while the Bureau tried to harmonize its requirements with other rules, even slight deviations between rules cause problems, which may confuse customers and make them more likely to refuse to provide data. Another bank noted that some HMDA and CRA data aggregation and submission systems rely upon identifiers to separate and process these different datasets, which the bank suggested was another reason to keep loans reportable under this rule separate from those reportable under HMDA.

A number of industry commenters and a group of State banking regulators requested that the Bureau not require financial institutions that already report data to duplicate their work. One stated that banks already report a significant amount of data to prudential regulators, and that the Bureau should eliminate duplicative reporting. Other commenters asked that the Bureau work with Federal agencies to align this rule with the FFIEC Call Report, and CRA and HMDA regulations to avoid duplication, reduce compliance burden, and reduce the potential for data errors. Two banks urged the Bureau to exempt loans reportable under other data reporting regimes, such as HMDA- and CRA-reportable loans. Another noted that its staff is trained on the established requirements of HMDA and CRA, and that removing duplicative or inconsistent requirements would reduce compliance costs, providing savings that could be passed on to the borrowers. Two community-oriented lenders suggested that the Bureau exempt all credit applications under Federal agency programs, as the data points proposed in this rule are already collected by that loan program's oversight agency (*i.e.*, SBA, USDA, etc.).

Two industry commenters suggested that the Bureau should first use existing small business lending data published by the government and private sector before collecting

additional data, thereby assessing the small business finance market without negatively impacting providers of capital to entrepreneurs. One bank asserted that the Bureau itself admitted it had enough data to analyze the small business lending market, and that the rule should focus on collecting data from non-depository institutions, as it would be duplicative to collect data from depositories, which provide data via the FFIEC and NCUA Call Reports and already have a history of being regulated.

Some industry commenters generally requested that the Bureau work out inconsistencies between this rule and other data collection regimes. Some offered more specific requests for harmonization. One suggested more alignment in terms of scope, coverage and exemptions between this rule, HMDA and CRA. Another commenter identified inconsistencies with existing Regulation B, citing the difference between its small business definition ($1 million or less in revenue) and the NPRM's proposed definition ($5 million or less). A CDFI lender observed that CDFIs report lending activity to the CDFI Fund, SBA, CRA, Opportunity Finance Network's annual member survey, and credit reporting agencies, and requested that the Bureau standardize data formats to match those used in CDFI Fund reporting to streamline data collection and minimize burden on CDFIs.

HMDA. A number of commenters identified overlap between this rule and HMDA/Regulation C, and noted that duplicative data would published in two places. Some industry commenters requested that the Bureau avoid inconsistent and duplicative reporting by excluding from HMDA reporting transactions reportable under this rule. Two trade association suggested a parallel rulemaking to amend Regulation C, timed with the release of this final rule.

On the other hand, other commenters suggested that HMDA-reportable loans should be excluded from this rule to avoid duplicative reporting, undue compliance burden, and regulatory confusion. A business advocacy group noted that the Bureau itself identified the overlap between HMDA-reportable loans and loans covered by this rule. A trade association suggested the Bureau could narrowly tailor an exemption by apply the rule only to financial institutions that report data

under HMDA, without an exclusion for HMDA-reportable loans by lenders that are not HMDA reporters, arguing that a narrowly tailored exclusion would serve the statutory purposes of the rule because commercial mortgage loans for small businesses would be captured under HMDA or this rule. A bank believed that duplicative reporting of HMDA-reportable applications did not serve the statutory purposes of the rule. A large bank disagreed with the Bureau's assertion that excluding HMDA-reportable transactions from this rule would add complexity to the analysis of data by requiring lenders to find and delete HMDA-reportable transactions from its submission to the Bureau; the bank argued that duplicative reporting was more complex. One lender stated that farm credit data are already collected from Farm Credit System lenders subject to HMDA.

A number of commenters identified, generally, inconsistencies between the proposed requirements for this rule and those of HMDA/Regulation C. Many industry commenters pointed out that many proposed data points in the NPRM would be similar to data points in Regulation C, and expressed concern that any differences in reporting requirements for these data points would lead to confusion and data errors. Two trade associations asserted that the overlap in data would create significant and needless complexities for covered lenders, and noted that there were inconsistencies between the rules despite the Bureau's attempts to limit them.

Several lenders requested that the Bureau harmonize this rule with Regulation C to the extent possible if no exemptions were possible. A large bank asked that the Bureau harmonize several data points—action taken, application date, and ethnicity, race, and sex of principal owners—because lenders would be able to collect these data just once for each small business applicant, increasing efficiency in the application process and facilitating compliance.

Some commenters addressed overlap between specific data points proposed in the NPRM and existing data point requirements under Regulation C. A number of industry commenters noted that for census tract, HMDA uses the tract where collateral is located while the Bureau proposed to use a waterfall approach of several addresses. Two lenders pointed out that HMDA does not have the firewall requirement proposed for this rule in the NPRM; one of these

commenters suggested that the final rule follow the HMDA approach (no firewall) for HMDA-reportable loans.

On the reporting of ethnicity, race, and sex of principal owners, two lenders noted that this rule and HMDA offer different answer choices. One of the commenters noted that lenders would provide two separate questionnaires regarding ethnicity, race, and sex for a single loan application, which could confuse applicants and make them decline to answer either one.

Several lenders noted that the proposed visual observation and surname provision, which does not require its use to determine the sex of a principal owner, was not aligned with the visual observation and surname requirement under Regulation C, which does require its use to determine the sex of a mortgage applicant. One stated that this disparity would cause confusion and errors in data collection. Another stated that for a loan application covered by both rules, the disparity would mean complying with one rule and violating the other.

Regarding credit purpose, a bank noted that a loan to a small business to purchase, improve, or refinance an apartment building would require different information to be collected and reported under both rules.

On action taken, one bank noted a disparity between the approaches of the proposed rule (one option for "incomplete" as an action taken) and of Regulation C (two different incompleteness options—one for a loan denial and the other for file closure) that it believed would cause difficulty, despite agreeing with the proposed rule's approach. Another bank noted that the proposed rule would require collection of gross annual revenue for the past fiscal year, while Regulation C requires the income used for the credit decision.

Community Reinvestment Act. A number of commenters noted the similarities between the small business and small farm data collected under CRA and this rule and suggested eliminating duplication. One community group stated that the data for this rule should replace CRA data, noting that this rule could replace the inconsistent, duplicative and inefficient collection of small business lending data with a comprehensive database. The commenter stated

that lenders and community groups both would prefer to consult with one database than to contend with two or more that are collected annually, and that this rule is likely to capture more data than the current CRA system. A bank suggested eliminating CRA reporting requirement as data collected under this rule would duplicate and surpass the CRA data points, but would not be interoperable as each rule would require different formatting, rounding, or coding. A minority business advocacy group and a joint letter from community and business advocacy groups requested that 1071 data be used for CRA examinations, just as HMDA data are. These commenters noted that current small business small farm data for CRA examinations is limited and not a good indication of whether lenders serve the most vulnerable businesses, and that the more robust dataset to be collected under this rule would be a better indicator.

One bank asked that the Bureau work with other Federal regulators to eliminate duplication with CRA data reporting, noting that CRA data already provides a good picture of lending to small business including agriculture. Another bank suggested that the Bureau, rather than create a new data collection requirement, exempt federally insured depositories and work with other Federal regulators to enrich existing CRA reporting to include the data the Bureau wants to collect under section 1071. The commenter noted that insured depositories already have robust CRA reporting systems, and generally already collect and report data required by the NPRM to meet CRA obligations. The bank stated that the use of CRA systems to report 1071 data would result in the faster delivery of information the Bureau needs at lower cost to reporters. The bank also suggested that the CFPB should focus this rule on non-depository institutions that do not now have robust reporting requirements. The commenter also stated that institutions are already comfortable with CRA reporting and understand how regulators use such information, but noted that they did not understand how data collected pursuant to section 1071 would be used and was concerned the Bureau would use it to retaliate and micromanage lenders, as it did in the consumer lending space.

A number of lenders asked that the Bureau work collaboratively with the prudential regulators to eliminate inconsistencies and duplication with CRA data reporting. A CDFI lender asserted that successful implementation of this rule would necessitate coordination of data requirements and encouraged the Bureau to coordinate with the CRA agencies to align rules to ensure that lenders covered by CRA continue to meet credit and community development needs of small businesses, particularly those owned by women and minorities. One bank noted that duplicate and inconsistent requirements would increase the compliance burden on lenders as well as data errors, and that inconsistent data reporting would require more resources without adding value. A bank stated that inconsistent definitions could cause community stakeholders to misinterpret data and draw incorrect conclusions regarding a lender's performance.

One bank supported a more streamlined approach taking advantage of existing CRA processes and definitions to reduce costs and burdens related to this rule, which in turn would ease burdens on lenders and reduce costs that would ultimately be passed on to the borrower. Another commenter suggested that the Bureau work closely with the agencies working on the modernization of CRA rules to reduce duplication and the friction caused by differences between the rules.

A number of commenters identified specific areas of inconsistency between the CRA and this rule. Several banks and a trade association noted that the small business definition proposed in the NPRM, businesses with gross annual revenue greater than $5 million, was inconsistent with the CRA definition, which included an asset threshold and originated loans less than $1 million. One bank stated that this discrepancy was likely to cause staff confusion and possible data integrity issues. A trade association requested that the Bureau adopt the CRA's small business definition using a loan size of $1 million and other Federal laws to create alignment for those lenders that already comply with existing regulations, and that a focus on businesses with $1 million in revenues would support the Bureau's goal of promoting small business lending in underserved areas to underserved small businesses, that are more likely to be closer to $1 million

rather than $5 million in revenue. Two banks stated that banks may receive more CRA credit for small business loans originated to businesses with $1 million or less in gross annual revenues.

Several commenters noted that the rule proposed a waterfall approach to using addresses to determine census tract, while CRA regulations inquire only about where loan funds are used. One bank commented that this meant that a single loan could result in the reporting of different census tracts for purposes of the two rules. Another bank suggested that a better way to achieve consistency with CRA was to allow lenders reporting under this rule to choose which of the three addresses to use and require the institution to report which address type it used.

Some industry commenters noted that the Bureau reduce its gross annual revenue threshold for its small business definition under this rule from $5 million to $1 million to align with CRA. A trade association noted that the $1 million threshold would align with the threshold for FFIEC Call Reports and for existing Regulation B, which requires tracking of loans to businesses with $1 million or less in revenue for purposes of sending adverse action notices under § 1002.9(a)(3). The commenter also stated that using this threshold would also mean that other data from this rule could be compared with CRA data, leading to a better evaluation of a bank's small business lending performance.

One bank stated that a discrepancy between this rule and CRA on the revenue threshold could lead to errors, given the many manual processes still used. Another bank asserted that a $5 million threshold would capture applications from businesses it did not consider small.

Several trade associations claimed that the proposed rule did not treat renewals and extensions the way CRA regulations do.

SBA. Several commenters stated that SBA-reportable loans should be exempt from the rule, including loans under the SBA 7(a) and 504 programs. One commenter stated that the Bureau should work with SBA to select reportable data elements and then obtain them from the SBA on loans and application denials to ease the reporting burden of SBA lenders, and that the majority of applications are already captured by third-party lending partners in the 504 program.

One bank stated that the Bureau's proposed small business definition is too broad and may capture entities that are not true small businesses. The commenter originated many multi-family loans to entities formed for the sole purpose of investing in real estate, not to run a small business, and asserted that the proposed definition would capture entities not consistent with SBA's definition of small business based on number of employees by industry and would be consistent with the spirit of section 1071, and that this would skew data.

FinCEN. One bank stated that data reported under this rule would be better provided through other means, such as FinCEN's recent business database and registry.

CDFI Fund. Some commenters, including a number of community-oriented lenders and community groups, stated that the Bureau should work with the CDFI Fund to streamline integrating the data from this rule with that of the CDFI Fund. Several commenters stated that new requirements from the CDFI Fund will likely expand transaction level reporting requirements to all certified CDFIs. One CDFI lender noted that the CDFI Fund's review and improvement to its current annual reporting process could create an opportunity to harmonize its definition, types of data collection, and timing of reporting with the Bureau. Another CDFI lender stated that the Bureau should work with the CDFI Fund to ensure that reporting requirements are aligned; CDFIs are currently required by Federal law to collect, maintain, and report specific demographic data about small businesses and consumers to ensure they serve their target communities. Several others stated that the Bureau should work with the CDFI Fund and loan software providers to streamline the process of integrating new data collection processes into existing systems. Some commenters noted that certain CDFIs must report data points such as interest rate, origination, points and fees, amortization type, loan term, and payment dates to the CDFI Fund. Several also pointed out that some CDFIs also report on loans to the SBA, to Federal prudential banking regulators pursuant to the CRA, and to a non-profit's annual member survey.

One lender stated that CDFIs have long sought guidance from the Bureau on compliance with overlapping statutory requirements from the CDFI Fund, ECOA, and Regulation B, and recommended that the Bureau use this rulemaking process to clarify data collection requirements in coordination with the CDFI Fund to avoid potential conflicts.

Several commenters said that some CDFIs will have to adjust processes and systems to comply with this rule, that the CDFI industry uses several different loan software products, and providers continually modify systems to comply with the CDFI Fund's reporting requirements.

One commenter stated that the Bureau should collect credit score, as CDFI Fund does, because it permits an "apples-to-apples" comparison of loans to help determine if small businesses that have historically struggled to access responsible loans receive credit on identical terms as white-owned businesses. The commenter also said that the burden to collect this would be minimal, as many CDFIs already report it to the CDFI Fund.

Farm Credit. An agricultural lender stated that a lack of understanding of the Farm Credit System by the Bureau would have unintended and detrimental consequences for those lenders' customers. The lender noted that these lenders institutions already report lending on Young, Beginning and Small lending efforts and volume (12 CFR 614.4165) to the Farm Credit Administration.

Agency cooperation. One bank suggested that the Bureau work with SBA to create more women-owned and minority-owned business programs, such as diversity loan programs to help the underserved, noting that the Dodd-Frank Act was passed as a reaction to the practices of larger lenders but would affect smaller lenders disproportionately.

A State financial regulator requested that the Bureau work with State regulators to provide them data. The commenter noted that the NPRM proposed modifications or deletions to protect privacy interests but was silent on whether the Bureau would share unredacted data with State regulators, and urged the Bureau to include in the final rule express language permitting the Bureau to share data collected under this rule with State regulators in accordance with

information sharing agreements. The commenter noted that such data will help State regulators identify fair lending violations and enforce anti-discrimination laws.

Responses to Comments Received

General comments on overlap. The CFPB acknowledges the general comments concerning the overlap between this rule and other data collection regimes, and general requests that the Bureau harmonize this rule with other similar data reporting regulations. The CFPB recognizes the overlap with other rules and in this final rule has made attempts to minimize the challenges, complexity, and duplication of effort, as well as potential errors in the data. In some instances, duplicate reporting will be eliminated—this rule will not require the reporting of any HMDA-reportable applications, and proposed amendments to CRA regulations would eliminate reporting on small business and small farm reporting to be replaced exclusively by data from this rule. In addition, the CFPB attempted wherever possible (*i.e.*, consistent with its statutory authorities under this rule) to borrow concepts or structures from other rules, such as FinCEN's customer due diligence rule. The CFPB also intends to continue to coordinate with other agencies to further harmonize this final rule with other similar regulations.

Regarding the requests that the Bureau not require financial institutions that already report data to duplicate their work, or that the Bureau exempt all loan applications under Federal agency programs, the CFPB has made certain adjustments in the final rule. As noted above, duplicate reporting will be eliminated for HMDA-reportable loans and, pursuant to proposed amendments to CRA regulations, under the CRA. However, other data reporting regulations have purposes sufficiently different from those of this rule such that the regulations are not completely overlapping, and that the simple elimination of one of the two reporting requirements would not advance both regulations. For instance, data reported via FFIEC Call Reports are not motivated only by considerations of fair lending and community development. In addition, such other reporting requirements address only originations, while section 1071 requires reporting on applications.

Regarding the comment that the Bureau should first use existing small business lending data generated by the government and private sector before collecting additional data, Congress disagreed when it passed section 1071 calling for data on small business lending applications. Existing data capture only limited application-level data on lending to small businesses by depository institutions, and hardly any application-level data on lending to small businesses by non-depository institutions.

Regarding requests that the CFPB work out inconsistencies between this rule and other data collection regimes, and that the Bureau standardize data formats to match those used in other data reporting, especially for CDFIs, the CFPB has attempted to do so in this final rule where consistent with section 1071's statutory purposes. In addition, the CFPB intends to work with agencies and other sources of small business lending data to explore other possible avenues for additional standardization.

HMDA. Regarding the identification of overlap between this rule and HMDA/Regulation C, and the requests to avoid duplicative reporting, the CFPB is exempting HMDA-reportable transactions from the requirements of this rule. This new provision would have the effect of eliminating inconsistencies between the two rules, the duplication of data collection and reporting, and potential data errors. However, the Bureau is not adopting a more narrowly tailored exclusion that would not apply to HMDA-reportable loans by financial institutions that are not HMDA reporters. For the reasons set out in the section-by-section analysis of § 1002.104(b)(2), the CFPB has determined that trying to close all potential data gaps would defeat the purpose of trying to alleviate concerns from commenters about having to implement and maintain two separate reporting systems. The CFPB's decision to exempt HMDA-reportable transactions also renders moot comments concerning inconsistencies between specific data points in Regulation C and those proposed for this rule, along with the firewall requirement.

Community Reinvestment Act. Regarding the comments identifying the similarities between the data required by this rule and the requirements of the CRA, and the request that the data of this rule replace the data for the CRA, the CFPB notes that, as stated in part II.F.2.i above, the CRA agencies have issued a proposed rule that, amongst other things, would exclusively rely on 1071 data for its assessment of the small business and small farm lending activities of banks, replacing the existing CRA data requirements based on Call Reports and other sources. The CFPB believes that when the final rule amending the CRA requirements is issued, duplication between the CRA and this rule will be eliminated, as requested by numerous commenters, including industry and community groups. As some community groups suggested, the CRA proposal contemplates using 1071 data for CRA examinations in the manner that HMDA data are currently used in CRA examinations. The CFPB agrees with these commenters that 1071 data would be more robust than the data currently collected under existing CRA rules.

Regarding the various request that the Bureau work with other Federal regulators to eliminate duplication, the CFPB observes that the CRA agencies appear to intend with their proposed rule to eliminate duplicative reporting by both relying on the Bureau's small business lending data and eliminating any independent data collection requirement. The CFPB intends to continue cooperating with the CRA agencies to ensure coordination between this rule and amendments to the CRA regulations, especially those concerning potentially duplicative reporting.

Regarding the comments that the Bureau should exempt lenders that report under the CRA, the CFPB does not believe such an exemption would be appropriate. In addition, in light of the CRA's proposal to use data collected and reported pursuant to section 1071, the result of such an exemption might be that no small business lending data would be collected for such institutions.

Regarding the comments that identified specific inconsistencies between the CRA and this rule, the CFPB does not disagree that the inconsistencies identified exist but notes that the

CRA's proposal that the CRA agencies rely exclusively on 1071 data for their analysis of small business and small farm lending would render these inconsistencies moot because only 1071 data would exist. Regarding the comment that the Bureau should reduce its gross annual revenue threshold for its small business definition under this rule from $5 million to $1 million to align with FFIEC Call Reports and for Regulation B, the CFPB is not doing so for the reasons set out in the section-by-section analysis of § 1002.106(b). The CFPB believes that a small business definition with a lower threshold would not further the statutory purposes of the rule because it would reduce the amount of data collected concerning lending to many businesses that, according to other metrics would still be considered small though above $1 million in revenue. In addition, the Bureau believes that analyses seeking to match or compare data from this rule that are interoperable with small business lending data from FFIEC need only screen this rule's data for gross annual revenue of less than $1 million, which this rule requires as a data point. For instance, the CRA NPRM proposes screening the 1071 data for loans to small businesses and small farms under $1 million revenue for purposes of certain parts of CRA examinations.

SBA. The CFPB is not exempting SBA-guaranteed loans from reporting under this rule. For its 7(a) and 504 programs, the SBA only collects and publishes a subset of the data required by this rule for originations. Still, the CFPB intends to coordinate with SBA to try to reduce duplicative reporting.

FinCEN. Regarding the comment that the data reported under this rule would be better provided through other means, such as via FinCEN's recent business database and registry, the CFPB understands that database is not set up to receive small business lending data.

CDFI Fund. Regarding comments that the Bureau should work with the CDFI Fund to harmonize reporting under the CDFI Fund's Transaction Level Report requirements with this rule, the CFPB agrees to coordinate with the CDFI Fund to determine where it is possible to avoid duplicative or inconsistent reporting of data and how to resolve any overlapping statutory requirements. The CFPB observes that it may not be possible to simply eliminate duplicate

reporting, as with HMDA or CRA reporting, given the differences in purposes and the requirements of the CDFI Fund compared to those of this rule. Regarding comments that the Bureau should work with loan software providers, the CFPB agrees and intends to meet with software providers as it develops the small business lending data submission platform to determine how reporting can be streamlined for CDFIs that must report small business lending data to various agencies, such as the CFPB under this rule, the SBA, and the CDFI Fund.

Regarding the comment that the Bureau should collect credit score, as CDFI Fund does, the CFPB notes that, as stated in the section-by-section analysis of § 1002.107(a), the CFPB believes that this data point—which the CFPB would also have to collect from other financial institutions that may have operations quite different from CDFIs—could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions in collecting and reporting this information.

Farm Credit. Regarding the comments that the Bureau's lack of understanding of the Farm Credit System would have unintended and detrimental consequences for FCS customers, and that the FCS lenders already report data to the Farm Credit Administration, the CFPB has consulted with FCS lenders, and believes that its approach will result in consistency across the data collected under this rule, more robust fair lending analyses and transparency into opportunities for small farms, and a more even playing field for compliance across all financial institutions.

Agency cooperation. Regarding the comment that the Bureau work with SBA to create more women-owned and minority-owned business programs, the CFPB regularly engages with other Federal regulators on a range of work that implicates its statutory mission; that includes, as appropriate, the SBA. Regarding the request that the Bureau provide small business lending data to State regulators, the CFPB agrees that doing so would likely be consistent with the statutory purposes of the rule. The CFPB will engage with State and Federal regulators regarding their

access to small business lending data collected under this final rule, while ensuring that data security and data privacy are appropriately protected.

E. Cross-Cutting Interpretive Issues

1. The Bureau's Approach to Non-Small Women-Owned and Minority-Owned Businesses in this Rulemaking

ECOA section 704B(b) states that "in the case of any application to a financial institution for credit for [a] women-owned, minority-owned, or small business," the financial institution must "inquire whether the business is a women-owned, minority-owned or small business . . . ." As explained below, the Bureau proposed to require financial institutions to collect and report data regarding applications for credit for small businesses; the Bureau did not, however, propose to require financial institutions to collect and report data with respect to applicants that are *not* small businesses.

The Bureau believed that section 1071 was ambiguous with respect to its coverage of applications for credit for non-small women- or minority-owned businesses, and the Bureau therefore proposed to interpret this ambiguity pursuant to ECOA section 704B(g)(1). The Bureau acknowledged that the plain language of 704B(b) could be read to require financial institutions to collect information from all women-owned and minority-owned businesses, including those that are not small businesses. But based on a close consideration of the text, structure, and purpose of the statute, and the interactions between section 1071 and other provisions of ECOA and Regulation B, the Bureau believed that the statute's coverage of, and Congress's intent with respect to, data regarding non-small businesses was ambiguous. The Bureau proposed this approach as an interpretation of the statute pursuant to its authority under 704B(g)(1), and, in the alternative, pursuant to both its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071 and its implied *de minimis* authority.

The Bureau sought comment on its proposed approach to limiting the scope of data collection pursuant to subpart B to covered applications for small businesses, but not women- or minority-owned businesses that are not small.

Several commenters, including industry and community groups, supported limiting the scope of data collection as the Bureau proposed. In particular, a cross-sector group of lenders, community groups, and small business advocates stated that the Bureau had taken a reasonable and adequately comprehensive approach in proposing to include only minority- and women-owned businesses that are "small," as this would cover 99.9 percent of all minority- and women-owned businesses. The group further noted that the Bureau should continue to monitor the U.S. Census Bureau's Annual Business Survey and adjust this requirement if minority- or women-owned businesses that are not considered "small" exceed 1 percent. In contrast, a State financial regulator commented that data collection on non-small women- or minority-owned businesses was important for fair lending enforcement purposes and would provide for better consistency with States pursuing similar information collection requirements. In response to the latter comment, the Bureau notes that such data collection would be of limited utility in light of section 1071's statutory purposes because, as discussed below, the lack of a control group (*i.e.*, data on non-small businesses that are neither women-owned nor minority-owned) would limit such data's utility for fair lending enforcement purposes. For the reasons set forth herein, the Bureau is finalizing the approach to non-small women-owned and minority-owned businesses as proposed.

The Bureau interprets ECOA section 704B(b) and (b)(1) to require that financial institutions first determine whether an applicant is a small business within the scope of the rule's data collection before making the required inquiries that would otherwise be prohibited by existing Regulation B. There is a general prohibition in existing Regulation B (in § 1002.5(b)) which states that a "creditor shall not *inquire* about the race, color, religion, national origin, or

sex of an applicant or any other person in connection with a credit transaction, except if expressly permitted to do so by law or regulation.

In the introductory language to ECOA section 704B(b), Congress instructed that section 1071's data collection regime applies only "*in the case of* any application to a financial institution for credit for women-owned, minority-owned, or small business" (emphasis added). The Bureau believes that "in the case of" indicates Congress's intent to limit application of section 1071 to these types of businesses, rather than requiring financial institutions to make 1071-related inquiries of all business applicants for credit.[290] The next paragraph (704B(b)(1)) does not use the conditional phrase "in the case of" used in 704B(b); rather, it instructs a financial institution to "inquire." The Bureau believes that the instruction to "inquire" in 704B(b)(1) is intended to provide the necessary exception to Regulation B's general prohibition against "inquir[ing]" as to protected demographic information in connection with a credit transaction.[291] Indeed, absent section 1071's lifting of the prohibition, generally, a financial institution could not determine, or even ask about, an applicant's women- or minority-owned business status, because doing so would necessarily constitute "inquir[ing] about the race, color, religion, national origin, or sex of an applicant" in violation of existing § 1002.5(b). The Bureau believes that Congress likely intended to ensure that financial institutions could determine whether section 1071's data collection and reporting requirements apply to an applicant without risking a violation of other provisions of ECOA and Regulation B.

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[290] Merriam-Webster defines "case" as meaning "a set of circumstances or conditions," "a situation requiring investigation or action (as by the police)," or "the object of investigation or consideration," https://www.merriam-webster.com/dictionary/case (last visited Mar. 20, 2023).

[291] As discussed in greater detail in the next section, the fact that the language of ECOA section 704B(b)(1) is designed to expressly permit inquiry into protected demographic information, which would otherwise be prohibited by existing § 1002.5(b), is also evidenced by the statute's three provisions creating special protections for responses to the inquiry: 704B(b)(2) requires that responses to inquiries about protected demographic information remain separate from the application and accompanying information; 704B(c) requires that applicants have a right to refuse to answer the inquiry about protected demographic information; and 704B(d) requires that certain underwriters or other employees involved in making determinations on an application not have access to the responses to inquiries about protected demographic information.

However, unlike with women- and minority-owned business status, there is no legal impediment to a financial institution determining whether an applicant is a small business, and financial institutions can make that determination as a threshold matter without risking running afoul of ECOA and Regulation B. Therefore, the Bureau believes that the scope of the introductory "in the case of" language in ECOA section 704(b) is ambiguous as to coverage of non-small women- and minority-owned businesses. To resolve this ambiguity, the Bureau applies its expertise to interpreting the language and structure of section 1071 within the context of the general prohibition on inquiring into protected demographic information in existing § 1002.5(b), and concludes that ECOA section 704B(b)(1) is best read as only referring to questions about applicants' protected demographic information (*i.e.*, women- and minority-owned business status as well as the ethnicity, race, and sex of the principal owners of the business). The Bureau believes 704B(b)'s more general "in the case of" language should be understood to indicate the conditions under which data collection should take place, and requires financial institutions to make a threshold determination that an applicant is a small business before proceeding with an inquiry into the applicant's protected demographic information.

A requirement to collect and report data on applications for women-owned and minority-owned businesses that are not small businesses could affect all aspects of financial institutions' commercial lending operations while resulting in limited information beyond what would already be collected and reported about women-owned and minority-owned small businesses. Indeed, as a cross-sector group of lenders, community groups, and small business advocates highlighted, approximately 99.9 percent of women- and minority-owned business are small.[292] In addition, financing for large businesses can be much more varied and complex than are the

[292] In the U.S. Census Bureau's 2018 Annual Business Survey, 5.7 million firms (99.6 percent of all employer firms) are small, as defined within that survey as having fewer than 500 employees. That same definition covers one million minority-owned employer firms (99.9 percent of all minority-owned firms) and 1.1 million women-owned employer firms (99.9 percent of all women-owned firms). *See* U.S. Census Bureau, *2018 Annual Business Survey (ABS)—Company Summary* (2018), https://www.census.gov/data/tables/2018/econ/abs/2018-abs-company-summary.html.

products used for small business lending The Bureau will continue to observe the market on this issue.

The Bureau also notes that the collection of data on applications for non-small women- or minority-owned businesses would not carry out either of section 1071's statutory purposes because the data would be of only limited usefulness for conducting the relevant analyses of non-small businesses. Such analyses would necessitate comparing data regarding non-small women-owned and minority-owned business applicants to data regarding non-small non-women-owned and non-minority-owned business applicants, in order to control for lending outcomes that result from differences in applicant size. But section 1071 does not require or otherwise address the collection of data for non-small business applicants that are not women- or minority-owned. Therefore, the resulting dataset will lack a control group, arguably the most meaningful comparator for any data on non-small women- or minority-owned businesses. It is unlikely that Congress intended, and the statute is reasonably read not to require, the collection of data that would be of limited utility.[293]

Finally, the Bureau notes that the title of section 1071 is "Small Business Data Collection," and section 1071 amends ECOA to add a new section titled "Small Business Loan Data Collection." In the presence of ambiguity, these titles provide some additional evidence that Congress did not intend the statute to authorize the collection of data on businesses that are not small.[294]

For these reasons, the Bureau interprets ECOA section 704B(b) to cover the collection only of data with respect to small businesses, including those that are women- and minority-owned. Likewise, as discussed immediately below in E.2 of this *Overview* to part V, the Bureau

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[293] *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989), we must search for other evidence of congressional intent to lend the term its proper scope.").

[294] *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (quoting *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 529 (1947)).

is clarifying that the 704B(b)(1) inquiry, when applicable, pertains to an applicant's minority-owned business status and women-owned business status, as well as an applicant's LGBTQI+-owned business status, along with the ethnicity, race, and sex of its principal owners. For the same reasons, the Bureau believes that not requiring the collection of data with respect to applications for non-small businesses would be necessary or appropriate to carry out the purposes of section 1071; in the alternative, the Bureau exercises its exception authority in 704B(g)(2) to effectuate this outcome. Finally, because the Bureau believes that the collection of data on non-small women- and minority-owned businesses would "yield a gain of trivial or no value," in the alternative the Bureau exercises its implied *de minimis* authority to create this exception.[295]

2. The Meaning of "information requested pursuant to subsection (b)"

Four different provisions of section 1071 refer to or rely on "information requested pursuant to subsection (b)" or similar language. First, ECOA section 704B(b)(2) provides that financial institutions must "maintain a record of the responses to such inquiry" and keep those records separate from the application and information that accompanies it. Second, 704B(c) states that applicants for credit "may refuse to provide any information requested pursuant to subsection (b)." Third, 704B(d) requires financial institutions to limit the access of certain employees to "information provided by the applicant pursuant to a request under subsection (b)," with certain exceptions. Fourth, 704B(e) instructs financial institutions that "information provided by any loan applicant pursuant to a request under subsection (b) . . . shall be itemized in order to clearly and conspicuously disclose" data including the loan type and purpose, amount of credit applied for and approved, and gross annual revenue.

In light of these four disparate provisions, the Bureau believes that section 1071 is ambiguous with respect to the meaning of "any information provided by the applicant pursuant

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[295] *Waterkeeper All. v. EPA*, 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting *Pub. Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989)); *see Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979).

to a request under subsection (b)."[296] On the one hand, ECOA section 704B(b)(1) directs financial institutions to inquire whether a business is "a women-owned, minority-owned, or small business," so the phrase could be interpreted as referring only to those three data points. Section 704B(e), however, indicates that the scope of 704B(b) could be much broader; it suggests that all of the information that financial institutions are required to compile and maintain—not simply an applicant's status as a women-owned, minority-owned, or small business—constitutes information provided by an applicant "pursuant to a request under subsection (b)." But as noted above, information deemed provided pursuant to subsection (b) is subject to the notable protections of separate recordkeeping under 704B(b)(2), a right to refuse under 704B(c), and the firewall under 704B(d). Applying these special protections to many of the data points in 704B(e), such as gross annual revenue or amount applied for, would be extremely difficult to implement, because this information is critical to financial institutions' ordinary operations in making credit decisions. Additionally, 704B(e) describes as "provided by any loan applicant" under 704B(b) data points that plainly must come from the financial institution itself, such as application number and action taken, further suggesting that Congress viewed this term as encompassing more information than lies within the four corners of 704B(b)(1). Finally, as noted above, the circular structure of 704B(b) complicates the question of what constitutes information provided "pursuant to a request under subsection (b)." Read together, the introductory language in 704B(b) and (b)(1) direct financial institutions, "in the case of" a credit application "for [1] women-owned, [2] minority-owned, or [3] small business," to "inquire whether the business is a [1] women-owned, [2] minority-owned, or [3] small business." The Bureau believes that this circularity further demonstrates the ambiguity of the phrase "pursuant to a request under subsection (b)."

[296] The Bureau does not believe that the minor linguistic variations in these four provisions themselves have significance.

The Bureau believes that it is reasonable to resolve these ambiguities by giving different meanings to the phrase "any information provided by the applicant pursuant to a request under subsection (b)" (or similar) with respect to ECOA section 704B(e) as opposed to 704B(b)(2), (c), and (d).[297] With respect to 704B(e), the Bureau interprets the phrase to refer to all the data points now articulated in proposed § 1002.107(a). Section 704B(e) is the source of financial institutions' obligation to "compile and maintain" data that they must then submit to the Bureau, so it would be reasonable to interpret this paragraph as referring to the complete data collection Congress devised in enacting section 1071.

But with respect to the three statutory provisions creating special protections for certain information—the firewall in ECOA section 704B(d), separate recordkeeping in 704B(b)(2), and the right to refuse in 704B(c)—the Bureau interprets the phrase to refer to the data points in § 1002.107(a)(18) (women-owned and minority-owned business statuses, along with the new LGBTQI+-owned business status), and (a)(19) (ethnicity, race, and sex of principal owners).[298] Each of these data points requests protected demographic information that has no bearing on the creditworthiness of the applicant, about which existing § 1002.5(b) would generally prohibit the financial institution from inquiring absent section 1071's mandate to collect and report that information, and with respect to which applicants are protected from discrimination. The Bureau accordingly believes that it is reasonable to apply section 1071's special-protection provisions only to this information, regardless of whether the statutory authority to collect it originates in 704B(b)(1) (women-owned and minority-owned business statuses), 704B(e)(2)(H) (LGBTQI+-owned business status), or 704B(e)(2)(G) (ethnicity, race, and sex of principal owners). The

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[297] While there is a presumption that a phrase appearing in multiple parts of a statute has the same meaning in each, "this is no more than a presumption. It can be rebutted by evidence that Congress intended the words to be interpreted differently in each section, or to leave a gap for the agency to fill." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 532 (2d Cir. 2017) (citing *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 575 (2007)). Here, the Bureau believes Congress indicated such an intention by using the same phrase in the substantially different contexts of providing special protections for protected demographic information on the one hand and "itemiz[ing]" all collected data on the other.

[298] The Bureau's interpretations with respect to a separate data point for small business status are discussed in the next section.

Bureau similarly believes that it would have been unreasonable for Congress to have intended that these special protections would apply to any of the other data points now proposed in § 1002.107(a), which the financial institution is permitted to request regardless of coverage under section 1071 which are not the subject of Federal antidiscrimination law, and many of which financial institutions currently use for underwriting and other purposes.

The Bureau implements these interpretations of "information requested pursuant to subsection (b)," and any relevant comments received, in several different section-by-section analyses. With respect to ECOA section 704B(e), the Bureau discusses its interpretation of the phrase in the section-by-section analysis of § 1002.107(a). The Bureau's interpretation of 704B(d)'s firewall requirement is addressed at greater length in the section-by-section analysis of § 1002.108, and the Bureau's interpretation of the separate recordkeeping requirement in 704B(b)(2) is addressed in the section-by-section analysis of § 1002.111(b). The right to refuse in 704B(c) is discussed in the section-by-section analyses of the data points that the Bureau deems subject to the right to refuse: § 1002.107(a)(18) (women-owned, minority-owned, and LGBTQI+-owned business statuses) and (19) (ethnicity, race, and sex of principal owners).

3. No Collection of Small Business Status as a Data Point

The Bureau notes that neither of its interpretations of "information requested pursuant to subsection (b)" reference a specific data point for an applicant's status as a small business, nor did the Bureau otherwise include in proposed § 1002.107(a) that financial institutions collect, maintain, or submit a data point whose sole function is to state whether the applicant is or is not a small business.

The Bureau's definition of small business in final § 1002.106, which is based on an applicant's gross annual revenue, renders redundant any requirement that financial institutions collect a standalone data point whose sole purpose is to state whether an applicant is a small business. Indeed, under the definition of small business, when a financial institution asks an applicant its gross annual revenue, that question is functionally identical to asking, "are you a

small business?" The Bureau believes that it is a reasonable interpretation of ECOA section 704B(b)'s query as to small business status for that question to take the form of, "what is your gross annual revenue?"[299] Furthermore, as discussed above with respect to the Bureau's approach to non-small women- and minority-owned businesses, the Bureau interprets financial institutions' data collection obligations as attaching only in the case of applications from small businesses; if a financial institution determines that an applicant is not a small business, none of the obligations under this rule would apply. As such, a standalone data point that serves only to designate whether a business qualifies as small for purposes of the rule would be redundant with the mere fact that the data collection occurs at all, as well as with the collection of gross annual revenue.

The Bureau sought comment on whether a standalone data point solely dedicated to small business status might nonetheless be useful and, if so, how it might be implemented. The Bureau received no comments on this issue.

The Bureau acknowledges that the plain language of ECOA section 704B(b) could be read to require financial institutions to ask applicants subject to the data collection the precise question, "are you a small business?" Upon further analysis, however, the Bureau believes that Congress's intended treatment of small business status as a standalone data point is ambiguous. As described in more detail above with respect to the rulemaking's coverage of women- and minority-owned businesses that are not small, 704B(b)'s introductory language and 704B(b)(1) appear to require financial institutions to know the answer to whether an applicant is women-owned, minority-owned, or small before they make their inquiry; to resolve this ambiguity, the Bureau interprets 704B(b)'s introductory language and 704B(b)(1) to require that financial institutions first straightforwardly assess whether an applicant is a small business before

[299] The financial institution could ask, in order to make an initial determination as to whether the rule applies, whether the applicant's gross annual revenue in its last full fiscal year was $5 million or less. If it was, the financial institution would need to request the specific revenue amount to comply with final § 1002.107(a)(14), along with the other applicant-provided data points specified in final § 1002.107(a).

proceeding to inquire into the applicant's protected demographic information that would otherwise be prohibited by existing § 1002.5(b).

Pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules as may be necessary to carry out, enforce, and compile data pursuant to section 1071, the Bureau interprets 704B(b) and (b)(1) to obviate the need for financial institutions to collect a standalone data point whose sole purpose is to note an applicant's small business status. For the same reasons, the Bureau believes that not requiring the collection of a separate data point on small business status would be necessary or appropriate to carry out the purposes of section 1071; therefore, in the alternative, the Bureau is exercising its exception authority in 704B(g)(2) to effectuate this outcome. Finally, because the Bureau believes that the collection of a standalone data point on small business status would "yield a gain of trivial or no value," in the alternative, the Bureau exercises its implied *de minimis* authority to create this exception.[300]

F. Conforming Amendments to Existing Regulation B

As discussed above, the Bureau is implementing section 1071 in a new subpart B of Regulation B. The content of existing Regulation B is becoming subpart A of Regulation B. This change does not affect the current section numbering in Regulation B. The Bureau believes it is appropriate to make this rule a part of Regulation B, as section 1071 is a part of ECOA.

The Bureau sought comment on whether it should instead codify its rule to implement section 1071 as a free-standing regulation with its own CFR part and, if so, why. A bank commenter supported the location of this rule within a new subpart B to Regulation B, noting that lenders often overlook that Regulation B applies to business as well as consumer credit. The commenter also noted that the intent of section 1071, to provide all credit applicants fair and equitable treatment and credit, makes Regulation B the natural place for this rule, rather than a free-standing regulation, which would generate unnecessary confusion.

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[300] *Waterkeeper All.*, 853 F.3d at 530 (quoting *Pub. Citizen*, 869 F.2d at 1556); *see Alabama Power*, 636 F.2d at 360-61.

As noted above and as discussed in more detail below, the Bureau is amending existing § 1002.5(a)(4) and commentary for existing § 1002.5(a)(2) and (4) to expressly permit under certain circumstances voluntary collection of minority-owned, women-owned, and LGBTQI+-owned business status, and the ethnicity, race, and sex of applicants' principal owners in accordance with the requirements of subpart B.

In addition, the Bureau is revising certain references to the entire regulation (which use the terms "regulation" or "part") in existing Regulation B to instead refer specifically to subpart A. The Bureau is likewise adding additional specificity in certain provisions in existing Regulation B to avoid confusion. The Bureau does not intend to make any substantive changes with these revisions, but rather intends to maintain the status quo. The Bureau is making the following changes:

In § 1002.1(a), regarding authority and scope, the Bureau is changing two references to "part" to instead refer to "subpart," regarding the application of what is now subpart A to creditors.

In § 1002.2, regarding definitions, the introductory text states that definitions contained therein apply to Regulation B, unless the context indicates otherwise. The Bureau is adding "or as otherwise defined in subpart B" for clarity.

In § 1002.12(b)(1) introductory text, (b)(2) introductory text, (b)(3) through (5) and (7), regarding record retention, the Bureau is adding "or as otherwise provided in subpart B" to indicate that subpart B may provide different record retention requirements than what is set forth in those paragraphs for business credit. The Bureau is also changing a reference to "this rule" in comment 12(b)(7)-1 to instead refer to existing § 1002.12(b)(7) regarding retention of prescreened credit solicitations, to avoid confusion with subpart B's treatment of solicitations.

Finally, § 1002.13 addresses information for monitoring purposes for credit secured by an applicant's dwelling. The Bureau is revising comment 13(b)-5, which addresses applications made through unaffiliated loan shopping services, to refer to subpart A of Regulation B instead

of the entirety of Regulation B, for clarity. The existing comment also refers to applications received by creditors subject to HMDA and associated data collection requirements; the Bureau is also adding to the end of the comment an additional sentence noting that creditors that are covered financial institutions under subpart B of this regulation may also be required to collect, report, and maintain certain data, as set forth in subpart B of Regulation B.

Subpart A—General

Section 1002.5 Rules Concerning Requests for Information

5(a) General Rules

5(a)(4) Other Permissible Collection of Information

Background

ECOA prohibits creditors from discriminating against applicants, with respect to any aspect of a credit transaction, on the basis of—among other characteristics—race, color, religion, national origin, sex, marital status, or age.[301] It also states that making an inquiry under 15 U.S.C. 1691c-2 (that is, section 1071), in accordance with the requirements of that section, shall not constitute discrimination for purposes of ECOA.[302] Regulation B, in existing § 1002.5(b), generally prohibits a creditor from inquiring about certain protected demographic information in connection with a credit transaction. Existing § 1002.5(a)(2), however, expressly permits collection of such otherwise prohibited information if required by a regulation, order, or agreement to monitor or enforce compliance with Regulation B, ECOA, or other Federal or State law or regulation.

In 2017, the Bureau amended Regulation B, adding § 1002.5(a)(4) to expressly permit creditors to collect ethnicity, race, and sex from mortgage applicants in certain cases where the creditor is not required to report under HMDA and Regulation C.[303] For example, existing

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[301] 15 U.S.C. 1691(a).

[302] 15 U.S.C. 1691(b)(5).

[303] *Equal Credit Opportunity Act (Regulation B) Ethnicity and Race Information Collection*, 82 FR 45680, 45684 (Oct. 2, 2017).

§ 1002.5(a)(4) expressly permits the collection of ethnicity, race, and sex information for certain transactions for which Regulation C permits optional reporting. However, nothing in existing Regulation B (or in ECOA) expressly permits collection and reporting of protected demographic data for financial institutions that are not required to report certain data under section 1071.

During the SBREFA process, some small entity representatives, primarily small CDFIs and mission-oriented community banks, stated that they would be inclined to collect and report small business lending data to the Bureau even if not required to do so, such as if they fell under loan-volume thresholds. These small entity representatives expressed an intent to report data even if not required to out of a belief in the importance and utility of these data.

Proposed Rule

The Bureau proposed to amend existing § 1002.5(a)(4) to add three provisions (in proposed § 1002.5(a)(4)(vii), (viii), and (ix)) that would permit certain creditors that are not covered financial institutions under the rule to collect small business applicants' protected demographic information under certain circumstances. The Bureau also proposed to add comment 5(a)(2)-4 and to revise existing comment 5(a)(4)-1 to provide guidance on these proposed exemptions.

Proposed § 1002.5(a)(4)(vii) would have permitted a previously covered financial institution to collect demographic information pursuant to subpart B for covered applications for up to five years after it fell below the loan-volume threshold of proposed § 1002.105(b), provided that it does so in accordance with the relevant requirements of proposed subpart B.

Proposed § 1002.5(a)(4)(viii) would have provided that a creditor in its first year of exceeding the covered financial institution loan-threshold in § 1002.105(b) may, in the second year collect demographic information pursuant to subpart B for covered applications, provided that it does so in accordance with the relevant requirements of proposed subpart B.

Proposed § 1002.5(a)(4)(ix) would have permitted a financial institution not covered by the rule that wishes to voluntarily report small business lending data to collect applicants'

protected demographic information without violating Regulation B. Unlike creditors subject to proposed § 1002.5(a)(4)(vii) or (viii), a creditor seeking to voluntarily collect applicant's protected demographic information under proposed § 1002.5(a)(4)(ix) would also be required to report it to the Bureau.

Existing comment 5(a)(4)-1 addresses recordkeeping requirements for ethnicity, race, and sex information that is voluntarily collected for HMDA under the existing provisions of § 1002.5(a)(4). The Bureau proposed revising this comment by adding to it a parallel reference to proposed subpart B, along with a statement that the information collected pursuant to proposed subpart B must be retained pursuant to the requirements set forth in proposed § 1002.111.

Proposed comment 5(a)(2)-4 would have explained that proposed subpart B of Regulation B generally requires creditors that are covered financial institutions as defined in proposed § 1002.105(a) to collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business or a women-owned business as defined in proposed § 1002.102(m) and (s), respectively. The Bureau proposed this comment for parity with existing comment 5(a)(2)-2, which addresses the requirement to collect and report information about the ethnicity, race, and sex of applicants under HMDA. Existing comment 5(a)(2)-3 explains that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.

The Bureau sought comment on its three proposed provisions to be added to existing § 1002.5(a)(4), and associated commentary, including whether there were other specific situations to add to the list of provisions in § 1002.5(a)(4) to permit the collection of applicants' protected demographic information pursuant to section 1071, and whether any similar

modifications to other provisions were necessary. In particular, the Bureau sought comment on whether it should add another provision to § 1002.5(a)(4) relating to proposed § 1002.114(c)(1), wherein the Bureau proposed to permit financial institutions to collect, but would not require them to report, applicants' protected demographic information prior to the compliance date.

Comments Received

The Bureau received comments on this provision from several industry commenters, a business advocacy group, and a community group. The community group supported the reasoning and approach of the proposed provisions. The commenter inquired whether the provisions would allow for voluntary reporting of only the protected demographic data, or all data points, noting that if the Bureau intended only to permit voluntary data collection of demographic information that it would not make sense to permit publication of these data points, and that the usefulness of such incomplete data would be limited. A business advocacy group applauded the Bureau for the proposed provisions and recommended that the Bureau add incentives for voluntary disclosure of data for those financial institutions, but asked that the incentives not distort the purposes of the regulation by encouraging lenders to report inaccurate or untrue data to reap the benefits of the incentive to report.

A community group commented that the Bureau should permit voluntary collection not only by financial institutions not covered by the rule, but also should permit covered financial institutions to collect data on consumer credit used to fund small businesses.[304]

Two agricultural lenders requested that the Bureau exempt Farm Credit System (FCS) lenders entirely from coverage under the rule while also adding a provision to the proposed voluntary reporting provisions stating that FCS lenders may submit a supplemental voluntary collection of data that is not otherwise already being provided to the public.

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[304] The Bureau addresses comments regarding the reporting of non-covered products in the section-by-section analysis of § 1002.104(b), under the heading *Voluntary Reporting*. While the final rule does not permit the voluntary reporting of non-covered products, the Bureau has implemented a safe harbor in § 1002.112(c)(4) for financial institutions that collect data on applications for products that turn out not to be covered credit transactions.

Final Rule

For the reasons set forth herein, the Bureau is finalizing amendments to existing § 1002.5(a)(4) introductory text and three provisions (in final § 1002.5(a)(4)(vii), (viii), and (ix)) that permit certain creditors that are not covered financial institutions under the rule to collect small business applicants' protected demographic information under certain circumstances. The Bureau is also adopting new § 1002.5(a)(4)(x) to similarly address information collected about multiple co-applicants. The Bureau is finalizing comment 5(a)(2)-4 along with its revision to existing comment 5(a)(4)-1 providing guidance on these new exemptions. The Bureau is additionally revising existing comment 5(a)(2)-3, as discussed below. These provisions contain updated cross-references to other sections in the final regulatory text and commentary, as well as addition of LGBTQI+-owned business status to accompany references to women- and minority-owned business statuses.

Final § 1002.5(a)(4)(vii) provides that a creditor that was required to report small business lending data pursuant to final § 1002.109 for any of the preceding five calendar years but is not currently a covered financial institution under final § 1002.105(b) may collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for those applications. Final § 1002.5(a)(4)(vii) also states that such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

The Bureau anticipates that some creditors that are no longer covered financial institutions and thus no longer required to report data in a given reporting year may prefer to continue to collect applicants' protected demographic information in the event they become a covered financial institution again, in order to maintain consistent compliance standards from

year to year. As it did in a similar context for HMDA reporting, the Bureau believes that permitting such collection for five years provides an appropriate time frame under which a financial institution should be permitted to continue collecting the information without having to change its compliance processes. The Bureau believes that a five-year period is sufficient to help an institution discern whether it is likely to have to report small business lending data in the near future but not so long as to permit it to collect such information in a period too attenuated from previous reporting.

Final § 1002.5(a)(4)(viii) provides a creditor that exceeded the loan-volume threshold in the first year of the two-year threshold period provided in final § 1002.105(b) may, in the second year, collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that application. Final § 1002.5(a)(4)(viii) also states that such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110. The Bureau believes that this provision will benefit creditors when the creditor has not previously reported small business lending data but expects to be covered in the following year and wishes to prepare for that future reporting obligation. For example, where a creditor surpasses the loan-volume threshold of final § 1002.105(b) for the first time in a given calendar year, it may wish to begin collecting applicants' protected demographic information for covered applications received in the next calendar year (second calendar year) so as to ensure its compliance systems are fully functional before it is required to collect and report information pursuant to subpart B in the following calendar year (third calendar year).

Final § 1002.5(a)(4)(ix) provides that a creditor that is not currently a covered financial institution under final § 1002.105(b), and is not otherwise a creditor to which final

§ 1002.5(a)(4)(vii) or (viii) applies, may collect protected demographic information pursuant to subpart B for covered applications from small businesses as defined in final §§ 1002.103 and 1002.106(b) for a transaction if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to final §§ 1002.107 through 1002.112 for that application. Voluntarily reported data pursuant to final § 1002.5(a)(4)(ix) may add some information that otherwise would not be collected and reported, and which would further both the statutory purposes of section 1071 without requiring reporting from very low-volume financial institutions that may find it difficult or costly to report data.

The Bureau is finalizing § 1002.5(a)(4)(ix) in response to feedback from some small entity representatives and other stakeholders at SBREFA, as well as several NPRM commenters, that indicated lenders might want to collect and report small business lending data even if they were not required to do so.

New § 1002.5(a)(4)(x) provides that a creditor that is collecting information pursuant to subpart B or as described in §§ 1002.5(a)(4)(vii) through (ix) for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners may also collect that same information for any co-applicants provided that it also complies with the relevant requirements of subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section with respect to those co-applicants.

The Bureau is adding § 1002.5(a)(4)(x) to permit creditors to collect information pursuant to subpart B regarding co-applicants for a covered application for a small business. Existing § 1002.5(a)(4) does not explicitly address whether creditors have permission to collect demographic information for co-applicants for a covered application for a small business, and the Bureau implements new § 1002.5(a)(4)(x) to remove any doubt that creditors that are permitted to collection information pursuant to subpart B on an applicant for covered applications for a

small business pursuant to §§ 1002.5(a)(4)(vii) through (ix) is also permitted to collect such information for co-applicants as well, even if the financial institution will only report information regarding a single designated applicant per new comment 103(a)-10. As described below, final comment 103(a)-10 provides that if a covered financial institution receives a covered application from multiple businesses that are not affiliates, it shall compile, maintain, and report data for only a single applicant that is a small business. The Bureau believes that it may be easier and more efficient for financial institutions to request the same information of all co-applicants—new § 1002.5(a)(4)(x) will enable financial institutions to collect small business lending data from unreported co-applicants without violating ECOA and Regulation B's general prohibition against collecting protected demographic information.

The Bureau believes that it is an appropriate use of its statutory authority under sections 703(a) and 704B(g)(1) of ECOA to permit creditors to collect, and for § 1002.5(a)(4)(ix) report, protected demographic information in the manner set out in § 1002.5(a)(4)(vii) through (x). These provisions will effectuate the purposes of and facilitate compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071. Section 1002.5(a)(4)(vii) will permit creditors to collect information without interruption from year to year, thereby facilitating compliance with the rule's data collection requirements and improving the quality and reliability of the data collected. Section 1002.5(a)(4)(viii) improves the quality and reliability of the data collected by financial institutions that may be transitioning into being required to collect and report 1071 data, and will provide a creditor assurance of compliance with existing § 1002.5 regardless of whether it actually becomes subject to subpart B reporting at the end of the two-year threshold period. Section 1002.5(a)(4)(ix) will potentially increase the collection of additional information and amount of data available for analysis, thereby advancing the purposes of section 1071. Finally, § 1002.5(a)(4)(x) will permit collection of demographic information for co-applicants, thereby reducing operational complexity to allow creditors to

focus on data quality and reliability. The Bureau also believes that these provisions are narrowly tailored and preserves and respects the general limitations in existing § 1002.5(b) through (d).

The Bureau is also revising existing comment 5(a)(2)-3, which explains that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection. The Bureau stated its belief in the NPRM that the reference to "another Federal statute or regulation" adequately encompassed section 1071 and subpart B, and thus did not propose to amend this existing comment. However, upon further reflection, the Bureau has determined to revise the provision specifically to reference subpart B for the sake of further clarity and the avoidance of doubt that loan brokers and other persons collecting applicants' protected demographic information on behalf of covered financial institutions pursuant to this final rule are not violating ECOA or Regulation B by doing so. The Bureau believes that it is an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) to permit such persons to collect protected demographic information on behalf of covered financial institutions, as such collection will effectuate the purposes of and facilitate compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071.

The Bureau is finalizing comment 5(a)(2)-4, which defines the phrase "information required by subpart B," with revisions to add cross-references to LGBTQI+-owned businesses, as defined in § 1002.102(*l*). Final comment 5(a)(2)-4 addresses the requirement under this final rule that creditors that are covered financial institutions as defined in § 1002.105(a) collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, as defined in § 1002.102(m), (s), and (*l*), respectively. The Bureau is finalizing this comment for parity with existing comment 5(a)(2)-

2, which addresses the requirement to collect and report information about the ethnicity, race, and sex of applicants under HMDA. The Bureau believes that it is an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) to specify the meaning of "information required by subpart B," by adding comment 5(a)(2)-4 and that the clarity and certainty this provision adds will effectuate the purposes of and facilitates compliance with ECOA and is necessary to carry out, enforce, and compile data pursuant to section 1071.

Finally, the Bureau is finalizing its revisions to existing comment 5(a)(4)-1 as proposed. The existing comment establishes recordkeeping requirements for ethnicity, race, and sex information that is voluntarily collected for HMDA under the existing provisions of § 1002.5(a)(4). The revisions to comment 5(a)(4)-1 likewise provide that protected demographic information that is not required to be collected pursuant to subpart B may nevertheless be collected under the circumstances set forth in § 1002.5(a)(4) without violating existing § 1002.5(b), and that the information collected pursuant to this final rule must be retained pursuant to the requirements set forth in final § 1002.111. The Bureau is revising this comment to provide for parity between this final rule and existing references to voluntary collection of data pursuant to HMDA. The Bureau believes that these revisions are an appropriate use of its general authority under ECOA sections 703(a) and 704B(g)(1) as these revisions provide clarity and certainty to financial institutions in their voluntary collection of applicants' protected demographic information. Such clarity and certainty effectuate the purposes of and facilitates compliance with ECOA and these revisions are necessary to carry out, enforce, and compile data pursuant to section 1071.

Regarding a commenter's request to clarify whether these amendments permit voluntary reporting only as to data points concerning protected demographic data, the Bureau observes that nothing prohibits creditors from collecting any of the information set forth in final § 1002.107, other than the protected demographic information in § 1002.107(a)(18) and (19). Creditors that choose to collect protected demographic information pursuant to final § 1002.5(a)(4)(ix) must

comply with § 1002.109 (along with other specified provisions), which means that they must collect and report all the required data specified in final § 1002.107.

The Bureau is not adding incentives for voluntary disclosure of data for creditors that are not covered financial institutions, as suggested by one commenter. It appears, based on SBREFA and NPRM comments, that some creditors already have an incentive to collect and report small business lending data pursuant to section 1071 even if they are not covered financial institutions under the rule; it is unclear what additional incentives the Bureau could offer to encourage other creditors to do the same. Regarding ensuring that reported data are not distorted, however, the Bureau notes that voluntary reporters must identify themselves as such pursuant to final § 1002.109(b)(10) and, a creditor voluntarily collecting and reporting data pursuant to final § 1002.5(a)(4)(ix) must do so in compliance with §§ 1002.107 through 1002.112 and 1002.114.

Regarding the comment that the visual observation and surname requirement would cause certain covered institutions to violate the prohibition in 12 CFR 202.5(b) from inquiring about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction, the Bureau notes that the concern is moot because the Bureau is not finalizing its proposed provisions for collecting principal owners' ethnicity and race via visual observation or surname in certain circumstances. (See the section-by-section analysis of § 1002.107(a)(19) for a detailed discussion of this change.) In any case, a creditor is permitted to make such inquiries under existing § 1002.5(a)(2), given that the provision permits the collection of demographic information when required to do so by another law or regulation (which includes this rule).

The Bureau addresses potential voluntary collection and reporting of data regarding non-covered products, including consumer-designated credit used for small business purposes, in the section-by-section analysis of § 1002.104(b) below. Based on its determination not to permit voluntary collection of data for such non-covered products, the Bureau is not adding an additional provision to § 1002.5(a)(4) to address such collection.

As discussed in the section-by-section analyses of §§ 1002.104(a) and 1002.105(b), the Bureau is not excluding agricultural lending or FCS lenders from coverage under this final rule. The commenter's request to permit supplemental voluntary collection and reporting of data by exempt FCS lenders if such data are not otherwise already being provided to the public is thus moot. Of course, any FCS lenders that are not covered financial institutions could nonetheless voluntarily collect and report data pursuant to final § 1002.5(a)(4)(ix).

Subpart B—Small Business Lending Data Collection

Section 1002.101 Authority, Purpose, and Scope

Proposed § 1002.101 would have set forth the authority, purpose, and scope for proposed subpart B. The Bureau sought comment on its proposed approach to this section, including whether any other information on the rule's authority, purpose, or scope should be addressed herein.

The Bureau did not receive any comments specifically regarding its recitation of the authority, purpose, and scope of subpart B. Comments addressing the authority, purpose, and scope of section 1071 and this final rule as a general matter are addressed in D.1 in the *Overview* to this part V above.

The Bureau is finalizing § 1002.101 as proposed. Final § 1002.101(a) provides that subpart B is issued by the Bureau pursuant to section 704B of ECOA (15 U.S.C. 1691c-2), and states that, except as otherwise provided therein, subpart B applies to covered financial institutions, as defined in § 1002.105(b), other than a person excluded from coverage of this part by section 1029 of the Dodd-Frank Act. Final § 1002.101(b) sets out section 1071's two statutory purposes of facilitating fair lending enforcement and enabling the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.

Section 1002.102 Definitions

The Bureau is finalizing a number of definitions for terms used in subpart B, in § 1002.102.[305] These definitions generally fall into several categories. First, some definitions in final § 1002.102 refer to terms defined elsewhere in subpart B—specifically, the terms business, covered application, covered credit transaction, covered financial institution, financial institution, and small business are defined in final §§ 1002.106(a), 1002.103, 1002.104, 1002.105(b), 1002.105(a), and 1002.106(b), respectively. These terms are of particular importance in subpart B, and the Bureau is defining them in separate sections, rather than in § 1002.102, for ease of reading.

Second, some terms in final § 1002.102 are defined by cross-referencing the definitions of terms defined in existing Regulation B—specifically, business credit, credit, and State are defined by reference to existing § 1002.2(g), (j), and (aa), respectively. Similarly, a portion of the small business and affiliate definitions refer to the SBA's regulation at 13 CFR 121.103. These terms are each used in subpart B, and the Bureau believes it is appropriate to incorporate them into the subpart B definitions in this manner.

Finally, the remaining terms are defined directly in final § 1002.102. These include applicant, closed-end credit transaction, LGBTQI+ individual, LGBTQI+-owned business, minority-owned business, open-end credit transaction, principal owner, small business lending application register, and women-owned business, as well as a portion of the definition of affiliate. Some of these definitions draw on definitions in existing Regulation B or elsewhere in Federal laws or regulations.

The Bureau believes that basing this rule's definitions on previously defined terms (whether in Regulation B or regulations promulgated by another agency), to the extent possible,

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[305] The Bureau notes that there are certain terms defined in subpart B outside of final § 1002.102. This occurs where a definition is relevant only to a particular section. For example, the firewall provisions in final § 1002.108 use the phrases "involved in making any determination concerning a covered application" and "should have access." Those phrases are defined in § 1002.108(a). Such definitions are discussed in detail in the section-by-section analyses of the provisions in which they appear.

will minimize regulatory uncertainty and facilitate compliance, particularly where the other regulations are likely to apply to the same transactions. As discussed further below, in certain instances, the Bureau is deviating from the existing definitions for purposes of this rule.

These definitions are each discussed in detail below. The Bureau is finalizing these definitions pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. In addition, the Bureau is finalizing certain of these definitions to implement particular definitions in section 1071 including the statutory definitions set out in 704B(h). Any other authorities that the Bureau is relying on to finalize certain definitions are discussed in the section-by-section analyses of those specific definitions.

102(a) Affiliate

Proposed Rule

The Bureau proposed § 1002.102(a) to define "affiliate" based on whether the term is used to refer to a financial institution or to an applicant.

Proposed § 1002.102(a) would have defined "affiliate" with respect to a financial institution as any company that controls, is controlled by, or is under common control with, another company, as set forth in the Bank Holding Company Act of 1956.[306] Existing Regulation B does not define affiliate. This proposed definition would have provided a consistent approach with the Bureau's Regulation C, which applies the term to financial institutions, as defined in Regulation C, for certain reporting obligations.[307]

Proposed § 1002.102(a) would have defined "affiliate" with respect to a business or an applicant as having the same meaning as described in 13 CFR 121.103, which is an SBA regulation titled "How does SBA determine affiliation?" The proposed definition would have provided consistency with the Bureau's proposed approach to what constitutes a small business

[306] 12 U.S.C. 1841 *et seq.*

[307] *See* Regulation C comment 4(a)(11)-3.

for purposes of section 1071 in proposed § 1002.106(b). Proposed § 1002.107(a)(14) would have permitted, but not required, a financial institution to report the gross annual revenue for the applicant in a manner that includes the revenue of affiliates as well. In proposed § 1002.107(a)(16), workers for affiliates of the applicant would be counted in certain circumstances for the number of workers data point.

The Bureau sought comment on its proposed approach to this definition.

Comments Received

Several industry commenters provided feedback on the Bureau's proposed definition of "affiliate." A joint letter from several trade associations asked the Bureau to provide clarification on how the definition of "affiliate" applies in the context of commercial real estate lending. Two other commenters objected to the Bureau's proposed reference to the SBA definition to determine affiliate of a small business because it can be changed by the SBA and the commenters recommended that the Bureau simplify the definition.

The Bureau did not receive comments on the proposed definition of "affiliate" with respect to a financial institution.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(a) as proposed. The Bureau believes it is appropriate to define "affiliate" with respect to financial institutions to be consistent with the approach in the Bureau's Regulation C, and received no comments suggesting it should do otherwise. The consistency with an existing regulatory definition may help provide clarity for financial institutions when determining their responsibilities under this final rule.

Regarding commenters' suggestions to simplify the definition of "affiliate," the Bureau does not believe it would be appropriate to deviate from the SBA's definition for determining who is an affiliate with respect to a business or an applicant. ECOA section 704B(h)(2) defines the term "small business" as having the same meaning as "small business concern" in section 3

of the Small Business Act.[308] Consistent with the statute, the Bureau's definitions of business and small business in final § 1002.106 refer to definitions in the SBA's regulations, of which the SBA's definition of affiliate in 13 CFR 121.103 is a part. The Bureau believes that defining "affiliate" in this manner is appropriate and necessary to maintain consistency with the SBA's definitions. In addition, the Bureau believes that using a commonly known existing regulatory definition will facilitate compliance with reporting obligations under this final rule. Finally, the Bureau believes the SBA's definition of affiliate is sufficiently broad to afford financial institutions flexibility in the small business size determination process, as discussed below in the section-by-section analysis of § 1002.106(b).

The Bureau addresses the comment regarding how the definition of "affiliate" applies in the context of commercial real estate lending in the section-by-section analysis of § 1002.106(b)(1) below.

102(b) Applicant

Proposed § 1002.102(b) would have defined "applicant" to mean any person who requests or who has received an extension of business credit from a financial institution. The term "applicant" is undefined in section 1071. Proposed § 1002.102(b) was based on the definition of applicant in existing Regulation B, though for consistency with other parts of the proposed rule, it added a limitation that the credit be business credit and uses the term financial institution instead of creditor. It also omitted the references to other persons who are or may become contractually liable regarding an extension of credit such as guarantors, sureties, endorsers, and similar parties. The Bureau acknowledged that including other such persons could exceed the scope of the data collection anticipated by section 1071. Including them could also make the data collection more difficult as financial institutions might need to report data points (such as gross annual revenue, NAICS code, time in business, and others) regarding multiple

[308] 15 U.S.C. 632.

persons in connection with a single application. The Bureau believed that collecting such information on guarantors, sureties, endorsers, and similar parties would likely not support section 1071's business and community development purpose.

The Bureau sought comment on its proposed approach to this definition and received one comment in response. The commenter requested that the Bureau clarify that loans jointly made to multiple borrowers, where one or more of the borrowers may qualify as a small business under the rule but are not the primary business(es) seeking the funding, are not subject to the reporting requirements.

For the reasons discussed herein, the Bureau is finalizing § 1002.102(b) as proposed. The Bureau believes it is appropriate to base the definition of applicant for purposes of new subpart B on the definition of applicant in existing Regulation B, with the limitation that the credit be business credit and using the term financial institution instead of creditor. The Bureau likewise believes that it is appropriate to limit the definition of applicant in subpart B to only those persons who request, or have received, an extension of business credit from a financial institution. As such, the definition of applicant in final § 1002.102(b) does not include other persons who are or may become contractually liable regarding an extension of business credit such as guarantors, sureties, endorsers, and similar parties. As stated in final comment 102(b)-1, in no way are the limitations to the term applicant in § 1002.102(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term applicant in existing § 1002.2(e) as applicable to existing Regulation B.

In response to the comment regarding loans jointly made to multiple borrowers, the Bureau does not believe that a modification to the definition of applicant is necessary. Rather, the Bureau is adding comment 103(a)-10 to address data collection and reporting if a covered financial institution receives a covered application from co-applicant businesses that are not affiliates, as defined in final § 1002.102(a). Final comment 103(a)-10 provides that if a covered financial institution receives a covered application from multiple businesses that are not

affiliates, as defined by final § 1002.102(a), it shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in final § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form. In addition, the Bureau notes that—if the applicants are affiliated entities—the rule already permits consideration of affiliates' revenues in determining whether a business qualifies as small. See the section-by-section analyses of §§ 1002.106(b) and 1002.107(a)(14) for additional discussion of affiliate revenue.

102(c) Business

Final § 1002.102(c) refers to § 1002.106(a) for a definition of the term "business." See the section-by-section analysis of § 1002.106(a) for a detailed discussion of that definition.

102(d) Business Credit

Proposed § 1002.102(d) would have referred to existing § 1002.2(g) for a definition of the term "business credit." The term "credit" is undefined in section 1071. Section 1071 does not use the term "business credit," though it does define "small business loan" as a loan made to a small business. Existing § 1002.2(g) defines "business credit" as "refer[ring] to extensions of credit primarily for business or commercial (including agricultural) purposes, but excluding extensions of credit of the types described in § 1002.3(a)-(d)," *i.e.*, public utilities credit, securities credit, incidental credit, and government credit.

The Bureau received two comments specific to its proposed definition of business credit. These two commenters, both credit union trade associations, expressed support for the proposed definition, stating that it was familiar to credit unions and encompasses the most common business credit products aimed at small business borrowers. The Bureau also received numerous comments related to its proposed coverage of agricultural credit, parts of which also touched on

the proposed definition of "business credit"; these comments are discussed below in the section-by-section analysis of § 1002.104(a).

The Bureau is finalizing § 1002.102(d) as proposed. Final § 1002.102(d) points to existing § 1002.2(g) in defining the term "business credit." The Bureau believes it is appropriate to define business credit by reference to the existing definition in Regulation B, which incorporates by reference the meaning of "credit," as defined in existing § 1002.2(j). For clarity and completeness, as discussed below, the Bureau is also adopting existing Regulation B's definition of credit. The Bureau's final rule uses the term business credit principally in defining a covered credit transaction in § 1002.104(a).

The Bureau notes that existing § 1002.2(g) excludes public utilities credit, securities credit, incidental credit, and government credit (that is, extensions of credit made *to* governments or governmental subdivisions, agencies, or instrumentalities—not extensions of credit made *by* governments), as defined in existing § 1002.3(a) through (d), from certain aspects of existing Regulation B.[309] For the purpose of subpart B, the Bureau is both incorporating existing § 1002.2(g)—which already includes partial carveouts for public utilities credit, securities credit, and incidental credit—and also finalizing complete exclusions for these types of credit from the definition of a covered credit transaction in § 1002.104(b). For clarity, the Bureau is separately defining these terms in § 1002.104(b) and explains the rationales for excluding each of them in the section-by-section analysis of § 1002.104(b) below. The Bureau is not adopting an exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities, because governmental entities do not constitute small businesses under the final rule.[310]

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[309] As explained in existing comment 3-1, under § 1002.3, procedural requirements of Regulation B do not apply to certain types of credit. The comment further states that all classes of transactions remain subject to § 1002.4(a) (the general rule barring discrimination on a prohibited basis) and to any other provision not specifically excepted.

[310] Government entities are not "organized for profit" and thus are not a "business concern" under final § 1002.106(a).

102(e) Closed-End Credit Transaction

Proposed § 1002.102(e) would have stated that a closed-end credit transaction means an extension of credit that is not an open-end credit transaction under proposed § 1002.102(n). The term "closed-end credit transaction" is undefined in section 1071. The Bureau's proposal would have specified different requirements for collecting and reporting certain data points based on whether the application is for a closed-end credit transaction or an open-end credit transaction. The definition of open-end credit transaction was addressed in proposed § 1002.102(n).

The Bureau sought comment on its proposed approach to the definition of a closed-end credit transaction. The Bureau received no comments and is finalizing § 1002.102(e) with one revision for clarity. The Bureau is revising the definition of a closed-end credit transaction to mean an extension of business credit that is not an open-end credit transaction under § 1002.102(n). The Bureau believes this definition is reasonable as it aligns with the definition of "open-end credit transaction" in final § 1002.102(o), and that such alignment will minimize confusion and facilitate compliance.

102(f) Covered Application

Final § 1002.102(f) refers to § 1002.103 for a definition of the term "covered application." See the section-by-section analysis of § 1002.103 for a detailed discussion of that definition.

102(g) Covered Credit Transaction

Final § 1002.102(g) refers to § 1002.104 for a definition of the term "covered credit transaction." See the section-by-section analysis of § 1002.104 for a detailed discussion of that definition.

102(h) Covered Financial Institution

Final § 1002.102(h) refers to § 1002.105(b) for a definition of the term "covered financial institution." See the section-by-section analysis of § 1002.105(b) for a detailed discussion of that definition.

102(i) Credit

Proposed § 1002.102(i) would have referred to existing § 1002.2(j) for a definition of the term "credit." The term "credit" is undefined in section 1071. Existing § 1002.2(j), which largely follows the definition of credit in ECOA,[311] defines "credit" to mean the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. The Bureau sought comment on its proposed approach to this definition.

The Bureau received several comments regarding its proposed definition of "credit." A few community groups expressed general support for a broad definition of credit. To ensure adequate coverage for future products, one commenter suggested defining credit to also cover situations where money is transmitted to a recipient but the money still effectively belongs to the transmitter and is to be repaid according to certain terms. Another commenter advocated for a credit definition that included as many lenders (and financing companies that are not technically lenders) as possible within the scope of this rulemaking, even when such companies are providing financing in a format that, according to the commenter, is not technically credit (the commenter offered cash advance and factoring companies as examples).

For the reasons set forth herein, the Bureau is finalizing § 1002.102(i) as proposed. Section 1002.102(i) refers to existing § 1002.2(j) for a definition of the term "credit." The Bureau believes that aligning to the implemented definition of credit in ECOA[312] for purposes of subpart B will help to foster consistency with existing Regulation B. The term credit in subpart B is used in the context of what constitutes a covered credit transaction—that is, whether the application is reportable under this final rule. See the section-by-section analysis of § 1002.104

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[311] *See* 15 U.S.C. 1691a. Existing Regulation B uses the term "applicant" instead of "debtor."

[312] *See id.* Existing Regulation B closely aligns with the definition of credit in ECOA, with some technical revisions and use of the term "applicant" instead of "debtor."

below for a detailed discussion of what does, and does not, constitute a covered credit transaction for purposes of this final rule.

102(j) Financial Institution

Final § 1002.102(j) refers to § 1002.105(a) for a definition of the term "financial institution." See the section-by-section analysis of § 1002.105(a) for a detailed discussion of that definition.

102(k) LGBTQI+ Individual and 102(l) LGBTQI+-Owned Business

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of this section." In the NPRM, the Bureau sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer plus (LGBTQ+)-owned business status, similar to its proposal for collecting minority-owned business status and women-owned business status under proposed § 1002.107(a)(18) and (19). The Bureau also sought comment on whether including this question, along with others, would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for industry.[313]

This section-by-section analysis of § 1002.102(k) and (*l*) discusses the Bureau's definition of LGBTQI+ individual and the related definition of LGBTQI+-owned business, respectively. Collection of LGBTQI+-owned business status is addressed in the section-by-section analysis of § 1002.107(a)(18).

Comments Received

The Bureau received comments from several lenders, individual commenters, and community and advocacy groups as to whether the Bureau should adopt a data point to collect an

[313] 86 FR 56356, 56482 (Oct. 8, 2021).

applicant's "LGBTQ+-owned business" status.[314] As explained further in the section-by-section analysis of § 1002.107(a)(18), some of these commenters did not support including such a data point in the final rule (and thus did not make any suggestions for how an LGBTQ+-owned business should be defined). One commenter opposed collecting LGBTQ+ data without a corresponding proposal to modify the definition of minority-owned business.

In contrast, other commenters supported requiring the collection and reporting of applicants' LGBTQ+-owned business status information. As discussed further in the section-by-section analysis of § 1002.107(a)(18), commenters generally explained that collecting such data would enhance fair lending enforcement and identify credit needs for these small businesses.

Most of these commenters generally echoed the Bureau's use of the term "LGBTQ+-owned business" status in expressing their support for the data point. Several recommended that the Bureau require financial institutions' inquiries about such status to include a definition of the status and give applicants response options specifically indicating that they are or are not such a business, similar to the Bureau's proposed approach for requesting information about applicants' minority-owned and women-owned business status.

One commenter suggested that the Bureau use the phrase "LGBTQI+-owned business" and include a definition in the final rule. The commenter recommended that the Bureau define the term as a business where (1) more than 50 percent of the ownership or control of which is held by one or more individuals self-identifying as lesbian, gay, bisexual, transgender, queer, or intersex and (2) more than 50 percent of the net profit or loss accrues to one or more individuals self-identifying as lesbian, gay, bisexual, transgender, queer, or intersex. The commenter stated that this definition is similar to the definitions of minority-owned and women-owned businesses and consistent with other Federal government and expert practice and recommendations as well

[314] The terms "LGBT," "LGBTQ," "LGBTQ+," and "LGBTQIA+" are used in this preamble to reflect the specific terms used by commenters, the conditions or titles of any cited research, or (particularly for "LGBTQ+") the Bureau's request for comment in the NPRM.

as the definition of "LGBTQ-owned business" in Federal legislation that was pending at that time.[315]

Final Rule

As discussed further in part II above and the section-by-section analysis of § 1002.107(a)(18) below, the Bureau believes that the collection of an applicant's LGBTQI+-owned business status will aid in fulfilling the purposes of section 1071, by facilitating evaluations of potential discriminatory lending practices on the basis of sex in violation of fair lending laws and helping communities, governmental entities, and creditors identify needs and opportunities of small businesses. Thus, the Bureau is adopting § 1002.102(k) and (*l*) pursuant to its authority under ECOA section 704B(e)(2)(H) to require financial institutions to compile and maintain any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071 and its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to the statute. The Bureau is not, as suggested by one commenter, including LGBTQI+ status in the definition of minority-owned business, but is, as requested by multiple commenters, adopting a definition of LGBTQI+ owned business that largely parallels the definition of a minority-owned business.

For the reasons set forth herein, the Bureau is defining "LGBTQI+ individual" in final § 1002.102(k) as including an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex. The Bureau is defining the term "LGBTQI+-owned business" in final § 1002.102(*l*) as "a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals." Both definitions are being included to facilitate

[315] The commenter cited the *LGBTQ Business Equal Credit Enforcement and Investment Act*, H.R. 1443, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/house-bill/1443/text (which would have amended ECOA section 704B to, among other things, require financial institutions to inquire whether a business is a "LGBTQ-owned" business).

the requirement in final § 1002.107(a)(18) that financial institutions collect an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses.

The Bureau agrees with a commenter's suggestion to use the term "LGBTQI+-owned business"—including an "I" to capture intersex individuals—instead of "LGBTQ+-owned business."[316] The Bureau believes that the term "LGBTQI+-owned business" better reflects the Bureau's intent to be broadly inclusive.

The Bureau notes that in user testing it conducted to assist its understanding of small business applicants' potential experience using the sample data collection form in the summer and fall of 2022, a few users were confused by the term "LGBTQI+-owned business."[317] Therefore, and consistent with commenters' suggestions, final comments 102(*l*)-2 and 107(a)(18)-2 explain that a financial institution must provide the definition of LGBTQI+-owned business when inquiring as to the applicant's business ownership status pursuant to final § 1002.107(a)(18). A financial institution may use the definition as set forth on the sample data collection form at appendix E. Final comment 102(*l*)-2 also clarifies that a financial institution must provide the definition of LGBTQI+ individual under final § 1002.102(k) if asked by the applicant, but does not need to do so unless asked.

Final comment 102(*l*)-2 clarifies that the definition of LGBTQI+-owned business is used only when an applicant determines if it is such a business for purposes of final § 1002.107(a)(18). The financial institution is not permitted or required to make its own determination as to whether an applicant is a LGBTQI+-owned business.

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[316] Explicit inclusion of intersex individuals within the scope of the definitions for LGBTQI+ individual and LGBTQI+-owned business is consistent with the prohibitions against discrimination on the basis of "sex" under ECOA and Regulation B. Sex characteristics including intersex traits are "inextricably bound up with" sex," *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020), and "cannot be stated without referencing sex," *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (quoting *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)).

[317] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. C, at 3, 8 (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

In line with commenters' suggestions, the definition for LGBTQI+-owned business in final § 1002.102(*l*) parallels concepts in the Bureau's definitions for minority-owned business and women-owned business in final § 1002.102(m) and (s), respectively. The final rule's LGBTQI+-owned business definition incorporates the same two-prong approach as the other business status definitions, with more than 50 percent ownership or control as the first prong and more than 50 percent of net profits or losses as the second prong.

The commentary for final § 1002.102(*l*) generally mirrors the commentary for the minority-owned business and women-owned business definitions in the final rule.[318] Final comment 102(*l*)-1 explains that a business must satisfy both prongs of the definition to be a LGBTQI+-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more LGBTQI+ individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more LGBTQI+ individuals. Final comment 102(*l*)-1 clarifies that the first prong of the definition can be met through either the control or ownership requirements (as do final comments 102(m)-1 and 102(s)-1).

Final comments 102(*l*)-3 through -6 mirror the corresponding commentary for the definitions of minority-owned business and women-owned business and provide clarifications of terms used and the concepts of ownership, control, and accrual of net profits or losses.

102(m) Minority-Owned Business

Proposed Rule

As discussed further herein, the final rule combines proposed § 1002.102(*l*) (minority individual) into final § 1002.102(m) to streamline the rule and facilitate compliance.

ECOA section 704B(b)(1) requires financial institutions to inquire whether applicants for credit are minority-owned businesses. For purposes of the financial institution's inquiry under 704B(b), 704B(h)(5) defines a business as a minority-owned business if (A) more than

[318] For discussion of comments as to the concepts of ownership and control in the LGBTQI+-owned business definition, the Bureau refers to discussion of these concepts in the section-by-section analyses of § 1002.102(m) and (s) regarding the definitions for minority-owned business and women-owned business.

50 percent of the ownership or control is held by one or more minority individuals, and (B) more than 50 percent of the net profit or loss accrues to one or more minority individuals. Section 1071 does not expressly define the related terms of "ownership" or "control," nor does it describe what it means for net profits or losses to accrue to an individual. Section 704B(h)(4) defines the term "minority" as having the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).[319] That statute defines "minority" to mean any Black American, Native American, Hispanic American, or Asian American.[320] While section 1071 uses the term "minority individual" in 704B(h)(5), it does not define that term.

Proposed § 1002.102(l)—definition of minority individual. Proposed § 1002.102(*l*) would have clarified that the term "minority individual" means a natural person who is American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino. As explained in the NPRM, the Bureau believed that these categories represent contemporary, more specific delineations of the categories described in section 1204(c)(3) of FIRREA. Proposed comment 102(*l*)-2 would have clarified that a multi-racial or multi-ethnic person is a minority individual. Proposed comment 102(*l*)-1 would have clarified that this definition would be used only when an applicant determines whether it is a minority-owned business pursuant to proposed §§ 1002.102(m) (definition of minority-owned business) and 1002.107(a)(18) (data point for minority-owned business status). Proposed comment 102(*l*)-3 would have clarified the relationship of the definition of minority individual to the disaggregated subcategories used to determine a principal owner's ethnicity and race.

The Bureau sought comment on its proposed approach to this definition, including its proposed clarification of the definition of minority individual, and requested comment on whether additional clarification was needed. The Bureau also sought comment on whether the

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[319] Pub. L. 101-73, section 1204(c)(3), 103 Stat. 183, 521 (1989) (12 U.S.C. 1811 note).

[320] *Id.*

definition of minority individual should include a natural person who is Middle Eastern or North African, and whether doing so should be dependent on whether Middle Eastern or North African is added as an aggregate category for purposes of proposed § 1002.107(a)(20).[321]

Proposed § 1002.102(m)—definition of minority-owned business. Proposed § 1002.102(m) would have defined a minority-owned business as a business for which more than 50 percent of its ownership or control is held by one or more minority individuals, and more than 50 percent of its net profits or losses accrue to one or more minority individuals. Proposed comment 102(m)-1 would have explained that a business must satisfy both prongs of the definition to be a minority-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more minority individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more minority individuals.

Proposed comment 102(m)-2 would have clarified that the definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of proposed § 1002.107(a)(18). A financial institution would provide the definition of minority-owned business when asking the applicant to provide minority-owned business status pursuant to proposed § 1002.107(a)(18), but a financial institution would not be permitted or required to make its own determination regarding whether an applicant is a minority-owned business for this purpose.

Proposed comment 102(m)-3 would have further noted that a financial institution would be permitted to assist an applicant when determining whether it is a minority-owned business but would not be required to do so, and could provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in proposed comments 102(m)-4 through -6. Additionally, for purposes of reporting an applicant's minority-owned business

[321] The Bureau received a number of comments regarding whether Middle Eastern or North African should be added as an aggregate category. Those comments are discussed in the section-by-section analysis of § 1002.107(a)(19).

status, a financial institution would rely on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

The Bureau proposed to clarify "ownership" and "control" using concepts from the beneficial ownership requirements in FinCEN's customer due diligence rule.[322] Proposed comment 102(m)-4 would have clarified that a natural person owns a business if that natural person directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Proposed comment 102(m)-4 would have also provided examples of ownership and clarified that, where applicable, ownership would need to be traced or followed through corporate or other indirect ownership structures for purposes of proposed §§ 1002.102(m) and 1002.107(a)(18). Proposed comment 102(m)-5 would have clarified that a natural person controls a business if that natural person has significant responsibility to manage or direct the business, and would have provided examples of natural persons who control a business. Proposed comment 102(m)-6 would have clarified that a business's net profits and losses accrue to a natural person if that natural person receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

The Bureau sought comment on the proposed definition of minority-owned business and possible alternatives that may clarify the term in order to help ensure that small business applicants can determine whether they are minority-owned businesses for purposes of data collection pursuant to section 1071.

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[322] *See* 31 CFR 1010.230 (describing the beneficial ownership requirements for legal entity customers). The Department of the Treasury's Financial Crimes Enforcement Unit (FinCEN) recently issued a final rule to implement requirements regarding reporting of beneficial ownership information pursuant to the Corporate Transparency Act, 31 U.S.C. 5336. *See* 87 FR 59498 (Sept. 30, 2022). While FinCEN's final rule does not include changes to the current customer due diligence rule, FinCEN has indicated its intent to revise the customer due diligence rule in a future rulemaking. *See id.* at 59507. FinCEN's final rule includes definitions for beneficial owner that will be different from what currently exists in the customer due diligence rule, as to both control and ownership, when the rule goes into effect on January 1, 2024. *See id.* at 59594. However, the final rule does not change the 25 percent threshold for determining ownership. *See id.*

Comments Received

Proposed § 1002.102(l)—definition of minority individual. The Bureau received comments regarding the definition of minority individual from several industry commenters and community groups.

One community group stated that the Bureau's proposal to mirror HMDA with respect to the definition of minority individual is desirable because HMDA's racial and ethnic categories are reasonably comprehensive, and using the same categories eases reporting requirements and creates consistency for applicants. A group of trade associations and a bank supported the Bureau's proposal to define a minority individual using only aggregate ethnicity and race categories, stating that doing so will help lessen confusion. Another bank requested clarification on who is considered multi-racial or multi-ethnic for purposes of the rule.

Proposed § 1002.102(m)—definition of minority-owned business. The Bureau received comments regarding the definition of minority-owned business from lenders, trade associations, and community groups.

One community group stated that the collection of data on minority-owned businesses, along with the collection of data on women-owned businesses, will help illustrate the experience of firms owned by women of color who likely face even higher barriers to accessing small business credit than those firms not owned by women of color. The commenter noted that these firms comprise a significant portion of small businesses and there are a greater proportion of women of color who own businesses than the share of white-owned businesses owned by women. Another requested that the Bureau add an "I don't know" response to the list of possible responses, as there may be applicants who cannot make a legal conclusion as to whether the small business is minority-owned. A trade association asserted that inquiring about the ethnicity (or gender) of business owners is contrary to the expectations of financial institutions and applicants alike.

Regarding the proposed requirement that in order to be considered a minority-owned business, one or more minority individuals must hold more than 50 percent of the ownership or control of the business, the Bureau received comments from several community groups and lenders in support. Conversely, a trade association and a bank urged the Bureau to revise the requirement such that one or more minority individuals must hold "50 percent or more" of the ownership or control because the statutory definition may result in underreporting for equal partnerships with mixed race partners and this would, they said, slant the statistical picture.

Regarding the proposed requirement that in order to be considered a minority-owned business, more than 50 percent of the net profit or loss must accrue to one or more minority individuals, a community group stated that the definition is appropriate to prevent illusory "ownership" by a minority individual. Several other commenters also supported the definition.

Several industry commenters requested that the Bureau not include the requirement that more than 50 percent of the net profits or losses must accrue to one or more minority individuals. Some of these commenters stated that the initial prong of the definition requiring more than 50 percent of ownership or control by a minority individual is sufficient for determining ownership and would reduce complexity for borrowers. A CDFI lender stated that defining ownership based on a profit and loss calculation may not fully serve the objectives of the statute, and asked the Bureau to consider the CDFI Fund definition of minority-owned business.[323] Several commenters also argued that the net profits or losses prong complicates the definition, could result in inaccurate data collection, implicates the limited understanding of many small business owners regarding the meaning of net profits and losses as well as the sensitive nature of

[323] The community group cited to the September 2021 CDFI Transactional Level Report Data Point Guidance, which provides guidance on providing transactional level report data. Under "Minority Owned or Controlled," the guidance states to "[r]eport whether the investee/borrower is more than 50% owned or controlled by one or more minorities. If the business is a for-profit entity, report whether more than 50% of the owners are minorities. If the business is a nonprofit entity, report whether more than 50% of its Board of Directors are minorities." CDFI Fund, *CDFI Transactional Level Report Data Point Guidance*, at 33 (Sept. 2021), https://www.cdfifund.gov/sites/cdfi/files/2021-08/CDFITLRGuidance_Final_Sept2021.pdf.

these issues, and concluded that many small business owners will not understand the definition as provided and will, as a result, decline to answer the question.

A bank asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave an example of an applicant that provides demographic information for one application, and then chooses not to provide information for a subsequent application, and asking which collection should be reported.[324] A trade association stated that it is possible in certain states for a third party non-owner to act as trustee of a trust, and that the Bureau should change a comment example to clarify whether it is the Bureau's intent to presume that the trustee of a trust is the owner. Another bank also asserted that requiring banks to collect such information is costly to banks, customers, and communities. A group of trade associations asserted that the commentary should be revised to explicitly state that a financial institution must provide an applicant with the applicable definition.

Several industry commenters supported the proposal to rely solely on the data provided by the applicant and that financial institutions should not be required to verify any such information provided by the applicant. With respect to self-certification of minority-owned business status, two trade associations supported permitting credit applicants to self-certify that 50 percent or more of the net profit or loss accrues to one or more minority individuals, rather than lenders needing to verify this information. Another trade association asserted that the applicant should solely determine whether the individual owners are multi-ethnic or multi-racial individuals and the financial institution should not be required to otherwise verify or report any information other than that supplied by the applicant.

[324] See the section-by-section analysis of § 1002.107(d) regarding the use of previously collected data.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(m) with a number of revisions to the regulatory text and commentary to incorporate the definition of minority individual. The Bureau has made these changes to streamline the rule and facilitate compliance. The Bureau is otherwise finalizing the associated commentary with a minor adjustment for clarity.

Final § 1002.102(m) defines a minority-owned business as a business for which one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals hold more than 50 percent of its ownership or control and for which more than 50 percent of the net profits or losses accrue to one or more such individuals. Final comment 102(m)-1 explains that a business must satisfy both prongs of the definition to be a minority-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more such individuals, and (B) more than 50 percent of the net profits or losses accrue to one or more such individuals. Final comment 102(m)-1 includes an additional sentence to clarify that a business that is controlled by an individual with the characteristics listed in the regulatory text satisfies this prong of the definition even if none of the individuals with ownership in the business satisfies those characteristics.

Final comment 102(m)-2 clarifies that the definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of final § 1002.107(a)(18), and is finalized with an adjustment made for clarity. Final comment 102(m)-3 is finalized as proposed and notes that a financial institution is permitted to assist an applicant when determining whether it is a minority-owned business but is not required to do so, may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in final comments 102(m)-4 through -6, and that, for purposes of reporting an applicant's minority-owned business status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

Final comment 102(m)-4, finalized with minor edits for consistency and clarity, provides examples of ownership and clarifies that, where applicable, ownership needs to be traced through corporate or other indirect ownership structures. With regard to a commenter's assertion that, in certain states, a trustee could act as a third party non-owner trustee of a trust, the Bureau believes the trustee would be considered an owner for purposes of this definition. Final comment 102(m)-4 also clarifies (as it did in the Bureau's proposal) that a trustee is considered the owner of a trust.

Final comment 102(m)-5 clarifies that an individual controls a business if that individual has significant responsibility to manage or direct the business, while final comment 102(m)-6 clarifies that a business's net profits and losses accrue to an individual if that individual receives the net profits, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes. Both comments are finalized with minor edits for consistency and clarity.

Final comments 102(m)-7 and -8 are adopted from the commentary to proposed § 1002.102(*l*) (respectively, proposed comments 102(*l*)-2 and -3). Final comment 102(m)-7 clarifies that an individual who is multi-racial or multi-ethnic constitutes an individual for which the definition of minority-owned business may apply, depending on whether the individual meets the other requirements of the definition. Final comment 102(m)-8 clarifies that the relationship of the ethnicity and race categories used in this section are aggregate ethnicity and race categories and are the same aggregate categories (along with Not Hispanic or Latino for ethnicity, and White for race) to collect an applicant's principal owners' ethnicity and race pursuant to final § 1002.107(a)(19). Final comment 102(m)-8 is revised from proposed comment 102(*l*)-3 to more clearly state the relationship of the ethnicity and race disaggregated subcategories in this comment to those used in final § 1002.107(a)(19). Proposed comment 102(*l*)-1 was not finalized because it was no longer relevant once the definition of minority individual was incorporated into the minority-owned business definition.

With respect to the categories of persons that constitute minorities for purposes of determining minority-owned business status, the Bureau believes its clarified terminology in final § 1002.102(m), which uses the aggregate ethnicity and race categories set forth in existing § 1002.13(a)(1)(i) and appendix B to Regulation C, will avoid the potentially confusing situation where an applicant is presented one set of aggregate ethnicity and race categories when answering questions about the principal owners' ethnicity and race pursuant to final § 1002.107(a)(19) (which also uses the same aggregate ethnicity and race categories)[325] but is asked to use a different set of aggregate categories when indicating whether the business is a minority-owned business. It also avoids creating a situation where a financial institution is required to use different aggregate ethnicity and race categories when complying with different portions of Regulation B and, if applicable, Regulation C. This consistency across ethnicity and race data collection regimes will also allow for better coordination among data users when reviewing data.[326] Further, the Bureau believes that these categories represent contemporary, more specific delineations of the categories described in section 1204(c)(3) of FIRREA.[327]

The Bureau does not believe it would be appropriate to deviate from the statutory definition of a minority-owned business in the various ways some commenters suggested, and the Bureau's authority to deviate from the statutory language is limited. The Bureau also believes that many small business applicants already respond to questions about who owns and who controls a business entity when completing customer due diligence forms or otherwise responding to questions related to that rule and thus will be familiar with these concepts.

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[325] The Bureau notes that while the aggregate ethnicity and race categories are the same among final § 1002.107(a)(19), existing § 1002.13(a)(1)(i), and appendix B to Regulation C, the disaggregated race subcategories that an applicant may use to respond to a financial institution's inquiry as to its principal owners' race under final § 1002.107(a)(19) differ (*i.e.*, due to the addition of disaggregated Black or African American race subcategories) from the disaggregated race subcategories in existing § 1002.13(a)(1)(i), and appendix B to Regulation C. See the section-by-section analysis of § 1002.107(a)(19).

[326] For example, OMB uses these same categories for the classification of Federal data on race and ethnicity. *See* Off. of Mgmt. & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 FR 58785 (Oct. 30, 1996).

[327] *See, e.g.*, 80 FR 36356 (June 24, 2015) (NCUA interpretive ruling and policy statement implementing an identical FIRREA definition of minority using this same modern technology).

Although the customer due diligence rule does not address the second prong of the definition regarding accrual of net profits or losses, final comment 102(m)-6 provides a comprehensive explanation of this prong of the definition.

With regard to comments urging the Bureau to remove the prong requiring that more than 50 percent of its net profits or losses accrue to one or more minority individuals in order to be considered a minority-owned business, aside from the Bureau's limited authority to deviate from the statutory language, the Bureau finds that this prong is necessary to prevent illusory "ownership" claims by "straw" owners.

Finally, with regard to commenters' requests for further clarification, in accordance with ECOA section 704B(g)(3), the Bureau may release material, as part of its regulatory implementation strategy, to assist both financial institutions with complying with the requirements of § 1002.102(m) and small businesses in understanding this definition.

102(n) Open-End Credit Transaction

Proposed § 1002.102(n) would have stated that an open-end credit transaction means an open-end credit plan as defined in Regulation Z § 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in § 1026.2(a)(12), is extended by a creditor, as defined in § 1026.2(a)(17), or is extended to a consumer, as defined in § 1026.2(a)(11). The term "open-end credit transaction" is undefined in section 1071. The Bureau's proposal would have specified different rules for collecting and reporting certain data points based on whether the application is for a closed-end credit transaction or an open-end credit transaction.

The Bureau sought comment on its proposed approach to this definition. The Bureau received no comments and is finalizing § 1002.102(n) as proposed. The Bureau believes this definition is reasonable because it aligns with the definition of "open-end credit transaction" in Regulation Z § 1026.2(a)(20), and that such alignment will minimize confusion and facilitate compliance.

102(o) Principal Owner

Proposed Rule

ECOA section 704B(e) requires financial institutions to compile and maintain the ethnicity, race, and sex of an applicant's principal owners. However, section 1071 does not expressly define who is a principal owner of a business. Proposed § 1002.102(o) would have defined principal owner in a manner that is, in part, consistent with the beneficial ownership requirements in FinCEN's customer due diligence rule.[328] Specifically, a natural person would be a principal owner if the natural person directly owns 25 percent or more of the equity interests of the business. Further, as noted in proposed comment 102(o)-1, a natural person would need to directly own an equity share of 25 percent or more in the business in order to be a principal owner. The Bureau also proposed that entities not be considered principal owners and indirect ownership by individuals likewise not be considered when determining if someone is a principal owner for purposes of collecting and reporting principal owners' ethnicity, race, and sex or the number of principal owners. Thus, when determining who is a principal owner, ownership would not be traced through multiple corporate structures to determine if a natural person owns 25 percent or more of the applicant's equity interests. Additionally, because only a natural person would be a principal owner for purposes of the rule, entities such as trusts, partnerships, limited liability companies, and corporations, would not be principal owners.

Proposed comment 102(o)-2 would have clarified that a financial institution would provide an applicant with the definition of principal owner when asking the applicant to provide the number of its principal owners pursuant to proposed § 1002.107(a)(20) and the ethnicity, race, and sex of its principal owners pursuant to proposed § 1002.107(a)(19). Proposed comment

[328] *See* 31 CFR 1010.230 (describing the beneficial ownership requirements for legal entity customers). As noted above, FinCEN recently issued a final rule to implement requirements regarding reporting of beneficial ownership information pursuant to the Corporate Transparency Act. *See* 87 FR 59498 (Sept. 30, 2022). That final rule does not amend the current customer due diligence rule (although FinCEN has indicated that it will be revised at a later point). *See* 87 FR 59498, 59507. Notably, however, FinCEN's final rule did not change the 25 percent threshold for determining ownership. *See id.* at 59594.

102(o)-2 would have also explained that if a financial institution meets in person with a natural person about a covered application, the financial institution may be required to determine if the natural person with whom it meets is a principal owner in order to collect and report the principal owner's ethnicity and race based on visual observation and/or surname. Additionally, proposed comment 102(o)-2 would have noted that if an applicant does not provide the number of its principal owners in response to the financial institution's request pursuant to proposed § 1002.107(a)(21), the financial institution may need to determine the number of the applicant's principal owners and report that information based on other documents or information.

The Bureau explained that aligning the proposed definition of principal owner with the 25 percent ownership definition in the customer due diligence rule would likely be familiar to most financial institutions and applicants. The customer due diligence rule is broadly in use and banks, credit unions, and certain other financial institutions must comply with that rule. Further, the Bureau believed that applicants, as a general matter, would be more likely to be familiar with customer due diligence requirements than SBA or CDFI Fund requirements because they have to complete customer due diligence forms before opening an initial account (*i.e.*, loan or deposit account) at a bank or at certain other institutions. However, unlike the customer due diligence rule, due to potential complications with collecting ethnicity, race, and sex information for principal owners, the Bureau proposed that individuals that only indirectly own 25 percent or more of an applicant's equity interests, as well as entities and trusts, would not be considered principal owners for purposes of the rule. The Bureau sought comment on its proposed definition, including its proposal to not include individuals that only indirectly own 25 percent or more of an applicant's equity interests as principal owners.

Comments Received

The Bureau received comments on this aspect of the proposal from a number of banks, trade associations, community groups, and a business advocacy group. Some of the industry commenters and a community group supported the Bureau's proposed definition for principal

owner. A group of trade associations agreed with the Bureau's proposal to align, in part, the definition with the customer due diligence rule, stating that financial institutions are already familiar with ownership concepts through that rule. Trade association commenters also supported the Bureau's proposal not to include entities and indirect ownership by natural persons, with one stating that the concepts of ownership by entities and indirect ownership would add unnecessary complexity to the Bureau's final rule and another noting that its members found them difficult concepts to explain and determine. The community group supporting the Bureau's proposed definition for principal owner stated that the proposed definition made intuitive sense, as 25 percent is a significant amount of ownership.

Several other industry commenters did not support the Bureau's proposed definition. Specifically, these commenters requested that the Bureau look to and align with all the concepts of the customer due diligence rule. The commenters stated that because financial institutions and customers are familiar with the customer due diligence rule and financial institutions already identify principal owners thereunder, consistency between the two regulatory regimes would reduce complexity and facilitate compliance. A business advocacy group stated that aligning the rules completely would allow financial institutions to leverage existing processes and training and focus on customer needs rather than regulatory interpretation. Another commenter argued that a new definition for principal owner under the rule would add unnecessary complexity to the loan origination process. A lender specifically suggested that financial institutions be required to identify and verify the identity of each individual who owns 25 percent or more of the entity, and one individual who controls the entity, as is required under the customer due diligence rule. Another commenter similarly argued for replicating this requirement for the rule, arguing that financial institutions would not find it challenging to trace indirect ownership because they already do so under the customer due diligence rule, that the approach would be familiar to small business applicants structured as legal entities, and that small businesses that are not legal entities (*e.g.*, sole proprietorships) likely would not have complicated equity structures.

Two industry commenters that supported aligning principal owner definition in the Bureau's rule more closely with the customer due diligence rule than proposed by the Bureau also expressed concern that differences in the definition between the regulatory regimes would lead to customer confusion. One of these commenters argued that confusion would likely result for applicants who will be asked to provide information about principal owners under both rules at the same point of the origination process. The other asserted that confusion as a result of different definitions would increase the possibility that customers would refuse to provide information.

A bank commented that the Bureau's proposal did not provide enough guidance or procedures for how financial institutions should handle reporting for small business applicants whose principal owner(s) are a separate corporate entity or trust.

Another bank stated that financial institutions should not be required to determine the ownership of small businesses, which it said the proposed rule would require.

A trade association, which requested an exclusion for applications from trusts from coverage under the final rule, raised a question about who should be considered a principal owner of a trust for data collection purposes, such as whether they should be the settlors, beneficiaries, trustees, or some combination thereof.

Final Rule

For the reasons set forth herein, the Bureau is finalizing its definition of principal owner in § 1002.102(o) and associated commentary with certain adjustments. The Bureau believes it is appropriate to align, in part, its definition of principal owner with the 25 percent ownership concept in FinCEN's customer due diligence rule given financial institutions' and applicants' likely familiarity with that rule's requirements.[329] The Bureau does not believe, however, that its definition must completely match the ownership and control requirements in the customer due

[329] 86 FR 56356, 56395 (Oct. 8, 2021).

diligence rule as urged by some commenters. While differences between similar concepts in different regulatory regimes may lead to some initial confusion, particularly as financial institutions (as well as small business applicants) already familiar with the customer due diligence rule implement this final rule's requirements, the Bureau believes that adding the concepts of indirect ownership by natural persons, as well as ownership by entities or trusts, to the definition of principal owner would add unnecessary complexity to this final rule.

Generally, FinCEN's customer due diligence rule defines a beneficial owner as not just any individual who directly owns 25 percent or more of a legal entity, but also includes individuals who indirectly have that amount of ownership in the entity, such as through multiple corporate structures.[330] If a trust directly or indirectly owns 25 percent or more of the entity, the trustee is considered to be a beneficial owner.[331] In addition to ownership, the customer due diligence rule also looks to control. A beneficial owner also includes the single individual with significant responsibility to control, manage, or direct the entity.[332]

The Bureau does not believe that it would be appropriate for the rule's definition of principal owner to incorporate indirect ownership and control, as suggested by some commenters. This final rule requires covered financial institutions to collect and report the ethnicity, race, and sex of small business applicants' principal owners and includes the definition of principal owner at § 1002.102(o) for the purpose of facilitating financial institutions' and applicants' ability to provide such information. The Bureau believes that a simpler definition for principal owner that aligns with the customer due diligence rule's general 25 percent or more ownership concept, but which only applies to individuals (not entities or trusts) with direct ownership, will encourage applicants to provide their principal owners' ethnicity, race, and sex

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[330] 31 CFR 1010.230(d)(1). *See also* Fin. Crimes Enf't Network, U.S. Dep't of Treas., *FinCEN Guidance FIN-2018-G001: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions* 3 (Apr. 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf. Certain legal entities are exempted from the rule. 31 CFR 1010.230(e)(2).

[331] 31 CFR 1010.230(d)(3).

[332] 31 CFR 1010.230(d)(2).

and facilitate more accurate reporting. With the simpler definition for principal owner, applicants do not need to first make potentially difficult determinations about which individuals indirectly own or control the small business before providing such individuals' ethnicity, race, and sex information.

The Bureau does not believe differences between the customer due diligence beneficial owner definition and the principal owner definition in this rule will lead applicants to refuse to provide their principal owners' ethnicity, race, and/or sex information, as suggested by one commenter. In contrast, the Bureau believes that its principal owner definition is less complicated and easier to understand and is more likely to facilitate applicants' willingness to provide their principal owners' information.

With respect to a commenter's assertion that the NPRM did not provide enough guidance or procedures for how financial institutions should handle reporting for small business applicants whose principal owner(s) are a separate corporate entity or trust, under the final rule (as generally in the proposal), only individuals are considered principal owners. Thus, entities, such as trusts, partnerships, limited liability companies, and corporations, are not principal owners. Final comment 107(a)(19)-10 clarifies that if an applicant has fewer than four principal owners (*e.g.*, because only one individual owns 25 percent or more of the equity interests of the small business), the financial institution reports ethnicity, race, and sex information for the number of principal owners that the applicant has identified and reports that the ethnicity, race, and sex fields for additional principal owners are "not applicable." (In the NPRM, this clarification generally appeared in proposed appendix G, instruction 25.)

Relatedly, as discussed in the section-by-section analysis of § 1002.106(a), a trust may also be a small business applicant (as opposed to a trust that is an owner of small business applicant) under the final rule. In this case, as was noted by a trade association commenter, it is unclear who should be considered a principal owner for the purpose of principal owners' ethnicity, race, and sex information. The Bureau has added new comment 102(o)-2 clarifying

that if a trust is an applicant for a covered credit transaction, a trustee is considered an owner of the trust, to align with commentary accompanying the definitions for LGBTQI+-owned business, minority-owned business, and women-owned business.

As to a commenter's concern that the rule would require financial institutions to determine the ownership of a business, it is unclear as to the specific aspect of the Bureau's proposal to which the commenter was referring. Under the Bureau's proposal (as in the final rule), a financial institution would collect and report the following information related to the ownership of an applicant: the applicant's status as a minority-owned and/or women-owned small business (as well as LGBTQI+-owned business status), the number of principal owners, and the ethnicity, race, and sex of those principal owners. A financial institution can rely (and, in fact, for the protected demographic information, must rely) upon an applicant's self-reported information. This aspect of those data points has been substantially finalized as proposed. Final comment 107(a)(18)-9, regarding the collection and reporting of women-owned, minority-owned, and LGBTQI+-owned business status information clarifies that a financial institution must only report an applicant's responses, even if it verifies or otherwise obtains such information. Final comment 107(a)(20)-2, regarding the collection and reporting of the number of an applicant's principal owners, also provides that a financial institution may rely upon an applicant's statements or information to report such information. It further provides that the financial institution is not required to verify the number of an applicant's principal owners, but if it does so, then it must report the verified information. Thus, a financial institution is not required to make its own determinations about the ownership of a business under the final rule.[333]

[333] The Bureau notes, however, that as part of its proposal requiring financial institutions to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances, a financial institution would have needed to determine if a representative of the applicant with whom it was meeting in person was a principal owner. As discussed in the section-by-section analysis of § 1002.107(a)(19) below, the Bureau is not finalizing this requirement. Thus, to the extent the comment was referring to this aspect of the proposal, the commenter's concern has been rendered moot.

In light of the foregoing, the text of final § 1002.102(o) and final comment 102(o)-1 generally remain unchanged from the proposal, though upon further consideration the Bureau has changed the reference to "natural person" in the proposed definition and related comment to "individual" in the final rule. In user testing conducted on versions of the Bureau's proposed sample data collection form at appendix E, users expressed confusion about the term "natural person."[334] The Bureau does not believe that there is a meaningful difference between the terms "individual" and "natural person" and as a result has decided to use the term "individual" in the definition for comprehensibility.

The Bureau is finalizing proposed comment 102(o)-2, renumbered as final comment 102(o)-3, to explain the purpose of the definition of principal owner; the Bureau has revised this comment to reflect other changes in the rule.

102(p) Small Business

Final § 1002.102(p) refers to § 1002.106(b) for a definition of the term "small business." See the section-by-section analysis of § 1002.106(b) for a detailed discussion of that definition.

102(q) Small Business Lending Application Register

Proposed § 1002.102(q) would have defined the term "small business lending application register" or "register" as the data reported, or required to be reported, annually pursuant to proposed § 1002.109. This definition referred only to the data that is reported, or required to be reported, annually; it did not refer to the data required to be collected and maintained (prior to reporting).[335] The Bureau sought comment on its proposed definition of "small business lending application register" or "register" in proposed § 1002.102(q). The Bureau received no comments on this definition, and therefore is finalizing § 1002.102(q) as proposed.

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[334] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. B, at 12, 15 (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

[335] In contrast, the term "Loan/Application Register" in Regulation C § 1003.2(k) refers to both the record of information required to be collected pursuant to § 1003.4 as well as the record submitted annually or quarterly, as applicable, pursuant to § 1003.5(a).

102(r) State

Proposed § 1002.102(r) would have referred to existing § 1002.2(aa) for a definition of the term "State." Existing § 1002.2(aa) defines the term as any State, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States. The Bureau requested comment on its proposed approach to this definition, but did not receive any feedback. The Bureau is finalizing § 1002.102(r) as proposed. The Bureau believes that, being consistent with existing Regulation B, this definition will be familiar to financial institutions.

102(s) Women-Owned Business

Proposed Rule

ECOA section 704B(b)(1) requires financial institutions to inquire whether applicants for credit are women-owned businesses. For purposes of the financial institution's inquiry under 704B(b), 704B(h)(6) defines a business as a women-owned business if (A) more than 50 percent of the ownership or control is held by one or more women, and (B) more than 50 percent of the net profit or loss accrues to one or more women. Section 1071 does not expressly define the related terms of "ownership" or "control," nor does it describe what it means for net profits or losses to accrue to an individual.

Proposed § 1002.102(s) would have defined a women-owned business as a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women. Proposed comment 102(s)-1 would have explained that a business must satisfy both prongs of the definition to be a women-owned business—that is, (A) more than 50 percent of the ownership or control is held by one or more women, and (B) more than 50 percent of the net profits or losses accrue to one or more women.

Proposed comment 102(s)-2 would have clarified that the definition of women-owned business is used only when an applicant determines if it is a women-owned business for purposes of proposed § 1002.107(a)(19). A financial institution would have provided the definition of

women-owned business when asking the applicant to provide women-owned business status pursuant to proposed § 1002.107(a)(19), but a financial institution would not have been permitted or required to make its own determination regarding whether an applicant is a women-owned business for this purpose.

Proposed comment 102(s)-3 would have further noted that a financial institution would be permitted to assist an applicant when determining whether it is a women-owned business but would not be required to do so, and could provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in proposed comments 102(s)-4 through -6. Additionally, for purposes of reporting an applicant's women-owned business status, a financial institution would rely on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

The Bureau proposed to clarify "ownership" and "control" using concepts from FinCEN's customer due diligence rule. Proposed comment 102(s)-4 would have clarified that a natural person owns a business if that natural person directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Proposed comment 102(s)-4 would have also provided examples of ownership and clarified that, where applicable, ownership would need to be traced or followed through corporate or other indirect ownership structures for purposes of proposed §§ 1002.102(s) and 1002.107(a)(19). Proposed comment 102(s)-5 would have clarified that a natural person controls a business if that natural person has significant responsibility to manage or direct the business and would provide examples of natural persons who control a business. Proposed comment 102(s)-6 would have clarified that a business's net profits and losses accrue to a natural person if that natural person receives the net profits, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

The Bureau sought comment on the proposed definition of women-owned business and possible alternatives that may clarify the term in order to help ensure that small business

applicants can determine whether they are women-owned businesses for purposes of data collection pursuant to section 1071.

Comments Received

The Bureau received comments regarding the definition of a women-owned business from a number of banks, trade associations, and community groups.

One community group requested that the Bureau add an "I don't know" response to the list of possible responses, as there may be applicants who cannot make a legal conclusion as to whether the small business is women-owned.

Regarding the proposed requirement that to be considered a women-owned business, one or more women must hold "more than 50 percent" of the ownership or control, the Bureau received several comments from community groups and a CDFI lender supporting this requirement. A trade association stated that the Bureau should revise the requirement to state that one or more women must hold "50 percent or more" of the ownership or control because the statutory definition may result in underreporting for equal partnerships with mixed gender partners.

Regarding the proposed requirement that to be considered a women-owned business, more than 50 percent of the net profit or loss must accrue to one or more women, one community group stated that the statutory definition is appropriate to prevent illusory "ownership" by one or more women. Another commenter supported the definition.

Some commenters stated that the Bureau should not include the statutory definition requirement that more than 50 percent of the net profit or loss must accrue to one or more women. A number of commenters stated that the initial prong of the definition requiring more than 50 percent of ownership or control by a woman is sufficient for determining ownership and would reduce complexity for borrowers. A CDFI lender stated that defining ownership on a profit and loss calculation may not fully serve the objectives of the statute, and asked the Bureau

to consider the CDFI Fund definition of women-owned business.[336] Several industry commenters asserted that the net profits or losses prong complicates the definition, can result in inaccurate data collection (for example, in spousal relationships where each partner equally owns and controls a small business), implicates the limited understanding of many small business owners regarding the meaning of net profits and losses as well as the sensitive nature of these issues, and that many small business owners will not understand the definition as provided and will, as a result, decline to answer the question.

A bank asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections. Specifically, the commenter gave an example of an applicant that provides demographic information for one application, and then chooses not to provide information for a subsequent application, and asking which collection should be reported.[337] A trade association stated that it is possible in certain States for a third party non-owner to act as trustee of a trust, and that the Bureau should change a comment example to clarify whether it is the Bureau's intent to presume that the trustee of a trust is the owner. Another bank also asserted that requiring banks to collect such information is costly to banks, customers, and communities. A group of trade associations asserted that the commentary should be revised to explicitly state that a financial institution must provide an applicant with the applicable definition.

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[336] The community group cited to the September 2021 CDFI Transactional Level Report Data Point Guidance, which provides guidance on providing transactional level report data. Under "Women Owned or Controlled," the guidance states to "[r]eport whether the investee/borrower is more than 50% owned or controlled by one or more women. If the business is a for-profit entity, report whether more than 50% of the owners are women. If the business is a nonprofit entity, report whether more than 50% of its Board of Directors are women." CDFI Fund, *CDFI Transactional Level Report Data Point Guidance*, at 33 (Sept. 2021), https://www.cdfifund.gov/sites/cdfi/files/2021-08/CDFITLRGuidance_Final_Sept2021.pdf.

[337] See the section-by-section analysis of § 1002.107(d) for a discussion on the use of previously collected data.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.102(s) with one addition and one minor adjustment for clarity, along with several non-substantive technical revisions to update citations to other provisions.

Final § 1002.102(s) defines a women-owned business as a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women. Final comment 102(s)-1 explains that a business must satisfy both prongs of the definition to be a women-owned business and includes an additional sentence to clarify that a business that is controlled by a woman or by women satisfies this prong of the definition even if none of the individuals with ownership in the business are women.

Final comment 102(s)-2 clarifies that the definition of women-owned business is used only when an applicant determines if it is a women-owned business for purposes of final § 1002.107(a)(18), and is finalized as proposed with the exception of one small adjustment for clarity.

Final comment 102(s)-3 is finalized as proposed and notes that a financial institution is permitted to assist an applicant when determining whether it is a women-owned business but is not required to do so, may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses set forth in final comments 102(s)-4 through -6, and that, for purposes of reporting an applicant's women-owned business status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

Final comment 102(s)-4 is finalized with an updated cross-reference and minor edits for consistency and clarity. It provides examples of ownership and clarifies that, where applicable, ownership needs to be traced or followed through corporate or other indirect ownership structures. With regard to a commenter's assertion that, in certain states, a trustee could act as a third party non-owner trustee of a trust, the Bureau believes that in such circumstances, the

trustee would be considered an owner for purposes of this definition. Final comment 102(s)-4 also clarifies (as it did in the Bureau's proposal) that a trustee is considered the owner of a trust.

Final comment 102(s)-5 clarifies that an individual controls a business if that individual has significant responsibility to manage or direct the business, while final comment 102(s)-6 clarifies that a business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes. Both comments are finalized with minor edits for consistency and clarity.

The Bureau does not believe that it would be appropriate to deviate from the statutory definition of women-owned business, as suggested by some commenters, and notes that the Bureau's authority to deviate from the statutory language is limited. The Bureau also believes that many small business applicants already respond to questions about who owns and who controls a business entity when completing customer due diligence forms or otherwise responding to questions related to that rule and thus will be familiar with the concepts therein. Although the customer due diligence rule does not address the second prong of the definition regarding accrual of net profits or losses, final comment 102(s)-6 provides a comprehensive explanation of this prong of the definition.

With regard to comments urging the Bureau to remove the prong requiring that more than 50 percent of its net profits or losses accrue to one or more women in order to be considered a women-owned business, the Bureau finds that this prong is necessary to prevent illusory "ownership" claims by "straw" owners.

Finally, in accordance with ECOA section 704B(g)(3), the Bureau may release material, as part of its regulatory implementation strategy, to assist both financial institutions in complying with the requirements of § 1002.102(s) and small businesses in understanding this definition.

Proposed Definition of Dwelling

Proposed § 1002.102(j) would have referred to Regulation C § 1003.2(f) for a definition of the term "dwelling." That provision defines dwelling to mean a residential structure, whether or not attached to real property. The term includes but is not limited to a detached home, an individual condominium or cooperative unit, a manufactured home or other factory-built home, or a multifamily residential structure or community. Proposed comment 102(j)-1 would have provided that Bureau interpretations that appear in supplement I to part 1003 containing official commentary in connection with § 1003.2(f) are generally applicable to the definition of a dwelling in proposed § 1002.102(j). Proposed comment 102(j)-2 would have clarified that the definition of dwelling under existing § 1002.14(b)(2) applies to relevant provisions under existing Regulation B, and proposed § 1002.102(j) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing § 1002.14(b)(2). The Bureau did not receive any comments on this aspect of the proposal.

The Bureau is not finalizing its proposed definition of "dwelling." The need for the Bureau to adopt its own definition of "dwelling" in this rulemaking is obviated by the Bureau's decision in this final rule to not require reporting of transactions that would constitute "covered loans" under Regulation C. That decision is discussed in detail in the section-by-section analysis of § 1002.104 below. The Bureau understands that there may be limited instances where a dwelling is used as collateral for a covered credit transaction that does not fall under the definition of a Regulation C covered loan because it does not involve the purchase, improvement, or refinance of a dwelling—for example, where a small business seeks to use their primary dwelling as collateral to obtain working capital such as inventory. In this example, the transaction would only be reported under the final rule, not under Regulation C, with a credit purpose of working capital (includes inventory or floor planning) per final comment 107(a)(6)-1. Taking into account these limited circumstances, the Bureau believes that adopting the

Regulation C definition of dwelling is no longer necessary to minimize the compliance risks that would have arisen from having to report a transaction under both Regulation C and this final rule.

Section 1002.103 Covered Applications

ECOA section 704B(b) requires that financial institutions collect, maintain, and report to the Bureau certain information regarding "any application to a financial institution for credit." For covered financial institutions, the definition of "application" will trigger data collection and reporting obligations with respect to covered credit transactions. However, section 1071 does not expressly define "application."

The Bureau is finalizing § 1002.103 and associated commentary with minor revisions for clarity and consistency, to define what is, and is not, a covered application for purposes of subpart B pursuant to its authority in ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Final § 1002.103(a) provides a general definition of the term "covered application," followed by a list of the circumstances that are not covered applications in final § 1002.103(b). For the reasons discussed below, the Bureau believes that its determinations as to what does and does not constitute a covered application for purposes of this rulemaking constitute reasonable interpretations of an "application" as used in section 1071.

103(a) Covered Application

Proposed Rule

The Bureau proposed to define a covered application in § 1002.103(a) as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. As noted above, the term "application" is undefined in section 1071. The Bureau believed its proposed definition of the term was reasonable, particularly as it would align with the similar definition of "application" in existing § 1002.2(f). The Bureau also proposed commentary to accompany this definition.

In considering the proposed definition of a "covered application," the Bureau believed that incomplete and withdrawn applications—which would have generally been captured under proposed § 1002.103(a)—would be essential to the purposes of section 1071 as a tool to identify potential discrimination and to better understand the credit market. The definition of "covered application" in proposed § 1002.103(a), which was similar to the definition of "application" in existing § 1002.2(f), would have also been familiar to creditors and would have provided flexibility to accommodate different application processes.

The Bureau recognized that the proposed definition of "covered application" in § 1002.103(a), while flexible, would have meant that data collection and reporting may be triggered at different times for different financial institutions and different types of covered credit transactions. While the proposed definition of "covered application" would not have provided a bright-line rule, the Bureau believed the proposed definition would have been familiar to financial institutions and would have provided consistency with similar definitions found in existing Regulation B and Regulation C.

As discussed in the NPRM, the Bureau also considered proposing several other options for defining a "covered application." First, the Bureau considered triggering collection and reporting based on a "completed application," which is defined in existing § 1002.2(f) as an application in which the creditor has received "all the information that the creditor regularly obtains and considers" in evaluating similar products. As noted in the NPRM, the Bureau did not propose to use the definition of "completed application" in existing § 1002.2(f) for its definition of covered application in subpart B, as doing so would have excluded incomplete applications and many withdrawn applications that may reflect demand for credit or potential discrimination during the application process. The Bureau also considered proposing to define "covered application" as a set of specific data points that, if collected, would trigger a duty to collect and report small business lending data. As noted in the NPRM, the Bureau did not propose this approach for several reasons, including that it would have introduced a new regulatory definition

of "application," would have led to operational changes and complexities for financial institutions, and could have led to increased evasion.

Proposed comments 103(a)-1 through -3 would have provided additional guidance on identifying what is a "covered application." Proposed comments 103(a)-4 through -6 would have addressed how a financial institution reports multiple covered credit transaction requests at one time or a request for a credit transaction that results in the origination of multiple covered credit transactions. Proposed comment 103(a)-7 would have addressed how a financial institution would report applications where there is a change in whether the applicant is requesting a covered credit transaction.

The Bureau sought comment on its proposed definition of a covered application in § 1002.103(a) and associated commentary. The Bureau also sought comment on the advantages and disadvantages of collecting data on incomplete or withdrawn applications, as well as how collection would or would not further the purposes of section 1071. In addition, the Bureau sought comment on reporting of multiple lines of credit on a single credit account, including how financial institutions internally consider multiple lines of a credit on a single account and the Bureau's approach in proposed comment 103(a)-6.

Comments Received

The Bureau received comments on its proposed approach to defining a covered application from a wide range of lenders, trade associations, community groups, and a business advocacy group. The overwhelming majority of commenters to address the issue, including most industry commenters and some community groups, generally supported the Bureau's proposal to define a "covered application" largely consistent with the existing Regulation B definition. Several of these commenters stated that lenders are familiar with the existing Regulation B definition and so implementing it within this rule would minimize the need for additional training or new procedures. Commenters also stated that the proposed definition is a flexible one that can accommodate the variety of small business lenders, products, and processes that exist in

the marketplace, and thus avoids a one-size-fits-all approach that would be unworkable in small business lending. Several lenders and trade associations urged the Bureau to finalize proposed comment 103(a)-1, which would have provided that a financial institution has latitude to establish its own application process or procedures, including designating the type and amount of information it will require from applicants. Some of these commenters also stated that the proposed comment is consistent with longstanding interpretation of existing Regulation B and that the flexibility is critical given the unique nature of commercial credit applications. A community bank stated that defining an application based on a set of specific data points would be inappropriate for commercial lending, which is less standardized than consumer mortgage lending. The bank further noted that defining an application based on a standardized set of data points would be unnecessary so long as each data point has a "not applicable" or "not received" choice for incomplete applications, which the commenter emphasized would be important to capture.

Some community groups and community-oriented lenders expressed support for the Bureau's proposed definition because it would capture applicants that do not make it to a completed application, and therefore potentially help identify barriers to credit early in the application process. These commenters argued that the proposed definition would further the purposes of section 1071, including by identifying potential bias, discouragement, or other discrimination. Similarly, some community-oriented lenders stated that the proposed definition would strike the right balance of triggering data collection and reporting requirements only after there is an actual request for credit, but still early enough in the process to capture most incomplete, withdrawn, and denied applications.

One community group expressed concern about the lack of standardization under the proposed definition, but ultimately concluded that the proposed definition makes sense and any concerns could be allayed through monitoring. The commenter expressed understanding for the desire to follow current lender procedures for defining an application based on existing

Regulation B, though noted that how a lender defines an application should have enough standardization to generate consistent data and be early enough in the process to capture incomplete and withdrawn applications, which are necessary to identify discouragement. The commenter also expressed support for the idea that peer comparisons may be a reasonable way to check a financial institution's method of defining an application; for example, by analyzing whether a financial institution has abnormally high rates of approval or low rates of incomplete applications.

A number of industry commenters, including community banks, credit unions, and trade associations, described the small business application process as informal and consultive. These commenters explained that the application process often does not involve a written application or a "formal" application, can be months-long, and often involves extensive back-and-forth communications between the lender and the small business, including in-person meetings, phone calls, texts, and emails. One commenter noted that many loans are funded without any "application," but rather based on the business's existing relationship with the institution and financial information on file. Some commenters described how the application process can start informally from a conversation, a general inquiry, or as an offshoot to deposit activity. Commenters explained that a business will bring in financial statements, tax returns, business plans, and other documents, which will be reviewed by the financial institution in order to analyze and generate the most appropriate package to fit the credit needs of the business. Several banks stated that business customers will often "shop around" with multiple financial institutions to get the best terms. Several commenters stated that small business lending often involves a lot of "hand holding" and lender involvement to reach a point where a formal application or a particular product and terms can be considered. Industry commenters also stated that commercial business customers are unique and each requires an individualized approach based on the characteristics of the business and the products of interest. Several commenters also noted that

the small business lending process differs from mortgage lending, which is highly regimented and uniform.

A number of community banks and other industry commenters expressed concern that the Bureau's rule implementing section 1071 would standardize and formalize the small business application process (which, they asserted, would be to its detriment); they predicted that business customers would be unhappy with the more rigid lending structure, and may avoid seeking credit altogether. These commenters expressed concern that small business lending would become impersonal and "form centric," and that it would change the fundamental relationship between lender and borrower, including the personalized attention and advice currently provided by lenders. Many of these commenters stated the view that the rule's data collection and reporting requirements would cause them to lose flexibility and adopt "check-the-box" criteria that is at odds with how community banks conduct business. Several commenters were concerned that at the start of an inquiry, a lender would need to implement a written application or other formalized method to collect the required data and that by doing so, conversations will turn into implied commitments. Commenters also stated the belief that lenders would implement a more rigid application process in order to avoid triggering data collection and reporting requirements under the Bureau's rule. Several other commenters argued that data collection and reporting obligations would require lenders to rebuild their loan application process and incur additional training and other costs, would reduce the availability of credit, and would give large banks an unfair advantage because such entities will have an easier time implementing the requirements of the Bureau's rule for online applications.

Most of these commenters' concerns were directed at small business lending data collection and reporting generally, and not specifically at the proposed definition of a covered application. However, a few commenters urged the Bureau to finalize a more concrete definition of covered application due to the concern that a subjective definition would be difficult for financial institutions' employees to implement. One commenter was also concerned about how

its practices would be reviewed by the subjective judgment of examiners. Another commenter cautioned against reporting of oral applications, noting that it could lead to inaccurate data if an answer is misheard or mistyped.

Some industry commenters, including trade associations for community banks, credit unions, and online lenders, requested the Bureau define a covered application consistent with existing Regulation B's "completed application" definition in existing § 1002.2(f), which would require reporting only when the lender has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (*i.e.*, enough information to make a credit decision). These commenters argued that triggering data collection and reporting off an "oral or written request" would be unrealistic, unworkable, and too open-ended. One commenter stated that a mere request is not something a lender can act or report on because there is insufficient information at that point to make the required reporting. Another commenter said that lenders need clear guidance on what events trigger data collection and the completed application definition would provide the most uniformity across products and financial institutions. Another commenter stated that using the completed application definition would avoid collecting data on incomplete applications, which often come from "unengaged" applicants. This commenter also noted that collecting 1071 data could lead to applicant confusion as to why personal information is being collected, which could lead to more incomplete applications. The commenter further argued that completed applications are the most essential data to capture in small business lending, that there is no indication Congress intended section 1071 to mirror HMDA or existing Regulation B, and that discouragement can be investigated using other 1071 data and existing examination authorities. Similarly, two industry commenters opposed requiring reporting on incomplete or withdrawn applications, arguing that reporting such transactions would not serve the purposes of section 1071, would create additional operational and regulatory burden, and that the focus of the Bureau's rule should be on declined and originated applications. Another urged the Bureau to avoid triggering collection based on

when a credit check is pulled, noting that financial institutions may often conduct a soft pull credit check outside the application process.

In contrast, some community group commenters argued that the proposed definition of covered application would be too narrow, and requested that a covered application include all communications where a business inquires about credit and seeks a credit decision. In support, the commenters pointed to research identifying discrimination in the pre-application stage. As noted above, other community group commenters supported the Bureau's proposed definition of a covered application, stressing the need to capture applications that do not make it to a completed application.

The Bureau received several comments on certain aspects of its proposed commentary to § 1002.103(a). A community bank and a community group supported proposed comment 103(a)-4, which would have provided that if an applicant makes a request for two or more covered credit transactions at one time, the financial institution reports each request for a covered credit transaction as a separate covered application. The bank stated that while the proposed approach would result in more work for the financial institution, it would lead to more accurate reporting (since each request would generate different reported data) and the approach would be similar to how data are reported under Regulation C. The community group commenter stated that it would be a reasonable approach and would accurately reflect the varied credit needs of applicants. A group of community group commenters supported the Bureau's proposed approach to require reporting of separate applications where an applicant seeks two or more products at one time, but requested that where the applicant only seeks one product, but is not sure about the type of product, it should only be reported as a single covered application. These commenters also noted a concern that the language in proposed comment 107(a)(5)-2 requiring lenders to maintain reasonable procedures designed to collect data, including regarding the credit product requested, would require the lender to identify each product that would be acceptable to the applicant, and if multiple, report them as separate covered applications.

In response to the Bureau's request for comments as to how a financial institution should report applications where there is a change in whether the request for credit involves a covered credit transaction, which was addressed in proposed comment 103(a)-7, the Bureau received feedback from trade associations and a business advocacy group. These commenters opposed reporting on a transaction in which the product ultimately pursued is not a covered credit transaction. They argued that financial institutions should not be required to report on non-covered credit transactions, collecting partial data on a product that is not a covered transaction would affect data quality and be of low value, and doing so would not advance the purposes of section 1071. Two of the commenters sought clarification or a safe harbor providing that if a financial institution collects data on an application that the financial institution anticipates will be covered by the Bureau's rule implementing section 1071 at the time of collection, but ultimately is not covered, the initial collection does not violate existing Regulation B. Otherwise, the Bureau did not receive any additional comments directly discussing proposed comment 103(a)-7 and limited reporting of non-covered credit products, despite seeking comment on the advantages and disadvantages of requiring full or limited reporting where an applicant initially seeks a product that is a covered credit transaction, but ultimately is offered and accepts a product that is not reportable.

Although the Bureau did not seek comment on the issue, a couple commenters asked how to report on an application made jointly by multiple business co-applicants. An agricultural lender requested that, if an application is submitted by more than one business, the financial institution be permitted to treat all co-applicants as one applicant when determining whether a borrower is a "small business." The commenter also asked the Bureau to clarify how to identify whether the application is from a minority-owned or women-owned business where one, but not all, co-applicants are minority- and women-owned businesses. Another commenter requested that the Bureau clarify that loans jointly made to multiple businesses, where one or more of the

co-applicants may qualify as a small business under the rule, but are not the primary business seeking the funding, are not subject to data collection and reporting requirements.

Several commenters asked the Bureau to clarify certain scenarios related to a covered application, including clarifying that certain scenarios are not covered applications. Several industry commenters were concerned that language in the NPRM's preamble—noting that ECOA section 704B(b)(1) provides that an "application" triggering data collection and reporting obligations occurs without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means—may be interpreted to *require* a financial institution to accept an application through all of these channels. One commenter asked for clarification whether a covered application includes an incomplete application where the information provided is insufficient to render a credit decision by the lender. A trade association representing online lenders asked the Bureau to expressly exclude from the definition of a covered application the circumstance where a business populates certain information on a webpage, but does not follow through with submitting the form to the financial institution. The commenter argued that it would be very burdensome for the financial institution to capture such circumstances as reportable transactions and that attempting to do so would result in misleading, erroneous, and unhelpful data. A couple commenters requested certain additional exclusions from the definition of covered application, including for HMDA reporters, co-branded and private label credit cards, and purchased loans.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.103(a) as proposed to define a "covered application" as an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. As described above, the overwhelming majority of commenters, including industry and community group commenters, supported this definition. As noted by some commenters, the definition will be familiar to creditors, provides flexibility to accommodate different application

procedures and lending models (including written and oral applications), and will capture incomplete and withdrawn applications, which are essential data for identifying potential barriers to credit, including potential discrimination. Final § 1002.103(a) will also align with the similar definition of "application" in existing § 1002.2(f), which is reasonable given the term "application" is otherwise undefined in ECOA and section 1071. Finally, the Bureau believes this approach strikes an appropriate balance by triggering data collection and reporting requirements only after there is a request for credit (using procedures defined by the financial institution), but still early enough in the process to capture most incomplete, withdrawn, and denied applications, which are essential data to the purposes of section 1071.

A number of industry commenters, particularly smaller institutions that engage in relationship lending, described the application process as informal, high-touch, and involving extensive back-and-forth. The Bureau believes the final definition of covered application can work well within the heterogeneous and sometimes iterative context of small business lending. Indeed, final § 1002.103(a) defines covered application in a manner that provides financial institutions flexibility to define an application based on its own unique business model. Thus, while a financial institution must have some type of trigger or tipping point within its process when an applicant has made a request for credit in accordance with its procedures, therefore triggering a "covered application," financial institutions have leeway on how precisely to define that tipping point, provided it occurs in the early stages of the process before a financial institution has begun meaningfully evaluating or underwriting the request.[338] Moreover, as noted

[338] The Bureau recognizes that the flexibility provided in final § 1002.103(a), which defines a covered application, may result in data collection and reporting obligations being triggered at different times for different financial institutions and different types of covered credit transactions. For example, for a financial institution that defines an application under its procedures as the submission of a standard form either online or in-person, a "covered application" will be triggered when an applicant submits the form. In contrast, another financial institution may not use a standard form and instead define an application as a request for credit only when the applicant authorizes the creditor to pull a credit check on the business and principal owners to allow the creditor to determine whether the business, in particular, qualifies for a particular product. In that circumstance, a "covered application" will not be triggered until that process was satisfied. Using the same example, if the financial institution orally collects certain information from a prospective applicant (such as gross annual revenue and business location) and discusses with the prospective applicant potential credit product options offered by the financial institution, no "covered application" will be triggered until the prospective applicant indicates that it wants to proceed to apply for credit.

above, creditors complying with existing Regulation B should be familiar with this definition, and have already incorporated it in some manner into their processes.[339] In response to industry commenters' concern that data collection and reporting under this final rule will standardize and formalize small business lending, the Bureau notes that most of this feedback was not directed at the proposed definition of a "covered application," but rather at the overall data collection and reporting regime. Indeed, some of the commenters raising these concerns also expressly supported the proposed definition of a covered application. Moreover, in response to commenters' general concerns that data collection and reporting under this rule will standardize and formalize small business lending, the Bureau does not believe that collection of certain data points will necessitate that lenders to fundamentally alter how they conduct business. Moreover, section 1071 is a congressional mandate; the Bureau has sought to implement it in a manner that furthers the purposes of the statute while reducing unnecessary burden.

Several commenters had specific suggestions or concerns regarding the definition of a covered application. Regarding several commenters' concern that the definition is too subjective, the Bureau notes that a bright-line definition would likely impose a more rigid process on financial institutions that would be difficult to implement given the heterogenous nature of small business lending. Moreover, as noted above, the definition used in final § 1002.103(a) should be familiar to financial institutions and will provide consistency with existing Regulation B and Regulation C. The Bureau is also not adopting existing Regulation B's definition of a

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and authorizes the financial institution to pull a credit check. Similarly, if a prospective applicant merely expresses interest in knowing the types of products that the creditor offers—not yet focusing on any particular type of covered credit transaction and not yet interested in submitting a "covered application"—the interaction also will not be reportable under this example.

[339] The Bureau believes that business creditors should be familiar with operationalizing this definition based on their experience providing adverse action notices under existing Regulation B, which can be triggered in relation to an incomplete application. *See* § 1002.9(a)(1) and (c) (requiring notice within 30 days after taking adverse action on an incomplete application or 30 days after receiving an incomplete application). The Bureau believes that financial institutions may also be familiar with Regulation C's definition of "application," which generally aligns with existing § 1002.2(f)'s definition of the term. *See* § 1003.2(b) (generally defining an "application" as "an oral or written request for a covered loan that is made in accordance with procedures used by a financial institution for the type of credit requested"); *see also* Regulation C comment 2(b)-1 (noting that Bureau interpretations that appear in the official commentary to Regulation B are generally applicable to the definition of application under Regulation C).

"completed application," as urged by some commenters. Although the Bureau agrees that a "completed application" definition would provide greater uniformity, the definition would exclude incomplete applications and most withdrawn applications. The Bureau believes including such applications is essential to the purposes of section 1071, as it may reflect demand for credit and potential discrimination early in the application process. As to the commenters who took issue with the proposed covered application definition precisely because it includes incomplete and withdrawn applications, the Bureau believes collecting data on such applications is likewise essential for the purposes of section 1071 and may reveal important trends or information on why small businesses initially seek credit, but ultimately do not complete the application process.

On the other hand, the Bureau does not believe it would be appropriate to expand the definition of "covered application" to include all communications where a business inquires about credit and seeks a decision. Although discrimination may occur in the pre-application phase, the Bureau believes that it could be very difficult as an operational matter for financial institutions to collect 1071 data whenever a business expresses any interest in credit, no matter how preliminary or informal the request, and that could require reporting of transactions with missing, unavailable, or erroneous data. As discussed below in the section-by-section analysis of § 1002.103(b), the Bureau is excluding inquiries and prequalification requests from the definition of a covered application; many of the reasons for those exclusions are relevant here as well and thus the Bureau is not broadening the general definition of a covered application. In response to a commenter's concern about reporting of oral applications, the Bureau notes that it is the responsibility of the financial institution to ensure that it accurately collects and reports required data pursuant to final § 1002.107, no matter the method of application. Commenter requests for certain additional exclusions from the definition of covered application, including for HMDA reporters, co-branded and private label credit cards, and purchased loans, are addressed in more detail in the section-by-section analysis of § 1002.104 below.

Several commenters asked the Bureau to clarify certain scenarios related to a covered application. First, in response to several industry commenters' concerns that the language in the NPRM's preamble discussing ECOA section 704B(b)(1) could be interpreted to *require* a financial institution to accept an application through all of these channels, the Bureau notes that this was not the intent and that it does not interpret ECOA section 704B(b)(1) in that manner. Rather, the Bureau interprets the statutory language to mean that data collection and reporting requirements apply regardless of a financial institution's method of accepting applications. Thus, whatever the means used by a financial institution to accept applications (*e.g.*, in person, by telephone, by electronic transmission, etc.), once a covered application is triggered, the financial institution has a duty to collect and report on the application.

Next, a commenter asked whether a covered application includes an incomplete application where the information provided is insufficient to render a credit decision by the lender. Assuming the business has requested a covered credit transaction in accordance with procedures used by a financial institution for the type of credit requested, the financial institution would be required to collect and report data, even if there is insufficient information to render a credit decision.[340] Indeed, as noted above, the Bureau believes capturing incomplete or withdrawn applications is essential to the purposes of section 1071.

In response to a trade association's request to expressly exclude from the definition of a covered application the circumstance where a business populates certain information on a webpage, but does not follow through with submitting the form to the financial institution, the

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[340] Generally, a "covered application" may align with the information necessary to make a credit decision or it may be possible to have a "covered application" before having information necessary to make a credit decision—it depends on each financial institution's own procedures. For example, suppose a financial institution defines an application under its procedures as the point when an applicant, or someone on the applicant's behalf, requests credit by filling out certain key pieces of information on an application form. If nothing else is required to qualify for credit and the financial institution's process is to immediately transmit the application to underwriting for a decision once the form is submitted, under the proposed definition of "covered application," data collection and reporting obligations would likely be triggered at the same time there is sufficient information to make a credit decision. On the other hand, if the financial institution requires additional verification of information and the institution commonly makes follow-up requests after the applicant has requested credit and before submitting the loan file to underwriting, the financial institution would likely have a "covered application" before it has sufficient information to make a credit decision.

Bureau notes that reporting of such circumstances depends on the procedures used by a financial institution for the type of credit requested. For example, if a financial institution's procedures require an applicant to submit a paper or digital form to the financial institution in order to be considered for the credit product requested, then there is no covered application that is reportable until the business submits the form to the financial institution. If, on the other hand, the financial institution regularly begins evaluating information about the applicant even if the form is not "officially" submitted to the financial institution, then there is likely a reportable covered application, even if the applicant has not "submitted" the form. In other words, if a financial institution offering online applications does not track or begin to evaluate applications until the business presses a "submit" button, the financial institution would not be required to begin tracking partial information inputted online for purposes of this final rule.

One commenter was concerned that the proposed definition lacked standardization, and emphasized the need for monitoring to ensure that financial institutions define an application under their own procedures in a manner that generates consistent data and is early enough in the process to capture incomplete and withdrawn applications. The Bureau agrees that review of data, including peer analysis, is important and may indicate whether a financial institution collects data in a manner that appropriately captures incomplete and withdrawn applications. For example, instances of unusually high approval rates or unusually low rates of incomplete and withdrawn applications can preliminarily indicate financial institutions that may be seeking to define an "application" in its written policies as occurring later in the process than actually occurs in practice; if a financial institution has a very high approval rate because all "applications" have been vetted earlier in the process, the financial institution's stated definition of an application likely does not reflect its actual practices. Similarly, where a financial institution has very few incomplete or withdrawn applications this may—depending on the financial institution's product offering and business model—be a sign that the financial institution is collecting data or defining an application as occurring after an applicant has

requested credit. While a financial institution has flexibility to identify its own procedures for what constitutes a request for credit, thereby triggering data collection and reporting obligations under this final rule, the Bureau anticipates that in most cases a covered application will typically occur before the financial institution underwrites or evaluates the request for credit.

The Bureau is finalizing comment 103(a)-1 with minor revisions for clarity. Final comment 103(a)-1 underscores that a financial institution has latitude to establish its own application procedure and to decide the type and amount of information it will require from applicants. The Bureau removed the word "process" (from the phrase "process and procedures") in proposed comment 103(a)-1 to align with the term "procedures" in final § 1002.103(a) and in final comment 103(a)-2; the rewording is not intended to indicate a substantive change. The Bureau is also finalizing as proposed comments 103(a)-2 and -3. Final comment 103(a)-2 explains that the term "procedures" refers to the actual practices followed by a financial institution as well as its stated application procedures, and provides an example. Final comment 103(a)-3 provides that the commentary accompanying existing §§ 1002.2(f) and 1002.9 is generally applicable to the definition of "covered application," except as provided otherwise in final § 1002.103(b).

In response to certain commenter questions about the scope of a covered application, the Bureau is adding new comment 103(a)-4 to clarify that the term covered application does not include solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution because in these situations, the business has not made a request for credit, and provides illustrative examples. New comment 103(a)-4, including a summary of comments received relating to the change, is discussed in the section-by-section analysis of § 1002.103(b).

The Bureau is finalizing comment 103(a)-5 (proposed as comment 103(a)-4) to provide that if an applicant makes a request for two or more covered credit transactions at one time, the financial institution reports each request as a separate covered application. The Bureau believes this approach furthers the purposes of section 1071 by better capturing demand for credit,

including demand for different covered credit transactions at the same time. The Bureau also believes this method of reporting will lead to higher data accuracy, as argued by one commenter, due to the simplicity of the approach. Finally, the Bureau believes that concerns about duplicative information requests will be mitigated by permitting financial institutions to reuse certain previously collected data, as set forth in final § 1002.107(d). In response to a commenter request, the Bureau is revising final comment 103(a)-5 to clarify that if an applicant is only requesting a single covered credit transaction, but has not decided on which particular product, the financial institution reports the request as a single covered application. This clarification resolves a commenter's concern that a financial institution will need to report multiple covered applications if more than one credit product is acceptable to the applicant. Final comment 103(a)-5 also provides illustrative examples.

The Bureau is finalizing comments 103(a)-6 and -7 (proposed as comments 103(a)-5 and -6) with minor adjustments for clarity and consistency. Final comment 103(a)-6 addresses the circumstance where an initial request for a single covered credit transaction would result in the origination of multiple covered credit transactions. Similarly, final comment 103(a)-7 addresses requests for multiple lines of credit at one time, providing that such requests are reported based on the procedures used by the financial institution for the type of credit account.

The Bureau is adopting new comment 103(a)-8 to address reporting of duplicate covered applications. Under new comment 103(a)-8, a financial institution may treat two or more duplicate covered applications as a single covered application for purposes of subpart B, so long as for purposes of determining whether to extend credit, the financial institution would also treat one or more of the applications as a duplicate under its procedures. The Bureau is adding this comment to respond to commenters' general concerns about duplicative reporting and because the Bureau does not believe reporting of true duplicates would further the purposes of section 1071. As set forth in new comment 103(a)-8, however, the provision only applies if the

applications are duplicates that a financial institution would otherwise treat as such under its own procedures.

The Bureau is finalizing comment 103(a)-9 (proposed as comment 103(a)-7) with revisions for clarity. Final comment 103(a)-9 addresses how a financial institution reports applications where there is a change in whether the applicant is requesting a covered credit transaction. Final comment 103(a)-9 provides that if an applicant initially requests a product that is not a covered credit transaction, but prior to final action taken decides to seek instead a product that is a covered credit transaction, the application is a covered application and must be reported pursuant to final § 1002.109. However, if an applicant initially requests a product that is a covered credit transaction, but prior to final action taken decides instead to seek a product that is not a covered credit transaction, the application is not a covered application and thus is not reported. The Bureau agrees with commenters' concerns that requiring reporting on applications where the applicant ultimately does not seek a covered credit transaction could lead to data quality issues, for example, if only partial data are captured. Although the Bureau sought comment on whether to require full or limited reporting in order to address concerns about potential steering in these cases, the Bureau did not receive any specific comments advocating for either full or limited reporting. In response to commenter requests for clarification that a financial institution does not violate existing Regulation B if it collects otherwise prohibited information on a transaction that ultimately is not a covered application, the Bureau has revised final § 1002.112(c)(4) to provide a safe harbor for incorrect determination of a covered credit transaction if, at the time of collection, the financial institution had a reasonable basis for believing that the application was a covered application. The Bureau has also revised final comment 103(a)-9 to clarify that once a financial institution determines there is a covered application, it shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. Final comment 103(a)-9 also discusses reporting if a financial institution makes a counteroffer for a product that is not a

covered credit transaction. Finally, the Bureau revised the language "during the application process" to "prior to final action taken" in final comment 103(a)-9 to provide greater clarity on the applicable timeframe.

The Bureau is adding new comment 103(a)-10 to address reporting in situations where a covered financial institution receives a covered application from multiple businesses that are not affiliates, as defined in final § 1002.102(a). The Bureau is adding this commentary in response to commenters' questions about how to report certain data if there is more than one co-applicant. Final comment 103(a)-10 provides that if a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by final § 1002.102(a), it shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in final § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form.

The Bureau considered requiring reporting data of all co-applicant small businesses, but doing so could potentially add significant complexity and may result in data quality issues. For example, reporting co-applicants as separate applications would likely result in duplicative reporting or special rules to address how to modify the reported data to avoid duplication. Similarly, requiring additional fields to accommodate reporting of all co-applicants' information would result in a significant expansion of the total data fields reported, adding considerable complexity and potentially leading to data quality issues. Given that only two commenters raised the issue of co-applicants, the Bureau believes that financial institutions likely do not frequently encounter applications involving more than one small business applicant.

On the other hand, the Bureau is not requiring reporting of a small business co-applicant only if it is the primary business seeking funding, as suggested by one commenter. The Bureau

believes it may not always be clear who is the "primary" applicant if there are multiple co-applicants; such a rule could be used to evade reporting altogether in these situations. The Bureau therefore believes that it is reasonable to require data collection and reporting for a single small business if there are multiple co-applicants. Final comment 103(a)-10 provides several illustrative examples. In addition, new § 1002.5(a)(4)(x) permits a creditor to collect certain demographic information concerning a co-applicant without violating existing Regulation B. See also the section-by-section analysis of § 1002.106(b) for a discussion of calculating gross annual revenue for purposes of determining small business status under final § 1002.106(b) if there are multiple co-applicants.

Lastly, the Bureau is adding new comment 103(a)-11 to clarify that refinances and requests for additional credit amounts on an existing account are covered applications, as further discussed in the section-by-section analysis of § 1002.103(b).

103(b) Circumstances That Are Not Covered Applications

Proposed Rule

Proposed § 1002.103(b) would have identified certain circumstances that are not covered applications—even if they may otherwise be considered an application under existing § 1002.2(f). Specifically, the Bureau proposed that a covered application would not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests. Solicitations and firm offers of credit would also not have been "covered applications" under the proposed definition. Proposed comments 103(b)-1 through -5 would have provided additional guidance and examples of circumstances that do and do not trigger data collection and reporting for covered applications.

The Bureau sought comment on proposed § 1002.103(b) and associated commentary concerning circumstances that would not be a covered application. Solicitations for comment on specific issues are noted throughout the discussion below.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. The Bureau proposed to exclude from the definition of a "covered application" requests by borrowers to modify the terms or duration of an existing extension of credit, other than requests for additional credit amounts. The Bureau believed that requests to modify the terms or duration of an existing extension of credit, which occur with high frequency in the small business lending space, would have added complexity and burden for financial institutions, while potentially providing limited additional information relevant to the purposes of section 1071.

However, the Bureau proposed that reporting would have been required for requests for additional credit amounts (such as line increases or new money on existing facilities). The Bureau believed that capturing requests for additional credit amounts would further the purposes of section 1071, particularly the community development purpose, as it would have more accurately captured demand for credit.

Inquiries and prequalification requests. The Bureau proposed to exclude inquiries and prequalification requests from what constitutes a "covered application." The Bureau believed that requiring data collection for all inquiries and prequalification requests could create operational challenges and pose data accuracy issues, including raising the risk of missing, unavailable, erroneous, or duplicative data.

The Bureau also considered whether to only require reporting of inquiries and prequalification requests in situations that would otherwise be treated as an "application" under existing Regulation B—*i.e.*, when the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. Ultimately, the logistics of reporting an inquiry or prequalification request only in these circumstances (where an inquiry or prequalification request becomes an "application" under existing § 1002.2(f)) could be operationally challenging for financial institutions, could lead to data distortion as only denials would be captured, and could cause unintended market effects.

On the other hand, potential discrimination may occur in these early interactions with a financial institution. In particular, the Bureau was concerned about excluding data on inquiries and prequalification requests when the financial institution evaluates information about a business and declines the request, as such data may be useful for identifying potential discouragement of or discrimination against applicants or prospective applicants.

Ultimately, however, the Bureau believed it was appropriate to interpret "application" as used in section 1071 to exclude inquiries and prequalification requests given the considerations identified above, including the timing and often informal nature of such interactions, the operational challenges of implementing such a definition, and related concerns about the reliability of the data.

The Bureau sought comment on a number of issues in connection with the reporting of inquiries and prequalification requests. For example, the Bureau sought comment on whether instead to define a "covered application," consistent with existing Regulation B, to include inquiries or prequalification requests where the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. Related to this alternative approach, the Bureau further sought comment on whether additional data fields would be necessary in order to distinguish prequalification requests and inquiries from other reported applications. In addition, if the Bureau were to require reporting of declined inquiries or prequalification requests, the Bureau sought comment on whether financial institutions would want the option to report all prequalification requests and inquiries, to allow for a comparison with denials.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. Proposed comment 103(b)-4 would have clarified that the term covered application does not include solicitations and firm offers of credit. The Bureau explained that like other reviews or evaluations initiated by the financial institution, these communications do not involve an *applicant* requesting credit, and so would not be "covered applications."

Excluding solicitations and firm offers of credit would also be consistent with the language of ECOA section 704B(b)(1), which expressly contemplates that an application could arise in response to a solicitation by a financial institution, though the text is silent on solicitations without any applicant response. Thus, consistent with the statutory language, the Bureau proposed that a solicitation or firm offer of credit could become a "covered application" under the proposed definition if an applicant responds to the solicitation or offer by requesting a covered credit transaction.

Comments Received

The Bureau received comments on its proposal to identify certain circumstances that are not covered applications, even if they otherwise would have been considered an application under existing § 1002.2(f), from a wide range of lenders, trade associations, community groups, and a business advocacy group.

Some commenters, including several lenders and trade associations, expressly supported all the clarifications of circumstances that are not reportable in proposed § 1002.103(b). One noted that the proposed exclusions would avoid duplicative steps and keep the data collection focused on its core purposes. Other commenters stated that the proposed exclusions were appropriate because they would not provide useful data and that the proposal would help ease financial institutions' transition to data collection. Comments on particular aspects of proposed § 1002.103(b) are discussed below.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. Many industry commenters supported the Bureau's proposed exclusion of reevaluations, extensions, or renewal requests on an existing business credit account. However, industry commenters largely urged the Bureau to exclude requests for additional credit amounts on existing accounts. These commenters argued that reporting line increases would add unnecessary complexity and time to an otherwise streamlined process that occurs with high frequency, in response to rapid changes to business conditions, and

is typically automated, which they said further lowers any risk of discrimination. These commenters argued that data collection for line increases would hurt small businesses by introducing hurdles in transactions where time is of the essence, and might discourage businesses from seeking line increases or creditors from offering them. Commenters also noted differences in how credit line increases are underwritten compared to other business credit: the process typically does not involve an application or other documentation, may involve limited underwriting, and any analysis performed is usually focused on the business's past performance and relationship with the financial institution. In addition, commenters expressed concern that including line increases would distort the data (for example, by "double reporting" accounts or because of the unique nature of credit line increases) or would provide data of limited value. A couple commenters emphasized the potential compliance difficulties for financial institutions, noting that excluding line increases would be simpler and avoid the need for financial institutions to determine who initiated a line increase. A trade association raised the additional concern that reporting of credit line increases and other requests for additional credit amounts will inflate the number of originations counted for purposes of determining whether an institution is a covered financial institution. In support of excluding modifications more generally, one commenter stated that modifications are not explicitly covered by other consumer financial laws and regulations, such as HMDA, the Real Estate Settlement Procedures Act of 1974 (RESPA), and Regulation Z.

Although opposed to the reporting of line increases, several commenters urged that, to the extent such transactions are reportable, the Bureau should mitigate the burden on financial institutions by (1) exempting any existing account from data collection under the Bureau's rule; and (2) permitting lenders to rely on prior responses regardless of when provided, unless there is a reason to believe the data are inaccurate. In support of the first proposal, these commenters argued that existing accounts may need challenging technology build-outs to integrate the rule's data collection requirements and existing clients may not be used to the collection process.

Most community groups to comment on this issue generally requested that all such circumstances (reevaluations, extensions, renewals), as well as refinances, be treated as reportable applications. These commenters argued that there should be a reportable application whenever a business communicates an interest in obtaining credit and has requested lender action, or if the lender takes action on the request, such as pulling a credit report, the business's tax information, or obtaining other data that can be used for underwriting—particularly if the financial institution's actions might negatively affect the business (for example, by lowering their credit score). A few commenters specifically focused on renewals and extensions, urging the Bureau to require reporting of these transactions, and to separate such transactions in the data from new originations. These commenters argued that renewals and extensions are an important source of credit for businesses and not reporting such circumstances would create a disconnect with Community Reinvestment Act (CRA) reporting. One commenter urged the Bureau to collect verbal and written agricultural loan modification or restructuring requests made to the Farm Service Agency, arguing that such requests constitute applications under existing Regulation B, highlighting concerns about discrimination in loan servicing and the detrimental effects on businesses when servicing applications are not granted, including default, acceleration, and foreclosures. Some commenters further argued that lender-initiated renewals should also be captured, given the detrimental effect they may have on a business that is "denied" credit or experiences a reduction in access to credit.

Several commenters requested clarification on aspects of the Bureau's proposed approach to reevaluation, extension, or renewal requests. A community bank was uncertain what dates to report under § 1002.107(a)(2) and (9) (application date and action taken date) for requests for additional credit on existing accounts, and was concerned that if the dates changed from the initial origination, it could be construed as a data misrepresentation. Several other commenters inquired whether a transaction is a reportable covered application if a new note is executed as part of a request to consolidate existing credit amounts under the same terms or as part of a

periodic review extending the credit under the same terms. A sales-based financing company explained that its customers often request funding over time, and asserted that each new request for credit should be reportable.

Inquiries and prequalification requests. The industry commenters to weigh in on inquiries and prequalification requests, including several banks, a CDFI lender, trade associations, and a business advocacy group, overwhelmingly supported the Bureau's proposal to exclude inquiries and prequalification requests. Commenters argued that including inquiries and prequalification requests would be operationally difficult given the high volume of such requests and because the interactions typically occur before the financial institution has the infrastructure in place to track requests for credit. They also argued that including such interactions could be misleading and lead to data accuracy issues, given the informal nature of such requests and because many such inquiries are subsequently abandoned or otherwise left incomplete. A business advocacy group also noted concerns about duplicative reporting of inquiries and prequalification requests if the business ultimately submits a credit application. A group of trade associations for insurance premium finance lenders argued that including inquiries and prequalification requests would be unworkable for their lenders, who are often not aware of a prospective applicant's interest in credit until they receive an agreement from the applicable insurance agent or broker; as a result, such financial institutions would be unaware of any inquiries or prequalification requests. Another commenter argued that reporting such transactions would effectively punish borrowers for inquiring about qualification requirements, products, and rates. Finally, one commenter stated that each financial institution should be permitted to define what constitutes an application, including any exclusions. Although industry commenters were generally in favor of the exclusion, a number of industry commenters stated that the line between inquiries or prequalification requests and covered applications should be sufficiently clear to avoid uncertainty during implementation, and asked the Bureau provide examples, in commentary to the rule, to differentiate these scenarios.

Conversely, a number of commenters, including a lender and community groups, urged the Bureau to require reporting on all or some inquiries and prequalification requests. Citing a study identifying the prevalence of discrimination in the pre-application phase,[341] commenters argued that the definition of covered application must be broad enough to capture pre-application phase discrimination. Several commenters requested that all communications where a business inquires about credit and seeks a credit decision should be reportable; another commenter urged reporting whenever the financial institution pulls a credit report or takes other action to begin underwriting. Several other commenters suggested that the Bureau align with existing Regulation B's treatment of prequalifications by treating denied inquiries and prequalifications as reportable applications.[342] One community group emphasized the importance of having online applications reported, including online prequalification requests in particular. The commenter argued that the absence of such data has been detrimental in the HMDA context, it creates an imbalance between online and traditional lenders, and the burden of reporting would be low as lenders are already required to capture such transactions for purposes of providing adverse action notices.

Although the Bureau sought comment on whether, alternatively, to define a "covered application" consistent with Regulation C—which does not require a financial institution to report prequalification requests and does not address reporting of inquiries more generally—the Bureau did not receive any comments directly on this point. Similarly, the Bureau did not receive any comments directly responding to its request for comment on the frequency with which financial institutions accept prequalification requests and what data are collected in connection with such prequalification requests, as well as potential effects on the market if some or all prequalification requests were reportable under section 1071. In addition, the Bureau did not

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[341] Nat'l Cmty. Reinvestment Coal., *Disinvestment, Discouragement and Inequity in Small Business Lending* (Sept. 2019), https://ncrc.org/wp-content/uploads/2019/09/NCRC-Small-Business-Research-FINAL.pdf.

[342] Existing comment 2(f)-3 provides that a creditor treats an inquiry or a prequalification request as an application if it evaluates information about the consumer, decides to decline the request, and communicates this to the consumer.

receive any comments in response to its request for feedback on whether assumptions[343] are used in the small business lending context and whether reporting of assumptions for small business lending would further the purposes of section 1071.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. A number of industry commenters urged the Bureau to exclude "preapprovals," which the commenters described as credit offered or originated by the financial institution without an initiating application from the business (including offers for a different product or offers to extend additional credit amounts). One of the commenters was particularly concerned about lender-initiated offers based on data collected or acquired by the financial institution about the small business; for example, a financial institution that uses deposit account data to evaluate a business for credit card offers. The commenter argued that in these circumstances, the business has not been "denied" credit because it never applied for credit; similarly, the commenter argued, accepted offers also should not be reported because there is no initiating application from the business. The commenter further argued that reporting of originated offers initiated by the financial institution would skew the data, as it would only reflect approvals. Reporting of "denied" offers, argued the commenter, would be infeasible, create confusion for the customer, and likely lead lenders to discontinue extending such offers altogether. Several other industry commenters similarly urged the Bureau to exclude "preapprovals," though they did not explain what precisely they meant by the term. One commenter argued that while preapprovals are clearly articulated in Regulation C, "preapprovals" do not exist in the small business lending space.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.103(b) as proposed to identify certain circumstances that are not covered applications, even if they otherwise would

[343] Regulation C requires the reporting of assumptions for HMDA. *See* Regulation C comment 2(j)-5 (discussing when assumptions should be reported as home purchase loans).

have been considered an application under existing § 1002.2(f). Specifically, final § 1002.103(b) provides that a covered application does not include (1) reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; and (2) inquiries and prequalification requests. The Bureau is finalizing comments 103(b)-1 through -4 with minor revisions for clarity and consistency, to provide additional guidance and examples of circumstances that do and do not trigger data collection and reporting under the definition of a covered application. The Bureau is finalizing comment 103(b)-5, which discusses inquiries and prequalification requests, to provide additional discussion and examples distinguishing a covered application from an inquiry or prequalification request. As discussed in the section-by-section analysis of § 1002.103(a) above, the Bureau is also adding new comment 103(a)-4 to clarify that solicitations, firm offers of credit, or other evaluations initiated by the financial institution are not a covered application; however, if the business seeks to obtain the credit offered, the business's request constitutes a covered application.

Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. Pursuant to final § 1002.103(b)(1), the Bureau is excluding reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts, from the definition of a covered application. The Bureau believes that requests to modify the terms or duration of an existing extension of credit—such as extensions on the duration of a credit line or changes to a guarantor requirement—occur with high frequency in the small business lending space. If the Bureau were to require reporting of such circumstances, the Bureau believes it would add complexity for reporting financial institutions while, as some commenters have noted, potentially providing limited additional information relevant to the purposes of section 1071. Moreover, the Bureau believes that broadly including requests to modify the terms or duration of existing extensions of credit might affect data quality absent additional flags to distinguish the transactions from new

originations, as well as to identify the particular nature of the changes. The Bureau further notes that Regulation C takes a similar approach by excluding reporting of loan modifications.[344]

Although some commenters argued that such transactions should be reported because they would provide a better understanding on the availability of credit, the Bureau believes such benefits would be modest, particularly absent additional data concerning how the modified credit request differs from the original request, which would require the collection of a number of additional data points. Similarly, although one commenter urged the Bureau to collect verbal and written agricultural loan modification or restructuring requests made to the Farm Service Agency, as discussed directly above, the Bureau believes expanding data collection and reporting requirements to all modification requests (except requests for additional credit amounts) would add significant complexity for lenders, could be duplicative, and may provide limited benefits without knowing the precise terms changed in the modification request. Nor does the Bureau believe that the definition of covered application should be expanded to encompass any expression of interest from a business to obtain credit or action by the financial institution towards underwriting; as noted above in the section-by-section analysis of § 1002.103(a) above, triggering data collection and reporting obligations too early could add significant complexity and affect data quality.

The Bureau believes that requiring reporting of requests for additional credit amounts (such as line increases or new money on existing facilities) is appropriate. Capturing requests for additional credit amounts directly furthers the purposes of section 1071, particularly the business and community development purpose, as it will more accurately capture demand for credit. Although industry commenters opposed reporting on new credit amounts due to what they described as the streamlined, fast-paced nature of such reviews, the Bureau believes those factors do not outweigh the benefits of having these data collected and reported. Moreover, the Bureau

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[344] *See* Regulation C comment 2(d)-2. Although CRA regulations currently require the reporting of renewals, the recent proposed revisions to the CRA rule would instead use 1071 data once available to satisfy small business loan and small farm loan data collection and reporting requirements. 87 FR 33884, 33997-98 (June 3, 2022).

does not believe that collecting data on such transactions will be so time consuming or difficult that it will dissuade small businesses from seeking the additional credit they need, particularly in light of final § 1002.107(d), which permits financial institutions to reuse applicant-provided data in certain circumstances. Collecting data on requests for additional credit amounts will assist in fair lending testing and provide additional insight into small business credit trends and availability, furthering the purposes of section 1071, even if—as some commenters suggested—line increases are often underwritten differently than new requests for credit.

Regarding commenters' concerns about duplicative reporting, the Bureau notes that pursuant to final § 1002.107(a)(7) and (8), the financial institution only reports the additional credit amount sought (and approved or originated, as applicable)—not the entire credit amount extended—therefore avoiding duplicative reporting. Moreover, the fact that a request is for a line increase will be reflected in the reporting of credit purpose pursuant to final § 1002.107(a)(6). Thus, unlike renewals or modifications more generally, which may occur for a variety of reasons, requests for additional credit amounts and the amounts requested will be clearly identifiable in the data. The Bureau also believes that commenters' concerns about the time and difficulty associated with collecting data are further mitigated by final § 1002.107(d), which permits a financial institution to reuse certain data points under certain circumstances. In response to a commenter's concern that reporting of credit line increases and other requests for additional credit amounts will inflate the number of originations counted for purposes of determining whether an institution is a covered financial institution, the Bureau notes that new comment 105(b)-4 clarifies that requests of additional credit amounts on an existing account are not counted as originations for the purpose of determining whether a financial institution is a covered financial institution pursuant to § 1002.105(b).

The Bureau is also providing specialized rules for the reporting of line increases, as suggested by several commenters. One suggested strategy—exempting accounts that are in place before this final rule goes into effect—could significantly reduce reportable transactions,

potentially for years into the future.[345] Moreover, under the tiered implementation period set forth in final § 1002.114(b), the Bureau believes that financial institutions (and their customers) will have adequate time to adjust to reporting. Similarly, in response to a different commenter's question about reporting requests for additional credit amounts, the Bureau notes that if there is an application for an additional credit amount on a covered credit transaction, a financial institution must collect data pursuant to this final rule even if the existing account was opened prior to the applicable compliance date.

The Bureau is also not adopting the commenters' second suggestion—to indefinitely allow financial institutions to rely on prior applicant responses—as the commenters provide no reason why reused data are more trustworthy in the context of requests for additional credit amounts, compared to other existing customers' requests for new credit. However, pursuant to final § 1002.107(d), financial institutions may reuse most applicant-provided data, so long as there is no reason to believe the data are inaccurate, for up to 36 months. Although not specific to requests for additional credit amounts, this provision may ease some of the commenters' concerns.

In response to comments, mainly from community groups, regarding the importance of having refinance transactions reported, the Bureau is revising comment 103(b)-2 to make clear that an applicant's request to refinance, which occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower, is reportable. The Bureau agrees with commenters that refinance transactions should be covered applications; they legally constitute a new credit obligation, and so are typically included within regulatory schemes governing originations.[346] Indeed, as one commenter correctly noted, the Bureau's inclusion of

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[345] Although information on average business credit card account age is not publicly available, credit card accounts typically have no expiration date and so may remain open indefinitely. Thus, exempting such accounts could create blind spots in the data for potentially years, or even decades, into the future.

[346] *See, e.g.*, Fed. Fin. Insts. Examination Council, *A guide to CRA Data Collection and Reporting*, at 12 (2015), https://www.ffiec.gov/cra/pdf/2015_CRA_Guide.pdf (stating that an institution should collect information about small business and small farm loans that it refinances or renews as loan originations). Regulation C § 1003.4(a)(3) (requiring reporting of whether the covered loan is a refinance); Regulation Z § 1026.20(a) ("A refinancing occurs

refinancing categories for the credit purpose data point (in proposed comment 107(a)(6)-1) in the proposed rule shows that the Bureau intended for refinances to be reportable transactions.

Several other commenters also requested clarification on aspects of the Bureau's proposed approach to reevaluation, extension, or renewal requests. In response to a community bank's questions regarding what dates to report under § 1002.107(a)(2) and (9) (application date and action taken date) for requests for additional credit on existing accounts, the Bureau notes the dates should be based on the new request for credit. Because a request for additional credit amounts is considered a separate covered application pursuant to final § 1002.103(a), all data reported, including applicable dates, should be in reference to the new request for credit, and not the initial origination. Several other commenters inquired whether a transaction is a reportable covered application if a new note is executed as part of a request to consolidate existing credit amounts under the same terms or as part of a periodic review extending the credit under the same terms. If an existing obligation is satisfied by a new credit obligation, as determined by contract and State law, it would generally be reportable as a covered application (assuming the other conditions of a covered application are met). Although in certain circumstances this may require reporting of credit amounts previously outstanding under a different credit obligation with the same borrower and with similar or identical terms, the Bureau believes that seeking to exempt these fact-specific circumstances would add considerable complexity to the rule and could undermine data quality. The Bureau generally agrees with the assertion that each new request for credit that is separately evaluated should be reportable (excluding counteroffers, pursuant to final comment 107(a)(9)-2). If a financial institution evaluates each new request for credit, then each of those instances should be reported as separate covered applications for the amount advanced. For example, if a small business makes several requests for advances from a merchant cash advance provider, each of which is evaluated by the provider, each of those requests will

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when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer. A refinancing is a new transaction requiring new disclosures to the consumer . . . .").

typically constitute a separate covered application. In contrast, if a financial institution extends a line of credit up to a specified amount, then any request drawn against the line within that established limit is authorized and would not be a separate covered application. See also existing § 1002.2(q), which defines the term to "extend credit" or "extension of credit."

Inquiries and prequalification requests. As the Bureau explained in the NPRM, existing Regulation B recognizes that before a consumer or business requests credit in accordance with the procedures used by a creditor for the type of credit requested, a creditor may provide a prospective applicant with information about credit terms. Generally, an inquiry occurs when a prospective applicant consumer or business requests information about credit terms offered by a creditor; a prequalification request generally refers to a request by a consumer or business for a preliminary determination on whether the prospective applicant would likely qualify for credit under a creditor's standards or for what amount.[347] Under existing Regulation B comments 2(f)-3 and 9-5, an inquiry or prequalification request may become an "application" if the creditor evaluates information about the consumer or business, decides to decline the request, and communicates this to the consumer or business; otherwise, such inquiries and prequalification requests are generally not considered applications under existing Regulation B. As explained in existing comment 2(f)-3, whether the inquiry or prequalification request becomes an application depends on how the creditor responds to the consumer or business, not on what the consumer or business says or asks. Finally, Regulation C excludes all prequalification requests from HMDA reporting, even if the prequalification request constitutes an application under existing Regulation B.[348]

Pursuant to final § 1002.103(b)(2), a "covered application" does not include inquiries and prequalification requests, even in circumstances where the inquiry or prequalification request may constitute an "application" under existing § 1002.2(f). The Bureau agrees with commenters

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[347] *See* Regulation C comment 2(b)-2 (describing prequalification requests).

[348] *See id.*

who stated that reporting inquiries or prequalification requests would be extremely operationally difficult given the volume of such requests and because such requests typically occur very early in the process, making it difficult to obtain or track applicant-provided data. There could be data quality issues given the sometimes-informal nature of such requests, which could raise the risk of missing, unavailable, or erroneous data. As noted by one commenter, reporting inquiries and prequalification requests could also be duplicative if the applicant subsequently applies for credit in accordance with the procedures designated by the financial institution; the Bureau would potentially need to create a separate data field or flag to distinguish such requests. Requiring reporting of such interactions could also lead financial institutions to pull back on offering prequalification reviews or engaging with prospective applicants, which could inhibit prospective applicants from shopping around for the best terms. As discussed in the section-by-section analysis of § 1002.103(a) above, small depository institutions have expressed concern that this rule will overly formalize small business lending and inhibit relationship lending. Given these concerns, the Bureau is not expanding the definition of a covered application to include pre-application conduct, such as every time a business inquires about credit or if a financial institution pulls information about the business, as urged by some community groups.

The Bureau also is not requiring, as suggested by some commenters, reporting of inquiries and prequalification requests only in situations that would otherwise be treated as an "application" under existing Regulation B—*i.e.*, when the financial institution evaluates information about the business, decides to decline the request, and communicates this to the business. The logistics of reporting an inquiry or prequalification request only in these circumstances could be operationally challenging for financial institutions and could lead to data distortion in a manner inconsistent with the statutory purposes of section 1071, as only denials would be captured. In this case, a financial institution may prefer to report all inquiries and prequalification requests, which could lead to some of the challenges identified above. Moreover, a financial institution will not know ex ante whether a prequalification will result in

the financial institution notifying the business it is unlikely to qualify, and so the financial institution would likely need to collect 1071 data at the beginning of the interaction regardless. Although the Bureau sought comment about its concerns related to the reporting of only denials, no commenters specifically addressed this issue.

As noted above, one commenter emphasized the importance of having online applications reported, including online prequalification requests in particular, arguing that the absence of reporting would lead to a lack of data and an imbalance among lenders. The Bureau notes, however, that the final rule does not exclude online applications (nor did the proposal). While prequalification requests are excluded for the reasons discussed above, that exclusion is not limited to a particular channel. However, to the extent an online questionnaire is truly a voluntary tool for businesses to shop around for potential terms, and not an application under the procedures established by the financial institution, the Bureau believes such inquiries should be excluded for the reasons described above.

Of course, requests for credit that meet the definition of "covered application" are reportable, even if the application was preceded by an inquiry or prequalification request. For example, if a business initially seeks information about potential credit offerings, the financial institution responds, and then the business submits an application for a covered credit transaction, the application is reportable. If, on the other hand, the business asks about potential credit offerings, but then chooses not to request credit, there is no covered application.

In response to commenters' request to provide further examples, in commentary to the rule, to differentiate inquiries or prequalification requests and covered applications, the Bureau has added to comment 103(b)-5 additional illustrative examples.

The Bureau has also made minor revisions to comment 103(b)-4 for clarity and consistency.

In sum, the Bureau believes it is appropriate to interpret "application" as used in section 1071 to exclude inquiries and prequalification requests given the considerations identified above,

including the timing and often informal nature of such interactions, the operational challenges of implementing such a definition, and related concerns about the reliability of the data. However, the Bureau does share commenters' concerns about discrimination that may occur in the pre-application phase. As discussed above, the Bureau believes it is important for regulators and other enforcers to review data collected and reported pursuant to section 1071 to preliminarily identify where financial institutions might not be appropriately defining an application, and for financial institutions to self-monitor for the same. For example, as discussed above, very high approval rates or very low rates of incomplete or withdrawn applications may be a preliminary indication that the financial institution is evading its obligations, for example, by collecting 1071 data late in the application process. Similarly, such rates may also suggest that the financial institution has a regular practice of decisioning requests for credit through "inquiries" or "prequalification requests"; if such reviews are regularly conducted and effectively function as a prescreening tool for the financial institution, they should be reported as a "covered application."[349]

The Bureau believes it is important for regulators and other enforcers to also carefully review the data for indicia of potential illegal discouragement in the pre-application stage, and for financial institutions to self-monitor for the same. For example, analyzing the rates of applications from small businesses within majority-minority neighborhoods, as compared to a financial institution's peers, may be useful to identify potential discrimination. Finally, the Bureau notes that inquiries and prequalification requests where the institution evaluates information about the consumer or business, declines the request, and communicates it to the business or consumer, are "applications" under existing Regulation B, and are thus subject to its requirements regarding "applications," including its adverse action notification requirements and nondiscrimination provisions. As stated in final comment 103(b)-1, in no way are the exclusions

[349] *See also* final comment 103(b)-5.

in final § 1002.103(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term application in existing § 1002.2(f) as applicable to existing Regulation B.

Solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution. The Bureau is adding new comment 103(a)-4 to clarify that the term covered application does not include solicitations, firm offers of credit, and other evaluations or offers initiated by the financial institution because the business has not made a request for credit, and to provide illustrative examples. The Bureau is adding this comment in response to comments from industry urging the Bureau to exclude "preapprovals," which the commenters described as credit offered by the financial institution without an initiating application from the business. The Bureau agrees with commenters who urged that solicitations, reviews, or evaluations initiated by the financial institution should not, on their own, be considered "covered applications" because the communications do not involve an *applicant* requesting credit. Excluding solicitations and firm offers of credit is also consistent with the language of ECOA section 704B(b)(1), which expressly contemplates that an application in response to a solicitation by a financial institution could be an application under section 1071, but the text is silent on solicitations without any applicant response.

The Bureau does not agree, however, that such offers or evaluations should not be reported even where the applicant responds to such a request and seeks the credit offered, as suggested by one commenter. Once the applicant responds affirmatively to the solicitation indicating that it wishes to proceed, there is a request for credit from the applicant; there is no requirement in the final definition of a covered application that the applicant be the initiating entity, only that the applicant make an oral or written request for a covered credit transaction in accordance with procedures used by a financial institution for the type of credit requested. Capturing such requests would also implement the language of ECOA section 704B(b)(1), which provides that data collection and reporting is required "whether or not such application is in response to a solicitation by the financial institution." The commenter also argued that reporting

on accepted solicitations or offers would skew the data as it would only include accepted offers. The Bureau understands that this may result in some data skew, but believes this outcome is preferrable to having no data at all on applicant requests for credit in response to a solicitation. Thus, solicitations, firm offers of credit, or other evaluations or offers initiated by the financial institution for a covered credit transaction may become a "covered application" if an applicant responds to the solicitation or offer by requesting the offered credit. However, if a financial institution unilaterally—with no request from the business—increases a credit line or provides some other type of credit to the business, it would not be considered a covered application because, similar to a mere solicitation, the transaction does not involve a request for credit.

Several commenters also asked the Bureau to provide that "preapprovals" are not covered applications. As noted above, to the extent the commenters are referring to evaluations or offers initiated by the financial institution alone, such events are not covered applications unless the applicant affirmatively responds, wishing to proceed. However, a preapproval as described in existing comment 2(f)-5.i is an example of a covered application. Under that comment, a preapproval occurs when a creditor reviews a request under a program in which the creditor, after a comprehensive analysis of an applicant's creditworthiness, issues a written commitment valid for a designated period of time to extend a loan up to a specified amount. If a creditor's program does not provide for giving written commitments, requests for preapprovals are treated as prequalification requests.

Section 1002.104 Covered Credit Transactions and Excluded Transactions

104(a) Covered Credit Transaction

ECOA section 704B(b) requires financial institutions to collect and report information regarding any application for "credit" made by women-owned, minority-owned, or small businesses. Although the term "credit" is not specifically defined in section 1071, ECOA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts

and defer its payment or to purchase property or services and defer payment therefor."[350] As noted above in the section-by-section analysis of § 1002.102(d), existing Regulation B further defines "business credit" as "extensions of credit primarily for business or commercial (including agricultural) purposes," with some exclusions.[351] As discussed in detail below, the Bureau is finalizing its proposal that covered financial institutions report data for all applications for transactions that meet the definition of business credit unless otherwise excluded.

Proposed § 1002.104(a) would have defined the term "covered credit transaction" as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b). Proposed comment 104(a)-1 would have reiterated that the term "covered credit transaction" includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau explained that such credit transactions for agricultural purposes and HMDA-reportable transactions would have fallen within the scope of the proposed rule. The Bureau noted that this was not an exhaustive list of covered credit transactions; other types of business credit would have constituted covered credit transactions unless excluded by proposed § 1002.104(b). With respect to excluded transactions, proposed § 1002.104(b) would have stated that the requirements of subpart B do not apply to trade credit, public utilities credit, securities credit, and incidental credit. Proposed commentary would have made clear that the term "covered credit transaction" also did not cover factoring, leases, consumer-designated credit used for business purposes, or credit secured by certain investment properties.

The Bureau received comments on transaction coverage from many lenders, trade associations, business advocacy groups, nonbank online lenders, the offices of two State attorneys general, and community groups. The Bureau received a few comments from industry expressing general support for the proposed definition of covered credit transaction. Many

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[350] 15 U.S.C. 1691a(d); *see also* § 1002.2(j).

[351] 12 CFR 1002.2(g).

community groups, as well as several community-oriented lenders and a cross-sector group of lenders, community groups, and small business advocates, requested expansive and broad product coverage; some commenters argued that such coverage was needed to prevent evasion, for comprehensive data analysis, and/or to fulfill section 1071's statutory purposes. Some commenters suggested the Bureau monitor the market to ensure that new products are covered by, and reported under, the rule. A business advocacy group and a joint letter from community groups, community-oriented lenders, and business advocacy groups urged the Bureau to subject "all forms of credit"—including merchant cash advances, factoring, and leases, in addition to term loans, credit cards, and other forms of credit—to fair lending and credit need analysis. They asserted that each of these products occupies a substantial portion of the "credit market" for small businesses and excluding any of them would allow potentially detrimental lending practices to proliferate.

For the reasons set forth herein, the Bureau is finalizing its definition of "covered credit transaction" in § 1002.104(a) as proposed. Final § 1002.104(a) defines the term "covered credit transaction" as an extension of business credit that is not an excluded transaction under § 1002.104(b). Final comment 104(a)-1 reiterates that the term "covered credit transaction" includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under final § 1002.104(b). Loans, lines of credit, credit cards, merchant cash advances, and credit products used for agricultural purposes fall within the scope of this final rule, which covers the majority of products that small businesses use to obtain financing.[352] As discussed in greater detail below, the Bureau believes that covering these products in this rule is important to fulfilling the purposes of section 1071. The Bureau stresses that the products discussed herein do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described in the rule and its associated

[352] *See* White Paper at 21-22.

commentary nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau thus is not expressly listing other products (such as credit extensions incident to factoring arrangements discussed below) as covered credit transactions.

Final § 1002.104(b), in turn, states that the requirements of subpart B do not apply to trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. Associated commentary makes clear that the term "covered credit transaction" also does not cover factoring, leases, consumer-designated credit that is used for business or agricultural purposes, or credit transaction purchases, purchases of an interest in a pool of credit transactions, and purchases of a partial interest in a credit transaction. In response to comments received, the Bureau is now excluding HMDA-reportable transactions and insurance premium financing from the scope of this final rule. As a result, the Bureau believes that proposed commentary that would have made clear that the term "covered credit transaction" does not cover credit secured by certain investment properties is not necessary.

The Bureau agrees that broad product coverage is important to fulfill section 1071's statutory purposes, though the Bureau is not extending coverage to all forms of small business financing as requested by some commenters. The Bureau believes the exclusions from the definition of covered credit transaction that it proposed in § 1002.104(b) are appropriate and has added two additional exclusions (HMDA-reportable transactions and insurance premium financing) in response to comments received. For the reasons set forth herein, the Bureau is finalizing § 1002.104 pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071.

Comments received on specific types of transactions that are reportable or not reportable under this rule are discussed in turn below.

Loans, Lines of Credit, and Credit Cards

Proposed Rule

Proposed § 1002.104(a) would have defined the term "covered credit transaction" as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b). Proposed comment 104(a)-1 would have reiterated that the term "covered credit transaction" includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau did not propose definitions for loans, lines of credit, and credit cards because the Bureau believed these products are generally and adequately covered by the definition of "credit" in proposed § 1002.102(i), which, as noted above, references existing § 1002.2(j). The Bureau sought comment on its proposed approach to covered credit transactions and particularly on whether it should define loans, lines of credit, and credit cards, and, if so, how.

Comments Received

A few commenters expressed general support for the explicit coverage of loans, lines of credit, and credit cards. One bank commenter opined that the Bureau's rule does not need to define loans, lines of credit, and credit cards because those definitions would add unnecessary complexities. One community group expressed approval for the Bureau's proposed coverage of lines of credit, stating that such products meet important credit needs to help businesses weather fluctuations in revenues and their coverage will help inform stakeholders whether minority- and/or women-owned businesses are able to access this important credit type or whether they experience a disproportionate amount of denials.

The Bureau received mixed feedback regarding its proposed coverage of credit cards. A few community groups supported credit card coverage, with one noting that credit cards are widely used by small businesses, often with smaller principal balances and higher interest rates than term loans. This commenter stressed the importance of assessing whether Hispanic- and African American-owned businesses are more likely to rely upon credit cards than other

businesses and whether the smallest businesses, and women- and minority-owned businesses, have equitable access to term loans or are served disproportionately by credit card loans or other credit products.

By contrast, a few credit union trade associations urged the Bureau to exclude credit cards from the rule to reduce burden and reporting volumes. One commenter argued that every credit union that offers even a single small business credit card product will ultimately become a covered financial institution unless the Bureau either establishes a de minimis threshold or expressly excludes small business credit cards. Another urged the Bureau to exclude credit cards from the rule on the basis that these products are already covered by the Credit Card Accountability Responsibility and Disclosure (CARD) Act and the exclusion would reduce compliance burden without weakening the quality of resulting data and would relieve lenders of the responsibility to sort out and isolate business credit card data from consumer credit card data, which are often both run by the same platform independently of other commercial lending activities.

Final Rule

For the reasons set forth herein, the Bureau is finalizing its coverage of loan, lines of credit, and credit cards as proposed. These products are commonly offered to small business applicants (making up almost 60 percent of the aggregate dollar volume of various financial products used by small businesses).[353] According to a recent Federal Reserve Banks' survey of employer firms, loans and lines of credit were the most common forms of financing sought by applicants, with credit cards in second place.[354] The Bureau believes that covering these products is important for advancing both of section 1071's statutory purposes.

The Bureau does not believe that it would be appropriate to exclude credit cards from coverage, as requested by several commenters. The Federal Reserve Banks found that almost one

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[353] *See id.* at 21 fig. 2.

[354] 2022 Report on Employer Firms at 25, https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms.

third of employer firm applicants sought credit cards[355] and credit card usage among minority-owned small businesses is higher than among white-owned small businesses.[356] The Bureau believes that excluding this popular source of small business financing, particularly among the smallest businesses and start-ups, would not be consistent with section 1071's statutory purposes. The Bureau has considered the concerns regarding reporting volumes among credit unions and notes that its higher originations threshold in final § 1002.105(b) for coverage under the rule should help alleviate these concerns. The Bureau does not believe that CARD Act reporting is a sufficient substitute for data collected under section 1071 because it does not cover business-purpose credit cards and does not include protected demographic information, both of which are central to section 1071's statutory purposes.

The Bureau is finalizing § 1002.104(a) and comment 104(a)-1 as proposed. The Bureau is not adopting definitions for loans, lines of credit, and credit cards because it believes these products are generally and adequately covered by the definition of "credit" in § 1002.102(i).[357]

Merchant Cash Advances

Background and Proposed Rule

As discussed above, proposed § 1002.104(a) would have defined the term "covered credit transaction" as an extension of business credit that is not an excluded transaction under proposed § 1002.104(b), and proposed comment 104(a)-1 would have reiterated that the term "covered credit transaction" includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b). The Bureau sought comment on its proposed approach to covered credit transactions, and in particular, on whether it

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[355] *Id.*

[356] *See, e.g.*, Fed. Rsrv. Bank of N.Y. *et al.*, *Latino-Owned Businesses: Shining a Light on National Trends* (Nov. 2018), https://www.newyorkfed.org/medialibrary/media/smallbusiness/2017/Report-on-Latino-Owned-Small-Businesses.pdf (finding that Latino business owners are more likely than non-Latino white business owners to use credit cards).

[357] As noted in the section-by-section analysis of § 1002.107(a)(5) below, the Bureau distinguishes between secured and unsecured loans and lines of credit when financial institutions report the type of credit product being applied for. The Bureau does not believe that this distinction has relevance to whether these products constitute "credit."

should define merchant cash advances and/or other sales-based financing transactions, and if so, how.

As the Bureau explained in the NPRM, merchant cash advances are a form of financing for small businesses that purport to be structured as a sale of potential future income. Merchant cash advances vary in form and substance, but under a typical merchant cash advance, a merchant receives a cash advance and promises to repay it plus some additional amount or multiple of the amount advanced (*e.g.*, 1.2 or 1.5, the "payback" or "factor" "rate"). The merchant promises to repay by either pledging a percentage of its future revenue, such as its daily credit and debit card receipts (the "holdback percentage"), or agreeing to pay a fixed daily withdrawal amount to the merchant cash advance provider until the agreed upon payment amount is satisfied. Merchant cash advance contracts often provide for repayment directly through the merchant's card processor and/or via Automated Clearing House withdrawals from the merchant's bank account.[358] Merchant cash advances constitute the primary product under an umbrella term often referred to as "sales-based financing;" generally, transactions wherein a financial institution extends funds to a business and repayment is based on the business's anticipated sales, revenue, or invoices.[359]

The Bureau understands that the merchant cash advance market is generally dominated by nondepository institutions not subject to Federal safety and soundness supervision or

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[358] This description is based on the Bureau's review of a sample of merchant cash advance contracts that the Bureau believes fairly represent typical merchant cash advance contracts in the market. The Bureau's review comports with observations made by industry and community groups regarding merchant cash advances.

[359] As stated below, the Bureau is not specifically defining sales-based financing in the rule because the Bureau believes these products are covered by the definition of "credit" in final § 1002.102(i). New York and California laws have recently sought to define sales-based financing. New York law, for example, defines "sales-based financing" as "a transaction that is repaid by the recipient to the provider, over time, as a percentage of sales or revenue, in which the payment amount may increase or decrease according to the volume of sales made or revenue received by the recipient." N.Y. Fin. Serv. 801(j). New York's definition of sales-based financing also encompasses a true-up mechanism where the financing is repaid as a fixed payment but provides for a reconciliation process that adjusts the payment to an amount that is a percentage of sales or revenue. *Id.* California law uses a similar definition. *See* 10 Cal. Code Reg. 2057(a)(22) (defining sales-based financing as "a commercial financing transaction that is repaid by a recipient to the financer as a percentage of sales or income, in which the payment amount increases and decreases according to the volume of sales made or income received by the recipient" and including "a true-up mechanism").

reporting requirements. The Bureau also understands that merchant cash advance providers may not be required to obtain State lending licenses. As a result, information on merchant cash advance lending volume and practices is limited. The Bureau notes, however, that a few states have enacted laws that would impose disclosure requirements upon certain commercial financing providers, including merchant cash advance providers.[360]

Although the Bureau's 2017 White Paper estimated the merchant cash advance market constituted less than 1 percent of the aggregate dollar volume of various financial products used by small businesses in the U.S. in 2014,[361] the Bureau notes that more recent evidence suggests the industry may now be much larger. For example, the 2021 Federal Reserve Banks' survey of firms with 1-499 employees ("employer firms") found that 8 percent of such businesses applied for and regularly used merchant cash advances.[362] Moreover, on August 18, 2019, the trade website deBanked reported that according to an investment bank's projections, "the [merchant cash advance] industry will have more than doubled its small business funding to $19.2 billion by year-end 2019, up from $8.6 billion in 2014."[363]

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[360] *See, e.g.*, Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (Dec. 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B. The California law does not go so far as to amend the California Financing Law to require factors or merchant cash advance providers to be licensed, but it does impose first-in-the-nation disclosure requirements in connection with these products similar to those imposed under TILA. The California law is implemented through regulations that took effect on December 9, 2022. *See* State of Cal. Dep't of Bus. Oversight, *PRO 01-18 Commercial Financing Disclosures SB 1235* (June 9, 2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf. The New York law is also implemented through regulations, which have not been finalized yet. See N.Y. Dep't of Fin. Servs., Revised Proposed New 23 NYCRR 600 (Sept. 14, 2022), https://www.dfs.ny.gov/system/files/documents/2022/09/rp_23nycrr600_text_20220914.pdf.

[361] *See* White Paper at 21 fig. 2, 22 fig. 3.

[362] Fed. Rsrv. Banks, *Small Business Credit Survey—2022 Report on Employer Firms*, at 19 (Feb. 22, 2022), https://www.fedsmallbusiness.org/survey/2022/report-on-employer-firms (2022 Small Business Credit Survey). Starting in 2017, the Federal Reserve Banks began to gather specific data on merchant cash advances for its annual reports on small business financing for employer firms—in the 2017 report, the survey found that 7 percent of such businesses applied for and regularly used merchant cash advances. Fed. Rsrv. Banks, *Small Business Credit Survey—2017 Report on Employer Firms*, at 9 (Apr. 11, 2017), https://www.fedsmallbusiness.org/survey/2017/report-on-employer-firms (2017 Small Business Credit Survey).

[363] Paul Sweeney, *Gold Rush: Merchant Cash Advances Are Still Hot*, deBanked (Aug. 18, 2019), https://debanked.com/2019/08/gold-rush-merchant-cash-advances-are-still-hot/.

The Bureau understands that merchant cash advances are often used by merchants due to the speed and ease with which they can be obtained,[364] particularly for merchants unable to obtain financing from more traditional sources.[365] According to the 2021 Federal Reserve Banks' report regarding firms owned by people of color (both small employer firms and non-employer firms), Black-owned firms, Hispanic-owned firms, and Asian-owned firms were more likely to have applied for merchant cash advances (14 percent, 10 percent, and 10 percent, respectively) than white-owned firms (7 percent).[366]

The Bureau believes that the higher frequency of merchant cash advance use among minority-owned businesses coupled with reports of problematic provider practices lends credence to claims that merchant cash advances may raise fair lending concerns. The Federal Trade Commission (FTC) released a Staff Perspective in February 2020 discussing its concerns with the merchant cash advance industry[367] and noting the industry's tendency to "cater to higher-risk businesses or owners with low credit scores—typically offering them higher-cost products."[368] The FTC has also filed enforcement actions against merchant cash advance providers and their principals, in one case alleging that they misrepresented the terms of merchant cash advances that they provided, and then used "unfair collection practices, including sometimes threatening physical violence, to compel consumers to pay."[369] In April 2021, the

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[364] *See* Fed. Rsrv. Banks, *Small Business Credit Survey—2021 Report on Employer Firms*, at 26 (Feb. 3, 2021), https://www.fedsmallbusiness.org/survey/2021/report-on-employer-firms (2021 Small Business Credit Survey) (reporting that 84 percent of surveyed credit applicants were approved for a merchant cash advance, as compared to a 43 percent approval rate for personal loans).

[365] *See* 2022 Small Business Credit Survey (noting that only 8 percent of "high credit risk" applicants obtained all the financing sought).

[366] *See* Fed. Rsrv. Banks, *Small Business Credit Survey—2021 Report on Firms Owned by People of Color*, at 30 (Apr. 15, 2021), https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color (Small Business Credit Survey of Firms Owned by People of Color).

[367] Fed. Trade Comm'n, *'Strictly Business' Forum, Staff Perspective*, at 6-8 (Feb. 2020), https://www.ftc.gov/system/files/documents/reports/staff-perspective-paper-ftcs-strictly-business-forum/strictly_business_forum_staff_perspective.pdf.

[368] *See id.* at 2.

[369] Press Release, Fed. Trade Comm'n, *New York-Based Finance Companies Deceived Small Businesses, Non-Profits and Seized Their Personal and Business Assets* (June 10, 2020), https://www.ftc.gov/news-events/press-releases/2020/06/new-york-based-finance-companies-deceived-small-businesses. *See also* Press Release, Fed. Trade Comm'n, *FTC Alleges Merchant Cash Advance Provider Overcharged Small Businesses Millions* (Aug. 3, 2020),

FTC obtained a settlement that required a merchant cash advance provider to pay more than $9.8 million to settle charges that it took money from businesses' bank accounts without permission and deceived business owners about the amount of financing they would receive and about other features of its financing products.[370] More recently, the FTC obtained a court order that permanently bans a merchant cash advance company and its owner from the merchant cash advance industry for deceiving and threatening small businesses and their owners.[371]

Moreover, the Bureau understands that the delinquency/default rate amongst small businesses that use merchant cash advances is relatively high—6 to 20 percent according to one estimate[372] and 10 percent according to an SEC analysis of one merchant cash advance provider[373] (compared with a charge off rate between 0 to 3.59 percent on SBA loans[374] and just over 1 percent on certain commercial and industrial loans[375]). The Bureau believes this high default rate may be explained by the fact that the typical merchant cash advance holdback percentage—10 to 20 percent of gross receipts or revenues—may be onerous for already cash-strapped small businesses.[376] The Bureau also understands that it is not uncommon

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https://www.ftc.gov/news-events/press-releases/2020/08/ftc-alleges-merchant-cash-advance-provider-overcharged-small.

[370] Press Release, Fed. Trade Comm'n, *Cash Advance Firm to Pay $9.8M to Settle FTC Complaint It Overcharged Small Businesses* (Apr. 22, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/cash-advance-firm-pay-98m-settle-ftc-complaint-it-overcharged.

[371] Press Release, Fed. Trade Comm'n, *FTC Action Results in Ban for Richmond Capital and Owner From Merchant Cash Advance and Debt Collection Industries and Return of More Than $2.7M to Consumers* (June 6, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-action-results-ban-richmond-capital-owner-merchant-cash-advance-debt-collection-industries.

[372] *See* Bryant Park Capital, *Merchant Cash Advance / Small Business Financing Industry Report*, at 28 (Jan. 2016), https://bryantparkcapital.com/wp-content/uploads/2018/06/BPC-MCA-SMB-Financing-Industry-Report.pdf.

[373] SEC Complaint (Jan. 2020), https://www.sec.gov/litigation/complaints/2020/comp24860.pdf.

[374] Small Bus. Admin., *Table 9—Charge Off Rates as a Percent of Unpaid Principal Balance (UPB) Amount by Program* (Mar. 31, 2022), https://www.sba.gov/document/report-small-business-administration-loan-program-performance.

[375] Bd. of Governors of the Fed. Rsrv. Sys., *Charge-Off and Delinquency Rates on Loans and Leases at Commercial Banks* (Aug. 22, 2022), https://www.federalreserve.gov/releases/chargeoff/delallsa.htm.

[376] *See* Bd. of Governors of the Fed. Rsrv. Sys., *Browsing to Borrow: "Mom & Pop" Small Business Perspectives on Online Lenders*, at 9 (June 2018), https://www.federalreserve.gov/publications/files/2018-small-business-lending.pdf (Board Small Business Perspectives) (noting that when asked "about the toughest part of running their businesses, most participants cited the challenges of managing their cash flow"); *id.* at 5 (noting that "[s]ome observers have argued that the owner's loss of control over cash flow puts some small businesses at risk"). The Bureau also notes that many merchant cash advance providers believe that they are not subject to State usury laws.

for small businesses that use merchant cash advances to obtain new merchant cash advances from other merchant cash advance providers (more than a quarter of such businesses, by one account);[377] they also may use one merchant cash advance to pay off another. Firms that take on added debt loads in this way (a process known as "stacking") "may not fully recognize the costs involved, which could potentially jeopardize the financial health of their businesses."[378]

As small businesses struggled with the COVID-19 pandemic, reports of merchant cash advance providers employing aggressive collection practices continued, such as "pursuing legal claims against owners that freeze their bank accounts and . . . pressing their family members, neighbors, insurers, distributors—even their customers."[379] Given the fact that 84 percent of the credit applicants surveyed by the Federal Reserve Banks were approved for a merchant cash advance[380] and the fact that it appears to have been significantly more difficult to obtain credit as a "high credit risk" applicant during the COVID-19 pandemic,[381] the Bureau believes that many vulnerable small businesses sought merchant cash advances to support their pandemic recovery.

Comments Received

The Bureau received comments on this aspect of the proposal from a wide range of lenders, trade associations, business advocacy groups, community groups, individuals, the offices of two State attorneys general, and others. The Bureau observes that, throughout the development of the rule to implement section 1071, merchant cash advances have been the focus of significant attention and a unique source of near-consensus among a diverse array of

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[377] *See* Opportunity Fund, *Unaffordable and Unsustainable: The New Business Lending*, at 3 (May 2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/13129 (stating that "[m]ore than a quarter of the businesses in our dataset had loans outstanding with multiple alternative lenders").

[378] Board Small Business Perspectives at 6.

[379] Gretchen Morgenson, *FTC official: Legal 'loan sharks' may be exploiting coronavirus to squeeze small businesses*, NBC News (Apr. 3 2020), https://www.nbcnews.com/business/economy/ftc-official-legal-loan-sharks-may-be-exploiting-coronavirus-squeeze-n1173346.

[380] *See* 2021 Small Business Credit Survey at 26.

[381] *Compare id.* at 22 (noting that only 7 percent of "high credit risk" applicants obtained all the financing sought), *with* Fed. Rsrv. Banks, *Small Business Credit Survey—2020 Report on Employer Firms*, at 12 (Apr. 7, 2020), https://www.fedsmallbusiness.org/survey/2020/report-on-employer-firms (reporting that 23 percent of "high credit risk" applicants obtained all the financing sought) (2020 Small Business Credit Survey).

stakeholders—almost all of whom advocated for covering merchant cash advances in the rule.[382] Comments received in response to the NPRM were no different in that, with the exception of a sole credit union trade association, the only commenters that supported the exclusion of merchant cash advances from the rule were merchant cash advance providers or trade associations representing merchant cash advance providers (the Bureau is not aware of any credit unions that offer merchant cash advances as that term is used herein). Most of these commenters argued that merchant cash advances do not meet the definition of credit under ECOA or State law and should instead be treated like traditional factoring arrangements (described in detail below), which are generally understood not to be credit. A few of these commenters also asserted that covering merchant cash advances is contrary to public policy because doing so will negatively impact access to financing and because they benefit businesses. Two commenters asserted that the Bureau failed to engage adequately in cost/benefit analysis as required by section 1022(b)(2)(a) of the Dodd-Frank Act, claiming that some smaller funders would exit the market due to increased regulatory burdens and costs. One commenter explained that because the merchant cash advance industry has never had to track the demographic status of a small business owner, implementing the Bureau's rule would require costly programming upgrades, adjustments to merchant cash advance funder systems, and additional employees to handle the reporting and auditing of these functions. This commenter also argued the rule would result in a less competitive market dominated by larger players and would put merchant cash advances at an unfair disadvantage compared to factoring.

The Bureau received many comments, primarily from community groups and community-oriented lenders, expressing broad support for covering merchant cash advances. A few of these commenters pointed to the fact that State regulators have started cracking down on

[382] For instance, of the substantive responses to the 2017 request for information, comments authored or co-authored by dozens of stakeholders (including community and business groups, industry, and trade associations) expressed explicit support for requiring the reporting of merchant cash advances (and additional letters expressed support for covering "fintech" or "alternative online" products more generally).

the merchant cash advance industry due to its lack of transparency and potentially predatory practices. A community group and a cross-sector group of lenders, community groups, and small business advocates noted that merchant cash advances are an important and growing part of small business financing, with the community group relaying one merchant cash advance provider's announcement that the COVID-19 pandemic created new demand for its products, in part because the kinds of smaller firms that it primarily serves encountered greater-than-normal challenges to accessing capital through traditional bank financing during the pandemic. The cross-sector group and another community group stressed a need for transparency and noted that there is insufficient data on merchant cash advances. The community group acknowledged that reporting on merchant cash advances may be more complex due to their different terms but argued that these features make transparency into this lending channel critical. This commenter also opined that excluding merchant cash advances from scrutiny would encourage lenders to "double down" on their use rather than offer more consumer-friendly products.

Several supporters of merchant cash advance coverage, including the offices of two State attorneys general, maintained that merchant cash advances are clearly credit and they incur repayment liability. A joint letter from community and business advocacy groups explained that merchant cash advances are distinct from factoring in that a genuine factoring transaction creates a completed sale of receivables owed to the seller as a result of goods delivered or services provided by the seller to a third party. A few commenters asserted that coverage of merchant cash advances meets section 1071's statutory purposes. One online lender noted that merchant cash advances are not regulated. Many commenters expressed strong concerns about high costs and predatory practices often associated with merchant cash advances, with the majority of these commenters expressing particular concern about use of merchant cash advances among minority business owners. A CDFI lender explained that it had analyzed several merchant cash advance and balance sheet lender agreements provided by its clients and discovered that the average product carried an annual percentage rate of 94 percent, with one product reaching 358 percent.

This commenter also found that, among the Hispanic borrowers in its sample, the average monthly payment was more than 400 percent of their take-home pay. An online lender characterized the lack of transparency in pricing merchant cash advances as a significant market failure that harms small business owners. A community group expressed strong concerns about the increasingly common practice of using confessions of judgments (where a borrower must agree to allow the lender to obtain a legal judgment without going to court) within merchant cash advance lending, citing an investigation that found that the number of merchant cash advance cases ending with a confession in favor of a merchant cash advance provider in New York State rose from 14 cases in 2014 to over 3,500 cases in 2018.[383] The commenter noted that the study further found that these confession of judgment cases won the merchant cash advance industry an estimated $500 million in 2017.[384]

Potential coverage of merchant cash advances under the final rule has also drawn the attention of government entities seeking to regulate the industry. For example, in response to the SBREFA Outline, the California Department of Financial Protection and Innovation submitted a comment letter stating that "nearly all the data points would be just as easy for a merchant cash advance company to report as any other financial institution." In addition, FTC staff submitted a comment letter in response to the Bureau's Request for Information on the Equal Credit Opportunity Act and Regulation B[385] noting that the FTC has brought many actions protecting small businesses but that detecting illegal conduct in this space can be challenging, particularly with regard to merchant cash advances. The FTC comment letter urged the Bureau to remind small business lenders that whether a particular law applies depends on actual facts and circumstances and not solely on how one party chooses to characterize the transaction. FTC staff

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[383] Zachary R. Mider & Zeke Faux, *Sign Here to Lose Everything Part 1: "I Hereby Confess Judgment"* (Nov. 20, 2018), https://www.bloomberg.com/graphics/2018-confessions-of-judgment.

[384] Zachary R. Mider & Zeke Faux, *Sign Here to Lose Everything Part 2: The $1.7 Million Man* (Nov. 27, 2018), https://www.bloomberg.com/graphics/2018-confessions-of-judgment-millionaire-marshal/.

[385] Comment No. CFPB-2020-0026-0117 (Dec. 1, 2020), https://www.regulations.gov/comment/CFPB-2020-0026-0117.

also recommended that the Bureau help small businesses through data collection, collecting complaints, and education.[386]

In response to the NPRM, the offices of two State attorneys general submitted a comment stating that merchant cash advance transactions fall within the definition of credit and that the inclusion of merchant cash advance transactions is crucial given the rapid expansion of the merchant cash advance market in the past decade and limited publicly available data on market size or standard industry practices. Having brought enforcement actions against multiple merchant cash advance providers, they also asserted that the unregulated nature of the merchant cash advance market makes it ripe for the type of problematic practices that they have directly observed through their investigations into the industry. They expressed strong support for the inclusion of merchant cash advance transactions within the scope of the Bureau's rule, stating their belief that the rule will promote fairness, transparency, and enhanced data collection in the area of small business financing, including the rapidly growing merchant cash advance market that is targeting small businesses.

The Bureau also received a few comments about other aspects of its proposal to cover merchant cash advances. One commenter advised against defining merchant cash advances in the rule, arguing that such a definition could be inconsistent with some State laws and thus may create additional complexity in complying with the final rule. Another commenter urged the Bureau to clarify the application of the rule to merchant cash advances, including by clearly defining merchant cash advances and explaining how the rule will apply to the particular features of merchant cash advance products. Two commenters expressed more general support for coverage of sales-based financing.

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[386] *Id.*

Final Rule

For the reasons set forth herein, the Bureau is finalizing its definition of "covered credit transaction" as proposed. Final § 1002.104(a) defines the term "covered credit transaction" as an extension of business credit that is not an excluded transaction under § 1002.104(b). Final comment 104(a)-1 reiterates that the term "covered credit transaction" includes merchant cash advances.

The Bureau believes that the statutory term "credit" in ECOA is intentionally broad so as to include a wide variety of products without specifically identifying any particular product by name. As noted above, ECOA defines "credit" to mean "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." As a result, the definition does not explicitly state that it applies to any type of credit, whether it be installment loans, credit cards, or merchant cash advances. To the extent there is any ambiguity about whether a particular product constitutes "credit," Congress appears to have intended for the Bureau (or previously, the Board) to fill that gap, but neither the Bureau nor the Board have had occasion to provide further clarity with respect to coverage of sales-based financing products like merchant cash advances except to note in commentary that factoring, as "a purchase of accounts receivable,"[387] is not covered by ECOA or Regulation B. However, based on its review of typical merchant cash advance arrangements and its expertise with respect to the nature of credit transactions, the Bureau believes the term "credit" encompasses merchant cash advances and other types of sales-based financing. As a result, the Bureau believes that merchant cash advances and other sales-based financing are covered by the definition of "credit" in final § 1002.102(i). The Bureau does not believe it is necessary to specifically define merchant cash advances or sales-based financing because the

[387] Existing comment 9(a)(3)-3.

broad definition of "credit" in ECOA and Regulation B— includes credit products covered by the rule unless the Bureau specifically excludes them.

Nor does the Bureau believe that merchant cash advances should be excluded from the rule as a species of factoring because merchant cash advances do not constitute factoring within the meaning of the existing commentary to Regulation B or the definition in final comment 104(b)-1. In factoring transactions, entities receiving financing sell their legal right to payment from a third party for goods supplied or services rendered, and that right exists at the time of the transaction itself; the provider of funds seeks payment directly from the third party, and the transaction between the recipient and the provider of funds is complete at the time of the sale. In other words, the recipient of the financing has no remaining payment obligation, meaning that no payment is deferred. In contrast, at the time of the advance in a merchant cash advance, the recipient of the financing has no existing rights to payment that it can transfer. The transaction thus constitutes only a promise by the recipient to transfer funds to the provider once they materialize at a later date. The Bureau believes that the ECOA definition of credit, by referring to the right to "defer" payments, necessarily invokes this temporal consideration.

The Bureau does not agree with arguments raised by other commenters that merchant cash advances are not "credit" under ECOA. Specifically, the Bureau does not agree that the purchase of the right to a specific portion of a merchant's future proceeds, up to an agreed-upon limit, constitutes a substantially contemporaneous exchange of value between a merchant cash advance provider and a merchant. The Bureau notes that a merchant's proceeds from future sales of goods and services, by definition, do not exist in the present and thus there can be no contemporaneous exchange of value, substantial or otherwise, where there is no present right to payment. The Bureau believes merchant cash advances are clearly distinguishable from back-dated checks, service contracts with staggered payment schedules, and true leases (discussed below). Merchant cash advances are typically repaid over a period of three to 12 months and the merchant has no existing rights to payment that it can transfer to the merchant cash advance

provider until they materialize at a later date, usually at least a month later. The Bureau also notes that under Regulation B, a transaction is "credit" if there is a right to defer payment of a debt—regardless of the number of installments required for repayment or whether the transaction is subject to a finance charge.[388]

Furthermore, the Bureau interprets ECOA's definition of credit as making dispositive whether one party has granted another the right to repay at some time subsequent to the initial transaction, without consideration of factors such as the absence of recourse or analysis of who bears the risk of loss. Merchant cash advance providers grant such a right: they advance funds to small businesses and grant them the right to defer repayment by allowing them to repay over time. Additionally, as a practical matter, the Bureau understands that merchant cash advances are underwritten and function like a typical loan (*i.e.*, underwriting of the recipient of the funds; repayment that functionally comes from the recipient's own accounts rather than from a third party; repayment of the advance itself plus additional amounts akin to interest; and, at least for some subset of merchant cash advances, repayment in regular intervals over a predictable period of time).

Finally, the Bureau believes that the inclusion of merchant cash advances in the Bureau's rule is important to fulfilling both the fair lending and the business and community development purposes of section 1071.[389] Commenters have warned of high costs and predatory practices in this area, and the Bureau is particularly focused on their increasingly prevalent use among minority business owners.[390] The Bureau also believes that including merchant cash advances will create a more level playing field across financial institutions that provide cash flow financing to small businesses by shedding light on such credit transactions as well as create a

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[388] Existing comment 2(j)-1.

[389] ECOA section 704B(a).

[390] *See, e.g.*, Fed. Rsrv. Bank of N.Y. *et al.*, *Latino-Owned Businesses: Shining a Light on National Trends* (Nov. 2018) (stating "Latino business owners are more likely than non-Latino White business owners to use credit cards, factoring, and merchant cash advances—products that require less collateral and are associated with higher average interest rates").

dataset that better reflects demand for such financing by the smallest and most vulnerable businesses.

Agricultural-Purpose Credit

Background

As reported by the 2017 Census of Agriculture,[391] there are about 3.4 million farmers and ranchers ("producers") working on 2 million farming and ranching operations ("farms") in the United States. The U.S. Department of Agriculture (USDA) Economic Research Service found that family farms (where the majority of the business is owned by the operator and individuals related to the operator) of various types together accounted for nearly 98 percent of U.S. farms in 2020.[392] Small family farms (less than $350,000 in gross cash farm income) accounted for 90 percent of all U.S. farms and large-scale family farms ($1 million or more in gross cash farm income) make up about 3 percent of farms but 44 percent of the value of production.[393]

According to the 2020 Annual Report of the Farm Credit Administration, most agricultural lending (approximately 83 percent) is done by either commercial banks or the Farm Credit System (FCS), a network of government-sponsored enterprises regulated by the Farm Credit Administration, an independent government agency.[394] The USDA's Farm Service Agency accounts for a small share (3 percent) of agricultural credit through direct loans and guarantees of loans made by private lenders.[395]

In a July 2019 report, the U.S. Government Accountability Office (GAO) discussed its finding that information on the amount and types of agricultural credit to socially disadvantaged

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[391] The Census of Agriculture is conducted by the USDA every five years and provides a detailed picture of farms and the people who operate them. *See generally* U.S. Dep't of Agric., *2017 Census of Agriculture* (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

[392] Econ. Rsch. Serv., U.S. Dep't of Agric., *Farming and Farm Income* (updated Sept. 1, 2022), https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/.

[393] *Id.*

[394] Farm Credit Admin., *2020 Annual Report of the Farm Credit Administration*, at 20 (2020), https://www.fca.gov/template-fca/about/2020AnnualReport.pdf.

[395] *Id.*

farmers and ranchers is limited,[396] and suggested that this rulemaking may be a way to engage in "additional data collection and reporting for nonmortgage loans."[397] The GAO found that, using 2015-2017 USDA survey data, socially disadvantaged farmers and ranchers represented an estimated 17 percent of primary producers in the survey, but accounted for only an estimated 8 percent of total outstanding agricultural debt.[398] Loans to purchase agricultural real estate accounted for most of socially disadvantaged farmers and ranchers' outstanding debt (67 percent).[399] Farms with minority or women primary producers[400] are, on average, smaller and bring in less revenue than farms with a non-socially disadvantaged primary producer (*i.e.*, a white male)—while socially disadvantaged farmers and ranchers represented 30 percent of all farms, they operated 21 percent of total farmland and accounted for 13 percent of the market value of agricultural products sold in 2017.[401]

The share of minority representation in farming, particularly that of Black farmers, has declined sharply over the last 100 years.[402] (The number of female producers has increased significantly over the last 100 years but remains relatively small compared to male farm producers.[403]) Based on the disposition of numerous lawsuits alleging discrimination against

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[396] *See* Gov't Accountability Off., *Agricultural Lending: Information on Credit and Outreach to Socially Disadvantaged Farmers and Ranchers is Limited* (2019), https://www.gao.gov/assets/gao-19-539.pdf (GAO Report).

[397] *Id.* at 12.

[398] *Id.* at 16. "The primary producer is the individual on a farm who is responsible for the most decisions. Each farm has only one primary producer." *Id.* at 5.

[399] *Id.* at introductory highlights.

[400] "Producers" are individuals involved in farm decision-making. A single farm may have more than one producer.

[401] *See* GAO Report at 7.

[402] In 1910, approximately 893,370 Black farmers operated approximately 41.1 million acres of farmland, representing approximately 14 percent of farmers. U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers*, at 298 (1910), https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf. In 2017, of the country's 3.4 million total producers, only 45,508 of them (1.3 percent) are Black and they farm on only 4.1 million acres (0.5 percent of total farmland); by comparison, 95 percent of U.S. producers are white and own 94 percent of farmland. U.S. Dep't of Agric., *2017 Census of Agriculture*, at 62, 72 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

[403] In 1910, women farmers represented approximately 4 percent of farm workers. *See* U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers*, at 340 (1910), https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf. As of 2017, women account for approximately 36 percent of farmers. *See* U.S. Dep't of Agric., *2017 Census of Agriculture*, at

minority farmers,[404] the Bureau believes that credit discrimination may play a role in this decline. The GAO cites advocacy groups for socially disadvantaged farmers and ranchers, which have said some socially disadvantaged farmers and ranchers face actual or perceived unfair treatment in lending or may be dissuaded from applying for credit because of past instances of alleged discrimination.[405] In addition, the GAO cites advocacy groups, lending industry representatives, and Federal officials in stating that socially disadvantaged farmers and ranchers are more likely to operate smaller, lower-revenue farms, have weaker credit histories, or lack clear title to their agricultural land, which can make it difficult for them to qualify for loans.[406] The Bureau understands that determining the "creditworthiness" of a farmer is often a judgmental process in which lending decisions are de-centralized and involve weighing many discretionary factors, and believes that there are heightened fair lending risks in agricultural lending.

Proposed Rule

In its proposal, the Bureau noted that credit used for agricultural purposes is generally covered by the broad definition of credit under ECOA and agricultural businesses are included in section 1071's definition of small business. Taking into account the information above, the Bureau stated that covering agricultural credit in this rulemaking was important for advancing both of section 1071's statutory purposes and did not propose defining covered credit in a way that would exclude agricultural credit from coverage. The Bureau sought comment on the potential costs and complexities associated with covering such credit.

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62 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

[404] *See, e.g.*, Order, *In re Black Farmers Discrimination Litig.*, No. 08-mc-0511 (D.D.C. filed Aug. 8, 2008), https://blackfarmercase.com/Documents/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf; *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000). *See also Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle v. Veneman*, No. 99-CIV-03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001).

[405] GAO Report at introductory highlights. Additionally, the GAO cited these sources as noting that some socially disadvantaged farmers and ranchers may not be fully aware of credit options and lending requirements, especially if they are recent immigrants or new to agriculture. *Id.*

[406] *Id.*

Comments Received

The Bureau received comments on this aspect of the proposal from many agricultural lenders, banks, trade associations, and community groups. Several community-oriented lenders and many community groups voiced support for the Bureau's proposed coverage of agricultural-purpose credit. A joint letter from community groups, community oriented lenders, and business advocacy groups asserted that covering agricultural credit will be helpful in advancing the goals of section 1071 because the vast majority of farms are small and family run, and farmers are an important part of the community development landscape, and because the litigation regarding discrimination against Black farmers shows the risk of discrimination and unequal access is significant in the agricultural context. A rural community group argued that the Bureau's legislative mandate is clear on this issue because agricultural lending falls under ECOA's definition of credit and farming operations are correctly included in the proposed rule's definition of small business. Several commenters asserted that covering agricultural credit serves section 1071's community development and fair lending statutory purposes. Another community group expressed its belief that 1071 data will allow for promotion of adaptive and sustainable agriculture among smaller farmers as opposed to relying on large agricultural businesses.

Some commenters discussed their belief that including agricultural credit within the scope of this rule was needed to address historical and/or continuing discrimination. A rural community group described the challenges relating to justifying claims in the discrimination settlements against USDA due specifically to the lack of any other form of data to quantify the results of disparities in treatment with access to loans. This commenter also relayed minority farmers' experiences of being more at risk of foreclosure due to not being told about or not being given fair access to many farm programs that benefit white farmers and due to receiving unfavorable loans originated with the specific intent of pushing these farmers into acceleration and foreclosure to remove them from their land. This commenter also detailed how the rule would illuminate a host of factors leading to disparate treatment of minority farmers, citing

conflicts of interest among staff of local Farm Service Agency offices, disclosure of loan terms, imposition of collateral requirements, and changes in valuations of assets in appraisals. This commenter described discouragement of minority farmers from making loan applications or requesting loss mitigation and asserted that data collection is a proven way to document and address such discouragement. The commenter alleged that agricultural lenders, notably Farm Credit System lenders, lack the data or any system to comply with ECOA.

One community group maintained that constrained access to capital has contributed to the staggering loss of Black-owned farmland in the Deep South, while another said that the Bureau's rule will highlight the racially disparate impact of facially neutral policies that disproportionately result in adverse outcomes for Black farmers, including underwriting decisions based on the types of farm, the business structure, and land appraisals. A CDFI lender relayed examples of issues faced by Black farmers, including: (1) lack of access to fair, affordable credit as a barrier for new farmers; (2) lenders and local USDA offices that seek to frustrate Black farmers by making things more complicated and causing lengthy delays that white farmers do not encounter; (3) lack of relationships with banks resulting in their being less willing to work with the farmers and provide assistance during the loan application process; (4) agricultural loan underwriting criteria that favor beef, cattle, and grain production, which are often the enterprises of large-scale white farmers; (5) alternative financing from a private lender not being an adequate substitute for having fair access to government lending programs with 1 percent interest and 40 year terms; and (6) Black farmers often being unable to secure financing and thus being left with no choice but to sell their land to white farmers.

Several commenters stressed the need for transparency due to lack of sufficient data on agricultural lending markets. One such commenter noted that the USDA has not made its limited data—which includes only numbers of loans applied for, made, and denied, at the county level—easily available to the public. This commenter also argued that comprehensive data are particularly important to increase equity and uniformity in loan modifications and restructurings

and to assist with decisions related to pandemic relief programs and the grant of specialized loan servicing. Another commenter suggested that 1071 data would help the USDA, the SBA, and other relevant government agencies better understand the needs of small agricultural businesses and noted that agricultural credit extends beyond acquisition of inventory farmland to include operational loans, agricultural machinery and building loans, and loans to develop local markets for selling agricultural products. A community group dismissed concerns that agricultural lending data would be too complex to collect and report, because it is already reported under CRA.

Some commenters suggested changes and clarifications related to applying the Bureau's rule to agricultural credit. One community group suggested the Bureau modify or clarify data collection to identify forms of disparate treatment unique in small-scale farm operations that may differ from other small businesses. This commenter also suggested that the Bureau clarify that the rule covers the Farm Service Agency, the Farm Credit System, all lenders making Farm Service Agency guaranteed loans, and the full range of other entities that provide credit to small farm businesses. A number of Farm Credit System lenders expressed support for a trade association letter that discussed how agricultural lending is fundamentally different from small commercial lending and requested a different small business definition to account for how they would be disproportionately covered by the rule. These comments are discussed in more detail in the section-by-section analysis of § 1002.106(b). One agricultural community group suggested that base acre payment transactions (transactions that take into account certain government payments, which are in turn based on a farm's historic crop yield) should be considered covered credit transactions because of concerns that base program acres may not benefit Native American farmers and because base acre payments are often used to prove or deny a farmer's request for loan origination or modification.

Some industry commenters requested an exclusion for agricultural credit from the Bureau's rule. One credit union association argued that agricultural lending should be exempted

because many agricultural borrowers are serviced by small local community financial institutions, including credit unions whose members are agriculturally based and whose members and borrowers are represented on the credit unions' board of directors. A few other commenters asserted that agricultural credit is not comparable to other types of small business lending and urged the Bureau to exempt it on those grounds; one stated that it does not make sense to compare a 200-acre farm with a gas station. A trade association pointed to different treatment under CRA and HMDA as evidence that it was unlikely that section 1071 was enacted to cover agricultural lending because their underwriting criteria are distinct and different from small business loans. A bank also suggested exempting agricultural lending, maintaining that its numbers would not be useful for fair lending purposes because unlike small business loans that are more on a one loan to one borrower or two-to-one basis, its agricultural portfolio included multiple loans to the same borrower. A few commenters argued that covering agricultural credit under the rule would have an outsized impact on farmers by increasing this cost of credit and reducing its availability. A trade association asserted that the burden of section 1071 compliance may force small lenders to reduce their lending below the exemption threshold, which in turn may limit the access to agricultural credit because large banks often do not engage in significant agricultural lending.

Final Rule

For the reasons set forth herein, the Bureau is not defining a "covered credit transaction" in final § 1002.104 in a way that would exclude agricultural credit from the final rule. Credit used for agricultural purposes is generally covered by the broad definition of credit under ECOA. First, ECOA's definition of "credit" is not limited to a particular use or purpose and Regulation B expressly covers agricultural-purpose credit. Further, ECOA does not provide an exception for agricultural credit, and it assigns enforcement authority to regulators of agricultural

lending such as the Secretary of Agriculture and the Farm Credit Administration.[407] Moreover, agricultural businesses are included in section 1071's statutory definition of small business.[408] The Bureau believes that covering agricultural credit in this rulemaking is important for advancing both of section 1071's statutory purposes and is not excluding agricultural credit from the final rule. The Bureau notes that most of the comments received on this aspect of the proposal were in favor of the rule covering agricultural lending. Even the many comments that the Bureau received from Farm Credit System lenders and related associations generally focused on urging the Bureau to adopt a separate small farm definition rather than a wholesale exclusion of agricultural credit.

As noted above, the products discussed in this rule do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described in the rule and its associated commentary nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau thus is not delineating certain products (such as base acre payment transactions) as covered credit transactions.

The Bureau does not believe it would appropriate to exclude agricultural credit from the rule, as requested by some commenters. With regard to the concern that agricultural lending should be exempted because of the impact on small local community financial institutions, such as credit unions, the Bureau notes that it is increasing its institutional coverage threshold, as discussed in the section-by-section analysis of § 1002.105 below, to limit any risk of impact on smaller financial institutions or of market disruption in the small business lending sector. By declining to draw a potentially blurry line between business-purpose credit and agricultural-purpose credit, the Bureau also believes that its finalized inclusive approach will better enable it

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[407] *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[408] ECOA section 704B(h)(2) (defining a small business as having the same meaning as the term "small business concern" in section 3 of the Small Business Act (15 U.S.C. 632)). Section 704B(h)(2) defines small business by reference to the Small Business Act definition of a small business concern, which includes independently owned and operated "enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries." 15 U.S.C. 632(a)(1).

to ensure that financial institutions that are offering business credit are complying with the final rule.

With respect to comments asserting that agricultural credit is unique and not comparable to other types of small business lending, the Bureau acknowledges that every small business industry has its own unique characteristics. In order to fulfill section 1071's business and community development purpose and to address the particularities of certain lending models, the Bureau is providing clarification regarding how reporting rules apply to certain covered credit transactions and is also not covering certain transactions. For the reasons described herein, however, the Bureau is not categorically exempting agricultural credit from the rule.

Moreover, the Bureau believes that data on agricultural credit will be useful for fair lending purposes. As discussed above, there is some evidence that minority-owned farms may obtain, or may be offered, higher interest rates and less favorable terms on agricultural credit. Data collected and reported under this final rule will allow the Bureau, other government agencies, and other data users to have insight into the existing market, observe the market for potentially troubling trends, and conduct fair lending analyses.

The Bureau has considered the comments arguing that covering agricultural credit under the rule would have an outsized impact on farmers by increasing this cost of credit and reducing its availability. The Bureau has also considered the claim that small lenders will reduce their lending below the exemption threshold, which in turn may limit the access to agricultural credit because large banks often do not engage in significant agricultural lending. The Bureau does not believe that there is a significant risk that lenders will reduce their agricultural lending as a result of this rule such that there will be a marked impact on the availability of agricultural credit. Moreover, as noted in the section-by-section analysis of § 1002.105 below, the Bureau is increasing its institutional coverage threshold for the final rule to reduce the impact on financial institutions with the lowest volume of small business lending, including agricultural lenders.

Based on its review of the GAO Report,[409] the decline of minority representation in farming over the last 100 years,[410] the disposition of numerous lawsuits alleging discrimination against minority farmers,[411] and comments discussing how the inclusion of agricultural credit in the rule is needed to address historical and/or continuing discrimination, the Bureau finds that covering agricultural credit is crucial to serving section 1071's purpose of facilitating enforcement of fair lending laws.

The Bureau furthers finds that covering agricultural credit is vital to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of small businesses, including small farms. The Bureau agrees with commenters that stressed the need for transparency due to lack of sufficient data on agricultural lending markets. The Bureau believes that the transparency afforded by data collected and reported under this final rule will empower rural communities to better address the challenges they face, particularly with regard to equitable credit access. Representatives of these communities appear to agree—in a recent letter addressed to the House and Senate Agriculture and Financial Services and Banking committees characterizing the proposed rule as "pro-farmer," multiple community groups noted that "[s]mall farmers have consistently demanded more transparent and fair markets, and our members know that having an accurate and up-to-date picture of agricultural lending will help farmers and consumers, not hurt them."[412] Relatedly, in a recent report, the

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[409] *See, e.g.*, GAO Report at 16.

[410] In 1910, approximately 893,370 Black farmers operated approximately 41.1 million acres of farmland, representing approximately 14 percent of farmers. U.S. Census Bureau, *1910 Census: Volume 5 (Agriculture), Statistics of Farms, Classified by Race, Nativity, and Sex of Farmers*, at 298 (1910), https://www2.census.gov/library/publications/decennial/1920/volume-5/06229676v5ch04.pdf. In 2017, of the country's 3.4 million total producers, only 45,508 of them (1.3 percent) are Black and they farm on only 4.1 million acres (0.5 percent of total farmland); by comparison, 95 percent of U.S. producers are white and own 94 percent of farmland. U.S. Dep't of Agric., *2017 Census of Agriculture*, at 62, 72 (Apr. 2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf.

[411] *See, e.g.*, Order, *In re Black Farmers Discrimination Litig.*, No. 08-mc-0511 (D.D.C. filed Aug. 8, 2008), https://blackfarmercase.com/Documents/2008.08.08%20-%20PLF%20Consolidation%20Order_0.pdf; *Pigford v. Glickman*, 206 F.3d 1212 (D.C. Cir. 2000). *See also Garcia v. Vilsack*, 563 F.3d 519 (D.C. Cir. 2009); *Love v. Connor*, 525 F. Supp. 2d 155 (D.D.C. 2007); *Keepseagle v. Veneman*, No. 99-CIV-03119, 2001 U.S. Dist. LEXIS 25220 (D.D.C. Dec. 12, 2001).

[412] HEAL (Health, Environment, Agriculture, Labor) Food All., Rural Coal., Nat'l Young Farmers Coal., Ctr. for Responsible Lending *et al.*, *RE: Support for Proposed Section 1071 rule and Opposition to H.R.7768—Farm Credit*

Bureau found that rural communities face unique challenges in accessing and using consumer financial products and that further research is required to better understand the needs of rural households and how the Bureau can best ensure that rural residents have equitable access to financial markets.[413]

The Bureau notes that many agricultural lenders have already been collecting and reporting some form of data by HMDA, the CRA, and/or the Farm Credit Administration and so should be able to adapt to the data collection requirements mandated by Congress. Additionally, to the extent that commenters were concerned about the impact on the smallest agricultural lenders, many of those concerns are addressed by the Bureau's decision, as discussed in the section-by-section analysis of § 1002.105(b) below, to require data collection and reporting only by financial institutions that meet a 100-loan threshold. In short, as further discussed in part IX below, the Bureau does not anticipate any material adverse effect on credit access in the long or short term to rural small businesses.

104(b) Excluded Transactions

Proposed § 1002.104(b) would have provided that the requirements of subpart B do not apply to trade credit, public utilities credit, securities credit, and incidental credit. Proposed comments 104(b)-1 and -2 would have made clear that the term covered credit transaction also does not cover factoring and leases. Proposed comments 104(b)-3 and -4 would have clarified that the term covered credit transaction does not include consumer-designated credit or credit secured by certain investment properties because such transactions are not business credit. In the NPRM, the Bureau also discussed its proposed treatment of extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities and certain purchases of covered credit transactions.

Administration Independent Authority Act (R. Davis) (Sept. 14, 2022), https://www.ushcc.com/advocacy-letters.html.

[413] CFPB, *Data Spotlight: Challenges in Rural Banking Access* (Apr. 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-spotlight_challenges-in-rural-banking_2022-04.pdf.

The Bureau received comments on its overall approach to § 1002.104(b) from several banks, trade associations, individuals, and members of Congress. Two industry commenters supported the exclusions as proposed, with another commenter expressing support but also suggesting expansion. Two commenters suggested listing all exclusions in the regulatory text with any clarifications of those exclusions set out in the commentary. A bank trade association urged the Bureau to extend section 1071 requirements to all nontraditional lenders and nontraditional products to avoid leaving open the opportunity for the abuse or dissatisfaction of small business borrowers to go undetected or disadvantaging highly regulated institutions such as community banks. A joint letter from several members of Congress asked the Bureau reconsider its proposed exclusions on the grounds that such exclusions would lead to a gap in understanding of the small business lending marketplace and whether entities are in compliance with fair lending laws. Comments received regarding specific exclusions, including additional exclusions sought by commenters, are discussed in greater detail below.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b) to provide that the requirements of subpart B do not apply to trade credit, HMDA-reportable transactions, insurance premium financing, public utilities credit, securities credit, and incidental credit. In response to comments received, the Bureau is excluding HMDA-reportable transactions from coverage under the final rule. As a result, the Bureau believes that proposed comment 104(b)-4 that would have made clear that the term "covered credit transaction" does not cover credit secured by certain investment properties is not necessary. Final comments 104(b)-1 and -2 make clear that the term covered credit transaction also does not cover factoring and leases. Final comment 104(b)-3 clarifies that the term covered credit transaction does not include consumer-designated credit because such transactions are not business credit. New comment 104(b)-4 provides clarification regarding certain purchases of covered credit transactions, including pooled loans, and partial interests. All of these provisions are discussed in detail below.

The Bureau has considered comments suggesting that all exclusions be listed in the regulatory text. The Bureau appreciates the need for clarity in articulating which products must be reported under this final rule but believes that it can provide sufficient clarity through its regulatory text and commentary. The Bureau's approach differentiates between products that meet the definition of both "credit" and "business credit" under Regulation B, and between those products that the Bureau is excluding (for reasons discussed below) pursuant to its exception authority under ECOA section 704B(g)(2). Products excepted under section 704B(g)(2) are enumerated in the regulatory text. Such specific exclusion is not necessary for products the Bureau considers not to be "business credit" in the first place; however, the Bureau believes that identifying and describing some such products in the commentary—which it has done—will provide clarity and facilitate compliance.

104(b)(1) Trade Credit

Background

Under existing Regulation B, trade credit refers to a "financing arrangement that involves a buyer and a seller—such as a supplier who finances the sale of equipment, supplies, or inventory; it does not apply to an extension of credit by a bank or other financial institution for the financing of such items."[414] Thus, trade credit typically involves a transaction in which a seller allows a business to purchase its own goods or services without requiring immediate payment in full, and the seller is not otherwise involved in financial services and does not otherwise provide credit that could be used for purposes other than the purchase of its own goods or services.[415] Businesses offering trade credit generally do so as a means to facilitate the sale of their own goods and not as a stand-alone financing product or a more general credit product offered alongside the sale of their own goods or services.

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[414] Comment 9(a)(3)-2.

[415] *See* comment 9(a)(3)-2.

Although ECOA and Regulation B generally may apply to trade credit, most of the specific notification requirements of existing Regulation B do not apply to trade credit transactions.[416] The Bureau's White Paper estimated that trade credit represents approximately 21 percent of the aggregate dollar volume of various financial products used by small businesses.[417] The Bureau understands that there are tens of thousands of merchants and wholesalers that extend credit to small businesses solely in connection with the sale of their goods and services.

Proposed Rule

The Bureau proposed to not cover trade credit in the section 1071 final rule. Proposed § 1002.104(b)(1) would have defined 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. Proposed comment 104(b)(1)-1 would have provided that an example of trade credit is one that involves a supplier that finances the sale of equipment, supplies, or inventory. Proposed comment 104(b)(1)-1 would have provided that an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit. Proposed comment 104(b)(1)-2 would have clarified that the definition of trade credit under existing comment 9(a)(3)-2 applies to relevant provisions under existing Regulation B, and that proposed § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)-2. The Bureau sought comment on its proposal to exclude trade credit from the rule and on its proposed definition of trade credit.

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[416] *See* § 1002.9(a)(3)(ii).

[417] White Paper at 21 fig. 2.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including banks, trade associations, and a business advocacy group. Several industry commenters expressed general support for the proposal to exclude trade credit. However, some of these commenters advocated expanding the exclusion. For instance, one commenter suggested that all asset-based financing should be excluded as trade credit, arguing that if the rule should not apply to sellers to facilitate their sales of goods, the rule also should not apply to their "behind the scenes" non-recourse factors and asset-based lenders who facilitate those sales. Two commenters urged broadening the proposed exclusion to include captive finance companies when they are financing equipment manufactured by their parent companies because these companies exist solely to facilitate the acquisition of the original equipment manufacturers' products. A few comments more broadly asked that the Bureau not limit the exclusion to "in-house" trade credit, suggesting that trade credit offered by financial institutions allows more suppliers to offer trade credit programs, and as a result provides more opportunities for credit access to small businesses. These commenters additionally argued that such expansion is needed to prevent uneven regulatory treatment, to promote competition in the market for trade credit, to avoid pushing more business transactions into a less regulated environment, and to obtain more fulsome data collection and reporting on trade credit. A trade association asked the Bureau to clarify that the trade credit exclusion encompasses auctions where a buyer may pay for acquired property at a later date.

A few other industry commenters urged the Bureau to cover trade credit in the final rule. Two of these commenters argued that providers of trade credit, especially in the agricultural sector, are competitors to traditional lenders, and should be covered. One commenter asked the Bureau to provide several specific transaction examples so that covered financial institutions can readily identify those transactions that they must report on, and those that are exempted. Another commenter asked the Bureau to clarify whether floor plan financing, which generally allows

merchants to stock inventory available for sale without advance payment to the manufacturer or distributor, would fall within the proposed trade credit exclusion. This commenter noted that floor plan finance companies support merchants by allowing them to maintain some level of inventory with frequent adjustments to the financing and payment terms, and they may be affiliated with the manufacturer or distributor.

Several commenters urged the Bureau to expand its trade credit exclusion to private label or cobranded credit. These commenters primarily argued that such transactions need to be quickly completed, often at a point-of-sale, and that asking for protected demographic information and other required data may reduce the supply and demand for such credit. A few commenters suggested that if the Bureau were to include private label and co-branded transactions in the final rule, it should only require the collection and reporting of such transactions over $50,000 to mitigate the impact of their inclusion.

Final Rule

For the reasons set forth herein, the Bureau is finalizing largely as proposed its exclusion for trade credit in this final rule. Final § 1002.104(b)(1) defines trade credit as a financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services. The Bureau has added the words "in full" to the proposed definition to account for the fact that trade credit may include an immediate partial payment or down payment to the businesses providing the goods or services. Final comment 104(b)(1)-1 provides that an example of trade credit is one that involves a supplier that finances the sale of equipment, supplies, or inventory. Final comment 104(b)(1)-1 provides that an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit, and it also provides that credit extended by a business providing goods or services to another business is not trade credit for the purposes of subpart B where the supplying business intends to sell or transfer its rights as a creditor to a third party, such as a financial institution. Final comment 104(b)(1)-2 clarifies that

the definition of trade credit under existing comment 9(a)(3)-2 applies to relevant provisions under existing Regulation B, and that § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)-2.

The Bureau is adopting a definition of "covered credit transaction" that excludes trade credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. While trade credit constitutes "credit" within the meaning of § 1002.102(i) and may constitute "business credit" within the meaning of § 1002.102(d), depending on its purpose, and therefore generally covered by ECOA, the Bureau believes that trade credit is different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to exclude it from coverage. The Bureau does not believe it would be appropriate to include trade credit in the scope of this final rule, despite some commenters' assertions that providers of trade credit in the agricultural sector would have a competitive advantage over other lenders.

Trade credit is not a general-use business lending product—that is, trade creditors generally extend credit as a means to facilitate the sale of their own goods or services, rather than offering credit as a stand-alone financial product or as more general credit product offered alongside the sale of their own goods or services. The Bureau believes that while trade creditors might meet the definition of a financial institution under § 1002.105(a), they are not primarily financial services providers, nor do they have the infrastructure needed to manage compliance with regulatory requirements associated with making extensions of credit. The Bureau understands that trade credit can be offered by entities that are themselves very small businesses;

these entities, in particular, may incur large costs relative to their size to collect and report small business lending data in an accurate and consistent manner.[418] Taken together, requiring trade credit to be reported under subpart B could lead to significant data quality issues. The Bureau also wants to avoid the risk that the fixed costs of coming into compliance with the rule could lead these businesses to limit offering trade credit to their small business customers, which may run contrary to the business and community development purpose of section 1071. These concerns are distinct from coverage generally under ECOA and Regulation B, which as noted above may still apply to trade credit.

The Bureau does not believe that the trade credit exclusion should be expanded to include all asset-based financing, captive finance companies, or trade credit offered by financial institutions that are not suppliers of goods or services, as requested by some commenters. The Bureau believes that, unlike trade creditors themselves, such providers offer stand-alone credit products in the same way as other financial institutions and are not retailers or merchants with limited regulatory compliance experience. As such, the Bureau does not have the same concerns about data quality or reduced small business lending by affiliates and facilitators that it does about trade creditors themselves. Thus, the Bureau is finalizing its definition of trade credit in § 1002.104(b)(1) to focus on the business providing the goods or services being financed. The trade credit exclusion does not extend to affiliates and facilitators of trade creditors that provide financing, even if only for the trade creditor's products and not for competing or unrelated products. Thus, provided that they otherwise meet the definition of a covered financial institution in § 1002.105(b), such affiliates and facilitators must collect and report data under the rule.

The Bureau also is not making further revisions to the regulatory text or commentary. With respect to the suggestion that the Bureau clarify that the trade credit exclusion encompasses

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[418] *See* Leora Klapper *et al.*, *Trade Credit Contracts*, 25 Review of Fin. Studies 838-67 (2012), https://academic.oup.com/rfs/article/25/3/838/1616515, and Justin Murfin & Ken Njoroge, *The Implicit Costs of Trade Credit Borrowing by Large Firms*, 28 Review of Fin. Studies 112-45 (2015), https://academic.oup.com/rfs/article/28/1/112/1681329.

auctions, the Bureau notes that because auction houses generally do not supply equipment, supplies, or inventory but rather facilitate sales for others, they do not offer trade credit under final § 1002.104(b)(1). However, other exclusions, such as the exclusion for incidental credit discussed below, may apply to such transactions. The Bureau is not adding further transaction examples, as only one comment requesting such additions and it otherwise appears that commenters understood that the proposed exclusion was intended to narrowly cover credit directly extended by the supplier of goods and services. Regarding floor plan financing, the Bureau notes that under final § 1002.104(b)(1), the trade credit exclusion applies where the manufacturer or distributor is financing its own inventory, but not where a financial institution is providing the financing and receiving payment.

The Bureau is also not expanding the trade credit exclusion to cover private label or cobranded credit transactions, which are credit transactions (typically, credit cards, but also revolving lines of credit and installment loans) that are originated at or facilitated by financial institutions through retailers either in-store or through a website. Moreover, as explained in the section-by-section analysis of § 1002.107(a)(5), the Bureau believes it is important to capture these products as a separate credit type. As that section explains, a private-label credit card account is a credit card account that can only be used to acquire goods or services provided by one business (for example, a specific merchant, retailer, independent dealer, or manufacturer) or a small group of related businesses. A co-branded or other card that can also be used for purchases at unrelated businesses is not a private-label credit card.

The Bureau believes that covering private label or cobranded credit transactions supports section 1071's statutory purposes. For instance, the Bureau believes that having robust data on this important source of financing will help to better understand small business needs. In researching the consumer credit card market, for example, the Bureau learned that while private

label card account holding has declined relative to general purpose cards,[419] late fees comprised the overwhelming majority—91 percent—of all consumer fees and 25 percent of total interest and fees for private label cards (compared to 45 percent and 7 percent, respectively, for general purpose credit cards).[420] Additionally, since private label and cobranded credit accounts are typically offered and serviced by financial institutions, with applications typically submitted directly to the financial institution via a website, the Bureau does not have the same concerns related to data quality or regulatory compliance as it does with trade credit offered by a supplier of goods and services who is not in the business of providing financial services. The Bureau also is not placing a $50,000 minimum threshold on such transactions, as suggested by a few commenters, because doing so would exclude significant portions of small business lending. The Bureau does not believe that such an approach would further the purposes of section 1071.

104(b)(2) HMDA-Reportable Transactions

Proposed Rule

The potential for overlap exists between section 1071 and HMDA because HMDA reporting requirements apply to mortgages regardless of whether they are consumer-purpose or business-purpose, so long as they are secured by residential real property. Section 1071 applies to all small business credit, regardless of what the credit is to be used for. For example, a mortgage intended to finance the purchase of an investment property would be covered by HMDA, assuming relevant institutional thresholds and other coverage criteria were otherwise met. If the mortgage applicant is a natural person, their ethnicity, race, and sex would be

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[419] The Bureau estimates that around 90 million consumers hold at least one general purpose and at least one private label card. Some 79 million hold only general-purpose cards. Just under 9 million hold only private label cards. General purpose cards remain prevalent, while private label cardholding has become relatively less common. By year-end 2020, there were 485 million open general purpose card accounts and 214 million open private label accounts. General purpose cardholding is just as common today as it was prior to the Great Recession, though that share is down from 63 percent on the eve of the pandemic. In contrast, 36 percent of adults held at least one private label card in 2020, compared to 52 percent in 2005. Consumers in all credit score tiers have seen declines in private label card account holding. Most general purpose and private label cards are held by consumers with superprime scores. CFPB, *The Consumer Credit Card Market*, at 25-26 (Sept. 2021), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2021.pdf.

[420] *See* CFPB, *Credit card late fees*, at 13 (Mar. 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_report_2022-03.pdf.

captured and reported under HMDA. However, if the mortgage applicant were a non-natural person (*e.g.*, a limited liability company or a corporation), then the lender would not collect demographic data under HMDA. That is, the lender would still need to report the application under HMDA, but they would report ethnicity, race, and sex as "not applicable." But under the Bureau's proposed rule, the lender would have captured the applicant's principal owners' ethnicity, race, and sex.

In its NPRM, the Bureau stated that by proposing to adopt Regulation C's definition of dwelling and its commentary regarding investment properties, the Bureau sought to ensure consistency and minimize compliance burdens for financial institutions that must also report credit transactions covered by HMDA (that is, HMDA-reportable transactions). Using the 2019 HMDA data, the Bureau had found that close to 2,000 lenders and around 530,000 applications indicated a "business or commercial purpose" and around 500,000 applications were used for an "investment" (as defined by the occupancy code) purpose. Of those applications, around 50,000 were for 5+ unit properties. The overall number of applications the Bureau expected to be reported annually under the proposed rule would have been around 26 million. Thus, the Bureau had anticipated a relatively small but not insignificant overlap regarding real estate investment loans between HMDA and section 1071.

Also in its proposal, the Bureau stated that it had considered excluding all transactions that were also reportable under HMDA but believed such an exclusion would have added complexity to data analysis. The Bureau understood that requiring lenders to find and delete from databases that supply their small business lending data submission only those transactions that also appear in HMDA may require a separate scrub of the data and create additional compliance burden, as well as compliance risk, if HMDA-reportable transactions are not deleted from a small business lending data submission. For example, if a small business wants to purchase a 5+ dwelling unit property (that is, HMDA reportable), the financial institution would have to make sure it is not collecting protected demographic information on principal owners,

even though that information must be collected for every other type of loan that same business might apply for. The Bureau also believed that it may not be possible to identify loans in the HMDA data that, but for this exclusion, would be reported under the Bureau's rule implementing section 1071 because the financial institution would need to know which HMDA applications are for small businesses versus large businesses. Moreover, excluding HMDA-reportable applications could mean that a financial institution that is below the HMDA reporting threshold would not report these loans at all.

Further, in addition to not being able to distinguish which applications are from small and not large businesses, the Bureau noted in its proposal its concerns that excluding all transactions that were also reportable under HMDA may be at odds with the statutory purposes of section 1071. The Bureau explained that the following proposed data points would not be collected for applications only reported under HMDA: (1) the principal owner's ethnicity, race, and sex where the applicant is an entity not an individual; (2) minority-owned and women-owned business status; (3) gross annual revenue; and (4) other data points such as pricing, NAICS code, and number of workers.

For applications that, under the proposal, would have been reported under both HMDA and section 1071 (generally, business credit secured by dwellings, with the exception of credit secured by 1-4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy), the Bureau sought comment on whether it should require such applications to be flagged as such when reported under subpart B. The Bureau noted its belief that for data integrity and analysis purposes, it may be helpful to know if a loan is in both datasets and a dual reporting flag may help ensure any data analysis is not double-counting certain applications.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including lenders, trade associations, community groups, and a business advocacy

group. Only one commenter, a community group, expressly supported dual reporting. The Bureau received a general suggestion to connect a loan to a HMDA record and then capture, under HMDA, demographic data on corporate entities, and expand its coverage to include more lenders, such as government entities and CDFIs. Two commenters suggested the Bureau provide a section 1071/HMDA sample form to aid dual reporting compliance. Some industry commenters generally stressed the need for consistency among reporting regimes and asked the Bureau to reconcile any differences.

Numerous comments, echoing those made by a trade association, urged the CFPB to avoid duplicative and inconsistent reporting of HMDA and CRA data in order to reduce compliance burden and the potential for inaccurate data reporting. An agricultural lender suggested the Bureau might be able to obtain 1071 data using the existing definitions and collection process currently in place for covered institutions under HMDA. A few credit union trade associations maintained that reporting of HMDA-reportable transactions should be voluntary. A bank recommended the Bureau remove and avoid data collection requirements that are duplicative and/or inconsistent, providing the example of misaligned action taken categories or alternatively, eliminate all business-purpose loans from the HMDA reporting requirement. A credit union argued that the benefit of dual reporting does not justify the increased burdens.

A few industry commenters stated that if dual reporting is required under the final rule, a dual reporting flag would be useful. Another commenter opposed adoption of a dual reporting flag, arguing that flagging entries will be a manual process that will increase the time it takes to file both reports and increase the possibility of making an error.

Almost all the comments on this aspect of the proposal argued against the proposal to report HMDA-reportable transactions under this rule. Some opponents to dual reporting urged the Bureau to exclude all HMDA-reportable transactions from this rule, while others recommended excluding transactions covered by this rule (such as business purpose loans) from Regulation C. A few other commenters did not express a preference and asked that the Bureau

exempt HMDA-reportable applications from section 1071 reporting, or vice versa. Many commenters asserted burden and stated that reported data would be duplicative and/or inconsistent. Several commenters pointed to differences in census tract reporting requirements as a source of potential confusion and data errors. And as discussed in the section-by-section analysis of § 1002.107(a)(19), another urged the Bureau to consider difficulties caused by the differences in collection and reporting of the ethnicity, race, and sex fields and the variations in data specifications for such information.

One bank commenter suggested that avoiding dual reporting may also avoid materially misrepresenting a lender's total loan application activity. A few industry commenters argued that reporting under HMDA alone meets 1071 purposes, with two of these commenters pointing to the Bureau's website, which states that 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 they shed light on lending patterns that could be discriminatory."[421] Two commenters that argued against dual reporting explained that mortgage lending is fundamentally different from small business lending. Responding to concerns about data gaps, two other commenters suggested that if the Bureau tailored the exception to applications 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. A bank recommended separating HMDA and section 1071 reporting such that only after a transaction was assessed for HMDA-reportability would a financial institution determine whether the transaction needed to be reported under section 1071.

[421] CFPB, *Mortgage Data (HMDA), About HMDA*, https://www.consumerfinance.gov/data-research/hmda/ (last visited Mar. 20, 2023).

Final Rule

For the reasons set forth herein, the Bureau is adding new § 1002.104(b)(2) to exclude a covered loan as defined by Regulation C, 12 CFR 1003.2(e), pursuant to its authority under ECOA section 704B(g)(2) to adopt exceptions to any requirement of section 1071, as the Bureau deems necessary or appropriate to carry out section 1071's purposes. Under this approach, for all applications with potential HMDA and section 1071 overlap, the Bureau would not require reporting under section 1071 (transactions would only be reportable under HMDA, and the recordkeeping and demographic data collection obligations of HMDA will apply). In 2021, there were 61,789 "business or commercial purpose" applications (excluding purchased loans), reported under HMDA with the "investment" occupancy code, for 5+ unit properties. Of those, 54,436 were from "non-natural person" applicants so demographic data under HMDA was not collected (thus, such data would have been requested for only for 7,353 of the 61,789 applications in 2021). The Bureau recognizes that there would continue to be no demographic data information collected and reported for the ~55,000 HMDA applications with non-natural person owners. The Bureau is finalizing this exclusion of HMDA-reportable transactions in order to alleviate concerns from a broad range of industry commenters about the difficulties associated with dual reporting, particularly in light of potential inconsistences related to demographic data collection and recordkeeping. In addition, this approach resembles the effort by the CRA agencies to eliminate dual reporting under section 1071 and the eventual CRA rule.

While the Bureau agrees that dual reporting of such transactions could be useful, the Bureau is mindful of commenters' concerns regarding burden and that reported data would be somewhat duplicative and/or potentially inconsistent for data points such as census tract, and principal owners' ethnicity, race, and sex. The Bureau believes that excluding all HMDA-reportable transactions would further the purposes of section 1071 because such an exclusion would limit this potential inconsistency that could result in poor data quality. Further, the Bureau is excluding all HMDA-reportable transactions from this final rule because excluding section

1071 transactions from Regulation C of HMDA would require a separate rulemaking and would disrupt ongoing and planning HMDA data collection efforts that have been in place for years.

The Bureau also agrees that reporting under HMDA alone would meet section 1071's purposes. Regulation C, which implements HMDA, provides that its public loan data can be used: (i) to help determine whether financial institutions are serving the housing needs of their communities; (ii) to assist public officials in distributing public-sector investment so as to attract private investment to areas where it is needed; and (iii) to assist in identifying possible discriminatory lending patterns and enforcing antidiscrimination statutes.[422] These purposes are entirely consistent with section 1071's purposes 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.[423] As the Bureau has previously stated, it believes that "HMDA's scope is broad enough to cover all dwelling-secured commercial-purpose transactions and that collecting information about all such transactions would serve HMDA's purposes."[424] The Bureau has also noted that collecting data about dwelling-secured commercial-purpose transactions serves HMDA's purposes by showing not only the availability and condition of multifamily housing units, but also the full extent of leverage on single-family homes, particularly in communities that may rely heavily on dwelling-secured loans to finance small-business expenditures.[425]

The Bureau recognizes its finalized approach will result in some data gaps. Most notably, some section 1071 information will not be collected for applications reported under HMDA, including the principal owner's ethnicity, race, and sex where the applicant is not an individual but an entity (*i.e.*, not a natural person); minority-owned, women-owned, and LGBTQI+-owned business statuses; gross annual revenue; pricing; NAICS code; and number of workers.

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[422] Regulation C § 1003.1(b)(1).

[423] ECOA section 704(a).

[424] 80 FR 66127, 66171 (Oct. 28, 2015).

[425] *Id.*

Moreover, at this time, the Bureau is not tailoring its exception to applications that are actually reported under HMDA, as opposed to those that could be reported under HMDA. New § 1002.104(b)(2) excludes all transactions meeting the definition of a Regulation C "covered loan," which means that institutions not subject to the HMDA reporting regime (because, for example, of institutional coverage thresholds) do not have to report HMDA-eligible applications under section 1071 even though they would not actually report such applications under HMDA. Additionally, the Bureau does not believe it would be feasible to connect, as suggested, an application reported under this final rule to a HMDA record and then capture, under HMDA, demographic data on corporate entities, and expand its coverage to include more lenders, such as government entities and CDFIs.

After considering the comments, the Bureau has concluded that trying to close all potential data gaps would defeat the purpose of trying to reduce complexity and alleviate concerns from commenters about having to implement and maintain two separate reporting systems. Given the fact that the Bureau expects around 25 million applications to be reported annually under the final rule, it believes that its exclusion of HMDA-reportable transactions will result in a relatively small loss of data and that these data might have been inconsistent with other 1071 data in ways that could impede analysis, frustrating the purposes of section 1071. The Bureau also notes that even in its proposal, and as discussed below, it did not seek to requiring reporting of all HMDA-reportable transactions under section 1071—only those "business or commercial purpose" applications (excluding purchased loans), reported under HMDA with the "investment" occupancy code, for 5+ unit properties would have also been reported under 1071. As a result, the Bureau notes that for 7,353 of the 61,789 such applications in 2021, there would continue to be no demographic data information collected and reported for only ~55,000 HMDA applications with non-natural person owners. The Bureau believes that this is an acceptable number given how small it is compared to the total number of reported transactions and given the strong concerns expressed about the difficulties with compliant dual reporting that could result in

poor data quality and thereby undermine the section 1071 statutory purposes. As for the number of "covered loan" applications that are ultimately not reported under HMDA, the Bureau believes that these applications can be excluded for the same reasons explained below in the section-by-section analysis of § 1002.105(b); financial institutions with the lowest volume of small business lending might limit small business lending activity because of the fixed costs of coming into compliance with the reporting requirements, creating risk of market disruption which would run contrary to the business and community development purpose of section 1071. Additionally, as the Bureau explained in HMDA, the Bureau "sought to exclude financial institutions whose data are of limited value in the HMDA dataset, thus ensuring that the institutional coverage criteria do not impair HMDA's ability to achieve its purposes, while also minimizing the burden for financial institutions."[426] The Bureau similarly believes that these data would have limited value in the 1071 dataset—the Bureau will be able to fulfill section 1071's purposes without it, while reducing burden and complexity for financial institutions that are not HMDA reporters.

Finally, the Bureau notes that section 1071 will capture business credit transactions that are secured by real estate but are not presently captured under HMDA. For example, section 1071 will capture transactions secured by non-dwellings as well as business loans secured by an applicant's primary residence or residential investment property as collateral for inventory financing or working capital (such loans would not be captured under HMDA because they do not involve a home purchase, home improvement, or refinancing). The small business lending rule will also capture transactions that are secured by dwellings located on real property used primarily for agricultural purposes.

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[426] *Id.* at 66278.

Credit Secured by Certain Investment Properties

Based on feedback received during the SBREFA process as well as its general knowledge regarding both consumer and commercial real estate lending, the Bureau understands that many financial institutions use their consumer mortgage lending channels to process credit applications secured by 1-4 individual dwelling units and used for investment purposes, while applications for credit secured by 5+ unit multifamily properties or rental portfolio loans secured by more than four 1-4 unit residential properties are generally processed through commercial mortgage lending channels. The Bureau also understands that loans made through consumer mortgage lending channels are often made pursuant to the guidelines of Fannie Mae, Freddie Mac, the Federal Housing Administration, and the Department of Veterans Affairs, and are likely already reported under HMDA.

In line with the SBREFA Panel's recommendation, the Bureau proposed that the rule not cover credit secured by certain investment properties, because such credit may not always be primarily for business or commercial purposes. Specifically, proposed comment 104(b)-4 would have explained that a covered credit transaction does not include an extension of credit that is secured by 1-4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy. The Bureau did not propose to exclude credit secured by owner-occupied dwellings; for example, those secured by a dwelling occupied by a business's sole proprietor/principal owner. The Bureau proposed to exclude real estate investment loans only in certain limited circumstances (such as when credit is secured by non-owner occupied 1-4 dwelling units and not 5+ dwelling units). The Bureau proposed to define "dwelling" to have the same meaning as Regulation C § 1003.2(f). Similarly, proposed comment 104(b)-4, which would address what does and does not constitute an investment property, was modeled on Regulation C's comment 4(a)(6)-4.

In its proposal, the Bureau noted its belief that its exclusion of credit secured by certain investment properties will better capture lending to true small businesses (as opposed to

consumers seeking to diversify their investments) and will also better align with financial institution lending practices. The Bureau stated that it understands that it may not always be easy for financial institutions to distinguish between business-purpose real estate investment loans and consumer-purpose real estate investment loans; however, covering all such loans would likely include some percentage of consumer-purpose loans, which could be contrary to section 1071's business and community development purpose.

The Bureau sought comment on its proposed approach for credit secured by certain investment properties, including whether it is appropriate to consider credit not to be business credit when it is secured by 1-4 individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy; and, if not, whether a different number of dwelling units in the property securing the credit would be an appropriate way to make a distinction between business and consumer-purpose credit. The Bureau also sought comment on whether to permit financial institutions to voluntarily report real estate investment loan transactions that are secured by non-owner occupied 1-4 dwelling units.

The Bureau received comments on this aspect of the proposal from lenders, trade associations, and a community group. Several commenters supported the exclusion of credit secured by certain investment properties. A community group stated that the exclusion was appropriate because the purpose of such credit is investment and not operating a business of renting out units.

A few comments urged expansion of the proposed exclusion to other real estate secured lending. A joint letter from several trade associations representing the commercial real estate industry advocated for expanding the proposed exclusion to impose a clear boundary between small business lending and all investment property lending to ensure that the information gathered under section 1071 reflects true small business lending. In line with this suggestion, this commenter also recommended rule text revisions. Another trade association suggested expanding the exclusion to all non-owner occupied commercial and multifamily real estate

lending, arguing that the credit is underwritten on the cash flow of the property and the value of the property itself, rather than the operating revenue of a business, like other investment properties. Another commenter suggested the Bureau specifically exempt commercial real estate loans secured by non-owner-occupied investment real estate to borrowing entities with NAICS codes 5311XX, the industry code for lessors of real estate.

Some comments reflected requests for clarifications and confusion regarding the proposal. A bank suggested removing occupancy status from covered credit transaction considerations because occupancy does not fairly or materially delineate small business lending from consumer lending and creates complexity in how financial institutions would need to design processes, systems, and training. Community groups suggested the Bureau require financial institutions to ask whether the credit will be used primarily for business purposes, such as to secure rental income. A bank suggested the Bureau focus on borrower type (natural person versus entity) instead of property type. A trade association urged the Bureau to remove the proposed exclusion for credit secured by certain investment properties and replace it with an exclusion of all credit subject to Regulation Z. Another bank commenter sought clarification of the proposed exclusion, noting situations where a borrower or a related party occupies a dwelling unit but still considers it to be an investment property and not a business. A trade association asked the Bureau how to determine owner occupancy for non-dwelling real estate, such as where a business owns an office building with multiple rental office spaces, and rents out all of these spaces except for one space occupied by the business itself. One bank appeared to believe that credit secured by 1-4 dwelling unit investment properties would be reportable for both HMDA and section 1071 with varying reporting requirements.

For the reasons stated herein and in the section above regarding HMDA-reportable transactions, the Bureau is adding new § 1002.104(b)(2) to exclude a covered loan as defined by Regulation C, 12 CFR 1003.2(e). This new exclusion renders moot the Bureau's consideration of proposed comment 104(b)-4 by encompassing virtually all credit that is secured by 1-4

individual dwelling units that the applicant or one or more of the applicant's principal owners does not, or will not, occupy. The Bureau's decision also renders moot comments regarding requests for clarifications and confusion regarding the proposal.

A "covered loan" as defined by Regulation C, 12 CFR 1003.2(e), means a closed-end mortgage loan or an open-end line of credit that is not an excluded transaction under § 1003.3(c). A transaction is not a "covered loan" if it is excluded by purpose. For example, Regulation C excludes agricultural-purpose transactions and transactions that are secured by a dwelling, as defined by § 1003.2(f), that is located on real property that is used primarily for agricultural purposes.[427] The regulation also excludes transactions otherwise made primarily for a business or commercial purpose[428] unless the transaction is also: a home improvement loan;[429] a home purchase loan;[430] or a refinancing (including cash-out refinancing).[431] Transactions are only covered under HMDA as covered loans if they are secured by a lien on dwelling. In addition to principal residences, a dwelling includes, but is not limited to, manufactured homes, multifamily apartment buildings, and properties for long-term housing and related services (such as assisted living for senior citizens or supportive housing for people with disabilities). Thus, a transaction may need to be reported under section 1071 if it is secured by a lien on a non-dwelling; for example, a recreational vehicle, houseboat, a hotel, dormitory, or properties for long-term housing and medical care if the primary use is not residential. For a full list of exclusions, please refer to Regulation C, section 1003.3. The Bureau notes that even if a transaction is excluded under Regulation C, that does not mean it is necessarily reportable under section 1071. For example, even though a transaction is a not a HMDA "covered loan" if it is a purchase of a partial interest in an otherwise covered loan, and thus not excluded by new § 1002.104(b)(2), it is

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[427] 12 CFR 1003.3(c)(9).

[428] 12 CFR 1003.3(c)(10).

[429] 12 CFR 1003.2(i).

[430] 12 CFR 1003.2(j).

[431] 12 CFR 1003.2(p).

also not reportable under this rule because, as explained below in the section regarding certain purchases of covered transactions, only the definition of "covered application" will trigger data collection and reporting obligations with respect to covered credit transactions and such purchases do not involve an application for credit.

While the Bureau anticipates that adoption of new § 1002.104(b)(2) results in the exclusion of most dwelling-secured lending, this Bureau is not expanding this exclusion to all investment (non-owner occupied) property lending, as recommended by a few commenters. Where a small business seeks credit to invest in commercial (non-dwelling) real estate, it is likely to apply to a financial institution's commercial lending division and there are unlikely to be any difficulties in determining that the transaction is a business-purpose real estate investment (and not a consumer-purpose real estate investment). It is important for this rule to capture lending to true small businesses (as opposed to consumers seeking to diversify their investments) to meet section 1071's business and community development purpose. Moreover, because such lending is not covered by HMDA, the potential for poor data quality arising from inconsistent dual reporting does not occur in this situation. In other words, excluding such transactions from coverage would not advance section 1071's statutory purposes in the same way as does excluding HMDA-reportable transactions. Rather, covering these transactions will allow data users for the first time to better understand the rationale behind credit decisions, help identify potential fair lending concerns, and provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps for commercial real estate lending and cash flow financing. In addition, robust data on such credit transactions across applicants, financial institutions, products, and communities could help target limited resources and assistance to applicants and communities, thus furthering section 1071's business and community development purpose. With respect to fair lending compliance, such data would help data users analyze potential discriminatory disparities.

104(b)(3) Insurance Premium Financing

To better manage cash flow and help pay for costly property and casualty insurance premiums, many businesses enter into insurance premium financing arrangements. Under a typical arrangement, an insurance premium financing company provides funds to pay for premiums that are remitted directly to the business's insurance provider, either directly or through an insurance agent or broker. The business then repays the premium amount advanced, plus some additional amount in the form of interest or a service charge, which is sometimes capped by State law.[432] If the business fails to repay the loan or otherwise defaults in its obligation, or if the insurance contract is cancelled, the insurance premium financing company is empowered under the financing agreement to demand the unearned premiums directly from the insurer. The Bureau understands that insurance premium financing companies have little to no contact with the businesses seeking credit and insurance premium financing arrangements are typically underwritten based on the terms of the insurance policy, the financial strength of the insurer that issued the policy and holds the unearned premium, and the uncollateralized exposure of the financing company, if any.

Unlike with other forms of credit, borrowers in insurance premium financing transactions are not free to use advanced amounts for general purchases because those amounts are intended solely to cover the cost of property and casualty insurance premiums and the funds are often remitted directly to the business's insurer. Moreover, because insurance premium financing companies are contractually empowered in the event of default to cancel the insured's insurance coverage and obtain a refund of unearned premiums to repay the amount advanced, these transactions are not typically underwritten based on the insured's ability to repay but on the value of the unearned premium collateral and the financial strength of the insurance carrier

[432] *See, e.g.*, Fla. Stat. Ann. section 627.840(3)(b); 215 Ill. Comp. Stat. Ann. 5/513a10(c).

holding that collateral. The Bureau also understands that, in some cases, certain contractual terms, including maximum interest rates, are regulated by State law.[433]

In the NPRM, the Bureau stated its belief that an organization offering insurance premium financing, where the organization provides short-term loans to businesses to pay for property and casualty insurance, would have been included within the definition of a financial institution in proposed § 1002.105(a), even though this specific business model was not described in proposed comment 105(a)-1. The Bureau did not specifically discuss insurance premium financing in its section-by-section analysis of proposed § 1002.104, noting that the Bureau was proposing to require that covered financial institutions report data for all applications for transactions that meet the definition of business credit unless otherwise excluded.

A group of insurance premium financing trade associations urged the Bureau to exclude insurance premium financing from the rule. This comment did not dispute that such financing is credit but argued that it should not be covered because it is unlike any other form of small business credit—insurance premium finance lenders do not interact with or exchange information with the applicant, credit terms (including interest rate and fees) are preestablished and do not vary, and some State insurance codes provide requirements regarding interest rates, fees, disclosures, and other aspects of a premium finance transaction. This commenter also maintained that insurance premium financing presents minimal fair lending risk, most of the data proposed to be required is not currently collected and would not be useful for comparisons, and financing companies would incur significant costs to comply, potentially limiting access to this credit. The commenter noted that FinCEN exempted insurance premium financing companies from its final rule imposing customer due diligence (beneficial ownership) obligations under the Bank Secrecy Act. This trade association stated that, if the Bureau does not exclude insurance premium financing companies, the Bureau should clarify how the rule will apply to avoid

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[433] *See, e.g.*, Fla. Stat. Ann. section 627.840 (providing, in part, that a premium finance company shall not impose a service charge of more than $12 per $100 per year); 215 Ill. Comp. Stat. Ann. 5/513a10 (stating that the maximum service charge is $10 per $100 per year).

curtailment of credit and conflict with State insurance laws, particularly those that prohibit, or at a minimum discourage, insurance agents and brokers from collecting applicant-provided demographic data from insureds.

The Bureau also received a letter from several members of Congress citing potential conflicts between proposed section 1071 requirements and State regulatory frameworks that they believed would improperly impair or interfere with State insurance law. They requested the Bureau reconsider subjecting these products to the final rule because they believed that doing so would not advance the policy underpinning section 1071 and would further negatively impact small businesses and their ability to purchase adequate insurance coverage.

For the reasons set forth herein, the Bureau is excluding insurance premium financing transactions from the final rule. New § 1002.104(b)(3) defines insurance premium financing as a financing arrangement wherein a business agrees to pay to a financial institution, in installments, the principal amount advanced by the financial institution to an insurer or insurance producer in payment of premium on the business's insurance contract or contracts, plus charges, and as security for repayment, the business assigns to the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums, accrued dividends, or loss payments) in its insurance contract or contracts. New § 1002.104(b)(3) adds that this exclusion does not include the financing of insurance policy premiums obtained in connection with the financing of goods and services.

The Bureau is adopting a definition of "covered credit transaction" that excludes insurance premium financing pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. While insurance premium

financing constitutes "credit" within the meaning of § 1002.102(i) and may constitute "business credit" within the meaning of § 1002.102(d) (depending on its purpose), the Bureau believes that it is categorically different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to believe that excluding it from coverage advances section 1071's statutory purposes. Insurance premium financing is not a general-use lending product, but instead, like trade credit, exists only to facilitate the sale of a specific nonfinancial product or service. Providers of insurance premium financing are not primarily financial services providers, nor do they currently manage compliance with regulatory requirements associated with making extensions of credit. Taken together, requiring insurance premium financing to be reported under subpart B may lead to significant data quality issues. In addition, the fixed costs of coming into compliance with this final rule could lead insurance premium financing companies to limit offering this credit to their small business customers, potentially undermining the business and community development purpose of section 1071.

The Bureau believes the new exclusion in final § 1002.104(b)(3) will carve out narrow financing arrangements where the amount financed is reasonably related to and intended to directly pay the cost of a business's insurance policy premiums. New § 1002.104(b)(3) also limits the exclusion to situations where the business assigns the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums) in its insurance policy because the Bureau understands that such security interests ensure that the underwriting focus is on the insurer, and not the small business applicant. New § 1002.104(b)(3) clarifies that the exclusion does not include the financing of insurance contract premiums purchased in connection with the financing of goods and services.

The Bureau notes that final § 1002.104(b)(3) does not cover situations where the insurance provider itself provides a business the right to defer payment of an insurance premium or fee owed by the business beyond the monthly period in which the premium or fee is due.

However, such arrangements may be covered by the trade credit exclusion in final § 1002.104(b)(1).

Factoring

Background

In traditional factoring arrangements, a business in need of financing sells all or a portion of its accounts receivable (existing but unpaid invoices) to another business, known as a "factor." The factor then receives payments on the accounts receivable from the business's debtors or customers directly, and not from the business that had entered into the factoring transaction. If the business has sold only a portion of its invoices, then once the account debtors pay their invoices to the factor, the factor remits the remainder of the balance to the business after deducting a fee (specifically, a discount applied to the sold accounts receivable usually stated on a percentage basis).

The Bureau understands that the factoring market is generally dominated by nondepository institutions not subject to Federal safety and soundness supervision or reporting requirements. The Bureau also understands that generally, factors may not be required to obtain State lending licenses. As a result, information on factoring volume and practices is limited. The Bureau notes, however, that the California and New York disclosure laws mentioned above cover factoring.[434]

The Bureau's 2017 White Paper estimated the factoring market as constituting around 8 percent of the number of accounts used by small businesses in the U.S. in 2014.[435] Based on more recent evidence, the Bureau believes the industry has not significantly grown. For example, the 2017 and 2020 Federal Reserve Banks' surveys of firms with 1-499 employees ("employer

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[434] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B.

[435] White Paper at 21 fig. 2, 22 fig. 3.

firms") found that 4 percent of such businesses applied for and regularly used factoring.[436] In the 2020 Small Business Credit Survey of Employer Firms, this figure dropped to 3 percent of employer firms[437] and in the 2021 survey, this figure went back up to 4 percent.[438]

An existing comment in Regulation B (comment 9(a)(3)-3) provides that "[f]actoring refers to a purchase of accounts receivable, and thus is not subject to [ECOA or Regulation B]." Existing Regulation B does not offer a definition for "accounts receivable." However, if there is a "credit extension incident to the factoring arrangement," Regulation B's notification rules[439] apply, as do other relevant sections of ECOA and Regulation B.[440] The Bureau understands that the Board's treatment of credit extensions incident to factoring arrangements—as a type of credit but one entitled to exemptions from certain requirements—was motivated by its reading of congressional intent related to the Women's Business Ownership Act of 1988,[441] which amended ECOA to extend notification and record retention requirements to business credit. In its proposed rule on this issue, the Board explained that it was treating credit extensions incident to factoring arrangements differently from other forms of business credit based on "evidence of congressional intent that the amendments should not apply to . . . certain types of business credit (such as applications for trade credit and credit incident to factoring arrangements)."[442]

Proposed Rule

In the NPRM, the Bureau proposed to not cover factoring. Modeled on the definitions set

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[436] 2020 Small Business Credit Survey; 2017 Small Business Credit Survey.

[437] *See* 2021 Small Business Credit Survey at 24.

[438] *See* 2022 Small Business Credit Survey at 25.

[439] *See* existing § 1002.9(a)(3)(ii) (requiring a creditor to notify an applicant, within a reasonable time (as opposed to within 30 days for credit sought by consumers and businesses with gross revenues of $1 million or less in preceding fiscal year), orally or in writing, of the action taken).

[440] Comment 9(a)(3)-3.

[441] Pub. L. 100-533, 102 Stat. 2689 (1988).

[442] 54 FR 29734, 29736 (July 14, 1989); *see also* 134 Cong. Rec. H9282-89 (daily ed. Oct. 3, 1988) (explaining that the committee recognizes that some forms of commercial loan transactions and extensions of credit may "require specialized rules," and that, for example, the committee believes that loans and credit extensions incidental to trade credit, factoring arrangements, and sophisticated asset-based loans should continue to be exempted from the record retention and automatic notification requirements).

forth in the New York and California commercial financing disclosure laws,[443] proposed comment 104(b)-1 would have provided that factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment has not yet been made. Proposed comment 104(b)-1 would have also clarified that an extension of business credit incident to a factoring arrangement is a covered credit transaction and that a financial institution shall report such a transaction as an "Other sales-based financing transaction" under proposed § 1002.107(a)(5).

The Bureau sought comment on its proposed approach to factoring. The Bureau also sought comment on how the subset of purported factoring arrangements that may in fact be credit (*i.e.*, those that are revolving in nature or that cover anticipated receivables) should be reported under the rule. Specifically, the Bureau sought comment on whether such arrangements should be reported as credit extensions incident to factoring (and thus reported as "other sales-based financing") or as merchant cash advances.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of commenters, including lenders, trade associations, and community groups. One commenter urged the Bureau to include the distinctions between merchant cash advances and factoring that were discussed in its NPRM preamble in the final rule's text or commentary to avoid future confusion over what products are ultimately covered by the final rule. This commenter also asked the Bureau to address the role of recourse and underwriting in its analysis of whether a particular financing transaction qualifies as credit. Another commenter encouraged the Bureau to consider differences between various factoring product structures and offered some explanations on how the term and costs of factoring arrangements could be reported. A community group

[443] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B.

asked the Bureau to explicitly include credit extensions incident to factoring arrangements in the list of covered transactions in the final rule, along with loans, lines of credit, credit cards, and merchant cash advances.

A wide range of commenters, including many community groups, community-oriented lenders, several members of Congress, individuals, and a nonbank online lender, urged the Bureau to cover factoring in the final rule. One community group suggested the Bureau use its discretionary authority to define credit broadly, regardless of comment 9(a)(3)-3 in Regulation B or other ECOA provisions, to avoid a conflict with congressional intent of shedding light on the distribution of financing to minority-owned, women-owned, and small businesses. Several commenters shared concerns about insufficient data on factoring and stressed the need for more transparency and for having a complete picture of the small business financing market. A few commenters argued that factoring constitutes a large part of the small business financing landscape and that section 1071's purposes would not be fulfilled without covering this product. Several commenters pointed to the fact that factoring arrangements are often used by minority-owned small businesses as evidence that they should be covered by the rule, with a few commenters specifically raising fair lending concerns related to factoring.

A few commenters questioned factoring's exclusion as non-credit, with the cross-sector group arguing that its inclusion would not create compliance concerns for other provisions of Regulation B because section 1071 is not broadly applicable to the entirety of Regulation B. That commenter also argued that a factoring arrangement is "credit" whenever its recipient is held liable for deferred payments conditional on the third party's ability to repay. This commenter noted that while recourse agreements (cited by the commenter as constituting 88 percent of the industry) enable the factor to pursue payment from the recipient if the third party fails to repay, non-recourse agreements also enable factors to seek payments from recipients under a variety of circumstances. Another community group argued a factoring arrangement is credit when a small business receives an amount less than the amount due from its client because the small business

recipient in that case is effectively paying interest and/or fees. A joint letter from community groups suggested the Bureau make clear that factoring is excluded only where there is a bona fide sale of an accrued right to payment without creating any obligations—contingent or otherwise—on the seller.

Two commenters pointed to the fact that New York and California both include factoring in their respective commercial financing disclosure laws as a reason why it should be covered by the rule. Some commenters expressed strong concerns that the exclusion of factoring would open a door to potential evasion by merchant cash advance providers and other actors. Many commenters urged the Bureau to include factoring within its rule implementing section 1071 in order to monitor these arrangements and prevent abuses.

Two commenters, both providers of factoring, suggested the Bureau clarify that non-recourse factoring is covered by the trade credit exclusion. These commenters noted that non-recourse factors would be subject to the rule as proposed because it would have provided that the extension of business credit by a financial institution (such as a factor) other than a supplier for the financing of the sale of inventory is not "trade credit." These commenters argued that compliance would be burdensome and disruptive to their operations, with one commenter stressing how important non-recourse factoring is in facilitating the sale of product by sellers to buyers.

Final Rule

For the reasons set forth herein, the Bureau is finalizing comment 104(b)-1 largely as proposed and is not covering factoring under the rule. The Bureau believes that, as discussed with respect to merchant cash advances above, a factoring agreement, as described in comment 104(b)-1, is not credit under ECOA because the provider of the funds does not grant the recipient the right to defer payment. Instead, the provider of funds seeks payment directly from a third party on a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The

Bureau also believes that treating factoring as credit under the rule could create inconsistencies and compliance concerns related to existing Regulation B, which currently states that factoring (as a purchase of accounts receivable) is not subject to ECOA.

The Bureau is finalizing a detailed description of what constitutes factoring in comment 104(b)-1 because the existing Regulation B commentary regarding factoring may not provide sufficient clarity for purposes of collecting and reporting data under section 1071 as it does not define "accounts receivable." This finalized description, modeled on the definitions set forth in the New York and California commercial financing disclosure laws,[444] provides that factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The Bureau has added the words "in full" to the proposed description to account for the fact that factoring may include an immediate partial payment or down payment to the businesses supplying the goods or services. Comment 104(b)-1 states that it is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to existing comment 9(a)(3)-3.

Based on the Bureau's work to date, comments received, and conversations with industry stakeholders, the Bureau understands that purported factoring arrangements may take various forms, including longer-term or revolving transactions that appear to have credit or credit-like features, and the Bureau believes that a subset of such arrangements may constitute credit incident to the factoring arrangement. Comment 104(b)-1 thus clarifies that an extension of business credit incident to a factoring arrangement is a covered credit transaction and that a financial institution shall report such a transaction as an "Other sales-based financing transaction" under § 1002.107(a)(5). By contrast, arrangements that do not involve goods or

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[444] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B.

services that have already been supplied or rendered are not "factoring" under the Bureau's description. The Bureau makes clear in comment 104(b)-1 that, despite the fact that some providers may label such arrangements as factoring, the name used by the financial institution for a product is not determinative of whether or not it is a "covered credit transaction," and such arrangements are not factoring as described in the final rule and are covered.

The Bureau does not believe it would be appropriate to codify distinctions between merchant cash advances and factoring in the final rule's text or commentary, as suggested by a commenter. The Bureau believes that factoring involves the sale of existing and alienable assets, while merchant cash advances involve a promise of future payments derived from anticipated receivables. Accordingly, providers of merchant cash advances—but not factoring that involves the sale of existing and alienable assets—grant the right to incur debt and defer its payment at a later date within the meaning of "credit" under § 1002.102(i).

For that reason, to the extent that a purported factoring arrangement involves multiple revolving transactions such that the transaction between the recipient and the provider of funds is not complete at the time of the sale, that transaction constitutes credit, and the Bureau would expect such a transaction to be reported as an "Other sales-based financing transaction" because it constitutes an extension of business credit that may or may not be incident to a factoring arrangement (depending on whether the first transaction involved the sale of existing and alienable assets). In terms of how to report the term and costs of extensions of credit incident to factoring arrangements, the Bureau notes that final § 1002.107(a)(12)(v) would require financial institutions to report, for a merchant cash advance or other sales-based financing transactions, the difference between the amount advanced and the amount to be repaid and that final § 1002.107(a)(5)(iii) requires reporting of estimated loan term for merchant cash advances and other sales-based financing in certain circumstances.

As noted above, the products discussed in this preamble do not constitute an exhaustive list of covered credit transactions; other types of business credit not specifically described

nevertheless constitute covered credit transactions unless excluded by final § 1002.104(b). In line with this approach, the Bureau is not expressly delineating additional products (such as credit extensions incident to factoring arrangements) as covered credit transactions in the final rule's regulatory text or commentary. Nor is it reopening existing Regulation B at this time in order to interpret "credit" to include factoring. The Bureau acknowledges that factoring constitutes a large part of the small business financing landscape, particularly among minority-owned small businesses, and that it would be helpful to have more transparency into these arrangements. However, making such a change as part of this final rule could creating inconsistences and compliance challenges with respect to existing Regulation B provisions.

The Bureau also does not believe that the question of whether a factoring arrangement is credit should be determined based on whether the small business recipient is effectively paying finance charges. For the reasons discussed in the section-by-section analysis of § 1002.102(i), the Bureau is finalizing a definition of "credit" that largely follows the definition of credit in ECOA[445] and existing § 1002.2(j); meaning the right granted by a creditor to an applicant to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment therefor. This longstanding definition does not turn on "the number of installments required for repayment, or whether the transaction is subject to a finance charge,"[446] nor on how underwriting is conducted. Rather, in order for factoring to be credit under ECOA, a factor must grant the right to defer payment of debt or to incur debts and defer its payment.

The Bureau also does not believe it would be appropriate, at this time, to distinguish between recourse and non-recourse factoring that involves the business-to-business sale of existing and alienable assets. The Bureau is aware that a significant proportion of the factoring market, as it is currently understood, may consist of recourse factoring, in which factors may pursue repayment from the recipient of funds if the third party fails to pay, and that even non-

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[445] *See* 15 U.S.C. 1691a. Existing Regulation B uses the term "applicant" instead of "debtor."

[446] Existing comment 2(j)-1.

recourse agreements may enable factors to seek repayment from recipients under some circumstances, such as fraud. As a result, the Bureau understands that in much of what market participants understand to be "factoring" within the meaning of existing Regulation B, the transaction between the recipient and the provider of funds is not conclusively complete at the time of the sale. The Bureau agrees with commenters that these transactions are, at minimum, akin to credit. Nevertheless, the Bureau believes that requiring reporting for these transactions at this time would have the effect of upending market participants' settled expectations that "factoring" is not credit within the meaning of existing Regulation B. Therefore, data collection and reporting pursuant to subpart B is not required for an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment has not yet been made, regardless of whether the agreement includes recourse or other nonpayment contingency provisions.

The Bureau appreciates the fact that New York and California both include factoring in their respective commercial financing disclosure laws and has in fact drawn from the States' helpful regulatory language for its own section 1071 commentary. However, coverage of factoring by these or other States[447] in their commercial financing disclosure regimes does not affect what constitutes "credit" under ECOA. The Bureau understands concerns that exclusion of factoring may open a door to potential evasion by merchant cash advance providers and other actors. However, the Bureau does not agree that it must include factoring in this final rule in order to monitor these arrangements and prevent abuses.

In the course of considering financial institutions' compliance with the rule, the Bureau intends to closely scrutinize secured finance transactions to ensure that companies are appropriately categorizing and reporting products as required by section 1071. The Bureau also

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[447] Other States, including Virginia and Utah, have passed similar commercial financing disclosure laws. *See, e.g.*, Virginia H. 1027 (enacted Apr. 11, 2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516; Utah S.B. 183 (enacted Mar. 24, 2022), https://le.utah.gov/~2022/bills/static/SB0183.html.

intends to obtain more information about the use of recourse and other nonpayment provisions in the factoring market, including types of these provisions and the frequency with which factors invoke them. If it proves necessary to modify existing Regulation B or subpart B, the Bureau is prepared to exercise all of its available authorities, including its authority under section 703 of ECOA to make adjustments that are necessary to prevent circumvention or evasion.

With respect to comments asking the Bureau to clarify that non-recourse factoring is covered by the trade credit exclusion, the Bureau notes that while non-recourse factors may not be subject to the trade credit exclusion because they are not typically a supplier that finances the sale of equipment, supplies, or inventory, they are likely providing "factoring" as described in final comment 104(b)-1. For the reasons discussed in the section-by-section analysis of § 1002.104(b)(1), the Bureau is not expanding its exclusion of trade credit to include third-party financing companies.

Leases

Background

A leasing transaction generally refers to an agreement in which a lessor transfers the right of possession and use of a good or asset to a lessee in return for consideration.[448] Under a "true" or "operating" lease, a lessee (the user) makes regular payments to a lessor (the owner) in exchange for the right to use an asset (such as equipment, buildings, motor vehicles, etc.).

Leases are not expressly addressed in ECOA or Regulation B. Until the issuance of the NPRM, the Bureau had never opined on whether ECOA and Regulation B apply to leases, and the Board made only one statement about the applicability of ECOA and Regulation B to leases, in the preamble to a final rule under ECOA. In that 1985 statement, the Board responded to the Ninth Circuit's opinion in *Brothers v. First Leasing*,[449] which concluded that consumer leasing

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[448] *See* UCC 2A-103(1)(j) (defining a "lease").

[449] 724 F.2d 789 (9th Cir. 1984).

falls under ECOA.[450] The Board stated that it believes that "Congress did not intend the ECOA, which on its face applies only to credit transactions, to cover lease transactions unless the transaction results in a 'credit sale' as defined in the Truth in Lending Act and Regulation Z."[451] The Board then noted that it will continue to monitor leasing transactions and take further action as appropriate.[452] The Bureau is unaware of any such further actions taken by the Board.

The Bureau understands that many financial institutions (such as equipment finance companies) offer both loans and leases to their small business customers and some financial institutions comply with Regulation B for their leases as well as their loans as a matter of course. Lessor stakeholders have told Bureau staff that from their perspective, as well as that of their customers, loans and leases are indistinguishable. The Bureau understands that this is particularly true of "financial" or "capital" leases, as defined under article 2A of the Uniform Commercial Code (UCC),[453] which closely resemble (and according to some stakeholders, in some cases are indistinguishable from) term loans. The Bureau understands that financial leases are treated like assets on buyers' balance sheets, whereas operating leases are treated as expenses that remain off the balance sheet. The Bureau understands that the ownership characteristics of a financial lease also resemble those of a loan—the financial lease term is the substantial economic life of the asset (as evidenced by a low dollar purchase option at the end of the lease term and/or lack of residual financial obligations at the end of the lease term) and the lessee claims both interest and depreciation on their taxes. The Bureau understands that for some financial institutions, reporting loans but not leases may require added cost and effort to separate them in databases. The Bureau also understands that because depository institutions currently report both loan and lease activity

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[450] 50 FR 48018, 48020 (Nov. 20, 1985).

[451] *Id.*

[452] *Id.* Since then, courts have gone both ways on the issue. *Compare Ferguson v. Park City Mobile Homes*, No. 89-CIV-1909, 1989 WL 111916, at *5 (N.D. Ill. Sept. 18, 1989) (consumer leases are "credit" under ECOA), *with Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 547 (7th Cir. 2005) (consumer leases are not "credit" under ECOA).

[453] The Bureau notes that the UCC separately defines a "consumer lease." *See* UCC 2A-103(1)(e). The Bureau's analysis regarding leases does not apply to leases primarily for a personal, family, or household purpose.

to other regulators in their Call Reports, they may prefer to maintain a consistent approach for section 1071.

Proposed Rule

In the NPRM, the Bureau proposed to not cover leases. Drawing from the UCC definition of "lease,"[454] which was incorporated into the New York and California commercial financing disclosure laws,[455] proposed comment 104(b)-2 would have provided that the term covered credit transaction does not cover leases, and that a lease, for purposes of proposed subpart B, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. It would have further stated that a lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. The Bureau sought comment on whether there are types of leases, or leases with certain characteristics, that should be excluded from proposed comment 104(b)-2 and thus treated as reportable under section 1071. Based on the practical difficulty cited by some stakeholders of distinguishing leases from loans, the Bureau also sought comment on whether financial institutions should be permitted to voluntarily report lease transactions.

Comments Received

The Bureau received comments on this aspect of the proposal from several community groups and community oriented lenders, trade associations, an online lender, and several members of Congress. Many of these comments argued that leases should be covered under the Bureau's rule. A few commenters suggested that leases were much like loans and other credit, with one commenter asserting that where a small business may retain leased equipment, that is

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[454] UCC 2A-103(1)(j) ("'Lease' means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.").

[455] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B.

akin to lending in which debt is incurred, payment is deferred and payments are made over a significant time period for a substantial asset, that is, the equipment. This commenter noted that the Bureau could apply its proposed loan threshold to leases. A cross-sector group of lenders, community groups, and small business advocates maintained that any data collection on the leasing market would be valuable, even if limited to credit sale leases or "$1 leases" (where the lessee makes payments on the leased item and at the end of the lease term, purchases the item for $1), which the commenter viewed as a form of credit sale lease.

A few commenters urged the Bureau to cover this large and growing share of the small business financing market in order to avoid data gaps. Two commenters expressed fair lending and predatory practice concerns regarding leasing—one commenter pointed to a lawsuit filed by the California State Attorney General against two lease financing companies operating in 15 states that allegedly forced 193 Black churches to make lease payments on falsely advertised and faulty computer kiosks.[456] Another commenter noted that leases are often used by minority-owned businesses, in some cases more often than white-owned businesses. This commenter also noted that New York and California both include leasing in their respective commercial financing disclosure laws and that at the Federal level, bicameral commercial financing disclosure legislation has been introduced to cover leasing. Two commenters argued that not covering leases in the final rule would open the door to potential evasion, allowing merchant cash advance providers and other financing companies to structure transactions as leases instead of loans.

Several trade associations, including ones representing equipment and vehicle lease and finance companies, expressed support for the Bureau's proposed approach to not cover leases. One commenter commended the Bureau for recognizing that leases are not treated as credit in the U.S. regulatory structure and for proposing use of the widely accepted UCC definition of a

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[456] *See* Complaint, *California v. Television Broadcasting Online, Ltd.*, 2011 WL 849066 (Cal. Super. Feb. 2011), https://oag.ca.gov/system/files/attachments/press_releases/n2042_complaint.pdf.

lease. Another commenter observed that the Bureau's proposed definition of "lease" would not cover instances where a lessee purchased or eventually owned the product being leased. This commenter advised against covering leases in the rule, arguing that doing so would result in incorrect reporting when applicants' employees submit lease applications but do not know the full scope of their employer's ownership makeup or financial holdings; it would also increase compliance costs, making short-term leases and rentals significantly more expensive.

Final Rule

For the reasons set forth herein, the Bureau is finalizing comment 104(b)-2 largely as proposed and is not covering leases under the final rule. Drawing from the UCC definition of "lease,"[457] which was incorporated into the New York and California commercial financing disclosure laws,[458] comment 104(b)-2 provides that the term covered credit transaction does not cover leases, and that a lease, for purposes of subpart B, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. It further states that a lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. In addition, comment 104(b)-2 clarifies that the name used by the financial institution for a product is not determinative of whether or not it is a "covered credit transaction."

The Bureau considered several other approaches to covering leasing, including referring to Regulation Z's definition of "credit sale." Under that definition, a "credit sale" is "a sale in which the seller is a creditor," and it includes a lease—unless the consumer may terminate it at any time without penalty—where the consumer "[a]grees to pay as compensation for use a sum

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[457] UCC 2A-103(1)(j) ("'Lease' means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.").

[458] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B.

substantially equivalent to, or in excess of, the total value of the property and service involved" and "[w]ill become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement."[459] The Bureau understands that financial institutions focused on offering leases and loans for business purposes are generally not familiar with the Regulation Z definition of "credit sale," given that Regulation Z applies only to consumer credit.[460] The Bureau thus believes that referring to the Regulation Z definition of "credit sale" could create confusion and would not align with current industry practices. The Bureau understands that such financial institutions offering leases primarily for business or commercial (including agricultural) purposes are more accustomed to applying the UCC definitions of "lease"[461] and "finance lease,"[462] and/or the generally accepted accounting principles (GAAP) rules issued by the Financial Accounting Standards Board governing "operating," "capital," and "finance" leases.[463] The Bureau believes that drawing from the UCC definition of lease will lead to more consistency with financial institutions' current practices. Nearly all U.S. jurisdictions have adopted Article 2A of the UCC,[464] and the Bureau

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[459] 12 CFR 1026.2(a)(16).

[460] *See* Regulation Z §§ 1026.2(a)(12) (defining "consumer credit" as "credit offered or extended to a consumer primarily for personal, family, or household purposes") and 1026.3(a)(1) (excluding extensions of credit "primarily for a business, commercial or agricultural purpose").

[461] UCC 2A-103(1)(j).

[462] UCC 2A-103(1)(g).

[463] *See* Fin. Acct. Standards Bd., *Accounting Standards Update: Leases (Topic 842)*, No. 2016-02 (Feb. 2016), https://www.fasb.org/Page/ShowPdf?path=ASU+2016-02_Section+A.pdf&title=Update+2016-02%E2%80%94Leases+%28Topic+842%29+Section+A%E2%80%94Leases%3A+Amendments+to+the+FASB+Accounting+Standards+Codification%C2%AE&acceptedDisclaimer=true&Submit=.

[464] *See* Ala. Code 7-2A-101 *et seq.*; Alaska Stat. 45.12.101 *et seq.*; Ariz. Rev. Stat. 47-2A101 *et seq.*; Ark. Code Ann. 4-2A-101 *et seq.*; Cal. Com. Code 10101 *et seq.*; Choctaw Tribal Code 26-2A-101 *et seq.*; Colo. Rev. Stat. 4-2.5-101 *et seq.*; Conn. Gen. Stat. 42a-2A-101 *et seq.*; D.C. Code 28:2A-101 *et seq.*; Del. Code Ann. tit. 6, 2A-101 *et seq.*; Fla. Stat. 680.1011 *et seq.*; Ga. Code Ann. 11-2A-101 *et seq.*; Haw. Rev. Stat. 490:2A-101 *et seq.*; Idaho Code 28-12-101 *et seq.*; 810 Ill. Comp. Stat. 5/2A-101 *et seq.*; Ind. Code 26-1-2.1-101 *et seq.*; Iowa Code 554.13101 *et seq.*; Kan. Stat. Ann. 84-2a-101 *et seq.*; Ky. Rev. Stat. Ann. 355.2A-101 *et seq.*; Mass. Gen. Laws ch. 106, 2A-101 *et seq.*; Md. Code Ann., Com. Law 2A-101 *et seq.*; Me. Stat. tit. 11, 2-1101 *et seq.*; Mich. Comp. Laws 440.2801 *et seq.*; Minn. Stat. 336.2A-101 *et seq.*; Miss. Code Ann. 75-2A-101 *et seq.*; Mo. Rev. Stat. 400.2A-101 *et seq.*; Mont. Code Ann. 30-2A-101 *et seq.*; N.C. Gen. Stat. 25-2A-101 *et seq.*; N.D. Cent. Code 41-02.1-01 *et seq.*; N.H. Rev. Stat. Ann. 382-A:2A-101 *et seq.*; N.J. Stat. Ann. 12A:2A-101 *et seq.*; N.M. Stat. Ann. 55-2A-101 *et seq.*; N.Y. UCC Law 2-A-101 *et seq.*; Neb. Rev. Stat. UCC 2A-101 *et seq.*; Nev. Rev. Stat. 104A.2101 *et seq.*; Ohio Rev. Code Ann. 1310.01 *et seq.*; Okla. Stat. tit. 12A, 2A-101 *et seq.*; Or. Rev. Stat. 72A.1010 *et seq.*; Pa. Cons. Stat. 2A101 *et seq.*; R.I. Gen. Laws 6A-2.1-101 *et seq.*; S.C. Code Ann. 36-2A-101 *et seq.*; S.D. Codified Laws 57A-2A-101 *et seq.*; Tenn. Code Ann. 47-2A-101 *et seq.*; Tex. Bus. & Com. Code Ann. 2A.101 *et seq.*; Utah Code Ann.

understands that virtually every form of lease used by major leasing companies provides that it is governed by the laws of one of the jurisdictions that has adopted Article 2A.

Based on its review of business-purpose leases and its expertise with respect to the meaning of "credit," the Bureau believes that the term "credit" does not encompass such business leases. In the business-purpose context, the Bureau understands that in a true lease, the lessor retains title and will receive the property back after the conclusion of the lease term, without any expectation by either party that, for example, ownership of the property will be transferred or that payments made pursuant to the lease agreement constitute anything other than payments in exchange for the temporary use of the property. As a result, the Bureau does not believe that in the business-purpose context a true lease transaction involves the right to incur debt and defer its payment, defer payment of a debt, or defer payment for goods or services.

The Bureau is aware that there are other types of leases with characteristics that bear some resemblance to forms of credit like credit sales, such as a contemplated transfer of ownership at the end of the lease term. The Bureau does not parse whether different types of leases might constitute "credit" but notes that final comment 104(b)-2's definition of lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. For further clarification, the Bureau notes that UCC section 1-203 provides helpful guidance on how to distinguish a lease from a security interest. For example, UCC section 1-203 provides, in part, that a lease transaction creates a security interest if the lessee's payment obligation continues for the term of the lease and is not subject to termination by the lessee and the lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.[465] The UCC additionally provides that additional consideration is nominal if it is less

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70A-2a-101 *et seq.*; V.I. Code Ann. tit. 11A, 2A-101 *et seq.*; Va. Code Ann. 8.2A-101 *et seq.*; Vt. Stat. Ann. tit. 9A, 2A-101 *et seq.*; W. Va. Code 46-2A-101 *et seq.*; Wash. Rev. Code 62A.2A-101 *et seq.*; Wisc. Stat. 411.101 *et seq.*; Wyo. Stat. Ann. 34.1-2.A-101 *et seq.*

[465] UCC 1-203(b).

than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised.[466] The UCC appropriately notes that whether a transaction in the form of a lease creates a lease or security interest is determined by the facts of each case.[467] The Bureau believes that drawing from an established definition of "lease" that small business lenders already use will minimize compliance risks and will offer sufficient consistency and clarity regarding interpretation of final comment 104(b)-2.

The Bureau is not covering leases under this final rule, as requested by some commenters. The Bureau agrees that some business leases are structured like loans and other credit but notes that a commenter's example of a small business being able to retain leased equipment is an example of the creation of a security interest, not a lease under final comment 104(b)-2. Similarly, so-called "$1 leases" create security interests because the lessee has an option to become the owner of the goods for nominal additional consideration. As noted by one commenter, final comment 104(b)-2's definition of lease does not include a transaction resulting in the retention or creation of a security interest.

The Bureau understands that bicameral commercial financing disclosure legislation was introduced in the last Congress to cover some leasing and other commercial finance products under the Federal Truth in Lending Act and that New York and California both include leases in their respective commercial financing disclosure laws. (The Bureau has in fact drawn from the states' helpful regulatory language for its own section 1071 commentary.) However, the Bureau does not believe that the coverage of leases in these particular legislative efforts has any bearing on what constitutes "credit" under ECOA. The Bureau appreciates commenters' concerns that not covering leases could open a door to potential evasion and lead to data gaps or fair lending problems. The Bureau believes that it can observe the small business financing market for such abuses and prevent them without including all leases in the rule. For example, in considering

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[466] UCC 1-203(d).

[467] UCC 1-203(a).

financial institutions' compliance with the rule, the Bureau intends to closely scrutinize transactions to ensure that companies are appropriately categorizing and reporting products as required by section 1071.

Consumer-Designated Credit

The Bureau understands that some small business owners may use consumer-designated credit in order to finance their small businesses—such as taking out a home equity line of credit or charging business expenses on their personal credit cards.

The proposed rule would not have covered products designated by the creditor as consumer-purpose products (consumer-designated credit). Proposed comment 104(b)-3 would have made clear that the term covered credit transaction does not include consumer-designated credit used for business purposes, because such transactions are not business credit. Proposed comment 104(b)-3 would have provided that a transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. The Bureau sought comment on this proposed interpretation, including how the Bureau has defined the scope of consumer-designated credit. The Bureau also sought comment on whether it should permit financial institutions to voluntarily report consumer-designated credit when they have reason to believe the credit might be used for business purposes.

The Bureau received comments on this aspect of the proposal from a range of banks, credit unions, trade associations, and community groups. One trade association generally agreed with the Bureau's approach to consumer-designated credit but asked the Bureau to clarify whether retail installment sales contracts are covered by the exclusion of consumer-designated credit. This commenter also asked the Bureau to confirm that, in determining whether credit is excluded as consumer-designated credit, existing comment 2(g)-1 interpreting the definition of "business credit" applies, which provides that "[a] creditor may rely on an applicant's statement of the purpose for the credit requested."

Some industry commenters supported the Bureau's proposed exclusion of consumer-designated credit. One of these commenters argued that the inclusion of consumer-designated credit within the rule would dramatically expand the size of the data collected beyond the purpose of section 1071, circumventing the congressional intent and increasing the rule's impact on the availability of credit for all consumers—not just business borrowers. Another commenter asked the Bureau to clarify that it will not challenge the designation of a transaction as consumer-designated credit, expressing concerns because financial institutions have no reliable method for validating a latent business purpose in an application for a consumer-designated credit transaction. Two banks recommended against requiring financial institutions to second guess consumers' intentions regarding use of funds by requiring them to report on loans suspected to be used for business purposes.

Several commenters urged the Bureau to cover consumer credit that will be used for business purposes. One community group suggested collecting 1071 data where personal credit card applicants responded that 50 percent or more of the loan would be used for small business purposes, asserting that this threshold would sufficiently weed out applications that would result in nominal amounts of funding for small business purposes but would still capture ones that are potentially important for meeting the community development purpose of section 1071. Two commenters expressed concerns that not covering consumer-designated credit would result in a push toward unregulated products, with one commenter asserting that a portion of the fintech sector is engaging in unscrupulous targeting of vulnerable customers (including racial and ethnic minorities). Two community groups asked the Bureau to reconsider its proposal, emphasizing how important consumer-designated credit is as a source of financing for small businesses, particularly for women-owned and minority-owned small businesses, sole proprietorships, and new businesses. Another community group recommended that the Bureau additionally include personal credit card loans that finance business expenses, asserting that these cards are a vital

source of credit for very small and start-up businesses, as well as businesses owned by women and people of color.

A number of banks suggested the Bureau exclude all credit subject to Regulation Z. Some suggested that such an exemption would provide clarity to the definition of "covered credit transaction" and would ease compliance burden when identifying covered applications, implementing data collection, and ensuring data integrity in a manner that meets the statutory purpose. One trade association added that financial institutions are already familiar with determining loan purpose under the Regulation Z definition in their everyday lending activities and that this approach would alleviate confusion with the proposed exclusion for credit secured by certain investment properties.

For the reasons set forth herein, the Bureau is finalizing comment 104(b)-3 almost entirely as proposed and is not covering consumer-designated credit under the final rule. Comment 104(b)-3 makes clear that the term covered credit transaction does not include consumer-designated credit used for business or agricultural purposes, because such transactions are not business credit. The Bureau is adding the reference to agricultural purposes for clarity. Comment 104(b)-3 provides that a transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. For example, an open-end credit account used for both personal and business purposes is not business credit for the purpose of subpart B unless the financial institution designated or intended for the primary purpose of the account to be business-related.

The Bureau believes it is appropriate to interpret section 1071 as not applying to this type of credit. Most notably, ECOA section 704B(b) directs financial institutions to collect data in the case of an application "*for credit* for women-owned, minority-owned, or small *business*" (emphasis added). The statute thus applies only to applications for credit for a business; at the time of an application for consumer-designated credit, however, the application is not for a business. Several policy reasons also support this approach. First, financial institutions may not

be able to consistently identify when consumer-designated credit is being used for business or agricultural purposes. Inconsistent reporting across financial institutions could lead to data quality concerns. Credit sought by consumers for both personal and business purposes could be particularly difficult to separate into reportable and non-reportable portions. The Bureau believes that excluding consumer-designated credit will simplify compliance by obviating the need for financial institutions to identify and distinguish business uses of consumer-purpose credit products. Second, not including consumer-designated credit that is used for business or agricultural purposes within the scope of this rulemaking makes it clear that the applications reported will all be seeking credit to use for business/agricultural purposes, which supports section 1071's directive to collect and report data in the case of an application for credit for a *business*. Third, not covering consumer-designated credit that is used for business or agricultural purposes provides certainty to financial institutions that offer only consumer-designated credit that they are not subject to this final rule's data collection and reporting requirements.

With respect to the request to clarify whether retail installment sales contracts are covered by the exclusion of consumer-designated credit, the Bureau notes that this exclusion applies equally to all credit products. In other words, a retail installment sales contract qualifies as consumer-designated credit if the financial institution offers or extends it primarily for personal, family, or household purposes. The Bureau confirms, as requested, that because the Bureau is finalizing § 1002.102(d) to define business credit as having the same meaning as in existing § 1002.2(g), existing comment 2(g)-1 also applies to subpart B. Thus, in determining whether credit is excluded as consumer-designated credit, a financial institution "may rely on an applicant's statement of the purpose for the credit requested."[468]

The Bureau agrees with commenter concerns that the inclusion of consumer-designated credit within the rule would dramatically expand the size of the data collected beyond the

[468] Existing comment 2(g)-1.

purpose of section 1071, circumventing congressional intent and potentially increasing the rule's impact on the availability of credit for all consumers—not just small business borrowers. The Bureau also confirms that financial institutions may rely on an applicant's statement of purpose for the credit requested and need not report consumer-purpose loans suspected to be used for business purposes, recognizing that alternative approaches would likely result in inconsistent results across lenders as they tried to discern latent business purposes in an application for a consumer-designated credit transaction.

With respect to the suggestion that the Bureau require financial institutions to inquire on an application whether 50 percent or more of the borrowed funds would be used for small business purposes and require collection of 1071 data in those instances, the Bureau believes that this approach would raise many of the policy concerns discussed above. The Bureau appreciates the concerns about potential fair lending violations and evasion raised by commenters relating to consumer-designated credit. The Bureau believes that its finalized bright-line approach will better enable it to ensure that financial institutions that are offering business credit are complying with the final rule.

The Bureau is not excluding to exclude all credit subject to Regulation Z from this rule's definition of "business credit," as suggested by some commenters. The final rule does not cover consumer-designated credit, which includes Regulation Z credit as well as other consumer-designated credit that is not encompassed by Regulation Z. The Bureau notes that some of Regulation Z's provisions apply to business purpose credit cards[469] and that Regulation Z does not cover consumer credit over certain applicable threshold amounts.[470]

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[469] *See* Regulation Z § 1026.12(a) and (b).

[470] *See id.* § 1026.3(b).

Certain Purchases of Covered Credit Transactions, including Pooled Loans and Partial Interests

Proposed Rule

As discussed in the section-by-section analysis of § 1002.103 above, ECOA section 704B(b) requires that financial institutions collect, maintain, and report to the Bureau certain information regarding "any application to a financial institution for credit." For covered financial institutions, the definition of "application" triggers data collection and reporting obligations with respect to covered credit transactions. In the NPRM, the Bureau noted that under proposed subpart B, purchasing a loan, purchasing an interest in a pool of loans, or purchasing a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. Rather, a reporting obligation arises on the basis of receiving a covered application for credit. (See the section-by-section analysis of § 1002.109(a)(3) for additional information.) The Bureau also noted the corollary point that selling an originated covered credit transaction would not, in itself, obviate an existing obligation of a covered financial institution to report small business lending data for that application, pursuant to proposed comment 107(a)-1.i.

In addition, the Bureau believed that requiring covered financial institutions to collect and maintain data related to the purchase of an interest in a pool of covered credit transactions would do little to further the purposes of section 1071. The Bureau generally believed that a pooled loan purchase would arise after credit decisions on the relevant loans had already been made (*e.g.*, after the loans were originated) and therefore the Bureau believed that the purchaser of an interest in a pool of loans would understand that there would be no section 1071 obligation. Information about the loans in this pool would already be captured, as the application for each originated loan in the pool would already be reported (assuming it was originated by a covered financial institution and otherwise satisfies the requirements of subpart B). For clarity, however, the Bureau stated in the NPRM preamble that no reporting obligations arise from purchasing an interest in a pool of covered credit transactions, including credit-backed securities or real estate

investment conduits. The Bureau believed that this clarification, similar to Regulation C comment 3(c)(4)-1, would assist covered financial institutions in understanding the scope of their obligations.

Moreover, the Bureau stated that the purchase of a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. The Bureau believed that this approach, combined with proposed § 1002.109(a)(3), provided sufficient clarity for financial institutions that choose to take part in loan participations. For example, Financial Institution A receives an application from a small business for a covered credit transaction and approves the loan, and then Financial Institution A organizes a loan participation agreement where Financial Institutions B and C agree to purchase a partial interest. This is a reportable application for a covered credit transaction for Financial Institution A, but it is not a reportable application for Financial Institutions B and C. The Bureau noted that this approach differs from how loan participations are reported by banks and savings associations under the CRA. That is, under the CRA, if the loan originated by Financial Institution A met the definition of a small business loan, then for any (or all) of the financial institutions that were CRA reporters, the loans could be reported under the CRA.[471]

The Bureau believed that the statutory purposes of section 1071 encourage the broad collection of small business lending data by financial institutions. The Bureau was not aware of any reason why data with respect to covered credit transactions should not be collected because more than one financial institution holds an interest in the originated loan. Conversely, the Bureau did not believe that requiring reporting by *each* financial institution with a partial interest in a covered credit transaction would further section 1071's purposes, and because having a single loan reported by multiple financial institutions could compromise the quality of the 1071 dataset. Read in conjunction with proposed § 1002.109(a)(3), however, the Bureau believed that

[471] *See, e.g.*, 12 CFR 228.21(f) (stating that when assessing the record of a nonminority-owned and nonwomen-owned bank, the Board considers loan participation as a factor).

the covered credit transactions at issue here would nonetheless generally be reported by one financial institution provided it met the threshold for originated loans pursuant to § 1002.105(b)—*i.e.*, the financial institution that sold portions of the loan to other participants.

The Bureau did not expressly exclude loan purchases, the purchase of an interest in a pool of covered credit transactions or the purchase of a partial interest in a covered credit transaction in the proposed rule's regulatory text or commentary, but sought comment on this approach. With respect to partial interests specifically, the Bureau solicited comment on how such an exclusion may differ from reporting obligations under the CRA and, if the Bureau adopted another approach, how overlapping reporters or data might be flagged to avoid double-counting certain information.

Comments Received

The Bureau received several comments regarding loan purchases and loan participations. Commenters did not address pooled loans specifically. A trade association and two banks agreed that loan purchases should not be covered; one of these banks requested that the Bureau add commentary emphasizing this point.

In contrast, two other commenters argued that all loan purchases should be reported, citing consistency with treatment under CRA and HMDA. One commenter further stated that excluding loan purchases and participations from reporting requirements would ignore the role of financial institutions with a significant percentage of loan purchases, despite their importance in the small business lending market. The other commenter stated that 1071 data should replace CRA lending data, the CRA considers loan purchases, and thus so should the Bureau's rule for consistency.

Several farm credit lenders and a trade association said that participation interests and participation loans should be specifically excluded, noting that a participation interest is legally distinct from a loan, the purchaser of an interest is not considered a creditor, and there is risk of double counting the data. One commenter asked that the Bureau exclude loan participations from

the definition of "covered credit transaction" because a customer never applies for any lender to participate in a covered credit transaction. In addition, some farm credit lenders noted that they frequently enter into loan participation agreements. They stated that a loan participation is significantly different from the purchase of a loan because under these agreements, the borrower's contractual relationship remains solely with the lead lender. These commenters further stated that requiring a participant to report would be akin to requiring a trust in a mortgage securitization to report HMDA data.

Final Rule

For the reasons set forth herein, the Bureau is revising the commentary to § 1002.104(b) to make clear that loan purchases, the purchase of an interest in a pool of loans, and the purchase of a partial interest in a credit transaction are not "covered credit transactions." Specifically, the Bureau is adding comment 104(b)-4 to clarify that for purposes of subpart B, the term "covered credit transaction" does not include the purchase of an originated credit transaction, the purchase of an interest in a pool of credit transactions, or the purchase of a partial interest in a credit transaction such as through a loan participation agreement. Such purchases do not, in themselves, constitute applications for business credit that the purchasing entity makes decisions on. Relatedly, in order to illustrate reporting obligations regarding pooled loans and partial interests, the Bureau is also adding examples to the commentary to § 1002.109(a)(3). The section-by-section analysis of § 1002.109(a)(3) addresses in detail situations where multiple financial institutions are involved in a covered credit transaction.

While the Bureau acknowledges the important role of loan purchases in the small business lending market, the Bureau notes that the definition of "covered application" triggers data collection and reporting obligations with respect to covered credit transactions. Under the final rule, purchasing an originated loan, purchasing an interest in a pool of loans, or purchasing a partial interest in a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data regarding the application underlying the

purchased loan. The Bureau has made clear in final § 1002.109(a)(3) and associated commentary that only the action taken on the *application* is reportable.

In response to commenters who urged consistency with HMDA, as noted above, the statutory language in HMDA contemplates data collection for loan purchases. Similarly, as interpreted by the agencies administering CRA, the CRA statute permits banks to fulfill their obligation to meet local credit needs by lending in low-to-moderate income communities or by purchasing loans made by others.[472] Conversely, section 1071 does not contain such language; it is focused on applications as the trigger for data collection and reporting obligations. Thus, the Bureau concludes for this rule that it is appropriate for financial institutions to have reporting obligations on the basis of making credit decisions on applications, as explained further in the section-by-section analysis of § 1002.109(a)(3)—a subsequent purchase of a loan (or an interest in a pool of loans, or a partial interest in a loan) is not, in itself, reportable.

104(b)(4) Public Utilities Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for public utilities credit from the definition of a covered credit transaction in proposed § 1002.104(b). The Bureau also proposed to define business credit in proposed § 1002.102(d) by reference to existing § 1002.2(g), which already excludes public utilities credit. The Bureau sought comment on its proposal to exclude public utilities credit but did not receive any comments in response.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(2) as proposed. Section 1002.104(b)(2) excludes public utilities credit, as defined in existing § 1002.3(a)(1). Existing § 1002.3(a)(1) states that the term public utilities credit refers to extensions of credit

[472] *See, e.g.*, 12 CFR 228.22(a)(2) (stating that the Board will consider both originations and purchases of loans under the lending test).

that involve public utility services provided through pipe, wire, or other connected facilities, or radio or similar transmission (including extensions of such facilities), if the charges for service, delayed payment, and any discount for prompt payment are filed with or regulated by a government unit. Several existing Regulation B requirements do not apply to public utilities credit transactions.[473] Existing comment 3(a)-1 explains that the definition applies only to credit for the purchase of a utility service, such as electricity, gas, or telephone service. Credit provided or offered by a public utility for some other purpose—such as for financing the purchase of a gas dryer, telephone equipment, or other durable goods, or for insultation or other home improvements—is not excepted under § 1002.104(b)(2) but may be excepted if it constitutes trade credit under § 1002.104(b)(1), or in the example of financing for certain home improvements, if it does not constitute an extension of business credit under § 1002.104(a). Existing comment 3(a)-2 states in part that a utility company is a creditor when it supplies utility service and bills the user after the service has been provided.

The Bureau is adopting a definition of "covered credit transaction" that only covers business credit and that fully excludes public utilities credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau believes that fully excluding public utilities credit from the rule is reasonable for the same reasons as the Board enumerated when it adopted exemptions from certain procedural requirements under subpart A. Specifically, covering public utilities credit under this rule could potentially result in "substantial changes in the forms and procedures of

[473] *See* § 1002.3(a).

public utilities companies. Costs associated with such changes would, in all likelihood, be passed along to [small business owners]."[474] The Bureau notes that many of the policies and procedures of public utilities companies are separately regulated at the State and municipal levels by public service commissions, and at the Federal level by the Federal Energy Regulatory Commission. The Bureau also believes that public utilities credit is akin to trade credit and thus is excluding it from coverage under subpart B for the same reasons.

104(b)(5) Securities Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for securities credit from the definition of a covered credit transaction in proposed § 1002.104(b). The Bureau sought comment on its proposal to exclude securities credit but did not receive any comments in response.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(3) as proposed. Section 1002.104(b)(3) excludes securities credit, as defined in existing § 1002.3(b)(1). Existing § 1002.3(b)(1) states that the term securities credit refers to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934. Several existing Regulation B requirements do not apply to securities credit transactions.[475]

The Bureau is adopting a definition of "covered credit transaction" that only covers business credit and that fully excludes securities credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry

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[474] 40 FR 49298, 49305 (Oct. 22, 1975).

[475] *See* § 1002.3(b).

out, enforce, and compile data under section 1071, as well as its authority under ECOA 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau is excluding securities credit to foster consistency with existing Regulation B.

104(b)(6) Incidental Credit

As noted above, the existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit, as defined in existing § 1002.3(a) through (d), from requirements of existing Regulation B. For the purpose of proposed subpart B, the Bureau proposed complete exclusions for incidental credit from the definition of a covered credit transaction in proposed § 1002.104(b).

As the Bureau explained in the NPRM, existing § 1002.3(c)(1) states that incidental credit refers to extensions of consumer credit other than public utilities and securities credit (i) that are not made pursuant to the terms of a credit card account; (ii) that are not subject to a finance charge (as defined in Regulation Z § 1026.4); and (iii) that are not payable by agreement in more than four installments. For example, existing comment 3(c)-1 explains that if a service provider (such as a hospital, doctor, lawyer, or merchant) allows the client or customer to defer the payment of a bill, this deferral of debt is credit for purposes of Regulation B, even though there is no finance charge and no agreement for payment in installments—meaning that it would not be covered under Regulation Z. Such extensions of incidental credit are excepted from compliance with certain procedural requirements as specified in existing § 1002.3(c). The Board created these exceptions in response to commenters that urged it to minimize burdens on

businesses that "permit their customers to defer payment of debt as a convenience and are not in the business of extending credit."[476]

The Bureau sought comment on its proposal to exclude incidental credit and it received one industry comment in support of the proposed exclusion.

For the reasons set forth herein, the Bureau is finalizing § 1002.104(b)(4) as proposed. The Bureau is adopting a definition of "covered credit transaction" that only covers business credit and that fully excludes incidental credit pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071, as well as its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau believes that the Board's reasoning with respect to incidental credit's limited exception under existing Regulation B is equally applicable and relevant here. Additionally, the Bureau believes that providers of incidental credit may not intend to extend credit and may not currently manage compliance with regulatory requirements associated with making extensions of credit. The Bureau believes an exclusion is appropriate to further the business and community development purpose of section 1071 because of the likelihood that these entities may incur large costs relative to their size to collect and report 1071 data in an accurate and consistent manner, which could result in entities limiting credit to their small business customers or in potential data quality issues.

Government Credit

The existing definition of business credit in § 1002.2(g) partially excludes public utilities credit, securities credit, incidental credit, and government credit (that is, extensions of credit

[476] 40 FR 49298, 49304 (Oct. 22, 1975).

made *to* governments or governmental subdivisions, agencies, or instrumentalities—not extensions of credit made *by* governments), as defined in existing § 1002.3(a) through (d), from existing Regulation B.[477]

In its NPRM, the Bureau did not propose in § 1002.104(b) to separately exclude government credit, as defined in existing § 1002.3(d)(1) to mean "extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities." The Bureau sought comment on its approach to government credit but did not receive any comments on this aspect of the proposal. For the purpose of subpart B, the Bureau is finalizing complete exclusions for public utilities credit, securities credit, and incidental credit from the definition of a covered credit transaction in final § 1002.104(b), as described above, but is not adopting a similar exclusion for government credit. The Bureau is finalizing its approach because it believes that an express exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities is not necessary because such governmental entities would not constitute small businesses under the final rule.[478]

Additional Requested Exclusions

The Bureau received numerous comments requesting the Bureau exclude additional products from coverage under the rule. These comments and the Bureau's response are discussed below.

Point-of-sale transactions. A trade association urged the Bureau to fully exempt point-of-sale transactions from the rule, arguing that data collected in connection with such transactions would be inaccurate. In the alternative, this commenter suggested an exception from the requirement to obtain principal owners' ethnicity, race, and sex information, for credit lines below $50,000. As discussed in the section-by-section analysis of § 1002.107(c), the Bureau

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[477] As explained in existing comment 3-1, under § 1002.3, procedural requirements of Regulation B do not apply to certain types of credit. The comment further states that all classes of transactions remain subject to § 1002.4(a) (the general rule barring discrimination on a prohibited basis) and to any other provision not specifically excepted.

[478] Government entities are not "organized for profit" and are thus not a "business concern" under proposed § 1002.106(a).

does not believe it would be appropriate to categorically exempt point-of-sale transactions. The Bureau also is not adopting a minimum transaction amount threshold, as discussed below.

Minimum transaction amount threshold. Some industry commenters requested the Bureau exempt all credit transactions from section 1071 collection and reporting requirements if they fell below a certain minimum transaction threshold. One commenter asked the Bureau to adopt a de minimis loan amount exemption of at least $1 million to soften the rule's impact on small entities and borrowers. A credit union stated that the Bureau should implement a minimum loan amount of $10 million. Some banks urged an exemption for “small loans” under $25,000, asserting a need to help institutions, especially smaller institutions, keep compliance costs down and ensure these credit products remain available to the small and agricultural businesses who need them most.

Some industry commenters, including several credit union trade associations, requested an exemption for credit transactions under $50,000. A few commenters argued such an exemption was needed for consistency with National Credit Union Administration regulations, which impose a $50,000 threshold for reporting member business loans. Two credit union trade associations argued that failing to exempt such loans would reduce their availability and also reflects a substantial underestimation of the full impact of the proposed covered financial institution threshold. Several trade associations also recommended the Bureau permit voluntary reporting of loans below $50,000. A bank stated that a $50,000 threshold would result in a significant improvement that would still allow the Bureau to obtain meaningful data. Another bank maintained that this exclusion was needed to reduce compliance burdens related to small loans that are not profitable but that are important to communities. On the other hand, another commenter stressed the importance of supporting access to microloans for financing start-up or growth and suggested separating microloans ($50,000 or less) into a separate category.

A few industry commenters suggested exempting loans under $100,000. These commenters generally argued that such an exemption was needed to keep the cost of loan

origination lower for small dollar borrowers, thereby helping to make more borrowers eligible for credit. Several industry commenters urged the Bureau adopt a minimum transaction amount threshold, without specifying a dollar amount. One of these commenters noted that, due to price inflation, $100,000 would be too small of an amount for such a threshold and that if a threshold were established, it would need to be per loan and not cumulative.

For the reasons set forth herein, the Bureau is not adopting an exemption for credit transactions below a certain dollar threshold. At the time of the Federal Reserve Banks' 2021 survey of employer firms, 60 percent of employer firms had $100,000 or less in outstanding debt, with 48 percent of such firms holding $50,000 or less in outstanding debt.[479] According to SBA data, more than 87 percent of Paycheck Protection Program loans in 2021 were loans of $50,000 and below,[480] and approximately 20 percent of SBA 7(a) loans between 2010 and 2019 were in amounts less than $25,000. In terms of industry adoption of minimum loan amount thresholds, research by the FDIC shows that only a small share (14.8 percent) of small banks require a minimum loan amount for their top loan product to small businesses, compared with a majority (69.8 percent) of large banks.[481] Moreover, as discussed in the section-by-section analysis of § 1002.106(b)(1), the Bureau believes that loan size a poor proxy for small business size—in fact, FDIC staff found "at least $19.1 billion in gross understatement of small business lending (in which small businesses with less than $1 million in gross annual revenue received loans with amounts greater than $1 million)."[482] Based on this information, the Bureau does not believe that adopting a minimum transaction amount threshold would further the purposes of section 1071 because it would exclude substantial portions of small business lending.

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[479] 2022 Small Business Credit Survey at 13.

[480] Small Bus. Admin., *PPP Report: Approvals through 05/31/2021*, https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf.

[481] Small Business Lending Survey at 44, https://www.fdic.gov/bank/historical/sbls/full-survey.pdf.

[482] Fed. Deposit Ins. Corp., *Measurement of Small Business Lending Using Call Reports: Further Insights From the Small Business Lending Survey*, at 7 (July 2020), https://www.fdic.gov/analysis/cfr/staff-studies/2020-04.pdf.

Vehicle financing. One bank urged the Bureau to specify that any motor vehicle financed in the first instance by retail motor vehicle dealers are deemed consumer loans and thus exempt. A vehicle leasing trade association also suggested that vehicle financing was so similar to consumer lending that it should be exempt from section 1071 reporting requirements.

The Bureau is not categorically exempting business-purpose vehicle financing, even though it may often be offered alongside consumer-purpose credit. Per existing comment 2(g)-1, the test for deciding whether a transaction qualifies as business credit is one of primary purpose. Where a small business applies for vehicle financing primarily for business or commercial (including agricultural) purposes from a covered financial institution, the transaction is reportable. For a broader discussion of vehicle financing with respect to reporting obligations where multiple financial institutions are involved in a covered credit transaction, see the section-by-section analysis of § 1002.109(a)(3).

Letters of credit. A bank asked the Bureau to clarify if letters of credit are covered credit transactions for purposes of section 1071, and if they are, this commenter also recommended that the Bureau exclude these types of transactions from reporting.

The Bureau understands that letters of credit products are primarily used in the international trade context. Generally, a letter of credit is an instrument issued by a bank that promises, upon the presentation of certain documents and/or satisfaction of certain conditions, to direct payment to a beneficiary of the instrument. Letters of credit are often presented by buyers of goods who seek to postpone payment until their goods have been received. Some letters of credit are secured by a promissory note and are converted if the customer fails to pay.

ECOA and Regulation B do not address letters of credit. Regulation Z excludes letters of credit under its comment 2(a)(14)-1.vi. In finalizing this exclusion, the Board stated that "[i]ssuance of letters of credit and execution of option contracts are not extensions of credit, although there may be an extension of credit when the letter of credit is presented for payment or

the option is exercised, if there is a deferral of the payment of a debt at that time."[483] The Bureau agrees with the Board's assessment of these products and believes that a letter of credit is not credit under ECOA. Thus, the Bureau is not covering letters of credit under the final rule.

Government programs. Some industry commenters urged the Bureau to exempt government lending programs (such as the Paycheck Protection Program) and/or government sponsored/guaranteed loans (such as USDA loans), arguing that inclusion would discourage participation. One also argued that the fact that the fees and interest rates for Paycheck Protection Program loans were set by Congress, meant there was a reduced risk of discriminatory lending practices related to terms of the credit transaction. Another suggested that 1071 data collection and reporting was not required because many government programs already collected similar information. A few commenters specifically recommended exempting SBA lending programs, particularly section 504 loans.

The Bureau has considered these comments but is not categorically exempting credit transactions originated by, sponsored by, facilitated by, or guaranteed by government entities. According to one source, there are 65 government-sponsored, grants, loans, and programs that may benefit small businesses.[484] The Bureau understands that many small businesses rely on government programs for credit and believes that excluding such credit in this final rule would not further either of section 1071's statutory purposes.

C-PACE loans. A trade association of Commercial Property Assessed Clean Energy (C-PACE) loan providers requested an exemption due to purportedly unique features of C-PACE loans, such as prior approval by the local government, absence of acceleration, lack of control over the identity of the obligor, and absence of private remedies.

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[483] 46 FR 20848, 20851 (Apr. 7, 1981).

[484] U.S. Chamber of Com., *65 Grants, Loans and Programs to Benefit Your Small Business* (Nov. 17, 2022), https://www.uschamber.com/co/run/business-financing/government-small-business-grant-programs.

C-PACE programs generally allow commercial property owners, which could include small businesses, to receive financing to fund clean-energy, seismic strengthening, or water conservation improvements to their properties. The financial obligation arises from voluntary contract. Various private companies appear to play a significant role in financing, originating, and administering C-PACE transactions. Under State law, C-PACE is an assessment that appears on businesses' property tax bills. Although the commercial property owner signs the financing agreement, it is typically not a personal liability of the commercial property owner, and the obligation will stay with the property until fully paid. C-PACE is secured by a super-priority lien on the property—if the property is sold through foreclosure, C-PACE (like a regular property tax lien) is first in line to receive any proceeds from the sale even if a mortgage was on the property first. The Bureau understands that typically, only the arrearage on the C-PACE lien gets paid off in foreclosure, and the rest of the C-PACE indebtedness remains with the property after foreclosure.

While publicly available data on C-PACE programs appear to be limited, the Bureau understands that these programs are growing in popularity;[485] excluding these loan products from the requirements of this rule would result in incomplete data about the relevant markets and would thus not advance section 1071's business and community development purpose.

The Bureau is not excluding C-PACE financing arrangements from reporting under section 1071, as requested by one commenter. Based on its understanding of typical C-PACE financing arrangements and its expertise with respect to the nature of credit transactions, the Bureau believes that the term "credit" under ECOA and final § 1002.102(i) encompasses these products. Under a C-PACE financing arrangement, there is (1) a "debt" in the form of an obligation to pay for the cost of property upgrades and (2) a right to defer payment on that obligation for a term. Similarly, there is (1) a "purchase[] [of] property or services" in the form

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[485] *See, e.g.*, Greenworks Lending, *C-PACE Financing Sees Massive Growth Nationally: What you should know about this alternative development financing mechanism* (June 7, 2021), https://commercialobserver.com/2021/06/c-pace-financing-sees-massive-growth-nationally/.

of property upgrades, and (2) a right to defer payment on the property or services. The borrower enters into C-PACE financing through a voluntary transaction. That the parties agree that payment will be made through an assessment through the property tax system does not change the Bureau's analysis. ECOA (and Regulation B) do not specify a particular vehicle or form of payment for a transaction to constitute credit, nor do they limit the form of obligation. The Bureau is not specifically defining C-PACE financing arrangements in the rule because the Bureau believes these products are covered by the definition of "credit" in final § 1002.102(i).

Finally, in the Bureau's judgment, an exclusion of C-PACE loans—whether by interpretation or by granting an exception—would not further the fair lending and the business and community development purposes of section 1071.[486] This is for three independent reasons. First, while the Bureau understands that C-PACE financing may present less fair lending risk compared to some other products because such financing is based on the value of the property, not the creditworthiness of the obligor (who can change along with ownership of the property), the Bureau does not believe that is a sufficient reason by itself to exclude C-PACE lending from coverage under this final rule. Section 1071 is not limited to those products with the highest fair lending risk. Second, the Bureau does not agree that data collection to provide additional insight into the product is unnecessary. Third, and most significantly, including C-PACE loans should create a more level playing field across financial institutions that provide construction financing to small businesses as well as create a dataset that better reflects demand for such financing by the smallest and most vulnerable businesses.

Overdraft lines of credit. In its NPRM, the Bureau did not address overdraft lines of credit other than asking whether they should be listed as a credit product separate from other lines of credit. The Bureau received one comment urging exclusion of overdraft lines of credit on the grounds that their inclusion would significantly expand the data collection requirements for

[486] ECOA section 704B(a).

small business deposit account applications since most such deposit accounts have an option to obtain an overdraft line of credit. This commenter also argued that collecting data on overdraft lines of credit would not further section 1071's purpose of preventing discrimination against small business credit applicants because banks conduct little, if any, underwriting when extending overdraft lines of credit on small business deposit accounts.

The Bureau is not categorically exempting overdraft lines of credit but notes that they are reportable only where there is an "application" under § 1002.103. Providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B pursuant to new comment 107(a)(6)-8.

Voluntary Reporting

Absent a specific requirement to collect protected demographic data (such as in section 1071), ECOA generally blocks collection of such demographic data in connection with an application for credit. The Bureau sought comment on whether financial institutions should be permitted to voluntarily collect and report applicants' protected demographic information for transactions such as leases (due to the practical difficulty cited by some stakeholders of distinguishing leases from loans), consumer-designated credit (when financial institutions have reason to believe the credit might be used for business purposes), and real estate investment loan transactions that are secured by non-owner occupied 1-4 dwelling unit properties pursuant to proposed § 1002.109.

The Bureau received comments from community groups and trade associations on this aspect of the proposal. A number of community groups stated that the Bureau should permit voluntary reporting on leases and factoring to have the most comprehensive data on the small business financing market as it relates to minority entrepreneurs. A community group purporting to address the proposed amendments to existing § 1002.5(a)(4) commented that the Bureau should permit voluntary collection not only by financial institutions not covered by the rule, but

also should permit covered financial institutions to collect data on consumer credit used to fund small businesses.

The Bureau did not receive any industry comments expressing an interest in being able to voluntarily report non-covered products. In fact, a few trade associations and a business advocacy group expressly opposed such voluntary reporting. One trade association argued against voluntary reporting of non-covered transactions, citing concerns about the quality of data collected and the creation of an uneven playing field among financial institutions that would contribute to misinterpretations of the data by observers. Two other commenters also argued against the voluntary reporting of consumer-designated credit used for business purposes, asserting that such reporting would create confusion, introduce the possibility of error, and put financial institutions in a position to question their members' intentions.

For the reasons set forth herein, the Bureau is finalizing its approach to not permit voluntary reporting of non-covered products. The Bureau sought comment on voluntary reporting to address a potential pain point for industry but heard no industry interest in such a solution. The Bureau thus finds it unnecessary to change the proposed section 1071 collection system to receive data on such non-covered products. However, as discussed in the section-by-section analysis of § 1002.112(c)(3), the Bureau is adopting a catch-all safe harbor that will protect financial institutions who encounter the underlying situation that voluntary reporting was intended to address. Specifically, that safe harbor will address situations where a financial institution has a reasonable basis—at the time of collecting the protected demographic information required by this rule—to believe there is a covered application and that data collection is necessary, including situations in which it later determines that the transaction is not in fact reportable (because the ultimate transaction is not a covered product, the business is not small, or there is otherwise not a covered application).

Section 1002.105 Covered Financial Institutions and Exempt Institutions

ECOA section 704B(h)(1) defines the term "financial institution" as "any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity." The Bureau is finalizing a definition of financial institution in § 1002.105(a) consistent with that statutory language. The Bureau is defining a covered financial institution in § 1002.105(b) as a financial institution that originated at least 100 covered credit transactions from small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution would be required to collect and report small business lending data pursuant to proposed subpart B.

The Bureau's definitions reflect the broad nature of the data collection specified in section 1071, while recognizing the risks that financial institutions with the lowest volume of small business lending might limit their small business lending activity because of the fixed costs of coming into compliance with this rule.

The Bureau is finalizing § 1002.105 to implement ECOA section 704B(h)(1) and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.105(b) pursuant to its authority under 704B(g)(2) to conditionally or unconditionally exempt any financial institution or class of financial institutions from the statute's requirements, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071. The Bureau is finalizing these provisions and using its exemption authority under 704B(g)(2) for the reasons set forth below.

105(a) Financial Institution

Proposed Rule

ECOA section 704B(h)(1) defines the term "financial institution," for purposes of section 1071, as "any partnership, company, corporation, association (incorporated or unincorporated),

trust, estate, cooperative organization, or other entity that engages in any financial activity." Existing Regulation B, which implements ECOA, has not otherwise defined this term.

Proposed § 1002.105(a) would have restated the statutory definition of a financial institution as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. The Bureau believed that this definition reflects the broad nature of small business lending data collection specified in section 1071. Under such a definition, the rule's data collection and reporting requirements would apply to a variety of entities that engage in small business lending, including depository institutions (*i.e.*, banks, savings associations, and credit unions),[487] online lenders, platform lenders, CDFIs, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit, nondepository lenders.

The Bureau noted that the broad scope of what may be considered a "financial activity" in the proposed definition of financial institution would not be the principal determinative factor as to whether small business lending data collection and reporting is required; the proposed definition of a covered financial institution, the proposed definition of a covered application, and the proposed definition of a covered credit transaction, among others, all would impose limits on what entities could be subject to the rule's data collection and reporting requirements.

Proposed comment 105(a)-1 would have provided a list of examples of entities that may fit within the definition of a financial institution. This proposed comment would have made clear that nonprofit and governmental entities, governmental subdivisions, or governmental agencies,

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[487] Throughout this document, the Bureau is using the term depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act, 12 U.S.C. 1813(c)(1), or credit union defined pursuant to the Federal Credit Union Act, as implemented by 12 CFR 700.2. The Bureau notes that the Dodd-Frank Act defines a depository institution to mean any bank or savings association defined by the Federal Deposit Insurance Act; there, that term does not encompass credit unions. 12 U.S.C. 5301(18)(A), 1813(c)(1). To facilitate analysis and discussion, the Bureau is referring to banks and savings associations together with credit unions as depository institutions throughout this rulemaking, unless otherwise specified.

among others, who conduct financial activity fit within the definition of a financial institution. Proposed comment 105(a)-2 would have referred to proposed § 1002.101(a) to reiterate the statutory exclusion for motor vehicle dealers.

The Bureau sought comment on this proposed definition of a financial institution, and generally requested comment on whether additional clarification is needed.

Comments Received

A broad range of commenters, including lenders, trade associations, community groups, and business advocacy groups, expressed support for the Bureau's proposed general definition of financial institution. A number of commenters stated that it is an appropriately broad definition that captures a wide variety of lenders, including online lenders, platform lenders, lenders involved in equipment and vehicle financing, and commercial finance companies. Commenters asserted that a broad definition will yield meaningful data. Several commenters noted that capturing a broad array of lenders is essential for achieving the objectives of section 1071 and that a broad definition is important for regulatory parity. Other commenters stated that there should be no exceptions permitted for certain types of lenders and a community group stated that missing any segment of lending risks encouraging abusive lending institutions to violate fair lending laws. One trade association expressed opposition to the proposed definition, however, arguing that it is too broad because it includes captive vehicle finance partners.

Several commenters agreed that the rule must apply to government lenders, with one commenter specifically requesting inclusion of the Farm Service Agency. An association urged the Bureau to include as examples in the rule the largest Federal, State, and municipal lending programs.

Another trade association stated that SBA certified development companies are certified and regulated by the SBA, and the SBA already collects application information that includes the data points that the Bureau proposes to collect. The commenter further asserted that reproducing these data will likely incur significant one time and ongoing compliance costs. In contrast, a

bank stated that data shows that the performance levels of the SBA and the lenders participating in their programs has produced dismal results, permitting some lenders to enjoy "preferred" lender status while not delivering loans to disadvantaged communities. Moreover, two commenters urged the Bureau to work with other government agencies to ensure that existing reporting is leveraged where possible.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.105(a) and its associated commentary as proposed. The Bureau emphasizes that the list of examples of entities in comment 105(a)-1 is not exhaustive and that other entities not specifically described may nonetheless fit within the definition of a financial institution under § 1002.105(a). The Bureau agrees with commenters that governmental lenders should be covered by the rule. As explained in the proposed rule, the Bureau interprets the statute to include government entities in the definition of financial institution. The definition of the term "financial institution" in ECOA section 704B(h)(1) includes the phrase "or other entity." That term readily encompasses governments and government entities. Even if the term "or other entity" were ambiguous, the Bureau believes—based on its expertise and experience—that interpreting it to encompass governments and government entities promotes the purposes of section 1071.

For example, the Bureau believes that it will be helpful to identify the business and community development needs and opportunities of small businesses, including those that are women-owned, minority-owned, and LGBTQI+-owned, by collecting lending data from both a county-run assistance program for establishing new businesses and financial institutions that operate nationwide, like online lenders. The Bureau also believes that the terms "companies" or "corporations" under the definition of "financial institution" in ECOA section 704B(h)(1), cover all companies and corporations, including government-owned or -affiliated companies and corporations. And even if those terms were ambiguous, the Bureau believes—based on its expertise and experience—that interpreting them to cover government-owned or -affiliated

companies and corporations advances the purposes of section 1071, particularly the business and community development purpose, as it will more accurately capture demand for credit.

The Bureau is not, however, listing specific examples of covered governmental lenders/programs in the rule. The Bureau does not believe such a list is necessary, and inclusion of a specific list could cause confusion if the listed programs (or those lenders' loan volumes) were to change.

In response to commenters who raised potential overlap with other reporting regimes, see part V.D.3 for a detailed discussion of this issue.

Commenters' requests for specific exclusions, such as for captive vehicle finance partners, are discussed in the section-by-section analysis of § 1002.105(b) below.

105(b) Covered Financial Institution

Background

Throughout the rulemaking process, the Bureau has received requests to adopt a variety of exemptions from collection and reporting requirements under section 1071. Reasons cited have included discouraging market disruption, ensuring data quality, alleged lack of materiality of data from smaller lenders that rarely make small business loans, and lack of capacity by the lenders sufficient to justify small business lending as a line of business in light of the cost of complying with the rule.

As detailed below, the Bureau is adopting an activity-based exemption. The Bureau defines a covered financial institution in § 1002.105(b) as a financial institution that originated at least 100 covered credit transactions from small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution will be required to collect and report small business lending data under this rule. The final rule does not include categorical exemptions for particular types of

institutions from coverage, but the Bureau notes that its Regulation B does not apply to motor vehicle dealers.[488]

Proposed Rule

Activity-based exemption. In the SBREFA Outline, the Bureau stated that it was considering whether only financial institutions that engage in a certain amount of small business lending activity should be required to collect and report 1071 data.[489] The Bureau explained that in light of section 1071's potentially broad application to financial institutions, an activity-based test to determine reporting responsibility might be appropriate. In particular, the Bureau expressed concern that financial institutions with the lowest volume of small business lending might limit their small business lending activity because of the fixed costs of coming into compliance with the rule. The Bureau stated that this result could be contrary to the community development purpose of section 1071.

In the NPRM, the Bureau stated that it believed that an activity-based threshold would provide a simple basis for financial institutions that infrequently lend to small businesses to determine whether they have conducted sufficient lending activity as to be required to collect and report data under proposed subpart B. The Bureau believed that furnishing a dual activity-based and asset-based threshold, under which infrequent lenders must ascertain both measurements to determine whether reporting may be required, would cut against the goal of simplifying the rule as lenders would then have to track two metrics, not one. The Bureau believed that a dual threshold would create more regulatory complexity as compared to only tracking total annual small business originations.

In particular, the Bureau believed that a primary advantage of an activity-based threshold—ease of compliance—would be undermined if the Bureau were to implement a

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[488] Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 2004 (2010).

[489] SBREFA Outline at 12-13.

complex, dual threshold eligibility test. The Bureau wished to ensure that infrequent lenders were not incurring significant undue compliance costs, particularly while not reporting data. In general, tracking two thresholds is more complex than tracking one. The Bureau believed it is also more likely that financial institutions are already tracking total originations. The Bureau believed that proposing an activity-based threshold that employs data already generally collected by financial institutions could mitigate the risk that section 1071, when implemented, would result in reduced access to credit.

Activity threshold level. Proposed § 1002.105(b) would have defined a covered financial institution as a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. Only those financial institutions that meet this loan-volume threshold in the definition of a covered financial institution would be required to collect and report small business lending data pursuant to subpart B.

The Bureau believed this definition would facilitate compliance by describing which financial institutions are required to collect and report small business data. The Bureau also proposed commentary to accompany proposed § 1002.105(b). In general, the Bureau believed that fulfilling the purposes of section 1071 necessitates collecting small business lending data from all sizes and types of financial institutions (other than those with a low volume of lending activity), particularly given the variety of entities identified in ECOA section 704B(h)(1). The Bureau proposed to exempt certain financial institutions from its small business lending rule because it remained concerned that financial institutions with the lowest volume of small business lending might limit their small business lending activity due to the fixed costs of coming into compliance with the rule. That type of market disruption could run contrary to the business and community development purpose of section 1071. Section 1071 describes its community development purpose as "enabl[ing] communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-

owned, minority-owned, and small businesses."[490] In the Bureau's view, ensuring that business and community development opportunities could be met as well as identified supported the Bureau's use of its exemption authority under 704B(g)(2) here.

The Bureau proposed to set the activity-based threshold based on small business originations, rather than applications. The statutory language of section 1071 generally applies to applications; however, the Bureau believed that using small business originations for purposes of defining a covered financial institution is the better approach. The Bureau expected that financial institutions track their small business application volumes in various ways, but whether an origination resulted was a clear and readily identifiable metric. Using an exemption metric based on applications would have imposed new obligations on financial institutions solely for purposes of determining whether or not they are subject to this rule. As discussed above, the Bureau believed that proposing an activity-based threshold that employed data already generally collected by financial institutions could mitigate the risk that section 1071, when implemented, would result in reduced access to credit. In addition, even those financial institutions that track total applications now may not do so in a way that fully aligns with how the Bureau proposed to define covered applications for purposes of proposed subpart B. Using the number of originations, as opposed to applications, for an activity-based threshold was also consistent with the Bureau's Regulation C.

The Bureau proposed to clarify in § 1002.105(b) that for purposes of defining a covered financial institution, if more than one financial institution was involved in the origination of a covered credit transaction, only the financial institution that made the final credit decision approving the application shall count the origination. The Bureau believed that providing this clarifying language would assist financial institutions in understanding which transactions count

[490] ECOA section 704B(a).

towards the loan-volume threshold. This approach was consistent with the Bureau's proposed § 1002.109(a)(3).

Proposed comments 105(b)-4 and -5 would have explained when a financial institution was a covered financial institution following a merger or acquisition. These proposed comments were largely consistent with the Bureau's approach to reporting obligations surrounding a merger under Regulation C,[491] with modifications to reflect the nature of the small business lending market and to provide additional clarifications.

Proposed comment 105(b)-6 would have clarified that Regulation B (including proposed subpart B) generally did not apply to lending activities that occur outside the United States.

Finally, proposed comment 105(b)-7 would have addressed financial institutions that do not qualify as covered financial institutions but may nonetheless wish to voluntarily collect and report small business lending data. This proposed comment would have reiterated that proposed § 1002.5(a)(4)(vii) through (ix) permitted a creditor that was not a covered financial institution under proposed § 1002.105(b) to voluntarily collect and report information regarding covered applications in certain circumstances. If a creditor is voluntarily collecting applicants' protected demographic information for covered applications, it shall do so in compliance with proposed §§ 1002.107, 1002.108, 1002.111, 1002.112, and 1002.114 as though it were a covered financial institution. Proposed comment 105(b)-7 would have further stated that if a creditor was voluntarily reporting those covered applications to the Bureau, it shall do so in compliance with proposed §§ 1002.109 and 1002.110 as though it were a covered financial institution.

The Bureau sought comment on its proposed 25 originations threshold incorporated into the definition of a covered financial institution. The Bureau also solicited comment on whether this threshold should alternatively be set at 50 or 100 covered credit transactions. In addition, the Bureau sought comment on whether an activity-based threshold should be based on the total

[491] *See* Regulation C comments 2(g)-3 and -4.

number of small business applications, rather than originations. The Bureau also requested comment on whether additional clarification was needed for this proposed definition.

Two-year threshold measurement period. The Bureau proposed to define a covered financial institution using a loan-volume threshold that must be achieved in each of the two preceding calendar years.

The Bureau acknowledged that a loan-volume threshold based on a two-year period could create some operational complexity for some financial institutions. To be sure that it was not a covered financial institution, a financial institution would need to maintain records sufficient to show total small business originations for both years of the threshold period. The Bureau believed that two years was not a prohibitively long time, although it is possible that infrequent lenders may have smaller staff or fewer resources to reliably track such information for section 1071's purposes. The Bureau believed that a two-year threshold period was advisable to eliminate uncertainty surrounding data collection responsibilities. Under this proposal, a financial institution that may not frequently lend to small businesses, but that experiences an unusual and unexpectedly high lending volume in a single year would not be a covered financial institution. As discussed in part VIII below, in order to comply with the Bureau's rule, a financial institution may need to undertake substantial one-time costs that include operational changes, such as staff training, information technology changes, and develop policies and procedures. Therefore, the Bureau believed it appropriate to propose a two-year threshold period to provide more stability around reporting responsibilities. Regulations that implement HMDA and the Community Reinvestment Act provide similar periods to determine coverage.

The Bureau noted that employing a two-year approach would delay reporting for new, potentially active entrants. For example, under this proposal a large lender that enters the market and originates hundreds or even thousands of small business loans in its first two calendar years of lending would not report its covered applications. That is, under the Bureau's proposal, this financial institution would not be required to collect and report data on its covered applications

for small businesses in those first two years, although the institution could choose to voluntarily collect and report data. The Bureau recognized, however, that triggering data collection and reporting requirements based on lenders' estimates of their projected future volume could be challenging to implement.

The proposed two-year threshold period could pose other challenges for financial institutions that conduct small business lending activity near the proposed 25 small business originations threshold. See the section-by-section analysis of § 1002.5(a)(4) above for a discussion of § 1002.5(a)(4)(viii), which would allow a financial institution to collect ethnicity, race, and sex information pursuant to proposed subpart B for a covered application under certain circumstances during the second year of the threshold period. See the section-by-section analysis of § 1002.114(c)(2) below for discussion of additional flexibility that the Bureau is finalizing regarding measuring lending activity prior to the rule's compliance date.

Proposed comment 105(b)-1 would have clarified the meaning of a preceding calendar year for purposes of the proposed activity-based threshold. See the section-by-section analysis of § 1002.114(c)(3) below for additional discussion regarding measuring lending activity prior to the rule's compliance date. Proposed comment 105(b)-2 would have emphasized that a financial institution qualifies as a covered financial institution based on total covered credit transactions originated for small businesses, rather than covered applications received from small businesses. Proposed comment 105(b)-3 would have explained that whether a financial institution is a covered financial institution depends on its particular small business lending activity in the two preceding calendar years, and that the obligations of a covered financial institution is an annual consideration for each year that data may be compiled and maintained under proposed § 1002.107(a).

Other requested exemptions. The Bureau did not propose to adopt alternative exemptions or exceptions to the definition of covered financial institution, other than the loan-volume threshold as described above.

With respect to government lenders, in the proposal the Bureau stated that it has not identified, nor did small entity representatives or other stakeholders provide, policy or legal rationales for excluding government lenders from the rule. The Bureau believed that collecting information on small business lending by government entities furthered the purposes of section 1071. Moreover, the Bureau believed, as described above in the discussion of proposed comment 105(a)-1, that government entities were included within the phrase "other entity" in the ECOA section 704B(h)(1) definition of "financial institution." For example, the Bureau believed that it would be helpful to identify the business and community development needs of women-owned, minority-owned, and small businesses by collecting lending data from both an online lender and a county-run assistance program for establishing new businesses.

For the same reasons, the Bureau did not believe that exempting not-for-profit lenders from data collection was consistent with the purposes of section 1071. The Bureau believed that organizations exempt from taxation pursuant to 26 U.S.C. 501(c) play a crucial role in lending to small businesses, particularly those that are women- or minority-owned, in certain communities.

With respect to the concern that certain financial institutions may encounter difficulty absorbing compliance costs, the Bureau believed that directly considering a financial institution's activity is a more appropriate way to address this concern and not a categorical exemption. With respect to a financial institution's lending importance for a community or region (such as low income or rural) as a reason to include categorical exemptions, the Bureau believed that such arguments emphasize the importance of collecting and analyzing such data to further the purposes of section 1071 rather than justify an exemption. Finally, with respect to the concern that certain business models or products are not conducive to data collection or reporting, the Bureau believed it would most appropriately address such concerns by providing clarification regarding how reporting rules apply to certain covered credit transactions and also not covering certain transactions. See the section-by-section analyses of §§ 1002.104(b) and 1002.109(a)(3).

The Bureau proposed comment 105(a)-1, discussed above, consistent with the considerations discussed here.

Therefore, for the reasons described above, the Bureau did not propose to define a covered financial institution by providing alternative exemptions or exceptions. The Bureau sought comment on this approach, including data or information that might bear upon any such alternative exemptions in light of section 1071's purposes.

Comments Received

Commenters expressed a variety of perspectives with respect to the Bureau's proposal regarding potential exemptions. Feedback from most industry commenters generally was in support of exempting certain financial institutions from data collection and reporting obligations. Most feedback in support of pursuing exemptions focused on the potential burden of new regulatory requirements, with some commenters cautioning that collection and reporting obligations could lead to an increase in the cost of credit and could cause lenders to exit the market. A few commenters connected these potential costs with section 1071's purpose of identifying business and community development needs and opportunities (chiefly arguing that costs might lead to higher costs of lending or lower lending volume), or otherwise expressed a general belief that some exemptions were consistent with statutory purposes. In addition, many commenters, mostly community groups, urged caution with respect to the extent of any such exemptions, arguing that not capturing a significant amount of small business lending data would run contrary to the general purposes of section 1071.

Activity-based exemption. Many commenters supported the general concept of an activity-based threshold. A large bank asserted that an origination-based approach would ensure that collected data represents a comprehensive view of the small business lending landscape. A few commenters stated that a clear, bright line rule is helpful, and that an activity threshold is relatively simple for low-volume lenders to apply. Moreover, two commenters said that an activity threshold creates a level playing field, while a CDFI lender stated that such an approach

will ensure that the Bureau captures data from lenders that are small in asset size but active in small business lending. Two commenters, however, noted that some lenders may not currently track applicant GAR and this may somewhat increase burden of counting originations to small businesses.

A community group urged the Bureau to guard against evasion of the activity-based threshold through the creation of subsidiaries, stating that the Bureau should include a rule that for the purposes of determining the loan threshold, loans are counted at the parent institution or holding company level.

A number of commenters opposed an activity-based threshold. Two banks stated that it was confusing because the threshold is only for originations, yet all applications are reported. One of the banks stated that a financial institution may not know whether it would meet the threshold until very close to the reporting period, while another bank stated it may be difficult to know which loans are covered for purposes of determining loan activity.

Several industry commenters asserted that an activity-based threshold is not a good metric for banks, with several banks suggesting that an asset-size coverage definition would be more straightforward and consistent. Commenters explained that lending varies each year, while assets are more predictable and forecastable. A few community banks stated that an activity-based threshold based solely on originations is misguided and results in a one-size-fits-all exemption that disregards the unique characteristics that exist in communities across the country, resulting in reduced access to credit. Several industry commenters stated that an activity-based threshold could encourage lenders to deny applications or reduce their lending to stay under the threshold. Additionally, several commenters noted that some lenders near the threshold may go back and forth between being covered or not.

Counting originations. Several lenders, trade associations, and a community group, expressed support for counting originations, not applications, for determining coverage. The community group asserted that this approach is consistent with CRA and HMDA.

A few commenters provided feedback on how originations should be counted for purposes of determining the threshold. A trade association asserted that all Paycheck Protection Program loans and similar future government programs should be exempt from the originations threshold. In addition, two commenters stated that additional credit amounts, such as line increases, should not count as a separate credit product for purposes of counting originations for the threshold. One noted that very small businesses may request multiple line increases in a year.

Activity threshold level. The Bureau received a large number of comments regarding the activity threshold level from a range of stakeholders, including lenders and community groups. Many community groups and some industry commenters, including community-oriented lenders and a few large banks, along with a minority business advocacy group and several members of Congress, supported the proposed 25 loan threshold, citing its broad coverage. Commenters stated that the proposed threshold allows for coverage of banks, nondepository lenders, "fintech" lenders, CDFIs, and other types of financial institutions. A community-oriented lender argued that gathering data from small business lenders or all types and sizes is critical, given that entrepreneurs of color are less likely to be approved for capital by banks, often turning to alternative lenders as a result. Another commenter stated that even a 25-origination lender will have substantial data with respect to adverse actions or declinations, up to four times as much.

Commenters asserted that this threshold was an appropriate approach to excluding *de minimis* lenders, was simple to apply, and would yield meaningful data collection. A few commenters argued that the activity threshold should not be increased above 25 loans, given the Bureau's estimated costs of compliance. Some commenters cited similarities to the 2015 HMDA rule, with one commenter further asserting that when the HMDA threshold was raised, certain lenders no longer reported data. Commenters asserted that gathering robust lending data will ensure that the rule implementing section 1071 is fulfilling the statutory purposes and community development organizations need sufficient data that cover enough of the market. In addition, one commenter urged a 10-loan threshold, asserting that is the minimum threshold that

is necessary to change lending behavior and improve access to capital for Black business borrowers. This commenter further asserted that all regulated financial institutions that maintain FDIC deposit insurance should report their small business lending results.

Many commenters, including community groups, community-oriented lenders, individual commenters, and a business advocacy group, emphasized that section 1071's statutory purposes could be frustrated if the threshold were increased. Commenters argued that it would be impossible to meet the statutory purposes of the rule unless most of the market is covered. A commenter further asserted that if the threshold were increased, the database would no longer be statistically representative of actual lending and would not be able to accurately reveal whether credit needs were being met in all communities. Commenters stated that increasing the threshold will disproportionately harm many small business owners, rural communities, banking deserts and redlined areas that may find that "small" lenders make up a significant portion of the local lending market. Commenters stated that accurately measuring access to credit, and pursuing fair lending enforcement when warranted, would be substantially diminished if too many lenders and loans are exempt from reporting, particularly in smaller cities and rural areas. Another commenter asserted that if the Bureau elected to use a higher threshold it would exclude gathering data from commercial lenders that are small, but still impact many people. Moreover, a commenter stated that the Bureau's estimates show decreased coverage of banks at higher thresholds.

Commenters stated that it is important to ensure coverage of rural areas, which may be in persistent poverty, and which are often served by small lenders. Moreover, a community group stated that the threshold must cover intermediate-sized banks, which are important to rural communities and small cities, and whose information has been missing from CRA data since 2003. Commenters stated that increasing the threshold could frustrate enforcement of the CRA, and risk the chance that the data are not representative of the actual small business lending

landscape. A commenter further asserted that comprehensive data are needed to assist in fair lending actions at the local level.

In contrast, nearly all industry commenters opposed the proposed coverage threshold of 25 originations annually for two consecutive years. Commenters stated that the threshold was too low and would lead to increased costs and burden, particularly for community banks and credit unions. Numerous banks and trade associations expressed concern that too many small banks would be subject to the rule with a 25-loan activity threshold. For example, two trade associations asserted that at least 780 banks under $100 million in assets would be subject to reporting, and these institutions average 13 employees at 1.6 branches. In addition, several members of Congress asserted that the proposed threshold levels for the rule were far too stringent, and would drastically impact the ability of small institutions to make loans to small businesses and decrease access to credit for minority-owned, women-owned, and small businesses. Several commenters argued that small lenders have little data to offer relative to the costs of acquiring the data. One also asserted that it was unreasonable to subject thousands of additional small depository institutions to a complex and costly rule to collect data on approximately four percent of the small business lending market. Many of commenters suggested higher thresholds, with requests ranging from 100 to 1,000 transactions annually, using the same two-year test. In particular, a large number of commenters requested thresholds at 100, 200, 500, or 1,000 loans annually.

A number of industry commenters supported a 100-loan threshold. Many of these commenters urged the Bureau to set institutional coverage similar to HMDA at that time, both for consistency and because lenders already reporting HMDA data would incur lower compliance costs because they already have data collection systems in place. Moreover, commenters asserted that a 100-loan threshold would still capture an estimated 95 percent of businesses loans in the country.

Conversely, a CDFI lender and two business advocacy groups opposed a 100-loan threshold, arguing that the Bureau's estimates show narrower coverage of small business lending at that threshold level. Another CDFI lender stated that nearly a half billion in lending would be obscured from reporting in its community with a 100-loan threshold.

A credit union trade association stated that a 100-loan threshold was too low. This commenter asserted that researchers draw statistically significant conclusions from HMDA data which covers approximately 90 percent of the mortgage market, and because a 100-loan threshold covers more than that percentage of the small business market, the rule would gather more data than is necessary.

In the context of discussing the rule's threshold, numerous commenters, including community banks, credit unions, and trade associations, along with a group of State bank regulators, cautioned the Bureau regarding the risk of small lenders exiting the market due to the rule's burden. Commenters argued that the rule will damage small institutions' ability to remain competitive and would favor large lenders with large compliance teams. Many commenters stated that small community banks and credit unions lack the staff or resources, including automation capabilities, to comply with the reporting requirements, with numerous institutions sharing the limited number of full-time staff that they had dedicated to business and agricultural lending.

Commenters further argued that Dodd-Frank Act mortgage rules resulted in many community banks leaving the mortgage lending business, and this proposal would produce similar results. For example, several commenters argued that HMDA and TILA-RESPA integrated disclosure rules led to market exodus, and they were concerned that there would be similar market exit of local lenders following the proposed rule implementing section 1071.[492] Commenters stated that communities could be left without a hometown bank and small

[492] CFPB, *Integrated Mortgage Disclosure Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z)*, 78 FR 80225 (Dec. 31, 2013).

businesses may seek credit from unregulated lenders. Moreover, two national trade associations stated that about 30 percent of surveyed franchised light-duty and commercial truck dealerships would discontinue small business credit extensions.

Several commenters also argued that the rule would exacerbate bank consolidation, particularly in rural and underserved areas, as the additional regulatory burden on community banks would lead to more mergers and acquisitions. Commenters further asserted that consolidation would reduce lending options for consumers and small businesses, and would discourage some smaller financial institutions from making small business loans. A few commenters stated that the rule would damage relationship banking and create an environment with less competition.

Numerous commenters also asserted that the rule is likely to reduce access to credit, as small banks and credit unions do not have the economies of scale to absorb the reporting costs, and thus compliance costs will be passed along to small business customers. Several commenters stated that they would have to reconsider their product offerings. For example, one bank stated that they might need to also reconsider their consumer product offerings and prices, and a credit union stated they might consider reducing lending to avoid being covered by the rule. In addition, one bank stated that they may need to charge additional fees for agricultural borrowers, while another bank stated that they would either need to increase their origination fee or greatly increase the minimum loan amounts. Another bank stated that as operating costs increase, they will be forced to adjust their business model by either increasing interest rates on loans, decreasing interest rates on deposits, or implement other account fees. Moreover, several commenters stated that the 25-loan threshold would limit small business lending flexibility, which could stifle lending innovation and result in lenders choosing to set minimum loan amounts.

In addition, many commenters argued that the 25-loan threshold would have a negative effect on lending in small and rural communities. Commenters stated that small banks, which are

vulnerable to increased compliance costs, are often located in rural areas where lending options are limited. Several commenters stated that the rule risks underserved areas being afforded fewer loan options. Commenters further asserted that the rule's regulatory burden would drive consolidation in rural and underserved areas, limiting access to credit in these communities.

Several commenters drew comparisons to HMDA. One bank stated that when it was subject to HMDA reporting, they struggled with compliance and eventually elected to reduce lending. In addition, several commenters asserted that the proposed 25-loan threshold was inconsistent with the reporting threshold of 100 closed-end mortgages in Regulation C at the time. Commenters argued that although their institution was exempt from HMDA reporting, and although their commercial lending unit is small, they would not qualify for the proposed 25-origination exemption from reporting under section 1071. A State bankers association stated that half of their survey respondents are exempt from HMDA, while only six believed they would be exempt with a 25-loan threshold. The commenter further stated that these small financial institutions—83 percent under $250 million in assets—have no data collection infrastructure in place. Some other commenters similarly asserted that many smaller institutions do not have data collection infrastructure in place and stated that they would incur significant costs.

In addition, some commenters asserted that the Bureau did not provide a sufficient rationale for a 25-loan threshold, arguing that the Bureau has not shown why this threshold is necessary and appropriate to carry out section 1071's purposes. Several commenters argued that the Bureau could obtain sufficient data at a higher threshold. Another commenter stated that the Bureau did not fully consider coverage, in particular how much data would be forgone at each threshold. A group of trade associations further asserted that the Bureau is obligated to provide coverage estimates for nondepository institutions and that RFA estimates are not sufficient.

While the Bureau did not propose an asset-based threshold in the proposed rule, numerous industry commenters requested an asset size threshold, ranging from $50 million to $10 billion. However, some industry commenters as well as community groups counseled

against an asset-based exemption, arguing that exemptions should be based instead on lending activity, and that size-based exemptions risked under-reporting in important markets. For example, one commenter stated that an asset-based threshold could affect different regions of the country and risk "blind spots" in the data. Some commenters said that assets are not an applicable measurement for many lenders, such as nondepository institutions. A bank trade association stated that asset-based exemptions have been exploited by market disruptors partnering with exempted institutions to create an uneven regulatory playing field.

Other requested exemptions. A number of commenters opposed exemptions for specific categories of lenders (consistent with the Bureau's proposal), with several commenters noting that capturing a broad array of lenders is essential for achieving the objectives of section 1071. Some commenters asserted that the rule must apply to government and public sector lenders, merchant cash advance companies, nondepository lenders, non-profit lenders, online lenders, and/or commercial finance providers. A State bankers association stated that the Bureau should specifically name industrial loan companies to make clear that all nonbank entities making small business loans are covered by the rule. Community groups asserted that all lenders are obligated to comply with fair lending laws, and requiring data disclosure will assist with ensuring compliance. Moreover, several industry commenters stated that a broad definition is important to ensure a level regulatory playing field and to ensure a comprehensive view of the entire small business lending market. A bank trade association urged the Bureau to pay close attention to nonbank lenders, which the commenter stated are roughly 30 percent of the current market and not currently subject to the Bureau's supervision.

In contrast, a large number of industry commenters urged the Bureau to exclude specific types of entities from coverage under the rule. Some requested that certain types of lenders such as credit unions or CDFIs be excluded from the rule entirely, while others requested certain indirect lending/multi-party business models be excluded, such as when applications are made via loan brokers, equipment dealers, or motor vehicle dealers. Numerous industry commenters

noted the unique burdens they believed the rule would place on small banks and credit unions, while a subset of these commenters argued that the Bureau should exempt these smaller institutions from the rule altogether.

Several commenters requested an exemption for CDFIs, stating that they are mission-driven institutions and dedicating resources to new regulatory requirements would detract from their community focus. Moreover, some commenters argued that requiring CDFIs to report would be duplicative, as CDFIs already report lending data to the CDFI Fund that shows that they are providing financial products for small businesses in their communities. Commenters further cited the Treasury Department's certification process for CDFIs and stated that CDFIs are already held to a high standard. Several commenters cited that the Bureau decided to exempt CDFIs when implementing the Qualified Mortgage rule. Conversely, a number of community groups argued that the rule must apply to all financial institutions, including CDFIs.

A number of commenters urged the Bureau to exempt community banks from reporting requirements, stating that community banks already incur substantial regulatory burden and would be put at a competitive disadvantage under the rule. Several commenters emphasized the "high-contact and relationship-based business lending model" of community banks. A community bank asserted that community banks should be commended for advancing over 50 percent of the nation's small business loans and over 80 percent of the nation's agriculture loans despite holding less than 20 percent of the nation's deposits. Another community bank stated that currently they are not subject to HMDA or CRA reporting requirements and thus this rulemaking poses the threat of significant new burdens on small community banks as well as on those community banks that are already subject to HMDA reporting.

In addition, some commenters stated that covering community banks will have the opposite effect of section 1071's purposes. Commenters asserted that community banks would incur substantial burden in gathering new data, which would make it more burdensome and expensive to offer small business loans, thus raising the cost of credit. A community bank stated

that, if adopted as written, the rule's paperwork burden will harm community banks, waste critical resources, and further restrict lending. Another community bank stated that the rule as proposed may very well be the final straw of regulation that will drive small community banks out of business with devastating impact on the small communities they serve. Moreover, commenters argued that the Bureau was designed to regulate large, complex financial institutions, not community banks.

Several commenters also urged the Bureau to exempt credit unions from reporting requirements, stating that credit unions have not demonstrated a pattern of unfair lending, that they seek to help women-owned and minority-owned businesses, and that credit unions are member-owned and not-for-profit. A trade association asserted that credit unions would like to furnish more small business loans, but a reporting regime will increase costs. Some commenters stated that exempting credit unions would allow them to remain competitive lenders and would avoid imposing new burdens on members. In contrast, a number of commenters—including community groups, community-oriented lenders, a business advocacy group, and a bank trade association—opposed special treatment for credit unions, citing a 2020 Federal Reserve study that shows a higher percentage of Black and Hispanic-owned firms sought loans from credit unions and CDFIs. In addition, a commenter stated that 2018-2020 HMDA data show that 73 percent of credit union lending in Mississippi went to white borrowers and 15 percent to Black borrowers.

One farm credit lender stated that Farm Credit System institutions should be exempt from collection and reporting, while another asserted that FCA financial institutions should have a qualified exemption that permits voluntary reporting. The latter commenter stated that these financial institutions are already reporting lending on Young, Beginning, and Small lending efforts and volume to the Farm Credit Administration. In addition, one commenter asserted that a lack of understanding of the Farm Credit System by the Bureau in this rulemaking will have unintended consequences for their customers. In contrast, a community group urged the Bureau

to apply the rule implementing section 1071 to agricultural lenders, stating that historic discrimination against minority and disadvantaged groups has been well documented in agriculture, and including agricultural lenders will hold financial institutions accountable to equitably serving small farms and mid-sized farms, beginning farmers, and historically underserved farmers. Another community group asserted that Farm Service Agency activity should also be covered by the rule.

Several commenters requested an exemption for institutions outside of Metropolitan Statistical Areas, with many specifying that rural institutions should be exempt from the rule. Commenters stated that rural banks and credit unions often play a vital role in their communities and acquiring data from rural lending will result in fewer institutions willing to conduct rural lending. Several industry commenters asserted that the new burden to these institutions will increase the cost of credit, and will be a significant detriment for local small businesses seeking access to credit. A bank argued that many rural loans are small dollar loans to sole proprietors such as farmers and ranchers and without an exemption, the nation's most rural and remote borrowers will have a harder time obtaining credit for their businesses.

Two banks requested exemptions for CRA reporters, arguing that financial institutions subject to Board, FDIC, or OCC regulations under the CRA are already being assessed to ensure that they are identifying and meeting the credit needs of the small businesses in their communities. In addition, one of the banks stated that CRA-examined institutions with at least a satisfactory rating for its two previous exams should be exempt from reporting requirements. In contrast, another commenter opposed exempting CRA reporters, stating that big banks and "shadow lenders" have the most impact on small business lending and have thwarted the effective oversight and enforcement of the CRA.

The Federal Home Loan banks argued that they should be exempt from the rule, explaining that the proposed definition of covered financial institution inadvertently would capture lending to their financial institution member/borrowers because those members are small

businesses. They stated that applying the rule implementing section 1071 to them is unnecessary in light of the comprehensive FHFA regulatory regime that applies to credit extended by the Federal Home Loan banks to their small and diverse financial institution members.

A trade association urged the Bureau to exempt SBA certified development companies from the rule, stating that these financial institutions are certified and regulated by the SBA and have a mission to assist small businesses with access to capital, including businesses in underserved communities. In addition, two development companies stated that they do not have the budget to incur these new reporting costs.

A few commenters requested an exemption for minority depository institutions. A national trade association asserted that Congress has determined that such institutions play an important role in serving underserved communities and minority populations, the intent behind section 1071 is already met by minority depository institutions, and therefore, the rule should not redundantly be applied to this special class of financial institutions. One bank stated that minority depository institutions are mission-driven to support their communities, while another bank asserted that these institutions are certified by the Treasury Department for serving historically underserved communities and/or low-to-moderate income Americans.

A trade association stated that retailers by their very nature are not financial institutions and thus should not be covered by the rule. The commenter further argued that applying this rule to retailers will have a negative impact on retail employees and customers as offering credit at retail could be reduced or eliminated, affecting overall access to credit. Moreover, the commenter stated that the retail environment is different from a typical bank, in that employees are not trained in the specifics of financial products, and the environment may not be practical for obtaining more sensitive information.

Two trade associations requested an exemption for loan brokers. One argued that there could be duplicative or inaccurate reporting in cases where technology companies match an

applicant with multiple third-party lenders. The other argued that it is appropriate to have a similar approach to HMDA and data can be obtained from the lender instead of the broker.

Several commenters urged the Bureau to exempt indirect lending transactions where the applicant interacts only with a vendor partner, such as equipment dealers and manufacturers. Commenters argued that the financial institution does not directly interact with the applicant, only the dealer or manufacturer, and thus the fair lending purpose of section 1071 would not be furthered. A trade association asserted that such an exemption would be consistent with the Bureau's proposed approach to motor vehicle dealers. A business advocacy group stated that, alternatively, there should be flexibility with respect to the timing and collection of this information. They further argued that the equipment dealer or manufacturers' employees are not trained staff for the financial institution and the data may be less accurate.

Some commenters stated that indirect auto lenders should be exempt from the rule. One commenter stated that the Bureau should exclude motor vehicle dealers, and by extension, financial institutions when they are working with motor vehicle dealers. Two commenters stated that while indirect lenders may be involved in credit decisions, compliance with the rule would be difficult, as the financial institutions that evaluate and purchase the auto loan never meet the applicant. One also said that it was unclear what information indirect lenders would be required to gather.

In addition, two motor vehicle dealer trade associations urged the Bureau to exempt motor vehicle dealers. They argued that collecting new data will slow applications, raise compliance burden, and increase the risk of inaccurate data. They stated that motor vehicle dealers do not have the resources to comply with a rule in the manner that a financial institution would. Moreover, they stated that survey data indicates 30 percent of dealers might choose to leave the market rather than face these compliance costs. Two other trade associations pointed to Board regulations implementing ECOA and argued that the dealer would be prohibited under the law from asking the business owner for ethnicity, race, and sex demographic data. In addition, a

bank expressed confusion over how a covered financial institution can require an exempt motor vehicle dealers to collect 1071 data. Another commenter noted that many dealers act as intermediaries between buyers and financial institutions, and requested that the Bureau work with small motor vehicle dealers to make the direct and indirect impacts of the rulemaking the least burdensome possible.

One State bankers association asserted that much valuable small business lending data will not be captured given the Dodd-Frank Act exclusion for motor vehicle dealers and urged the Bureau to advocate in Congress as necessary to include them in the rule.

A trade association urged the Bureau to exempt captive vehicle partners from reporting, arguing that these institutions are inextricably tied to entities that are exempt. The trade association further argued that it would be confusing in terms of reporting responsibility, as there are many creditors involved in a single loan and its subsequent assignment, and the finance partner does not directly interact with the applicant. Furthermore, the commenter stated that a lack of regulatory relief could lead to market exit and that captive finance companies are crucial to the economy.

Commenters urged the Bureau to exempt a variety of other entities, including institutions outside of direct CFPB supervisory authority, mission-driven banks, and financial institutions that identify as small businesses. In addition, some commenters urged the Bureau to adopt exemptions similar to HMDA using exemption factors such as asset size, location test, federally related test, and loan activity. One merchant cash advance provider stated that merchant cash advance funders should not be considered covered financial institutions because they do not extend credit or provide loans.

In addition, several commenters cited the firewall requirement and said that certain financial institutions should be exempted from the entire rule due to the challenges associated with the statutory firewall provision. One commenter said that banks under $1 billion should be

exempted on this basis, a few said community banks should be exempted on this basis, and one commenter said that all but the largest lenders or all depository lenders should be exempted.

Two-year threshold measurement period. Commenters who addressed the issue were in support of a two-year threshold measurement period, with one community group citing its consistency with CRA and HMDA.

Final Rule

For the reasons set forth herein, the Bureau is revising § 1002.105(b) to set the activity-based coverage threshold at 100 originations in each of the two preceding calendar years, rather than 25 originations as proposed. The Bureau is also finalizing its proposal not to exempt particular types of institutions from the rule. The Bureau believes that a 100-loan activity threshold achieves section 1071's purposes while minimizing any risk that low volume small business lenders would reduce their lending activity. The Bureau is adding comments 105(b)-3 and -4, as explained below, as well as making other minor revisions to the commentary for additional clarity.

The Bureau is finalizing § 1002.105(b) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071 and its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

Activity-based exemption. The activity-based threshold for coverage in the final rule will provide a simple basis for financial institutions that infrequently lend to small businesses to determine whether they have conducted sufficient lending activity as to be required to collect and report data under the final rule. Furthermore, in comparison to an asset-based exemption or a dollar-volume threshold, the Bureau believes that an activity-based exemption is a more

compelling basis for exempting certain financial institutions from coverage in light of section 1071's business and community development purpose.

While several commenters expressed support for an asset-based threshold or a dual asset-based and activity-based threshold, the Bureau believes an activity-based threshold is considerably less complex. Moreover, small business lending activity is more directly related to a given financial institution's role in the small business lending market than a measurement of the financial institution's size as measured in total assets.

In addition, the Bureau believes that an activity-based exemption is a superior approach to a size-based exemption because an exemption based on asset size would apply only to depository institutions. The Bureau is unaware of a similar size metric for nondepository institutions, and commenters did not offer one. In addition, the Bureau agrees with commenters who stated that an asset-based exemption approach might create an uneven playing field and might risk presenting a cost disadvantage for other small financial institutions.

Moreover, exempting proportionately more depository institutions than nondepository institutions may present a challenge to the comprehensiveness of the small business applicants' demographic data collected under section 1071 as well as to the lending by different types of lenders. A recent small business credit survey revealed racial disparities in applications under the SBA's Paycheck Protection Program: the data showed white-owned firms were most likely to apply for a loan through a small bank (defined as under $10 billion in assets), while Black-owned firms were three times as likely as white-owned firms to apply for a loan through an online lender.[493] Exempting depository institutions using an asset-based threshold and not similarly exempting nondepository institutions could run counter to the purposes of section 1071 and undermine the utility of the data, as well as the purposes of the Bureau, which are, in part, "to implement and, where applicable, enforce . . . consistently" Federal laws including ECOA.[494]

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[493] Small Business Credit Survey of Firms Owned by People of Color at 14.

[494] 12 U.S.C. 5511(a).

A few commenters asserted that an activity-based threshold could encourage lenders to deny applications or reduce their lending to stay under the threshold. These are speculative fears, but to the extent that institutions intend to take such action, the Bureau reminds financial institutions that inconsistencies in the way an institution applies its policies could give rise to a fair lending violation under ECOA. Denied applications must indicate the principal reason(s) for the adverse action, as required by § 1002.9(b)(2).

Regarding a commenter's concern about potential evasion of the activity-based threshold through the creation of subsidiaries, see the section-by-section analysis of § 1002.109(a)(2) which addresses reporting by subsidiaries.

Counting originations. The Bureau agrees with commenters who asserted that using a coverage threshold based on the number of originations rather than applications for purposes of defining a covered financial institution is the better approach. As one commenter pointed out, many financial institutions are already familiar with this approach due to its consistency with CRA and HMDA. Using originations provides a clear and readily identifiable metric for financial institutions. One commenter stated that the Paycheck Protection Program and similar future government programs should be exempt from the threshold. As discussed above, the Bureau is not exempting specific government programs from the activity-based threshold. However, by the time this rule is effective and implemented, lending activity conducted pursuant to the Paycheck Protection Program will have long since ceased and such loans will not be included in origination counts, rendering such commenter concerns moot.

In addition, the Bureau agrees with commenters who stated that additional credit amounts, such as line increases, should not count as a separate origination for purposes of counting the activity-based threshold. Financial institutions may receive multiple requests for additional credit amounts on existing accounts in any given year and such activity may make it more difficult for institutions to determine coverage under the rule. In order to address this issue, the Bureau is adding comment 105(b)-5 which clarifies that for purposes of determining

coverage under § 1002.105(b), requests for additional credit amounts on an existing account are not counted as originations.

Moreover, as discussed in § 1002.106(b)(2), every five years the gross annual revenue threshold used to define a small business in § 1002.106(b)(1) shall be adjusted, if necessary, to account for inflation. The first time such an update could occur is early 2030, with an effective date of January 2031. The Bureau is adding comment 105(b)-4 to clarify how financial institutions reporting data should count originations in this situation, explaining that a financial institution seeking to determine whether it is a covered financial institution applies the gross annual revenue threshold that is in effect for each year it is evaluating.

Two-year threshold measurement period. Consistent with commenters who addressed the issue, the Bureau believes that a two-year threshold period is advisable to minimize uncertainty surrounding data collection responsibilities.

Activity threshold level. Supporters of the 25-loan threshold and supporters of the 100-loan threshold each argued that the Bureau should set the threshold with reference to the HMDA threshold for closed-end loans. Given the differences in statutory authorities and between home mortgages and small business loans, the Bureau does not believe that the activity-based thresholds implementing HMDA and section 1071 must be the same.[495]

Table 1 below provides the Bureau's estimated share of depository institutions, estimated share of small business loans from those institutions (measured in total number of loans), and estimated share of small business credit from those institutions (measured in dollars) that would

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[495] The Bureau's 2015 HMDA Rule set the closed-end loan threshold at 25 originated loans for each of the two preceding calendar years. Then, in 2020, the Bureau increased the threshold to 100 closed-end loans, effective the same year. However, in September 2022, the United States District Court for the District of Columbia vacated the 2020 HMDA Rule's increased reporting threshold for closed-end mortgage loans as arbitrary and capricious under the Administrative Procedure Act. *Nat'l Cmty. Reinvestment Coal. v. Consumer Fin. Prot. Bureau*, No. 20-cv-2074, 2022 WL 4447293 (D.D.C. Sept. 23, 2022).

Accordingly, the threshold for reporting data about closed-end mortgage loans is 25, which was the threshold set by the 2015 HMDA Rule. The court upheld the 2020 HMDA Rule's increase in the open-end credit threshold.

See also CFPB, Home Mortgage Disclosure (Regulation C); Judicial Vacatur of Coverage Threshold for Closed-End Mortgage Loans, Technical Amendment, 87 FR 77980 (Dec. 21, 2022), https://files.consumerfinance.gov/f/documents/cfpb_judicial-vacatur-_technical-amendment_2022-12.pdf.

be covered by a loan-volume threshold of 25, 50, or 100 small business loans. This information is based on FFIEC and NCUA Call Reports, as well as CRA submissions.[496] The Bureau estimates that a depository institution is covered for a particular loan-volume threshold as of 2019 if the estimated number of originations for that institution exceeded the threshold in both 2017 and 2018. Given the limitations of the existing source data (limitations acknowledged by the congressional mandate of section 1071), the Bureau cautions that these estimates cannot provide a complete sense of the possible consequences of adopting each particular threshold. These estimates apply only to depository institutions.[497]

Table 1: Estimated depository institution coverage by loan volume (as of 2019)

Coverage Category	25 Loans	50 Loans	100 Loans
Institutions Subject to Reporting	38% – 40% of all depository institutions[498]	27% – 30% of all depository institutions	17% – 19% of all depository institutions
SBL Institutions Subject to Reporting[499]	63% – 67% of SBL depository institutions	46% – 50% of SBL depository institutions	29% – 32% of SBL depository institutions
Banks and Savings Associations (SAs) Subject to Reporting	70% – 73% of all banks and SAs[500]	52% – 56% of all banks and SAs	33% – 36% of all banks and SAs
SBL Banks and SAs Subject to Reporting	71% – 75% of SBL banks and SAs	53% – 57% of SBL banks and SAs	33% – 37% of SBL banks and SAs

[496] On the bank Call Report and in the Community Reinvestment Act data, for small bank and small farm loans, banks report on business loans with original amounts of $1 million or less and farm loans with original amounts of $500,000 or less. For lines of credit or loan commitments, banks report the size of the line of credit or commitment when it was most recently approved. Banks include loans guaranteed by the SBA and other government entities in their small loans to businesses. Banks do not report loans to nonprofit organizations in this category. Thus, these data collections would include loans made to purchase, for example, individual vehicles and pieces of equipment for the nation's largest businesses.

[497] Under these data collections, banks report small loans made to businesses and farms (regardless of the borrower's size). Credit unions report commercial loans over $50,000 made to members (also, regardless of the borrower's size). The methodologies and assumptions used to produce these estimates are further documented in the *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rulemaking.* This document is available at https://https.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/.

[498] There were 10,525 depository institutions as of December 31, 2019, including 112 credit unions that are not Federally insured.

[499] A depository institution is considered an "SBL institution" if it has any small business loans on its balance sheet.

[500] Based on FFIEC Call Report data, there were 5,177 banks and savings associations as of December 31, 2019.

Coverage Category	25 Loans	50 Loans	100 Loans
Credit Unions Subject to Reporting	7% of all credit unions[501]	4% of all credit unions	2% of all credit unions
SBL Credit Unions Subject to Reporting	31% of SBL credit unions	18% of SBL credit unions	8% of SBL credit unions
Share of Total Small Business Credit by Depository Institutions (Number of Loans Originated) Captured	98.3% – 98.6%	96.7% – 97.3%	94.2% – 95.1%
Share of Total Small Business Credit by Depository Institutions (Dollar Value of Loans Originated) Captured	95.3% – 96.0%	89.4% – 91.0%	81.0% – 83.0%

Table 1 above shows that as the loan-volume threshold rises, the estimated share of depository institutions subject to section 1071 decreases substantially. Likewise, the estimated share of small business loans and small business credit captured by the rule would also decrease, although those decreases are less pronounced. The Bureau has no information for nondepository institutions (other than for Farm Credit System institutions based on their Call Report data[502]) such that the Bureau could provide similar estimates for comment. The Bureau requested in the NPRM such information and data that might bear on any activity-based exemption for nondepository institutions and did not receive any substantive information.

The Bureau notes that the above estimates represent small business lending data prior to the COVID-19 pandemic and ensuing policy responses. The Bureau is keenly aware that many financial institutions, including those that may not have historically participated actively in small business lending, served their communities by becoming participating lenders in the SBA's Paycheck Protection Program. This program ended on May 31, 2021. Because financial institutions' initial determinations of whether they are covered under this final rule, and if so into

[501] Based on the 2019 NCUA Call Report data, there were 5,348 credit unions as of December 31, 2019, including 112 credit unions that are not Federally insured.

[502] To estimate the number of Farm Credit System (FCS) members covered by the final rule, the Bureau considers the Young, Beginning, and Small Farmers Reports for all Farm Credit System lenders as of December 31, 2019. For the purposes of estimating coverage, the Bureau assumes that all loans made by FCS members to farmers are covered loans. Thus, the Bureau estimates that the rule will cover almost all FCS small business loans.

which compliance date tier they fall, will be based on 2022 and 2023 originations (see final § 1002.114(b)), institutions' Paycheck Protection Program lending activity will not factor into whether a given financial institution qualifies as a covered financial institution because such lending ceased in May 2021.

After considering the feedback from commenters, the Bureau seeks to minimize impact on the financial institutions with the lowest volume of small business lending due to the fixed costs of coming into compliance with this final rule. Numerous industry commenters cautioned the Bureau regarding the risk of market disruption due to the rule's burden and cost. Many argued that the relatively large fixed cost of complying with section 1071's data collection and reporting requirements would significantly increase the cost of small business credit. Commenters argued that the rule will damage small institutions' ability to remain competitive, would hasten consolidation, and would favor large lenders with large compliance teams. A number of lenders discussed the ways in which they may be forced to limit their lending, particularly in rural and underserved areas. Several lenders asserted that a 100-loan threshold was preferable, in part because HMDA reporters already have data collection infrastructure in place.

The Bureau stated in the NPRM that it was also considering a 50 or 100 origination threshold. After consideration of the comments, the Bureau believes that a 100-loan activity threshold is more appropriate. The Bureau believes that this adjustment will best address widespread industry concerns regarding compliance burdens for the smallest financial institutions and that it is consistent with the purposes of section 1071. A 100-loan threshold will ease compliance burdens for the smallest financial institutions and will still capture the overwhelming majority of the small business lending market, including the majority of agricultural lending. As demonstrated in Table 1, a 100-loan threshold captures nearly 95 percent of the share of small business loans originated by depository institutions. In short, while a 100-loan origination threshold decreases data coverage in comparison to a 25-loan origination

threshold, a 100-loan origination threshold massively expands data availability relative to the status quo.[503]

Other requested exemptions. The Bureau agrees with commenters who urged broad coverage of financial institutions under the rule. The Bureau believes that, in light of the text and purposes of section 1071, the Bureau should generally adopt the posture that all manner of small business lenders should be subject to reporting. The Bureau is not categorically exempting any particular type of financial institution from coverage. The Bureau believes that exemptions for any category of financial institution—whether credit unions, community banks, CDFIs, minority depository institutions, government lenders, non-profit lenders, agricultural lenders, retailers, or merchant cash advance providers—would create significant gaps in the data and would create an uneven playing field between different types of institutions. Inclusion of data from not-for-profit lenders is likely to be particularly helpful in identifying further opportunities for business and community development, including by for-profit creditors. Moreover, the Bureau believes that most policy arguments made by industry for being exempt from this rule are better addressed by adjusting the activity-based threshold to 100 originated loans. The higher activity threshold will help minimize compliance costs for all types of smaller financial institutions with lower lending volumes but still result in a comprehensive dataset that furthers section 1071's statutory purposes.

Comment 105(a)-2 refers to § 1002.101(a) to reiterate the statutory exclusion for motor vehicle dealers. Given the statutory exclusion, motor vehicle dealers are not required to report small business lending data to the Bureau. See the section-by-section analysis of § 1002.109(a)(3) for further discussion on reporting obligations where multiple financial institutions are involved in a covered credit transaction, including indirect lending transactions.

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[503] See part IX.H below for additional analysis on coverage of rural vs. non-rural depository institution branches. The Bureau notes that it has no data on the geography of lending for all depository institutions. Furthermore, commenters provided no additional data. As such, the Bureau is unable to estimate coverage of rural vs. non-rural small business loans.

With respect to addressing the particularities of certain lending models, the Bureau is not categorically exempting particular financial institutions from coverage. The Bureau is, however, providing clarification regarding how reporting rules apply to certain covered credit transactions and is also not covering certain transactions. See the section-by-section analyses of §§ 1002.104(b) and 1002.109(a)(3). Regarding the request by some commenters to be exempted from this rule due to the statutory firewall requirement, see the section-by-section analysis of § 1002.108.

Section 1002.106 Business and Small Business

ECOA section 704B(h)(2) defines the term "small business" as having the same meaning as "small business concern" in section 3 of the Small Business Act.[504] The Bureau is defining a small business consistent with the statutory language. In particular, the Bureau is defining a small business to have the same meaning as the term "small business concern" in 15 U.S.C. 632(a), as implemented by 13 CFR 121.101 through 121.107. Notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of subpart B, the Bureau is providing that a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less. The SBA Administrator has approved the Bureau's use of this alternate small business size standard pursuant to the Small Business Act.[505] The Bureau has also obtained approval for this gross annual revenue threshold to adjust, if need, for inflation or deflation every five years (after January 1, 2025) using the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), rounded to the nearest multiple of $500,000.

Under the final rule, financial institutions will need to consider whether an applicant is a business under § 1002.106(a) and if the applicant is a business, whether it is small under § 1002.106(b). The Bureau believes that these definitions implement the statutory language of section 1071 while reflecting the need for a wide variety of financial institutions to apply a

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[504] 15 U.S.C. 632.

[505] 15 U.S.C. 632(a)(2)(C).

simple, broad definition of a small business that is practical across the many product types, application types, technology platforms, and applicants in the market.

For the reasons set forth below, the Bureau is adopting § 1002.106 to implement ECOA section 704B(h)(2) and pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071.

106(a) Business

Background

ECOA section 704B(h)(2) defines the term "small business" as having the same meaning as "small business concern" in section 3 of the Small Business Act.[506] The Small Business Act provides a general definition of a "small business concern," authorizes the SBA to establish detailed size standards for use by all agencies, and permits an agency to request SBA approval for a size standard specific to an agency's program. The SBA's regulations define a "business concern" as "a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor."[507]

Proposed Rule

Proposed § 1002.106(a) would have defined a business as having the same meaning as the term "business concern or concern" in 13 CFR 121.105. This proposed definition is consistent with ECOA section 704B(h)(2), which defines the term "small business" as having the same meaning as "small business concern" in section 3 of the Small Business Act.[508] The SBA issued 13 CFR 121.105, entitled "How does SBA define 'business concern or concern,'"

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[506] 15 U.S.C. 632.

[507] 13 CFR 121.105.

[508] 15 U.S.C. 632.

pursuant to the Small Business Act. The Bureau referred to the entirety of that section for additional information. In particular, the Bureau noted that this definition would include elements such as being "a business entity organized for profit" that has "a place of business located in the United States" and "operates primarily within the United States or . . . makes a significant contribution to the U.S. economy."[509]

The Bureau sought comment on its proposed definition of a business, and generally sought comment on whether additional clarification is needed.

Comments Received

Comments received focused primarily on the Bureau's proposed business size standard, which are discussed in the section-by-section analysis of § 1002.106(b) below. The Bureau did receive some comments, however, on its proposed approach to the definition of business concern from a few banks, trade associations, a business advocacy group, and an online lender. These commenters requested that the Bureau consider certain modifications or adjustments to the definition of a business concern, such as clarifying that the term does not include non-profit entities, government agencies, certain trusts, foreign entities, and certain real estate holding companies.

One bank generally supported the proposed definition but requested clarification that the definition of business concern excludes "passive businesses" and non-natural borrowing entities that are established by applicants solely for tax, anonymity, and other such purposes not intended to earn profit through business production, operations, or service delivery. This commenter noted that it is common for consumer borrowers to establish limited liability companies or trusts solely to acquire properties and conduct similar transactions, or for use in remaining anonymous to preserve their physical safety, and requested that these scenarios be explicitly excluded because these entities' obligations and contributions do not align with those of small businesses.

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[509] 13 CFR 121.105(a)(1).

A few commenters recommended that applications from nonprofit organizations also be exempted. A few commenters specifically requested the Bureau exclude any not-for-profit organizations, which might include non-operating entities, holding companies, trusts, special purpose vehicles, pass-through entities, holding companies that are not organized for profit, and limited liability companies that are not formed for business purposes.

Two commenters asked the Bureau to confirm that public agencies and government institutions are excluded from the coverage of the final rule. One commenter asked the Bureau to exclude foreign-owned entities from the final rule. A bank asked for clarification on whether a "small business" can be taxed under the owner's Social Security number (as opposed to an employer identification number) or whether people that have a "hobby" business or farm that report income under Schedule C or F within their tax returns are considered a small business.

A trade association suggested the Bureau exclude applications from trusts (which could be a single purpose trust, such as a land trust that is established only to hold specific real estate, a traditional estate planning vehicle or, though more infrequently, a business trust) from coverage under the final rule. This commenter stated that including trusts could raise difficult issues regarding who should be considered for data collection purposes (the settlors, beneficiaries, trustees or some combination thereof), what is the "net profit or loss" of the trust, as well as who is entitled to that net profit or loss. The commenter argued that such burdens would not be justified by the minimal information that would be generated with respect to reporting of lending to trusts.

One commenter argued for the inclusion of a test that would discern between independent contractors and what it called "actual" small businesses, as it believes that the credit needs and experiences of independent contractors and many small businesses can differ greatly. Another suggested the Bureau confirm that the proposed definition of "small business" excludes subsidiaries of large corporate entities.

A trade association for community banks recommended the Bureau exclude farms from the definition of "small business," arguing that the underwriting criteria for small farm loans differ from other small business loans and that this distinction is acknowledged in several Federal laws such as CRA and HMDA. This commenter argued that the proposed originations-based coverage threshold would likely lead to many small lenders reducing their agricultural lending below the threshold, thereby limiting the access to credit for small farms, and concluded that an exemption was needed to acknowledge the uniqueness of agricultural lending.

Final Rule

For the reasons discussed herein, the Bureau is finalizing § 1002.106(a) as proposed, to define the term business as having the same meaning as the term "business concern or concern" in 13 CFR 121.105.

As noted above, this definition includes elements such as being "a business entity organized for profit" that has "a place of business located in the United States" and "operates primarily within the United States or . . . makes a significant contribution to the U.S. economy."[510] This definition also provides that a business concern may take a number of different legal forms, including a trust, sole proprietorship, partnership, limited liability company, corporation, joint venture, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.[511] The Bureau is not providing interpretations of this SBA regulation in subpart B, as requested by some commenters, because the Bureau believes that existing SBA interpretations are responsive to commenters' request for clarification. For example, financial institutions are not required to collect and report data for not-for-profit applicants, because they are not

[510] 13 CFR 121.105(a)(1).

[511] 13 CFR 121.105(b).

"organized for profit" and are thus not a "business concern."[512] Moreover, the Bureau expects that applications from foreign businesses will fall outside the scope of the rule's data collection and reporting requirements unless they have a place of business located in the United States and they either operate primarily within the United States or they make a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor.

The Bureau also does not believe it would be appropriate to deviate from the term "business concern or concern" in 13 CFR 121.105 by adopting additional exclusions such as one for passive businesses. As discussed above, section 1071 defines small business as referring to the definition of small business concern in section 3 of the Small Business Act. The Bureau thus must look to this definition, and the SBA's implementing regulations, in defining both a business and a small business for purposes of this final rule. (The SBA Administrator's approval for the Bureau's alternate size standard for this rulemaking is discussed in the section-by-section analysis of § 1002.106(b) below.)

In addition, the Bureau believes that covering applications from all types of businesses in its rule (including passive businesses[513] and non-operating entities) is important for advancing both of section 1071's statutory purposes. The Bureau is thus not adopting such exclusions requested by commenters. However, because the Bureau understands that passive businesses and non-operating entities are generally affiliated with other businesses (for example as subsidiaries of large corporate entities), and because financial institutions are permitted to consider affiliate revenue in determining whether a business is small for purposes of this rule, the Bureau anticipates that applications from most of these kinds of businesses ultimately will not be

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[512] *See id.*, which states that a business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.

[513] The SBA defines a business as passive if: (i) it is not engaged in a regular and continuous business operation (the mere receipt of payments such as dividends, rents, lease payments, or royalties is not considered a regular and continuous business operation); or (ii) its employees are not carrying on the majority of day to day operations, and the company does not provide effective control and supervision, on a day to day basis, over persons employed under contract; or (iii) it passes through substantially all of the proceeds of the financing to another entity. 13 CFR 107.720(b)(1).

reportable since many such businesses will not be "small" businesses under the rule implementing section 1071. (See the section-by-section analysis of § 1002.106(b) for additional related discussion.)

The Bureau does not agree that trusts must be excluded, as suggested by one commenter, on the grounds that covering applications from trusts could raise difficult issues regarding who should be considered the principal owner for data collection purposes. Treatment under the final rule differs, for certain data points, based on whether the applicant's owner is a trust or whether the applicant itself is a trust. When a financial institution seeks to extend credit to a small business applicant whose ownership interests or assets are owned by a trust, the trust or trustee often needs to be the applicant for the credit. In such situations, because only individuals who are direct owners are considered principal owners under final § 1002.102(o), entities such as trusts would not be principal owners and thus the financial institution would not need to collect or report principal owners' ethnicity, race, and sex or the number of principal owners. And as outlined in new comment 102(o)-2, if the applicant for a covered credit transaction is a trust, a trustee is considered the principal owner of the trust for reporting purposes. The Bureau also notes that only a trust organized for profit would meet the definition of a "business concern" and fall within the scope of the rule. The Bureau believes that these clarifications sufficiently address the commenter's concerns and that covering different types of business structures in its final rule is important for advancing both of section 1071's statutory purposes. Thus, the Bureau is not defining business in a way that would exclude trusts from the final rule.

In response to comments asking the Bureau to confirm that public agencies and government institutions are excluded from the coverage of the final rule, the Bureau notes that an express exclusion for extensions of credit made to governments or governmental subdivisions, agencies, or instrumentalities is not necessary because such governmental entities do not constitute businesses under the final rule. Specifically, government entities are not "organized for profit" and are thus not a "business concern" under final § 1002.106(a).

With respect to the suggestion that the Bureau develop a test to identify independent contractors (and presumably exclude them), the Bureau notes that it is not requiring financial institutions to collect or report an applicant's business structure. Independent contractor arrangements can take many forms; the Bureau does not believe it would be appropriate to exclude from coverage under section 1071, for example, a business that acts as an independent contractor to another business, simply by virtue of that arrangement. Finally, the Bureau notes that the SBA has routinely treated independent contractors as business concerns[514] and based on both of section 1071's statutory purposes, the Bureau is not convinced that it should define business in a way that would deviate from the SBA's approach and exclude independent contractors from the final rule.

In response to a commenter's request for clarification on whether a "small business" can be taxed under the owner's Social Security number (as opposed to an employer identification number) or whether people that have a "hobby" business or farm that report income under Schedule C or F within their tax returns are considered a small business, the Bureau notes that generally, tax documentation is not dispositive for the SBA's definition of a small business concern. In many instances (for example, with startup businesses), the business may not have any tax returns available or the business may be a sole proprietorship that is taxed under its owner's Social Security number. As long as the business is a "small business concern" in 15 U.S.C. 632(a) (as implemented in 13 CFR 121.101 through 121.107) and its gross annual revenue for its preceding fiscal year is $5 million or less, it is a small business under this final rule.

For reasons discussed in the section-by-section analysis of § 1002.104(a), the Bureau is not adopting a categorical exclusion for farms from the definition of "small business." Credit

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[514] For example, in an interim final rule implementing changes related to loans made under the Paycheck Protection Program, the SBA stated "SBA has determined that changing the calculation for sole proprietors, *independent contractors*, and self-employed individuals will reduce barriers to accessing the [Paycheck Protection Program] and expand funding *among the smallest businesses*." 86 FR 13149, 13150 (Mar. 8, 2021) (emphasis added).

used for agricultural purposes is generally covered by the broad definition of "credit" under ECOA. ECOA's definition of credit is not limited to a particular use or purpose and Regulation B expressly covers agricultural-purpose credit; ECOA does not provide an exception for agricultural credit; and it assigns enforcement authority to regulators of agricultural lending such as the Secretary of Agriculture and the Farm Credit Administration.[515] Moreover, agricultural businesses are encompassed in section 1071's statutory definition of small business.[516] With respect to the concerns that the Bureau's proposed originations-based threshold would likely lead to many small lenders reducing their agricultural lending below the exemption threshold, the Bureau notes that it is increasing the exemption threshold as discussed in the section-by-section analysis of § 1002.105(b) above. Moreover, the Bureau believes that covering agricultural businesses in its rule is important for advancing both of section 1071's statutory purposes, particularly given historical and/or continuing discrimination against Black farmers and the need for transparency into agricultural lending both for fair lending enforcement and business and community development. The Bureau is thus not defining small business in a way that would exclude such businesses from the final rule.

106(b) Small Business Definition

106(b)(1) Small Business

Background

Section 1071 data collection purposes, requirements, and potential impacts. A key component of the Bureau's fair lending work under the Dodd-Frank Act is to ensure fair, equitable, and nondiscriminatory access to credit for both individuals and their communities.[517] Section 1071 of the Dodd-Frank Act, which amended ECOA, requires financial institutions to

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[515] *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[516] ECOA section 704B(h)(2) (defining a small business as having the same meaning as the term "small business concern" in section 3 of the Small Business Act (15 U.S.C. 632)). Section 704B(h)(2) defines small business by reference to the Small Business Act definition of a small business concern, which includes independently owned and operated "enterprises that are engaged in the business of production of food and fiber, ranching and raising of livestock, aquaculture, and all other farming and agricultural related industries." 15 U.S.C. 632(a)(1).

[517] *See* 12 U.S.C. 5493(c)(2)(A).

collect and report to the Bureau data regarding applications for credit for women-owned, minority-owned, and small businesses. ECOA section 704B(h)(2) states that "[t]he term 'small business' has the same meaning as the term 'small business concern' in section 3 of the Small Business Act (15 U.S.C. 632)." Section 1071 was adopted for the dual statutory purposes of facilitating fair lending enforcement and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[518]

As set forth in section 1071, the data that financial institutions are required to collect and report to the Bureau include, among other things, the gross annual revenue of the business in its preceding fiscal year, the type and purpose of the loan, the census tract for the applicant's principal place of business, and the ethnicity, race, and sex of the principal owners of the business.[519] ECOA section 704B(f)(2)(C) further provides that information compiled and maintained under the statute shall be "annually made available to the public generally by the Bureau, in such form and in such manner as is determined by the Bureau, by regulation." The Bureau believes that the collection and subsequent publication of robust and granular data pursuant to section 1071 regarding credit applications for small businesses will provide much-needed transparency to an otherwise opaque market and help ensure fair, equitable, and nondiscriminatory access to credit.

The Bureau understands that access to fair, equitable, and nondiscriminatory credit is crucial to the success of small businesses. Small businesses—including women-owned and minority-owned small businesses—need access to credit to smooth out business cash flows and to enable entrepreneurial investments that take advantage of, and sustain, opportunities for growth. The market these businesses turn to for credit is vast, varied, and complex. Overall, small businesses have many options when it comes to financing, including a wide range of

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[518] ECOA section 704B(a).

[519] ECOA section 704B(e)(2).

products and providers. Yet market-wide data on credit to small businesses remain very limited, particularly with respect to applicants' protected demographic information at the core of section 1071. The Bureau believes that its rulemaking implementing section 1071 of the Dodd-Frank Act will provide critical data for financial institutions, community groups, policy makers, and small businesses.

SBA size standards. The Small Business Act permits the SBA Administrator to prescribe detailed size standards by which a business concern may be categorized as a small business, which may be based on the number of employees, dollar volume of business, net worth, net income, a combination of these, or other appropriate factors.[520]

As implemented by the SBA, these size standards generally hinge on average annual receipts or the average number of employees of the business concern and are customized industry-by-industry across 1,012 6-digit NAICS codes. Specifically, the SBA typically uses two primary measures of business size for size standards purposes: (i) average annual receipts[521] for businesses in services, retail trade, agricultural, and construction industries, and (ii) average number of employees for businesses in all manufacturing, most mining and utilities industries, and some transportation, information and research and development industries.[522] To measure business size, the SBA also uses financial assets for certain financial industries, and for the petroleum refining industry it uses refining capacity and employees. The SBA's size standards are used to establish eligibility for a variety of Federal small business assistance programs, including for Federal government contracting and business development programs designed to assist small businesses in obtaining Federal contracts and for the SBA's loan guarantee

[520] 15 U.S.C. 632(a)(2)(A) and (B).

[521] Effective January 6, 2020, the SBA changed its regulations on the calculation of average annual receipts for all its receipts-based size standards from a three-year averaging period to a five-year averaging period. 84 FR 66561 (Dec. 5, 2019).

[522] The SBA now uses a 24-month average to calculate a business concern's number of employees for eligibility purposes in all its programs. 87 FR 34094 (June 6, 2022).

programs, which provide access to capital for small businesses that are unable to qualify for and receive conventional loans elsewhere.

Under the Small Business Jobs Act of 2010,[523] the SBA is required to review all size standards no less frequently than once every five years.[524] The SBA's lowest size standards based on average annual receipts are currently used for agricultural industries. At the time of the Bureau's NPRM, the SBA used a $1 million average annual receipts standard for 46 out of 64 agricultural industries.[525]

The SBA has since maintained or increased its size standards across all industries. Following the SBA's implementation of revised size standards in May and June 2022[526] and its inflation adjustment of monetary-based industry size standards in November 2022[527], a $1 million standard is no longer used for any industry. The size standards for agricultural industries now range from $2.25 million to $34 million, and the size standards for non-agricultural industries now range from $8 million to $47 million. In April 2022, the SBA also proposed increasing 150 size standards for businesses in manufacturing and other sectors (excluding wholesale trade and retail trade) that are based on the number of employees.[528] The SBA also increased size standards for 57 industries in the wholesale trade and retail trade sectors.[529]

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[523] Pub. L. 111-240, 124 Stat. 2504 (2010).

[524] 15 U.S.C. 632 note.

[525] *See* Small Bus. Admin., *Table of size standards* (effective Oct 1, 2022), https://www.sba.gov/document/support-table-size-standards.

[526] Through a series of rules that became effective on May 2, 2022, the SBA implemented revised size standards for 229 industries (all using average annual receipts standards) to increase eligibility for its Federal contracting and loan programs. *See* 87 FR 18607 (Mar. 31, 2022); 87 FR 18627 (Mar. 31, 2022); 87 FR 18646 (Mar. 31, 2022); 87 FR 18665 (Mar. 31, 2022). The SBA did not reduce any size standards—it either maintained or increased the size standards for all 229 industries, in many cases with size standard increases of 50 percent or more. Effective July 14, 2022, the SBA also increased size standards for 22 wholesale trade industries and 35 retail trade industries. 87 FR 35869 (June 14, 2022).

[527] 87 FR 69118 (Nov. 17, 2022) (adjusting monetary-based industry size standards (*i.e.*, receipts- and assets-based) for inflation that occurred since 2014 by adding an additional 13.65 percent inflation increase to these size standards).

[528] 87 FR 24752 (Apr. 26, 2022) (establishing 250 employees and 1,500 employees, respectively, as the minimum and maximum size standard levels for Manufacturing and other industries (excluding Wholesale and Retail Trade), up from the current minimum of 100 employees and the current maximum of 1,500 employees in the SBA's existing size standards).

[529] 87 FR 35869 (June 14, 2022).

The Small Business Act further provides that no Federal agency may prescribe a size standard for categorizing a business concern as a small business concern absent approval by the SBA Administrator.[530] The SBA's rule governing its consideration of other agencies' requests for approval of alternate size standards requires that the agency seeking to adopt an alternate size standard consult in writing with the SBA's Division Chief for the Office of Size Standards in advance of issuing an NPRM containing the proposed alternate size standard.[531] The Bureau met this requirement and also provided a copy of the published NPRM to the Division Chief for the Office of Size Standards. The Bureau subsequently obtained approval from the SBA Administrator for its alternate small business size standard contained in this final rule.

Market considerations. A wide variety of financial institutions, with varying levels of sophistication and experience, extend credit to small businesses. This rulemaking applies to a broad range of financial institutions. Banks and credit unions that serve a breadth of customers typically organize their commercial lending operations into segments based on a combination of risk, underwriting, product offering, and customer management factors that are appropriate to each segment. The three most frequent organizational groupings are retail/small business, middle market, and large corporate banking. Commercial customers are generally assigned to an organizational grouping based on their revenue potential and aggregate credit exposure, with smaller accounts assigned to the retail/small business banking area. The overwhelming preponderance of small businesses are found in the retail/small business banking group, which may also conduct consumer banking.

Today, the distinguishing characteristic that many larger financial institutions (principally banks with $10 billion or more in assets) use to assign small businesses into the retail/small

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[530] 15 U.S.C. 632(a)(2)(C); *see also* 13 CFR 121.903(a)(5).

[531] 15 U.S.C. 632(a)(2).

business banking group is gross annual revenue.[532] While cut-offs vary by financial institution, the Bureau understands that a common demarcation for small/retail customers are those with less than $5 million, or sometimes up to $10 million, in gross annual revenue. The maximum amount of a retail/small business banking term loan or credit line is typically $5 million or less.

Financial institutions that do not conduct SBA lending generally do not collect or consider the number of employees of a small business applying for credit, but they often capture gross annual revenue information, including for regulatory compliance purposes. Specifically, retail/small business lenders routinely collect applicants' gross annual revenue information because notification requirements under existing Regulation B vary for business credit applicants depending on whether they "had gross revenues of $1 million or less in [their] preceding fiscal year."[533] For a business applicant with gross annual revenues of $1 million or less, a creditor must provide a notification following an adverse action, such as a credit denial, that is generally similar to that provided to a consumer in both substance and timing.[534] As a result, small business lenders often adopt compliance management systems similar to those found among consumer lenders.

The Bureau believes it is important for a financial institution to be able to quickly determine at the beginning of the application process whether an applicant is a "small business" for purposes of this final rule. Financial institutions generally cannot inquire about an applicant's protected demographic information (including the ethnicity, race, and sex of an applicant's principal owners) without being legally required to do so.[535] As discussed in the *Overview* of this part V, this final rule will only require (and thus only permit) such inquiries for small business

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[532] *See* Fed. Deposit Ins. Corp., *Small Business Lending Survey*, at 11 (2018), https://www.fdic.gov/bank/historical/sbls/full-survey.pdf (FDIC Small Business Lending Survey) (finding that a substantial majority of large banks use gross annual revenue (61.8 percent) as a limit to define small businesses).

[533] 12 CFR 1002.9(a)(3)(i).

[534] *Id.* The notification requirements for applicants with gross annual revenues in excess of $1 million are generally more flexible in substance and also do not impose a firm deadline for provision of a Regulation B notification. 12 CFR 1002.9(a)(3)(ii).

[535] *See* 12 CFR 1002.5(a).

applicants.[536] While the Bureau is allowing financial institutions flexibility in when they seek this protected demographic information, the Bureau believes that financial institutions generally have the best chance of obtaining it and supporting the purposes of section 1071, if they ask for it in the earlier stages of the application process. As a result, a financial institution may need to know, even before the application is initiated, which application path the applicant must follow—a 1071-governed or a non-1071-governed application path.

Early feedback. From very early on in its discussions with stakeholders regarding section 1071, the Bureau has received feedback focused primarily on how the Bureau might define a business size standard. For example, in response to the Bureau's 2017 request for information, many stakeholders expressed concern about the difficulties in determining the appropriate NAICS code for businesses and in applying the NAICS-based standards in determining whether a business loan applicant is a small business. Commenters who addressed the issue of a small business definition were universally in favor of the Bureau adopting something less complex than the SBA's size standards based on 6-digit NAICS codes. Commenters noted that the use of these standards is relatively complex and would introduce burdens for this rule with limited benefit.

Likewise, during the SBREFA process, small entity representatives generally preferred a simple small business definition and expressed concern regarding the complexity of the SBA's NAICS-based size standards. Some small entity representatives supported an approach for defining a small business that would use an applicant's gross annual revenue for determining whether it was "small" (thresholds under consideration at SBREFA were $1 million and $5 million). For most small entity representatives, nearly all their small business customers had less than $5 million in gross annual revenue; most were under $1 million. Several small entity representatives remarked that a $1 million gross annual revenue threshold would be too low,

[536] Such inquiries are also permitted for co-applicants of small businesses pursuant to final § 1002.5(a)(4)(x).

noting that it would exclude many businesses defined by SBA regulations as "small"; some of these small entity representatives said that a $5 million gross annual revenue threshold would be acceptable. Some small entity representatives advocated for higher revenue thresholds, such as $8 million or $10 million. Some small entity representatives supported a more complex approach that would distinguish between applicants in manufacturing and wholesale industries (500 employees) and all other industries ($8 million in gross annual revenue). One small entity representative also supported another approach, which was closest to the SBA's existing size standards, stating that it reflects the SBA's substantially different definitions of a small business across different industries. Feedback from stakeholders other than small entity representatives also reflected broad support for the Bureau pursuing a simplified version of the SBA small business definition.

Proposed Rule

Proposed § 1002.106(b) would have defined a small business as having 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. Proposed § 1002.106(b) would have further stated that, notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of proposed subpart B, a business is a small business if its gross annual revenue, as defined in proposed § 1002.107(a)(14), for its preceding fiscal year is $5 million or less. The Bureau's proposal noted it was seeking SBA approval for this alternate small business size standard pursuant to the Small Business Act.[537]

Proposed comments 106(b)-1 and 106(b)-2 would have clarified the obligations of covered financial institutions when new information changed the determination of whether an applicant is a small business, giving rise to requirements under proposed subpart B and/or prohibitions under existing Regulation B. The Bureau acknowledged that a financial institution's

[537] 15 U.S.C. 632(a)(2)(C).

understanding of an applicant's gross annual revenue may change as the application proceeds through underwriting.

Proposed comment 106(b)-3 would have explained that a financial institution may rely on an applicant's representations regarding gross annual revenue (which may or may not include an affiliate's revenue) for purposes of determining small business status under proposed § 1002.106(b).

The Bureau sought comment on this proposed definition of a small business, including the $5 million gross annual revenue size standard, as well as whether additional clarification is needed for any aspect of this proposed definition. The Bureau also sought comment on whether another variation of the proposed size standard would better serve the purposes of section 1071, such as a lower revenue size standard or a higher one, potentially at the $8 million or $10 million level. The Bureau also sought comment on whether, in addition to the above-described gross annual revenue-based size standard, a small business definition that also included any business that was furnished a loan pursuant to an SBA program (regardless of the applicant's gross annual revenue) would further the purposes of section 1071.

Similarly, the Bureau sought comment on whether a threshold based on $8 million gross annual revenue or 500 employees (depending on the type of business) would align more closely with section 1071's purposes. Likewise, the Bureau sought comment on whether a variation of the proposed size standard, such as using an applicant's average gross annual revenue averaged over two or five years, would better serve the purposes of section 1071. In addition, the Bureau sought comment on defining a small business consistent with the entirety of existing SBA regulations, including any advantages or disadvantages that using such a definition might pose specifically in the context of this rulemaking. Specifically, the Bureau sought comment on how the proposed size standard would fit in with a financial institution's current lending or organization practices. The Bureau sought comment on whether the proposed size standard would introduce additional difficulties or challenges for SBA lenders.

Comments Received

The Bureau received many comments supporting the use of a simple gross annual revenue threshold from a range of lenders and trade associations, along with a community group, a technology service provider, a business advocacy group, several members of Congress, and others. Many commenters said that a gross annual revenue threshold was simple, objective, relatively easy to apply at the time of application, and/or will make compliance easier. One bank more generally emphasized the need for a simplified definition of small business that is easily determinable at the time of application. Another commenter noted that determining the appropriate NAICS codes and the number of employees is not easy early on in the application process. A bank stated that revenue thresholds provide a consistent and transparent line of delineation. Some commenters asserted that a gross annual revenue threshold was preferable to the SBA's more complex size standards that change over time. One commenter asserted that a gross annual revenue threshold was the only feasible way to implement section 1071 and that trying to apply SBA size standards 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. One agricultural lender argued that having to determine whether a business is small for the purposes of the rule could delay communicating a credit decision in violation of ECOA and the Farm Credit Act, while another commenter hypothesized that financial institutions may decline loan requests due to inadequate financial documentation for a small business determination. Another commenter expressed general support for a broad definition of small business.

Despite the broad support for a gross annual revenue threshold, commenters disagreed on where to set the threshold. Some commenters supported the proposed threshold of $5 million or less in gross annual revenue. A trade association stated that the proposed approach was sufficiently broad and could encompass as great a portion of the population of minority- and women-owned businesses as practical. One agricultural lender asked for additional context and

insight for the $5 million threshold and an explanation regarding how a number larger than $1 million, which the Bureau had previously considered during the SBREFA process, meets the intent of Congress under section 1071. A bank advocated for a $250,000 gross annual revenue threshold, asserting that most businesses that surpass this threshold have access to or already utilize an attorney or accountant, either one of which should be able to adequately advise on the presence of any discriminatory terms.

The Bureau received some comments expressing general disapproval of its proposed approach to the gross annual revenue threshold. A few banks argued that a $5 million threshold is too high, with one adding that this was particularly true in community bank areas and another suggesting that the Bureau did not adequately support its proposal with statistics. A few industry commenters asserted that an expansive small business definition would burden their organizations with significant costs and that the Bureau should instead reduce the number of businesses that are reportable under the regulation. A women's business advocacy group suggested the Bureau have "multiple levels" in its small business definition. Several commenters noted a preference for a gross annual revenue threshold lower than $5 million, without specifying an amount. A credit union suggested the Bureau ensure that both annual revenue and asset size[538] be taken into consideration.

Most commenters that suggested an alternative small business definition expressed preference for a $1 million gross annual revenue threshold. Some industry commenters asserted that a $1 million threshold would be less burdensome, less costly, and/or would simplify compliance as compared to the proposed $5 million threshold. One said that anything other than a $1 million threshold may be too complex for applicants and/or financial institutions, which could lead to less than expected levels of data integrity and misalignment with the 1071 statutory purposes. Several industry commenters and a business advocacy group argued that a gross

[538] It is unclear whether the commenter was referring to the asset size of the small business or asset size of the financial institution.

annual revenue threshold of $1 million or less is more in line with congressional intent and purpose. A bank asserted that it would be more feasible to implement a firewall between underwriter and customer because a $1 million threshold would avoid a complete change in how the bank underwrites and processes small business loan applications.

Some commenters said that a $1 million threshold would better align with existing Regulation B adverse action notification requirements, with one adding that misalignment leads to compliance costs. A bank suggested the Bureau amend the existing Regulation B requirements on adverse actions to ensure consistency with this rule and avoid confusion with loan officers and loan processers.

Many more commenters advocated for alignment with CRA regulations that use $1 million or less in annual revenue to define a small business, with some arguing that misalignment with the CRA would lead to increased compliance costs. Some industry commenters stressed the need for consistency between reporting regimes, asserting that the proposed threshold did not align with other regulatory requirements such as CRA. One commenter suggested that inconsistency with CRA would add another nuance to data validation. A State bankers association suggested that a $1 million threshold would also better align with Small Business Development Center and Small Business Investment Company program guidelines. A credit union trade association suggested that a $1 million gross annual revenue threshold would be consistent with the SBA's definitions for some types of small businesses, including most agricultural small businesses.

Some commenters said that a $1 million threshold would cover most (over 95 percent) of small businesses as defined by the SBA size standards in effect at the time of the NPRM. Similarly, many commenters argued that the proposed $5 million threshold would be overinclusive and a $1 million threshold would better exclude non-small businesses. One bank said this overinclusiveness would be particularly notable in middle/rural America, while another argued that the proposed definition would create inequity and inflated costs for banks serving

small-to-midsize markets by picking up a disproportionate number of businesses as small businesses under the rule.

Two credit union trade associations argued that the proposed $5 million threshold would increase the size of the 1071 data collection, the risk to data privacy, and the costs associated with compliance for covered financial institutions. Two other commenters suggested that a $1 million threshold would accomplish the goals of section 1071 without unnecessary drawbacks.

In contrast, some commenters requested a more expansive size standard for defining small businesses under the rule. A number of community groups expressed a preference for a $7.5 million threshold, citing language from the SBA's website[539] indicating that most non-manufacturing businesses with average annual receipts under $7.5 million will qualify as a small business. A few other commenters expressed a preference for a $8 million threshold. A CDFI lender maintained that a $8 million threshold was the most common SBA size standard threshold for average annual receipts, would cover more manufacturing and wholesale businesses, and received broad support from small entity representatives (though they recommended eliminating the 500 employees standard for manufacturing and wholesale that was part of that option under consideration at SBREFA). Another commenter opined that a threshold of $8 million (adjusted every five years according to the SBA's recalibrations) would better cover the small business market, account for differences in business types (such as manufacturing) and regional economic conditions, and would more closely align with what lenders already consider small businesses. Finally, a joint letter from community groups, community oriented lenders, and business advocacy groups asserted that a threshold lower than $8 million would lead to significantly less data against which to compare lending patterns and to identify lending trends and gaps.

Existing SBA size standards. Several commenters recommended the Bureau use the SBA's definition and size standards. One credit union trade association asserted that the SBA

[539] Small Bus. Admin., *Basic requirements*, https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements (last visited Mar. 20, 2023).

definition is already used by credit unions and all financial services providers as the industry standard and thus using an alternative definition would only create confusion and inconsistent Federal regulations, thereby harming credit unions' ability to serve their members. A bank argued that having different definitions and requirements across similar regulatory obligations would result in more burden and costs due to the unique review and maintenance of each obligation.

Loan size. Some industry commenters suggested defining a small business by the credit amount requested. Several said that small businesses should be defined by loans of $1 million or less. A bank asserted that this would be a much more reasonable definition of what a small business is and will encompass the majority of its commercial lending to small businesses. A few commenters argued that this would better align with CRA and call report requirements. Another commenter noted that loan size does not fluctuate over time like revenue and it is easy to identify at the beginning of the application process. Some credit union commenters suggested requiring reporting for small business loans up to $10 million. A few other industry commenters suggested adopting a maximum amount applied for "exclusion" of $750,000 in order to exempt applications from non-small businesses. These commenters asserted that such an exclusion would harmonize this rule with the SBA's maximum direct loan amount. A few commenters expressed disapproval of a $1 million loan size threshold, noting many small businesses borrow amounts far more than $1 million while many large businesses borrow amounts far below that threshold.

Small farm definition. The Bureau received comments from many agricultural lenders suggesting that the $5 million gross annual revenue threshold would be overinclusive when applied to farms and that agricultural lending needs a different small business definition for purposes of section 1071 in order to capture only truly small farms. One commenter asserted that under the Small Business Act's implementing regulations, the Bureau must take into account differing industry characteristics. Specifically, many agricultural lenders suggested that the

Bureau's definition of "small business" align with the Farm Credit Administration's (FCA) definition of "small farmer," which is a "farmer, rancher, or producer or harvester of aquatic products who normally generates less than $250,000 in annual gross sales of agricultural or aquatic products."[540] A few also urged the Bureau not to ignore the USDA small farm definitions.[541] One commenter noted that even a $1 million threshold would be too high because 96 percent of farms had less than $1 million in annual sales of agricultural products. Several commenters suggested that the FCA definition would facilitate compliance because staff and compliance professionals at Farm Credit lenders are already very familiar with that standard and because it would be confusing and burdensome for staff to manage two competing regulatory definitions of "small" customers.

Several commenters noted that approximately half of Farm Credit System loans outstanding were to "small farmers" and that this level of coverage would more than accomplish section 1071's statutory purposes. One agricultural lender noted that over 76 percent of its loan volume portfolio would fall within the proposed $5 million "small business" definition (approximately 3,770 loans) but 10.7 percent of the loan volume portfolio falls under the FCA definition (approximately 2,730 loans).

Other suggested size standards. A trade association representing online lenders recommended the Bureau adopt an easy-to-administer definition based on 4-digit NAICS codes. This commenter argued that while a singular revenue or number of employees standard to designate small businesses might be simpler for the Bureau, it would not be a true reflection of

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[540] Farm Credit Admin., *Bookletter 040—Revised: Providing Sound and Constructive Credit to Young, Beginning, and Small Farmers, Ranchers, and Producers or Harvesters of Aquatic Products*, at 2 (Aug. 10, 2007), https://ww3.fca.gov/readingrm/Handbook/FCA%20Bookletters/BL-040%20REVISED.docx.

[541] The USDA Economic Research Service (USDA-ERS) measures farm size by annual gross cash farm income—a measure of the farm's revenue (before deducting expenses) that includes sales of crops and livestock, payments made under agricultural Federal programs, and other farm-related cash income including fees from production contracts. Econ. Rsch. Serv., U.S. Dep't of Agric., *Farm Structure and Contracting* (last updated Mar. 8, 2022), https://www.ers.usda.gov/topics/farm-economy/farm-structure-and-organization/farm-structure-and-contracting/. Within this classification system, small family farms have gross cash farm income less than $350,000, with subcategories of low-sales farms (gross cash farm income less than $150,000) and moderate-sales farms (gross cash farm income between $150,000 and $349,999). *Id.*

the small business market. The commenter asserted that employing the first 4 digits of the NAICS codes would provide measurements that differentiates broadly by industry, but provides a standard that gives lenders flexibility, allowing them to use data supplied by the borrower without having to undertake a costly and time-consuming verification process of the data provided.

Many community groups, community-oriented lenders, and a minority business advocacy group urged the Bureau to adopt the 500 employee/$8 million test set forth in the SBREFA Outline. A few of these commenters said this was an easily implemented definition that covered the bulk of small businesses as defined by the SBA without the complexities of the SBA's NAICS-code based definitions, whereas the Bureau's proposal would exclude 270,000 businesses that the SBA classifies as small businesses, with many such businesses disproportionately located within retail trade and construction industries, where small businesses are more likely to be owned by people of color.

One comment letter suggested defining a small business as having a gross annual revenue of $1 million and including a threshold for the number of employees required for a business to be deemed small. They referenced the SBA's size standards, which use a 100-employee threshold for some industries, but suggested the Bureau use a similar definition or alter its small business definition to include more minority- and women-owned small businesses.

Other issues. A few comments addressed the role of affiliate revenue in business size determinations. A bank suggested aligning treatment of affiliate revenue with current CRA requirements[542] to avoid reporting disparities from institution to institution for similarly situated applicants. Pointing to SBA rules and guidance, two other industry commenters asserted that

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[542] The CRA requires an institution to rely on the revenues that it considered in making its credit decision when indicating whether a small-business or small-farm borrower had gross annual revenues of $1 million or less—in the case of affiliated businesses, the institution would aggregate the revenues of the business and the affiliate to determine whether the revenues are $1 million or less only if the institution considered the revenues of the entity's parent or a subsidiary corporation of the parent as well as that of the business. *See* Fed. Fin. Insts. Examination Council, *A Guide to CRA Data Collection and Reporting*, at 13 (Jan. 2001), https://www.ffiec.gov/cra/pdf/cra_guide.pdf.

subsidiaries of large companies should be excluded from the definition of "small business" if the aggregate revenues for all affiliates, as defined in 13 CFR 121.103, exceed the gross annual revenue threshold.

Two commenters asked for clarification related to business size determinations involving multiple applicants. One suggested the Bureau clarify that loans jointly made to multiple borrowers are not reportable where one or more of the borrowers may qualify as a small business under the rule but is not the primary business seeking the funding. Another commenter suggested the Bureau (i) allow lenders to treat all co-borrowers as one applicant such that the gross annual revenue of all co-borrowers would be aggregated for purposes of assessing whether the loan is a small business loan and (ii) clarify how to identify loans to a "minority-owned business" or a "women-owned business" when one, but not all, co-borrowers meet the definitions of these terms.

A group of insurance premium finance trade associations noted that their members do not obtain any financial information or information about for-profit status regarding any applicant and suggested the Bureau permit their members to ask the insured business if it is a small business (after furnishing the regulation's operative definition) when the signed premium finance agreement is submitted to the lender or immediately after the lender receives the signed premium finance agreement.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.106(b)(1) (proposed as § 1002.106(b)) to define a small business as having 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. As discussed above, the Bureau believes that adopting existing statutory and regulatory small business definitions, which are widely understood and already the subject of notice and comment, is consistent with the purposes of section 1071 and will facilitate compliance. Final § 1002.106(b)(1) further states that, notwithstanding the size standards set forth in 13 CFR

121.201, for purposes of subpart B, a business is a small business if its gross annual revenue, as defined in final § 1002.107(a)(14), for its preceding fiscal year is $5 million or less. The Bureau believes this definition implements the statutory language of section 1071 while reflecting a need for financial institutions to apply a simple, broad definition of a small business across industries. The Bureau has obtained SBA approval for this alternate small business size standard pursuant to the Small Business Act.[543]

The Bureau believes that adopting this gross annual revenue standard is consistent with the purposes of section 1071 and addresses the concerns that the Bureau has heard with respect to determining whether applicants are small businesses for purposes of complying with section 1071, particularly regarding determining the applicant's NAICS code, and the implications thereof. Due to concerns expressed by other stakeholders, which are described above, and upon its own further consideration as discussed in this section-by-section analysis under *Alternatives Considered* below, the Bureau is not adopting suggested alternative standards, including, but not limited to a $1 million gross annual revenue standard, a $7.5 or $8 million gross annual revenue standard, a threshold based on loan size, a different standard for agricultural lending, nor the existing SBA size standards.

The Bureau agrees with the many commenters who said that a definition of small business for purposes of section 1071 based on a gross annual revenue threshold was simple, objective, relatively easy to apply at the time of application, and/or will make compliance easier. The Bureau understands that a majority of large banks already use gross annual revenue thresholds to delineate small business lending within their own institutions.[544] The Bureau also agrees that a gross annual revenue threshold is the preferred way to implement section 1071 to avoid overly complicating the data collection process, leading to the introduction of errors that would undermine data accuracy, or interfering with financial institutions' ability to extend credit

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[543] 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

[544] *See* FDIC Small Business Lending Survey at 11.

to business applicants in a prompt and efficient manner. The Bureau believes that a simplified definition of small business that does not require determining the appropriate NAICS codes and/or the number of employees will satisfy lenders' needs to easily determine small business status early in the application process and avoid delays in communicating a credit decision.

While the Bureau received broad support for a simple gross annual revenue threshold generally, it received narrower support for a threshold of $5 million or less in gross annual revenue. The Bureau believes that a $5 million threshold strikes the right balance in terms of broadly covering the small business financing market to fulfill section 1071's statutory purposes while meeting the SBA's criteria for an alternative size standard.[545] As described above, the SBA is generally increasing size standards across industries and no longer uses a $1 million annual receipts standard for any industry. As a result, the Bureau's $5 million standard is sufficiently inclusive relative to the SBA size standards. Moreover, while there is no clear consensus on a simplified size standard that uniformly covers all small business financing markets,[546] the Bureau understands that among the banks that already use a gross annual revenue threshold to delineate small business lending, the majority of banks of all sizes use a threshold above $1 million in firm gross annual revenue.[547] In fact, larger banks typically use even higher thresholds (for banks with less than $1 billion in assets, 25.1 percent use a threshold greater than $5 million in firm gross annual revenue, while 37.0 percent of banks with $1 billion to $10 billion in assets use a gross annual revenue threshold of $5 million or more).[548]

The Bureau has considered the potential effect of applying a $5 million gross annual revenue threshold to both non-agricultural and agricultural industries and compared that standard to coverage under the SBA's existing size standards. Among non-agricultural industries, the

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[545] *See* 15 U.S.C. 632(a)(2)(C); 13 CFR 121.903.

[546] *See, e.g.*, FDIC Staff Report at 10 (discussing various gross annual revenue thresholds ranging from $1 million to $10 million and resolving "[g]iven the lack of consensus on the correct definition of a small business, [to] present results using both thresholds wherever possible").

[547] *Id.* at 9.

[548] *Id.*

Bureau estimates[549] that over 1.5 million (27 percent) small businesses would not be covered by an alternative $1 million gross annual revenue threshold and at a $2 million threshold, the rule would have been underinclusive by 12 percent. (This and other size standards suggested by commenters are discussed in detail under *Alternatives Considered* below.) At a $8 million threshold, the percentage of underinclusivity falls to approximately 4 percent, or approximately 235,000 non-agricultural businesses.

Applying an $8 million threshold to agricultural businesses, the Bureau's analysis[550] shows that over 20,000 such businesses that are *not* considered small under the SBA's size standards would have their applications reported to the Bureau.[551] With the finalized $5 million gross annual revenue threshold, relative to current SBA size standards, *all* small farms' applications will be reported to the Bureau, along with applications from 14,000 agricultural businesses that are not considered small under the SBA's size standards. Thus, the Bureau believes that its $5 million gross annual revenue threshold strikes an appropriate balance between covering the applications of most businesses that are considered small under the SBA's size standards, while minimizing the number of businesses above the SBA's size standards whose applications will be reported to the Bureau, and in a way that satisfies the SBA's criteria for approving an alternative size standard under its regulations.

The Bureau also notes that in their proposal to amend their regulations implementing the CRA, the Board, FDIC, and OCC proposed to define the terms "small business" and "small

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[549] The Bureau used the most recent Statistics of U.S. Businesses (SUSB) from Census (from 2017) to estimate the total number of businesses that would be under- or over-included for section 1071, relative to the SBA's size standards and based on various revenue-based size standard alternatives. We use SBA size standards as of May 2022 which reference 2017 NAICS codes; these NAICS codes are consistent with the SUSB data. The 2017 SUSB only contains information on employer businesses.

[550] The Bureau's analysis of agricultural industries used the 2017 Census of Agriculture from the USDA, relative to the SBA's size standards, based on various revenue-based size standard alternatives. The Bureau notes that because the Census of Agriculture does not have the granularity of the SUSB, it made some additional strong assumptions. The Census of Agriculture also does not have the same employer/non-employer distinction as the SUSB and therefore includes information on all farms.

[551] In the Census of Agriculture, there is just a $5+ million category so this number would not change for thresholds above $5 million.

farm" consistent with the Bureau's definitions in its NPRM.[552] Thus, per the CRA proposal, once 1071 data are available, the agencies would transition from the current CRA definitions of small business and small farm loans to definitions that cover loans to small businesses and small farms with gross annual revenues of $5 million or less.[553] Given the many comments that the Bureau received advocating for CRA alignment, the Bureau strongly supports the CRA agencies' efforts and believes that finalizing its proposed small business definition will streamline reporting and minimize compliance risks for financial institutions that are also reporting covered credit transactions under CRA and would simplify data analysis for CRA-reportable transactions. See part II.F.2.i above for further discussion of the CRA and its relationship to this rule.

With respect to a commenter's suggestion that the Bureau increase the existing Regulation B threshold for notification to business credit applicants for consistency with this rule, the Bureau does not believe such a change would be appropriate at this time. Given the fact that these notification requirements have been in place for close to 50 years and financial institutions have invested in compliance infrastructure around these requirements, the Bureau believes that the notification threshold in existing Regulation B should not be amended without additional research and input from stakeholders.

To address ECOA and existing Regulation B's general prohibition against inquiring about protected demographic information in connection with a credit transaction,[554] and to clarify the obligations of covered financial institutions under subpart B, the Bureau is adopting final comments 106(b)(1)-1 and 106(b)(1)-2 to address situations when new information may arise that could change the determination of whether an applicant is a small business. The Bureau acknowledges that a financial institution's understanding of an applicant's gross annual revenue may change as the institution proceeds through underwriting. The Bureau is finalizing comment

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[552] 87 FR 33884, 33890 (June 3, 2022).

[553] *Id.* at 33899.

[554] *See* existing § 1002.5(a)(2); 15 U.S.C. 1691(b)(5).

106(b)(1)-1 (proposed as 106(b)-1) with updated cross-references to other portions of the final rule. Final comment 106(b)(1)-1 explains that if a financial institution initially determines an applicant is a small business as defined in final § 1002.106(b) based on available information and obtains data required by final § 1002.107(a)(18) and (19), but the financial institution later concludes that the applicant is not a small business, the financial institution may process and retain the data without violating ECOA or Regulation B if it meets the requirements of final § 1002.112(c)(4). The Bureau is finalizing comment 106(b)(1)-2 (proposed as 106(b)-2) with certain revisions for additional clarity. Final comment 106(b)(1)-2 explains that if a financial institution initially determines that the applicant is not a small business as defined in final § 1002.106, but then later concludes the applicant is a small business prior to taking final action on the application, the financial institution must report the covered application pursuant to final § 1002.109. In this situation, the financial institution shall endeavor to compile, maintain, and report the data required under final § 1002.107(a) in a manner that is reasonable under the circumstances.

The Bureau is finalizing comment 106(b)(1)-3 (proposed as comment 106(b)-3) to explain that a financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include an affiliate's revenue) for purposes of determining small business status under final § 1002.106(b)(1). The comment further clarifies that, if the applicant provides updated gross annual revenue information or the financial institution verifies such information, the financial institution must use the updated or verified information in determining small business status. The Bureau has changed the heading of this comment and has removed some of the introductory language to this comment for clarity as suggested by several commenters; this change is not intended to alter the meaning of this comment.

The Bureau has considered comments regarding the role of affiliate revenue in business size determinations. The Bureau agrees that subsidiaries of large companies should be excluded

from the definition of "small business" provided that the aggregate revenues for all affiliates, as defined in 13 CFR 121.103, exceed the $5 million gross annual revenue threshold—and, indeed, this is consistent with what the Bureau proposed. The Bureau is not, however, adopting the mandate in the SBA regulations, which provide that the average annual receipts size of a business concern with affiliates *must* be calculated by adding the average annual receipts of the business concern with the average annual receipts of each affiliate.[555] The Bureau understands that the SBA totals the average annual receipts of the applicant and all of its affiliates in determining size because in order to be eligible for certain Federal programs and certain Federal contracts and subcontracts, a firm must be a "small business concern."[556] Because the size standard used for this rule is only to determine whether data collection is required pursuant to section 1071 and has no bearing on eligibility for Federal small business assistance, the Bureau does not believe it is necessary to mandate that financial institutions consider affiliate revenue in determining an applicant's small business status.

The Bureau believes that this approach to use of affiliate revenue in size determinations will address concerns related to treatment of passive businesses and non-operating entities, such as special purpose vehicles. The Bureau understands that passive businesses and non-operating entities are generally affiliated with other businesses (for example as subsidiaries of large corporate entities). The Bureau notes that final § 1002.102(a) adopts the SBA's expansive view of what constitutes affiliation,[557] and it is therefore unlikely that a special purpose entity or other large project financing investment entity would be formed without any affiliation with an established entity—rather, they are likely created as subsidiaries of an existing business or as

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[555] 13 CFR 121.104(d)(1).

[556] Small Bus. Admin., *Small Business Compliance Guide*, at 4 (July 2020), https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf.

[557] 13 CFR 121.103; *see also* Small Bus. Admin., *Small Business Compliance Guide* (July 2020), https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf (affiliation can be based on (1) "control (when one controls or has the power to control the other, or a third party or parties controls or has the power to control both)"; (2) ownership; (3) "stock options, convertible securities, and agreements to merge;" (4) management; (5) identity of interest"; or (6) "franchise and license agreements").

joint ventures between existing businesses.[558] Thus, financial institutions will be able to exclude businesses that are, in fact, middle- or large-sized applicants from data collection and reporting under this final rule by considering these businesses' affiliate revenues, which will likely exceed the $5 million gross annual revenue threshold for purposes of the definition of a small business. For example, if a financial institution receives an application for financing from a special purpose vehicle or shell company established for the purpose of acquiring significant commercial real estate (such as a hospital building), the financial institution could rely on information provided by the applicant regarding its, and its affiliates, gross annual revenue for purposes of determining small business status under § 1002.106(b). As discussed in greater detail below, the Bureau also believes that its approach to affiliate revenue further obviates the need to define a small business by the credit amount requested as suggested by some commenters.

The Bureau has considered the comments regarding business size determinations involving multiple unaffiliated applicants and does not agree with the suggested approach to allow financial institutions to treat all co-applicants as one applicant by aggregating their gross annual revenues for purposes of assessing business size. The Bureau does not believe that (in situations not involving affiliated entities) such an approach would be consistent with the SBA's definitions of business concern and small business concern. The Bureau is addressing commenters' requests for clarification on this issue by adding new comment 106(b)(1)-4, which provides that if a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by final § 1002.102(a), where at least one business is a small business under final § 1002.106(b), the financial institution shall compile, maintain, and report data pursuant to final §§ 1002.107 through 1002.109 regarding the covered application for only a single applicant that is a small business. The comment clarifies that the financial

[558] Similarly, where a substantial portion of its assets and/or liabilities of a special purpose entity is the same as a predecessor entity, the SBA's definition of a business concern specifically dictates that the annual receipts and employees of the predecessor must be taken into account in determining size of the new business concern. 13 CFR 121.105(c).

institution shall not aggregate unaffiliated co-applicants' gross annual revenues for purposes of determining small business status under final § 1002.106(b) and provides a cross reference to final comment 103(a)-9 for additional details.

In response to the group of insurance premium finance trade associations that highlighted their members' challenges with determining small business status, the Bureau notes that insurance premium financing arrangements are excluded under final § 1002.104(b)(4) for the reasons set forth in the corresponding section-by-section analysis.

Alternatives Considered

Gross annual revenue of $1 million. In the NPRM, the Bureau did not propose a $1 million gross annual revenue threshold, expressing concern that such a threshold likely would not satisfy the SBA's requirements for an alternative size standard across industries and would exclude too many businesses designated as small under the SBA's size standards. Nevertheless, as discussed above, many commenters requested the Bureau adopt a $1 million gross annual revenue threshold.

The SBA no longer uses a $1 million annual receipts standard for any industry and the Bureau does not believe that a gross annual revenue threshold of $1 million would be more in line with congressional intent and purpose. Congress did not specify a gross annual revenue threshold for defining a small business under section 1071 but instead pointed to the SBA's definition of small business concern.[559] However, Congress set forth a process to allow the Bureau to prescribe an alternative size standard, if approved by the SBA Administrator.[560] Given the fact that the SBA no longer uses a $1 million standard for any industry[561] and is thus unlikely

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[559] In ECOA section 704B(h)(2), Congress provided that "[t]he term 'small business' has the same meaning as the term 'small business concern' in section 3 of the Small Business Act (15 U.S.C. 632)."

[560] 15 U.S.C. 632(a)(2)(C).

[561] Through a series of rules that became effective on May 2, 2022, the SBA implemented revised size standards for 229 industries (all using average annual receipts standards) to increase eligibility for its Federal contracting and loan programs. *See* 87 FR 18607 (Mar. 31, 2022); 87 FR 18627 (Mar. 31, 2022); 87 FR 18646 (Mar. 31, 2022); 87 FR 18665 (Mar. 31, 2022). The SBA did not reduce any size standards—it either maintained or increased the size standards for all 229 industries, in many cases with size standard increases of 50 percent or more. Effective July 14, 2022, the SBA also increased size standards for 22 wholesale trade industries and 35 retail trade industries.

to approve an alternative size standard at that threshold for all industries, the Bureau believes that its small business definition is a more appropriate alternative size standard.

While it is true that a $1 million threshold would better align with existing Regulation B adverse action notification requirements, the Bureau believes that the flexibilities built into the final rule for small business size determinations will obviate the need for changes to adverse action operations, including compliance with existing Regulation B adverse action notification requirements. The Bureau also notes that the concerns raised by many commenters regarding alignment with CRA regulations would likely be resolved if the CRA proposal, which expressly seeks alignment with the Bureau's alternative small business definition, is finalized. With respect to suggested alignment with Small Business Development Center and Small Business Investment Company program guidelines, the Bureau points to the fact that credit transactions made under programs with lower thresholds are by default small business transactions for the purposes of the final rule and thus not inconsistent.

The Bureau has considered the comments arguing that a $5 million threshold would be overinclusive and a $1 million threshold would better exclude non-small businesses. Based on the Bureau's analysis, neither a $1 million threshold nor $5 million threshold would be overinclusive among non-agricultural industries relative to the SBA's current size standards. On the other hand, the Bureau estimates that, in terms of the number of SBA "small" firms whose applications would not be reported to the Bureau, a $1 million threshold would be 4.5 times more underinclusive than a $5 million threshold. Moreover, research conducted by FDIC staff found that among banks with $1 billion to $10 billion in assets, more than one-third of self-described small business lending would be excluded under the $1 million gross annual revenue definition and that among banks with more than $10 billion in assets, nearly two-thirds would be

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87 FR 35869 (June 14, 2022). Effective December 19, 2022, the SBA added an additional 13.65 percent inflation increase to the monetary small business size standards. 87 FR 69118 (Nov. 17, 2022).

excluded.[562] Based on this study, FDIC staff concluded that "for the typical bank, a [gross annual revenue] threshold of $1 million is overly conservative and would exclude many firms that should properly be considered small businesses." The Bureau agrees with this conclusion, and likewise believes that a $1 million gross annual revenue threshold would not satisfy the SBA's requirements for an alternative size standard across industries and would exclude too many businesses designated as small under the SBA's size standards.

Gross annual revenue of $7.5 to $8 million. The Bureau is not adopting a $7.5 million or $8 million gross annual revenue threshold, as suggested by a number of commenters. While the Bureau agrees that a threshold of $7.5 to 8 million would more expansively cover SBA small businesses (the Bureau estimates that under a $8 million threshold, applications from approximately 130,000 more SBA "small" firms would be reported to the Bureau as compared to a $5 million threshold), the Bureau does not believe that this definition more closely aligns with what lenders already consider small businesses based on comments received in support of a lower than $5 million threshold. Moreover, the Bureau notes that while an $8 million threshold would be less underinclusive among non-agricultural industries relative to SBA size standards, it would be more overinclusive among agricultural businesses.

Loan size. The Bureau does not believe that it would be appropriate to define a small business based on the size of the loan applied for (*i.e.*, by adopting a maximum "amount applied for" exclusion) such as one in the amount of $750,000 (for SBA alignment) or $1 million (for CRA alignment), as suggested by some commenters. The Bureau likewise is not defining a small business based on whether a loan is for an amount up to $10 million, as suggested by some commenters, or any other size.[563] As explained in the NPRM, the Bureau believes that such potential definitions do not bear a sufficient relationship to the size of the business or its

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[562] FDIC Staff Report at 10.

[563] It is possible that these commenters intended to advocate for a $10 million gross annual revenue threshold. For the reasons stated above, the Bureau does not believe a definition of small business using a $10 million gross annual revenue threshold would fulfill section 1071's statutory purposes.

operations. For instance, under a definition similar to existing CRA requirements, application data for businesses with low revenue that may be applying for large loans would be excluded. The Bureau does not believe that adopting such an approach would further the purposes of section 1071. The Bureau likewise agrees with commenters cautioning against using the CRA definition based on loan size, because many small businesses borrow amounts far more than $1 million while many large businesses borrow amounts far below that threshold.[564]

Existing SBA size standards. Despite some recommendations that the Bureau use the SBA's definition and size standards, the Bureau believes the SBA's size standards are not suitable for this data collection initiative and prefers to establish a small business definition specifically tailored to this rulemaking implementing section 1071.

A simple, easy-to-implement small business definition is necessary in light of the general prohibition in existing Regulation B against creditors' inquiring about protected demographic information in connection with a credit transaction unless otherwise required by Regulation B, ECOA, or other State or Federal law, regulation, order, or agreement.[565] ECOA section 704B(e)(2)(G), as implemented by this rule, requires a financial institution to collect and report the ethnicity, race, and sex of the principal owners of the business. Thus, in order to avoid potential liability under ECOA and existing Regulation B, a financial institution must accurately determine that a business credit application is subject to section 1071 *before* inquiring about the applicant's protected demographic information. The Bureau does not believe the SBA's existing size standards allow for the quick and accurate determination of small business status required for this 1071 data collection initiative. Specifically, the Bureau does not believe this determination can be quickly and accurately made if, as required under the SBA's existing size

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[564] *See, e.g.*, FDIC Small Business Lending Survey at 17 (finding that at banks with assets of $1 billion to $10 billion, at least $19.1 billion in gross understatement of small business lending (in which small businesses with less than $1 million in gross annual revenue received loans with amounts greater than $1 million)).

[565] ECOA provides that it is not discrimination for a financial institution to inquire about women-owned or minority-owned business status, or the ethnicity, race, and sex of principal owners pursuant to section 1071. 15 U.S.C. 1691(b)(5).

standards, the financial institution must determine the appropriate 6-digit NAICS code for the business and then apply the NAICS-based size standards to determine whether an applicant for business credit is a small business.

As discussed above, commenters expressed concern to the Bureau about the difficulties in determining the appropriate 6-digit NAICS code for businesses and in applying the SBA's NAICS-based size standards. They generally preferred a simple small business definition and expressed concern that the SBA's approach to defining a small business—which bases classification on an applicant's 6-digit NAICS code—is relatively complex in this context. The Bureau believes that removing a NAICS code-based small business determination as a step in determining small business status will both facilitate compliance and better achieve the purposes of section 1071. The Bureau understands that one reason that commenters expressed a strong desire for a simple approach to determining whether an applicant is small is that this initial determination may drive the application process. To comply with section 1071 requirements, financial institutions may use a different application process, or different or additional application materials, with small business credit applicants than they do with applicants that are not small businesses. Thus, quickly and accurately determining whether an applicant is a small business at the outset of the application process may be a crucial step, one that financial institutions would benefit from being able to seamlessly accomplish. Considering the requirements and prohibitions in ECOA with respect to protected demographic information, the Bureau understands the import that financial institutions have placed on both the speed and accuracy of this determination.

Notwithstanding its decision to not rely on NAICS codes in its small business definition, the Bureau believes that NAICS codes possess considerable value for section 1071's fair lending purpose as well as its business and community development purpose. As discussed in the section-by-section analysis of § 1002.107(a)(15) below, the Bureau is therefore requiring financial institutions to collect and report 3-digit NAICS sector codes for applications subject to

this final rule. However, the Bureau believes that gathering NAICS code information at some point during the application process, while still the subject of some concern for financial institutions, differs in kind from requiring NAICS information as a necessary step to beginning an application (and correctly determining which type of application to initiate). In addition, the NAICS information now required by the final rule is a 3-digit NAICS code instead of a 6-digit code as proposed; this information will provide valuable data to analyze fair lending patterns and identify business subsectors with unmet credit needs, while limiting the burden this collection may impose on financial institutions and small business applicants.

The Bureau also believes that its simplified alternative size standard will provide reporting results that are largely consistent with what would be reported by adopting the full SBA size standards. The Bureau used data from the U.S. Census's 2012 Statistics of U.S. Businesses (SUSB) and the U.S. Department of Agriculture's 2012 Census of Agriculture to analyze how various alternative approaches would change the number of businesses considered "small" under this rule relative to the SBA definition.[566] Among the 7.2 million small employer businesses and farms, the Bureau estimates that 365,000 businesses that would be small under the SBA's existing size standards will not be covered by the Bureau's $5 million gross revenue standard. The Bureau further estimates that the Bureau's rule will cover some 14,000 agricultural businesses that would not be small under the SBA's existing size standards. The Bureau believes that such variation with respect to the SBA's current size standards is an appropriate trade-off for the reasons described herein.

The Bureau notes, however, that some industries will have greater divergence between which businesses are small under the Bureau's $5 million gross annual revenue alternative size standard and which businesses are small under the SBA's existing size standards. That is,

[566] The 2012 SUSB is the most recent Census product to have categories of revenue and employees granular enough to conduct this analysis. The Bureau constructed the 2012 equivalents of the second and third alternatives due to the vintage of the SUSB data available and used the SBA's 2012 size standards for the analysis. The 2012 SUSB only covers employer firms or businesses with at least one employee.

applications for businesses that are small under the SBA's existing size standards will be reported to the Bureau less from some industries than others. In general, there will be a larger proportion of businesses whose applications will not be reported in industries with a higher revenue-based size standard. The industries most affected by this are the retail trade and construction industries. Other industries disproportionately affected may include manufacturing, wholesale trade, health care and social assistance, and professional, scientific, and technical services. The Bureau received limited public feedback with respect to such concerns.

The Bureau also believes that a simplified size standard will be important for financial institutions that may not frequently engage in small business lending in determining whether they are covered under this final rule. As discussed in the section-by-section analysis of § 1002.105(b), small business lending data collection and reporting is required only for financial institutions that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. Financial institutions that do not frequently lend to small businesses will seek to track precisely how many such transactions they have originated. The Bureau believes that it is important to empower financial institutions to quickly ascertain whether a covered credit transaction was originated for a small business, so that infrequent lenders can continue to monitor whether compliance with this final rule is required.

The Bureau believes that its $5 million gross annual revenue standard is a more efficient and appropriate measure of applicant size for purposes of determining whether small business lending data collection is required pursuant to section 1071. The Bureau understands that the SBA generally bases business concern size standards on average annual receipts or the average number of employees of the business concern, as customized industry-by-industry across 1,012 6-digit NAICS codes. The SBA typically uses two primary measures of business size for size standards purposes: (i) average annual receipts[567] for businesses in services, retail trade,

[567] The Bureau understands that the SBA changed its regulations on the calculation of average annual receipts for all its receipts-based size standards, and for other agencies' proposed receipts-based size standards, from a three-year

agricultural, and construction industries, and (ii) average number of employees[568] for businesses in all manufacturing industries, most mining and utilities industries, and some transportation, information, and research and development industries.[569] The Bureau understands that the SBA's size standards are used to establish eligibility for a variety of Federal small business assistance programs, including for Federal government contracting and business development programs designed to assist small businesses in obtaining Federal contracts and for the SBA's loan guarantee programs, which provide access to capital for small businesses that are unable to qualify for and receive conventional loans elsewhere. The Bureau notes that its $5 million size standard will only be used to determine whether small business lending data collection is required pursuant to section 1071, and has no bearing on eligibility for Federal small business assistance. Moreover, the Bureau believes it is far more likely that an applicant will be able to readily respond to a question regarding its gross annual revenue for the preceding fiscal year—something already contemplated by existing Regulation B for all business credit to determine whether adverse action notice requirements apply[570]— than offer the closest metric currently in use by SBA regulations, which is generally average annual receipts across the previous five fiscal years.[571]

The Bureau believes that requiring application of existing SBA size standards for this rule could result in many financial institutions having to undergo extensive operational and/or compliance management system changes. The Bureau believes that it will reduce burden for financial institutions, particularly those without sophisticated compliance management systems

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averaging period to a five-year averaging period, outside of the SBA Business Loan and Disaster Loan Programs. 84 FR 66561 (Dec. 5, 2019).

[568] Generally, the average number of employees of the business concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 24 calendar months. *See* 13 CFR 121.106(b)(1).

[569] To measure business size, the SBA also uses financial assets for certain financial industries, and for the petroleum refining industry, it uses refining capacity and employees.

[570] *See* 12 CFR 1002.9(a)(3).

[571] 13 CFR 121.104(a) and (c).

or familiarity with SBA lending, to comply with a gross annual revenue size standard for the section 1071 small business definition that better aligns with current lending practices.

If the Bureau were to adopt a small business definition using the existing SBA size standards that vary by industry based on 6-digit NAICS codes, financial institutions would only be able to request an applicant's protected demographic information further along in the application process, once they have obtained the multiple pieces of data that would be necessary to determine whether the applicant is small and, therefore, the 1071 process applies. This delay could make it more difficult for financial institutions to collect applicants' protected demographic information (particularly for applications that are withdrawn or closed for incompleteness early in the application process), which is important to both of section 1071's statutory purposes. These data collection considerations differ from those applicable to SBA lending programs, whereby a lender often cannot (and should not) make an accurate eligibility determination for an SBA loan until later in the application process, often after a loan has already been initially decisioned and after the lender has collected information related to size, time in business, and other data.

In order to allow financial institutions to expeditiously determine whether this rule applies, the Bureau is seeking to minimize complexity for financial institutions in determining whether a covered application is reportable because the applicant business is a small business—a necessary determination for the collection of protected demographic information pursuant to section 1071. The Bureau believes, and most commenters agreed, that this rule will benefit from a universal, easy-to-apply reporting trigger that does not need to be supported by additional documentation or research. Such a reporting trigger must be easily understood by small business owners who may be completing an application online, or by the tens of thousands of customer-facing personnel who take small business applications in an industry with a recent turnover rate

of over 20 percent.[572] The Bureau also believes that a gross annual revenue reporting trigger will facilitate better compliance with section 1071 requirements because it aligns with many larger financial institutions' current lending and organizational practices, which use gross annual revenue to assign small businesses into their retail/small business banking groups.[573]

Requiring financial institutions to rely on the SBA's existing size standards for purposes of 1071 data collection and reporting requirements could pose risks to the efficient operation of small business lending. Based on the overwhelmingly consistent feedback the Bureau has received from stakeholders on this issue, the Bureau believes that using the SBA's existing size standards for the purposes of section 1071—wherein the financial institution must quickly determine the appropriate 6-digit NAICS code for businesses and then apply a variety of standards, including potentially gathering information to determine five years of the applicant's average annual receipts or employee information—would not align with current lending and organizational practices. Application of the SBA's existing size standards, at the beginning of the application process, could slow down the application process, particularly at institutions that otherwise would often be able to render credit decisions in a matter of minutes; the Bureau believes that financial institutions may be compelled to raise the cost of credit or originate fewer covered credit transactions as a result. Such an outcome could needlessly affect access to credit for small businesses. The Bureau believes that eliminating credit opportunities or reducing access to credit for small businesses, including women-owned and minority-owned small businesses, in this way would frustrate the statutory purpose of section 1071 to "enable communities, governmental entities, and creditors to identify business and community

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[572] Jim Dobbs, *Employee churn surges at banks despite pay hikes*, Am. Banker (Sept. 9, 2022), https://www.americanbanker.com/news/employee-churn-surges-at-banks-despite-pay-hikes.

[573] *See* Fed. Deposit Ins. Corp., *Small Business Lending Survey*, at 12 (2018), https://www.fdic.gov/resources/publications/small-business-lending-survey/2018-survey/section2.pdf (finding that a substantial majority of large banks use gross annual revenue (61.8 percent) as a limit to define small businesses).

development needs and opportunities of women-owned, minority-owned, and small businesses."[574]

The Bureau expects that many financial institutions, for efficiency, will bifurcate their business credit application procedures based on an initial determination of whether the application will be subject to this rule. The Bureau therefore believes that many financial institutions will not proceed with taking applicant information until the financial institution is able to determine that the applicant is small (in which case, this rule requires it to collect and report the applicant's protected demographic information) or that the applicant is not small (where ECOA generally prohibits the financial institution from collecting protected demographic information). If this process necessitates determining the correct NAICS code for the applicant, and in many cases, requesting five years of average annual receipts or the 24-month average number of employees from the applicant pursuant to SBA's existing size standards, the Bureau believes that businesses seeking credit would encounter, at a minimum, otherwise avoidable delays in application processing.

Section 1071 is also unique in that Congress specified that the data collection regime include a particular form of revenue for the businesses at issue. As discussed in the section-by-section analysis of § 1002.107(a)(14) below, section 1071 requires a financial institution to collect "the gross annual revenue of the business in the last fiscal year of the women-owned, minority-owned, or small business loan applicant preceding the date of the application."[575] The Bureau considered whether under section 1071 a financial institution should have to apply two different revenue-based rules (first, one for determining whether the business is small under the existing SBA size standards and therefore 1071 data must be collected and reported; and, second, if the business is small, another for reporting the business's gross annual revenue in the last fiscal year), or whether applying only one revenue-based standard for implementing section 1071

[574] ECOA section 704B(a).

[575] *Id.*

could be sufficient. Requiring financial institutions to apply different standards could be unnecessarily confusing and burdensome, as well as also increase the potential for errors in data collection and reporting. Moreover, as discussed below, section 1071 amends ECOA, which already incorporates the concept of gross annual revenue as implemented under existing Regulation B's adverse action notice requirements.

Small farm definition. The Bureau is not adopting a different small business definition for farms. Many agricultural lenders suggested aligning with the Farm Credit Administration's (FCA) small farmer definition for agricultural financing transactions, primarily arguing that: (i) the proposed $5 million threshold is substantially overinclusive as applied to the farming community and would cover almost all the customers of FCS lenders; (ii) aligning with the FCA's "small farmer" definition would facilitate compliance and reduce burden because FCS lenders are very familiar with the standard; and (iii) this change would take into account the unique nature of the agricultural industry, which is disproportionately dominated by family farms.

The Farm Credit Act of 1971 authorizes the FCS to provide financing and services to farmers and ranchers through FCS banks and associations. The Act also provides the FCA, an independent Federal agency, authority to regulate and examine these institutions and it requires them to report annually to FCA about the operations and achievements of the associations' lending and service programs for young, beginning, and small farmers and ranchers. FCA's definition of "small farmer" is "a farmer, rancher, or producer or harvester of aquatic products who normally generates less than $250,000 in annual gross sales of agricultural or aquatic

products."[576] The FCA has not updated this threshold since it was first adopted in 1998 although it has since considered whether to change it.[577]

The NPRM made clear the Bureau's intention to cover agricultural credit, and the Bureau did not propose a separate small farm definition or any other adjustments specifically for agricultural credit. Prior to the SBA increasing its size standards for small farms, the Bureau acknowledged in the NPRM that its proposed $5 million size standard could result in data reporting on applications from approximately 77,000 businesses that would not be considered small under the SBA size standards in effect at that time, the vast majority of which would be farms (for which, at that time, the SBA predominantly used a $1 million standard). Conversely, the Bureau estimated that 270,000 primarily non-agricultural businesses that would be small under the SBA's size standards in effect at the time of the NPRM would not be covered under the proposed $5 million gross annual revenue standard.

As noted above, the SBA's size standards for agricultural industries have increased since the NPRM and now range from $2.25 million to $34 million average annual receipts—which now means that the $5 million gross annual revenue standard the Bureau is finalizing is markedly more aligned with SBA's size standards for farms than it was at the time of the NPRM. The Bureau believes that these recent changes to the SBA size standards, which were based on extensive research and a notice and comment rulemaking, further suggest that a definition of small farms based on $250,000 in annual gross sales, preferred by certain commenters, would not sufficiently cover small agricultural businesses.

The Bureau does not believe that the Small Business Act requires the Bureau to adopt a separate definition for small farms, as implied by one commenter. The Small Business Act

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[576] Farm Credit Admin., *Bookletter 040—Revised: Providing Sound and Constructive Credit to Young, Beginning, and Small Farmers, Ranchers, and Producers or Harvesters of Aquatic Products*, at 2 (Aug. 10, 2007), https://ww3.fca.gov/readingrm/Handbook/FCA%20Bookletters/BL-040%20REVISED.docx.

[577] 84 FR 5389, 5390 (Feb. 21, 2019) ("Several agricultural and economic cycles have occurred since 1998, and we are considering whether the $250,000 gross sales amount continues to be appropriate or should be revised or indexed to reflect the changes, including the economic conditions presently affecting agricultural producers.")

provides that the SBA Administrator must "ensure that the size standard varies from industry to industry to the extent necessary to reflect the differing characteristics of the various industries and consider other factors deemed to be relevant by the Administrator."[578] The Bureau believes, and explained to the SBA when obtaining its approval, that this rule will benefit from a universal, easy-to-apply reporting trigger that reflects the need for a wide variety of financial institutions to apply a simple, broad definition of a small business that is practical across the many product types, application types, technology platforms, and applicants in the market. In particular, the Bureau believes that the size standard finalized here is consistent with factors that the SBA has previously identified as relevant to the proper exercise of its discretion in this respect—the SBA considers (1) current economic conditions, (2) its mission and program objectives, (3) the SBA's current policies, (4) impacts on small businesses under current and proposed or revised size standards, (5) suggestions from industry groups and Federal agencies, and public comments on the proposed rule, and (6) whether a size standard based on industry and other relevant data successfully excludes businesses that are dominant in the industry.[579]

While the Bureau received widespread support for a simple gross annual revenue threshold, it also understands, as explained by some commenters, that many agricultural lenders generally do not collect gross annual revenue for underwriting or regulatory compliance purposes, which could complicate use of a gross annual revenue threshold to determine small business status. Nonetheless, ECOA section 704B(e)(2)(F) requires financial institutions to collect and report gross annual revenue under section 1071. As discussed in its section-by-section analysis of § 1002.107(a)(14), the Bureau is finalizing comment 107(a)(14)-2, which first clarifies that pursuant to final § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including the gross annual revenue of the applicant. The final comment then states that if a financial institution is nonetheless unable to

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[578] 15 U.S.C. 632(a)(3).

[579] *See* 85 FR 62372, 62373 (Oct. 2, 2020) (discussing the SBA's revised size standard methodology).

collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is "not provided by applicant and otherwise undetermined." The Bureau believes that permitting this reporting flexibility for agricultural lenders and other financial institutions will reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and the gross annual revenue could not be collected.

While the Bureau acknowledges arguments that the FCA definition might facilitate compliance among FCS lender staff and other compliance professionals who are already familiar with that definition, the Bureau does not believe it would be appropriate to deviate from its otherwise widely supported cross-industry approach. While the Bureau acknowledges that the market share of total farm business debt held by FCS lenders is significant (44.4 percent at the end of 2020[580]), the Bureau is mindful that many other types of non-FCS lenders participate in this important small business lending market. Such lenders would not be able to leverage familiarity with the existing FCA definition and may engage in other types of non-farm lending that would not be subject to this definition. As a result, these lenders may not equally benefit from applying the FCA definition to agricultural small businesses. Indeed, the Bureau understands that an association of community banks issued a letter to oppose efforts to obtain special treatment for FCS lenders, stating that "[i]t would be totally inappropriate to exempt FCS lenders from onerous regulatory burdens while subjecting smaller lenders, such as community banks, to those regulations even as both types of lenders are serving the same customer base in many instances."[581] The Bureau believes a consistent small business definition that applies to all financial institutions will result in consistency across the 1071 data, more robust fair lending analyses, and arguably an even playing field for compliance across all financial institutions.

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[580] Farm Credit Admin., *2021 Annual Report*, at 16 (2022), https://www.fca.gov/template-fca/about/2021AnnualReport.pdf.

[581] Letter from Indep. Cmty. Bankers of Am., to Senate Chairs Stabenow and Brown and Ranking Members Boozman and Toomey (June 23, 2022), https://www.icba.org/docs/default-source/icba/advocacy-documents/letters-to-congress/senate-letter-opposing-fca-independent-authority-act.pdf?sfvrsn=8d2f1c17_0.

The Bureau acknowledges that a $5 million gross annual revenue threshold will be somewhat overinclusive relative to SBA and Census of Agriculture standards. Some agricultural lenders lament that the threshold would cover almost all their lending and several commenters argued in favor of the FCA definition instead for section 1071 purposes because, they said, it would capture a substantial amount of data while mitigating some of the impact of the compliance cost. As discussed above, the Bureau believes that its $5 million gross annual revenue threshold strikes an appropriate balance between covering the applications of most businesses that are considered small under the SBA's size standards, while minimizing the number of businesses above the SBA's size standards whose applications will be reported to the Bureau, and in a way that satisfies the SBA's criteria for approving an alternative size standard under its regulations. In striking this balance, the Bureau considered section 1071's statutory purposes, and it believes that a broader scope of coverage with regard to agricultural businesses is warranted, given the historical and/or continuing discrimination against Black farmers and the need for transparency into agricultural lending both for fair lending enforcement and business and community development.

Other suggested size standards. The Bureau is not adopting a small business definition based on 4-digit NAICS codes, as suggested by one commenter. As explained above in its discussion of existing SBA size standards, the Bureau believes needing to obtain even a 4-digit NAICS code at the beginning of the application process would often result in a financial institution not being able to determine whether an applicant for business credit is small (and thus subject to the data collection requirements of this final rule) until later in the application process. Similarly, the Bureau believes that a small business definition based on both number of employees and gross annual revenues (*e.g.*, the 500 employee/$8 million standard set forth in the SBREFA Outline and suggested by commenters or one commenter's 100 employee/$1 million standard) would mean that a financial institution would only be able to request an applicant's protected demographic information further along in the application process, once they have

obtained the multiple pieces of data that would be necessary to determine whether the applicant is small and, therefore, only at that later stage would it be able to determine that such data collection is required. This delay could interfere with financial institutions' ability to collect these data, particularly for applications that are withdrawn or closed for incompleteness early in the application process, which would limit the usefulness of the data for section 1071's statutory purpose of fair lending enforcement.

106(b)(2) Inflation Adjustment

Inflation is a general increase in the overall price level of the goods and services in the economy; deflation marks a general decrease in the same. A price index, of which there are several types, measures changes in the price of a group of goods and services. The Board's Federal Open Market Committee currently finds that an annual increase in inflation of 2 percent in the price index for personal consumption expenditures, produced by the Department of Commerce, is most consistent over the longer run with the Board's mandate for maximum employment and price stability.[582] The United States Bureau of Labor and Statistics, which publishes several price indices, found that from December 2020 to December 2021, "consumer prices for all items rose 7.0 percent, the largest December to December percent change since 1981."[583]

In order to keep pace with changes to the SBA's own size standards and the potential impact of future inflation or deflation, the Bureau stated in the NPRM that it was considering whether it might update its proposed $5 million gross annual revenue size standard over time (perhaps at the end of a calendar year in order to allow financial institutions to use the same threshold consistently throughout the year). The Bureau sought comment on how this should be done and the frequency at which it should occur.

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[582] Bd. of Governors of the Fed. Rsrv. Sys., *What is inflation and how does the Federal Reserve evaluate changes in the rate of inflation?* (last updated Sept. 2016), https://www.federalreserve.gov/faqs/economy_14419.htm.

[583] U.S. Bureau of Labor Stat., *Consumer Price Index: 2021 in review* (Jan. 2022), https://www.bls.gov/opub/ted/2022/consumer-price-index-2021-in-review.htm.

Two community groups and a CDFI lender requested that the Bureau address adjustments of its gross annual revenue threshold for defining a small business under the rule. The community groups suggested annual adjustments for inflation, while the CDFI lender suggested an adjustment every five to ten years to account for future inflation and keep pace with changes to the SBA's own size standards. Conversely, a bank argued against incremental adjustments, stating that the Bureau should set its small business definition once in the final rule. Another bank suggested that the Bureau wait to determine if the threshold needs adjusting after it has sufficient data to analyze after several years of collection.

For the reasons set forth herein, the Bureau is finalizing new § 1002.106(b)(2) to provide that every five years after January 1, 2025, the gross annual revenue threshold set forth in § 1002.106(b)(1) shall adjust based changes to the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics (CPI-U). Any such adjustment will be rounded to the nearest multiple of $500,000. If an adjustment is to take effect, it will do so on January 1 of the following calendar year.

New comment 106(b)(2)-1 clarifies the Bureau's inflation adjustment methodology. The comment explains that the base for computing each adjustment (both increases and decreases) is the January 2025 CPI-U; this base value will be compared to the CPI-U value in January 2030 and every five years thereafter. The comment provides several examples illustrating this comparison. New comment 106(b)(2)-1 makes clear that if, as a result of rounding to the nearest multiple of $500,000, there is no change in the gross annual revenue threshold, there will be no adjustment.

New comment 106(b)(2)-2 provides that if publication of the CPI-U ceases, or if the CPI-U otherwise becomes unavailable or is altered in such a way as to be unusable, then the Bureau shall substitute another reliable cost of living indicator from the United States Government for the purpose of calculating adjustments pursuant to final § 1002.106(b)(2).

The Bureau agrees with several commenters that it should provide for a mechanism to update the rule's $5 million gross annual revenue size standard over time to account for the potential impact of inflation or deflation. In order to minimize operational disruptions, the Bureau is not adopting an annual adjustment for inflation; instead, a determination regarding the need to adjust the threshold will occur every five years, beginning in 2030, to account for future inflation or deflation on a schedule similar to the SBA's own size standards, which are required to be reviewed no less frequently than once every five years under the Small Business Act.[584] Recently, the SBA added a 13.65 percent inflation increase to its receipts- and assets-based size standards.[585] Moreover, in order to mitigate commenters' concerns discussed in the section-by-section analysis of § 1002.107(a)(14) regarding complexity and difficulty of collecting gross annual revenue information, the Bureau will round any such adjustment to the nearest multiple of $500,000. The Bureau believes that this rounding, in combination with the approach in final comment 107(a)(14)-1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information, and providing language that a financial institution may use to ask the applicant for such information—will make it easier for financial institutions to more quickly determine small business status for the purpose of rule applicability. The Bureau also believes that this approach is consistent with existing Bureau procedures for inflation adjustments (albeit in a more streamlined way), provides transparency for replication, and will result in less-frequent changes in the reporting requirements of financial institutions, thereby reducing the disruption that an annual inflation adjustment might cause in this situation.

The Bureau is providing commentary to ensure transparency regarding its inflation methodology, which will allow financial institutions to better anticipate and prepare for potential inflation or deflation adjustments. To further explain its methodology, the Bureau is providing

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[584] Pub. L. 111-240, 124 Stat. 2504 (2010); *see also* 13 CFR 121.102(c) (requiring the SBA examine the impact of inflation on monetary size standards (*e.g.*, receipts, tangible net worth, net income, and assets) and make necessary adjustments at least once every five years).

[585] 87 FR 69118 (Nov. 17, 2022).

the following illustration, which assumes that compliance with the rule was required beginning July 1, 2014, subject to the same five-year adjustment schedule described above. In this illustration, the base for computing each adjustment would be January 2015, which had a CPI-U value of 233.707. Here, the CPI-U value for January 2020 (257.971) would be used for the first five-year inflation update since January 2015 and would update the gross annual revenue threshold to reflect the change in the CPI between January 2015 and January 2020. As demonstrated with the formulas below, the percentage change between those two years' CPI-U values would be calculated (about 10.4 percent) and then would be applied to the $5 million gross annual revenue threshold to get a value of $5,519,112. This would be rounded to $5,500,000 and would become the new threshold effective in January 2021.

$$\text{GAR effective January 2021} = \$5\ million\ x \left(\frac{\text{CPI-U January 2020}}{\text{CPI-U January 2015}}\right)$$

$$= \$5\ million\ x \left(\frac{257.971}{233.707}\right)$$

$$= \$5\ million\ x\ (1.1038)$$

$$= \$5{,}519{,}112$$

$$rounded\ to\ the\ nearest\ \$500{,}000$$

$$= \$5{,}500{,}000$$

All subsequent adjustments would be made in the same manner. For instance, using the above illustrative example, the following calculation would be performed in January 2025 (ten years after January 2015, five years after January 2020):

$$\text{GAR effective January 2026} = \$5\ million\ x \left(\frac{\text{CPI-U January 2025}}{\text{CPI-U January 2015}}\right)$$

$$rounded\ to\ the\ nearest\ \$500{,}000$$

The CPI-U series[586] used for the Bureau's inflation adjustment methodology is public and can be used by anyone wishing to perform the calculation themselves. Additionally, the Bureau of Labor and Statistics provides an inflation calculator for this exact CPI-U series, which allows any entity to easily calculate an adjusted gross annual revenue threshold without the need for manual calculations.[587]

In addition to new comment 106(b)(2)-2, discussed above, which clarifies the timing of its inflation adjustments, the Bureau believes that the adjustment schedule set forth below will also be helpful to explain the inflation adjustment timing:

Table 2: Inflation/Deflation Adjustment Schedule

Date	Inflation/Deflation Adjustment Schedule
January 2025	Base month/year for computing each adjustment.
January 2030	Reference month/year for the first five-year inflation adjustment.
Spring – Summer 2030	Calculation performed to determine changes in the CPI-U between January 2025 and January 2030.
January 2031	If necessary, effective date for the adjusted gross annual revenue threshold amount.
January 2035	Reference month/year for the second five-year inflation adjustment.
Spring – Summer 2035	Calculation performed to determine changes in the CPI-U between January 2025 and January 2035.
January 2036	If necessary, effective date for the adjusted gross annual revenue threshold amount.

[586] Specifically, the Bureau of Labor and Statistics series is CUUR0000SA0 and a chart with its values for all months and years is available at https://data.bls.gov/timeseries/CUUR0000SA0. The CPI-U is released on a month lag, so the value for January is available in February.

[587] This calculator is available at https://www.bls.gov/data/inflation_calculator.htm and uses the CUUR0000SA0 as the basis for its calculation. To use this calculator for the illustrative example above, enter 5,000,000 in the $ field, enter January 2015 as the starting date, and January 2020 in the subsequent date field. Click on calculate, and the result is $5,519,111.54, the same number as above, which would be rounded to the nearest $500,000, *i.e.*, $5,500,000.

Section 1002.107 Compilation of Reportable Data

107(a) Data Format and Itemization

Background

ECOA section 704B(e) requires financial institutions to "compile and maintain" records of information provided by applicants "pursuant to a request under subsection (b)," and requires them to "itemiz[e]" such information to "clearly and conspicuously disclose" a number of data points enumerated in the statute in section 704B(b) and (e)(2).[588] In addition, section 704B(e)(2)(H) provides the Bureau with authority to require "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." Section 1071's statutory purposes are twofold: (1) to facilitate enforcement of fair lending laws; and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[589]

Proposed Rule

The Bureau proposed to adopt the data points enumerated in ECOA section 704B(b) and (e)(2)(A) through (G) largely consistent with its proposals under consideration at SBREFA, but with certain changes as discussed in the proposed rule. Consistent with its approach in the SBREFA Outline,[590] the Bureau proposed data points pursuant to its statutory authority set forth in section 704B(e)(2)(H) relating to pricing, time in business, NAICS code, and number of workers. In addition, based on feedback from small entity representatives and other stakeholders and in the course of developing the proposed rule, the Bureau identified several additional data points that it believed would be important to the quality and completeness of the data collected

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[588] As discussed in greater detail above in E.2 of the *Overview* to this part V, the Bureau interprets the phrase "pursuant to a request under subsection (b)" in section 1071 as referring to all of the data points contemplated by ECOA section 704B(e), not merely whether the applicant is a minority-owned, women-owned, or small business.

[589] ECOA section 704B(a).

[590] SBREFA Outline at 34-35.

and would aid significantly in furthering the purposes of section 1071. The Bureau proposed to adopt additional data points regarding application method, application recipient, denial reasons, and number of principal owners. In addition, the Bureau relied on ECOA section 704B(e)(2)(H), as well as its authority under 704B(g)(1), to propose certain clarifications to the data points enumerated in section 704B(b) and (e)(2)(A) through (G).

In regard to the specific method by which a financial institution would collect the data points, the proposed rule would have required a covered financial institution to compile and maintain data regarding covered applications from small businesses, and required that the data be compiled in the manner prescribed for each data point and as explained in associated Official Interpretations (included in the proposed rule) and the Filing Instructions Guide that the Bureau anticipated later providing on a yearly basis. The proposed rule then explained that the data compiled would include the items described in proposed § 1002.107(a)(1) through (21). The Official Interpretations, sometimes referred to as official comments or official commentary, would provide important guidance on compliance with the regulation and were discussed in relation to each data point as well as other regulatory provisions. The Filing Instructions Guide would provide instructions on the operational methods for compiling and reporting data, including which codes to report for different required information. The Filing Instructions Guide would be updated yearly, as is the Filing Instructions Guide that is used with HMDA compilation and reporting.[591] Proposed comment 107(a)-1 would have provided general guidance on complying with § 1002.107(a).

The Bureau crafted the proposed rule in consideration of the concerns and input of the small entity representatives and other stakeholders. First, the proposed rule would generally not have required a financial institution to verify applicant-provided information and limited the data points proposed pursuant to ECOA section 704B(e)(2)(H) to those that the Bureau believed

[591] *See generally* Fed. Fin. Insts. Examination Council, *The Home Mortgage Disclosure Act*, https://ffiec.cfpb.gov/ (last visited Mar. 20, 2023).

would be most useful for the purposes of section 1071. In addition, the Bureau considered the costs, including data quality scrubs, automation and training, that would be imposed by the collection and reporting of the proposed data points; these were discussed in the proposed rule and that discussion is now updated in part IX below. The Bureau attempted to craft the collection and reporting requirements to be as clear and operationally manageable as possible, and requested comment on potential methods for increasing clarity and manageability.

In regard to concerns from small entity representatives and other stakeholders about being required to collect applicants' protected demographic information for purposes of section 1071, the Bureau noted that several small entity representatives reported collecting this kind of information currently in certain situations (because they are CDFIs, or because they are participating in certain SBA or similar guarantee programs). In addition, the Bureau crafted the proposed rule to provide flexibility for financial institutions in the collection and reporting of this information. The Bureau also did not propose an exemption for small financial institutions from reporting data points adopted pursuant to ECOA section 704B(e)(2)(H), as suggested by some small entity representatives and commenters, though it did propose an exemption from the rule for certain institutions with limited small business credit originations.

The Bureau sought comment on its proposed approach to the collection and reporting of data points, including the specific requests for input above and in the section-by-section analysis of each of the proposed data points.

Comments Received

The Bureau received numerous comments discussing the general data point collection and reporting requirements from banks, trade associations, credit unions, farm credit institutions, community groups, lenders, research institutions, an association of State bank supervisors, and a Federal agency. This comment summary section will discuss the comments regarding the overall data points first, then focus on those that dealt specifically with the data points proposed pursuant to ECOA section 704B(e)(2)(H) (often making statements similar to those on the overall data

points). Comments regarding individual data points are discussed below in the section-by-section analyses that follow.

General data point comments. Several community groups and a business advocacy group supported the overall data points requirements, stating that robust data are essential for understanding underwriting, gaps in lending, unmet community needs, and other issues that stand in the way of equitable, responsible lending. A business advocacy group stated that the recent enhancement of HMDA data proves the importance of robust data because of its strongly positive impact on lending to minorities. That commenter also stated that the rule should start out with the collection of granular data because discrimination often involves not only credit denials but also less favorable credit terms.

A joint comment letter from community groups, community oriented lenders, and business advocacy groups stated that CDFIs and mission-driven lenders, who will have to comply with the data point reporting requirements, view the costs as reasonable considering the benefits of the rule. Two community-oriented lenders made similar statements, saying that they already collect most of this information for underwriting and compliance with other requirements. One also stated that it does not plan to raise fees or restrict access to credit as a result of the rule. One rural community group stated that the data points will be important for understanding agricultural lending and for that reason supported the inclusion of agricultural lending under the rule.

Several industry commenters stated that the data points were too numerous and would be burdensome to collect and report. These commenters stated that setting up the compliance system would be particularly costly and that the cost would have to be passed on to customers, and one suggested that the Bureau should reconsider moving forward with the rule. These commenters also stated that financial institutions do not currently collect these data points. A trade association for online lenders stated that collecting these data points would interfere with online lenders' business model and the Bureau should obtain this information from other sources,

such as the SBA, the Minority Business Development Agency, and the Treasury Department. A bank stated that 1071 data disclosure will help address significant racial and gender gaps but asked that the Bureau consider the depth and breadth of the data collected because community banks are faced with what it referred to as seemingly continuous data collection (for HMDA, Bank Secrecy Act, etc.) and regulatory exams. The bank also asked that the collection method be "SMART" (specific, measurable, attainable, realistic, and timely) in order to reduce burden.

Several banks suggested that HMDA data yield useful fair lending analyses in the residential mortgage market because those loans are underwritten similarly. In contrast, they stated, small business loans are more complex and unique and have to be manually underwritten to consider numerous variables in accordance with the individual institution's standards, rendering any fair lending analyses flawed and unreliable. One of these commenters suggested that if fair lending analysis is to be performed using only the data points proposed, lenders will be forced to revamp and substantially limit the inputs used in decision making, ultimately leading to a smaller number of product offerings and fewer approvals for small business loans overall.

Industry commenters also made several other suggestions and requests regarding the proposed data points. Two commenters asked that the Bureau eliminate or reduce the use of free-form text to report additional information, suggesting that the information gathered would be burdensome, hard to trend, open to different interpretations, and unreliable. Two commenters stated that it was important that applicants provide their information voluntarily. A trade association asked for reporting flexibility when information is not available, recommending the use of "declined to answer" if the applicant declined, and "not available" for all other circumstances in which the applicant did not provide the information notwithstanding the lender's inquiry.

One commenter asked for a rule provision stating that the collection and reporting requirements under the rule are not intended to limit the range of data that a financial institution

may collect, use, and share for its own purposes. That commenter stated that technology companies currently use numerous data points when making credit decisions that enable them to extend credit to a wider range of applicants, and limiting their ability to do so could limit access to credit for small businesses.

Issues regarding data points proposed pursuant to ECOA section 704B(e)(2)(H). The Bureau received numerous comments from lenders, community groups, and individual commenters supporting inclusion of the data points proposed pursuant to ECOA section 704B(e)(2)(H). Several of these commenters stated that such data points are important because the dataset must include key underwriting variables in order to fulfill section 1071's fair lending purpose. One commenter stated that these data points are necessary to ensure proper analysis and not allow lenders, as HMDA reporters have done, to hide behind data *not* collected as a reason for lending disparities. Two commenters stated that such data points are necessary because robust data are needed to illuminate who lenders are serving and who they are excluding.

Several commenters stated that the Bureau must require the collection and public dissemination of a database detailed enough to meaningfully achieve section 1071's fair lending and community development purposes. Others suggested that the data points proposed pursuant to ECOA section 704B(e)(2)(H) will allow comparisons of small businesses in general with very small businesses, which they view as the bedrock of communities. One commenter said that such data points will help CDFIs better understand the small business credit market, especially in low-income communities, and whether and how discrimination in small business lending is occurring. That commenter and another also stated that robust data will help policymakers and the public to better understand lending gaps and unmet community needs.

One lender stated that the proposed data points will provide insight on the quality of the capital accessed by different demographic groups of small business applicants, which will be useful in not only identifying potentially discriminatory lending practices, but also highlight capital gaps in the marketplace that lenders may be able to fill. It also said that the data will show

how financial institutions compare across key metrics and help determine if an institution has equitable lending, providing an unprecedented snapshot of the lending landscape for small businesses.

The Bureau received a large number of comments, mainly from industry, objecting to the inclusion of data points proposed pursuant to ECOA section 704B(e)(2)(H). Commenters made many objections, but the most common was that such data points are not collected now and would add significantly to the burden imposed by the rule, raising costs for borrowers. Many commenters also stated that several of these data points would be of little use and some suggested that they could result in inaccurate data. Many commenters suggested that the extra burden would reduce the availability of small business credit, and some stated that the extra burden of such data points would limit community banks' survivability and speed up consolidation and the closing of branches in rural and underserved communities. Other commenters also stated that these data points would be particularly difficult for institutions that do not have any reporting requirements under HMDA, credit unions, auto finance lenders, CDFIs, and/or smaller lenders in general. Several commenters stated that because farm credit associations are often customer owned, the increased costs would be imposed directly on the borrowers. One commenter stated that the data points proposed pursuant to ECOA section 704B(e)(2)(H) can fluctuate during loan processing, and would create tracking issues and reporting errors. Some commenters suggested that small business applicants would not want to provide so much information, which would slow down and interfere with the lending process.

Numerous commenters stated that small business lending is complex and nuanced and very different from residential lending, and the partial information provided by the data points would lead to inaccurate interpretations and potentially interfere with current credit approval methods. Several of these commenters stated that if statistical disparities are detected using the more straightforward data points adopted pursuant to ECOA section 704B(e)(2)(A) through (G), those disparities can be researched on an institution, transaction, or file basis, providing the same

information that the Bureau has proposed to collect pursuant to 704B(e)(2)(H), but within context and without raising false positive flags. Those commenters and others stated that including too many unreliable and nuanced data point analyses will result in numerous false positives and inaccurate and unfair conclusions by community groups and their members, and potentially regulators. A State bankers association stated that these data could be used against banks as a competitive advantage for credit unions and other non-traditional lenders. Conversely, a credit union trade association stated that any rule to implement section 1071 will widen the competitive gulf between credit unions and big banks and "fintechs" that have the economies of scale and the technological sophistication to automate complex functions, and the data points proposed pursuant to ECOA section 704B(e)(2)(H) would make this problem worse. Another commenter stated that it would be unfair to compare some such data points between regulated and non-regulated entities because regulated entities have additional costs.

Some commenters who objected to the inclusion of data points pursuant to ECOA section 704B(e)(2)(H) suggested that the Bureau should first require the data points enumerated in 704B(e)(2)(A) through (G), then add any other appropriate data points over time. They explained that this approach would allow the Bureau to assess the burden and potential restriction of small business credit imposed by the data points in 704B(e)(2)(A) through (G) before moving forward with further requirements only if appropriate and beneficial. Some commenters also pointed out that HMDA reporting evolved over many years and the "all at once" approach in the proposal is a mistake and will not allow lenders time to adjust.

Several small lenders and their trade associations stated that if the Bureau opts to require some or all of the data points proposed pursuant to ECOA section 704B(e)(2)(H), then it should consider partial collection of data for community banks and other small lenders. A trade association for community banks suggested that the cost of such data points would include expensive data quality scrubs to avoid negative exam findings, which would be disproportionately borne by smaller financial institutions. That commenter was also concerned

that the rule could require the standardization and homogenization of small business lending, damaging the customized and relationship-based lending for which community banks are valued. The commenter went on to state that if community banks are forced to standardize, it will especially harm the vulnerable small businesses that most benefit from the high-touch, relationship-based lending that they offer.

Some commenters stated that the data points proposed pursuant to ECOA section 704B(e)(2)(H) would create serious privacy risks. Several commenters suggested that this was especially a concern in rural areas where the applicant might be identified through certain data points, such as the combination of the NAICS code and census tract, and this risk might lead some small businesses to not apply for credit. Some of these commenters also stated that it would be disadvantageous for financial institutions to have access to pricing terms of their competitors. One of these commenters stated that collecting more data points would increase business borrower perception that this information is being used in the credit decision.

One commenter suggested that data collection mandates in excess of what the law requires may be found to be "arbitrary and capricious," if a court decides that the Bureau has "relied on factors which Congress has not intended it to consider" or "offered an explanation for its decision that runs counter to the evidence before the agency." The commenter did not explain whether or how the proposed data points might be viewed this way. Another commenter stated that the full scope of data that the rule would require financial institutions to report is inconsistent with the operation of business credit markets, and that Congress established a limited scope data collection regime in section 1071. That commenter further stated that if Congress intended to require all covered financial institutions to proactively deliver the same data required in fair lending enforcement actions, Congress would have written that into the law. Although not specifically mentioning the relevant legal standard for inclusion of such data, several industry commenters argued that some or all of the data points proposed pursuant to ECOA section 704B(e)(2)(H) would not fulfill the purposes of section 1071.

Final Rule

As discussed in the section-by-section analyses that follow, the Bureau has made changes to many of the proposed data points in order to carry out the purposes of section 1071 more effectively and to reduce any difficulties the rule might impose on small business lenders. In particular, the Bureau has sought to: (1) improve the usefulness of the data points for fair lending analysis and for business and community development purposes; and (2) facilitate compliance by, among other things, focusing on the reporting of information the financial institution already collects or possesses. The Bureau's NPRM approach, comments received, and final rule (including changes to specific data points) are discussed for each data point in turn. The Bureau notes that proposed § 1002.107(a)(19), "women-owned business status," has been combined with proposed § 1002.107(a)(18), "minority-owned business status," and the final § 1002.107(a)(18) data point now addresses "minority-owned, women-owned, and LGBTQI+-owned business statuses." As a result, the data points in proposed § 1002.107(20) and (21) have been renumbered as final § 1002.107(19) and (20).

The Bureau is finalizing the introductory text to § 1002.107(a), regarding data format and itemization, to reflect the number of data points in the final rule. Final § 1002.107(a) provides that a covered financial institution shall compile and maintain data regarding covered applications from small businesses, and that the data shall be compiled in the manner prescribed in the individual data point provisions and the Filing Instructions Guide for subpart B for the appropriate year. Furthermore, the data compiled shall include the items described in final § 1002.107(a)(1) through (20). The Bureau believes that these methods will facilitate compliance and yield quality data, and did not receive comments on the specific text of § 1002.107(a) or associated commentary.

The Bureau is finalizing comment 107(a)-1 to provide general guidance on complying with § 1002.107(a). Comment 107(a)-1 explains that a covered financial institution (i) reports the data enumerated in § 1002.107(a) even if the credit originated pursuant to the reported

application was subsequently sold by the institution; (ii) annually reports data for covered applications for which final action was taken in the previous calendar year; and (iii) annually reports data for a covered application on its small business lending application register for the calendar year during which final action was taken on the application, even if the institution received the application in a previous calendar year. The Bureau believes that these operational instructions will clarify a financial institution's collection and reporting requirements and so facilitate compliance. The Bureau also believes that these instructions will help to ensure the accuracy and consistency of the data collected and reported. The Bureau did not receive comments on comment 107(a)-1.

The final rule adds new comment 107(a)-2, which explains that a covered financial institution may use technology such as autocorrect and predictive text when requesting applicant-provided data under subpart B that the financial institution reports via free-form text fields, provided that such technology does not restrict the applicant's ability to write in its own response instead of using text suggested by the technology. The Bureau believes that the ability to use autocorrect and predictive text will facilitate the use of free-form text boxes. The Bureau considered commenters' objections to the use of free-form text boxes for collecting and reporting data under this final rule. Although the Bureau is aware that data collected with predetermined lists is easier to report and work with, the Bureau believes that free-form text responses will provide useful information that would not otherwise be collected, as they have done for HMDA data, and the use of autocorrect and predictive text will facilitate use of free-form text boxes and reduce inadvertent errors or typos.

The Bureau is finalizing comment 107(a)-3 (which was numbered as comment 107(a)-2 in the proposal) as proposed, except that the final rule adds a web address instead of the placeholder in the proposed rule. Final comment 107(a)-3 explains that additional details and procedures for compiling data pursuant to § 1002.107 are included in the Filing Instructions Guide, which is available at https://www.consumerfinance.gov/data-research/small-business-

lending/filing-instructions-guide/. As explained above, the Bureau did not receive comments on the use of the Filing Instructions Guide.

The Bureau is also adding new comment 107(a)-4, to make clear that the Bureau may add additional response options to the lists of responses contained in certain of the individual data-point comments, via the Filing Instructions Guide, and instructs financial institutions to refer to the Filing Instructions Guide for any updates for each reporting year. For example, a credit purpose provided frequently in the free-form text box for that data point could be added to the response options via listing in the Filing Instructions Guide. The Bureau believes that such flexibility will enhance the quality and currency of the data collected. In addition, because financial institutions must refer to the Filing Instructions Guide when compiling, maintaining and reporting their data, the Bureau does not believe that this flexibility will add operational difficulty to the reporting of data under this final rule.

General data point issues. In regard to the comments suggesting that the overall data point collection regime is too burdensome, the Bureau notes that most of the data points are enumerated in the statute and the Bureau has implemented the data points in such a way as to reduce the burden of compilation and reporting as much as feasible while fulfilling the purposes of section 1071. The Bureau does not require verification of applicant-provided data, allows responses of "not applicable" and "not provided by applicant and otherwise undetermined" when appropriate, and provides several safe harbors to facilitate compliance. In addition, the Bureau believes that it has set up the compilation and reporting system in a way that is specific, measurable, attainable, realistic and timely, as requested by a commenter. In addition, see the discussion below regarding other data points considered for further information on the question of the rule's burden and the issue of accuracy of fair lending analysis and small business credit data.

In regard to the suggestion that the Bureau use other sources to obtain information regarding small business credit instead of via this rulemaking, as explained above the Bureau

does not believe that currently available sources are sufficient to carry out the purposes of section 1071, and Congress required the Bureau to promulgate a rule to collect the data. In addition, the Bureau notes that the data collected under this rule are not exclusive, and financial institutions may collect any other data allowable under current law to use in processing or underwriting small business credit. For this reason, the Bureau does not believe that this final rule will interfere with online lenders' business practices, which a commenter was concerned about, or the business practices of other entities that offer small business credit. In addition, the Bureau does not believe that compilation of data under this final rule will interfere with relationship banking by community banks, because they will continue to be able to relate to and serve customers as they have done previously, and may continue to make credit decisions in any legally appropriate fashion that they have done in the past.

As for the commenter's concern that applicant responses be voluntary, the Bureau notes that although financial institutions are required to have processes and procedures in place to collect these data, applicants are free to choose not to answer their requests. For the collection of demographic data, applicants may select an option of "I do not wish to respond" or similar. For many of the other data points, so long as a financial institution maintains procedures reasonably designed to collect applicant-provided data, a financial institution may report "not provided by applicant and otherwise undetermined." In regard to the commenter's request that the Bureau allow responses of "declined to answer" and "not available," the Bureau believes that the reporting options of "not provided by applicant and otherwise undetermined" and "not applicable" are more suited to this data collection, and notes that the commenter did not explain why the suggested responses would be better.

Issues regarding data points adopted pursuant to ECOA section 704B(e)(2)(H). The Bureau is finalizing its proposed data points with certain changes as described in the respective section-by-section analyses of those data points below. The Bureau is relying on ECOA section 704B(e)(2)(H), as well as its authority under 704B(g)(1), to make clarifications to certain of the

data points set forth in 704B(b) and (e)(2)(A) through (G), as described in the section-by-section analyses of those data points below.

Pursuant to its statutory authority set forth in ECOA section 704B(e)(2)(H), the Bureau is adopting data points for pricing, time in business, NAICS code, number of workers, application method, application recipient, denial reasons, and number of principal owners. The Bureau has determined that these data points will serve the purposes of section 1071, improve the utility of the data for stakeholders, and reduce the occurrence of misinterpretations or incorrect conclusions based on analysis of an otherwise more limited dataset. In finalizing these data points, the Bureau considered the additional operational complexity and potential reputational harm described by commenters that collecting and reporting these data points could impose on financial institutions. The Bureau seeks to respond to industry concerns by adopting a limited number of data points that will offer the highest value in light of section 1071's statutory purposes. For this reason, the Bureau is not adopting certain additional data points suggested by commenters such as credit score, applicant's disability status, or business structure (see the discussion below).

In addition, the Bureau did not choose to take an incremental approach to adding data points, as several commenters suggested, or permit collecting and reporting of certain data points to be phased in over time. The Bureau believes the information from the data points adopted pursuant to ECOA section 704B(e)(2)(H) will enhance the usefulness of the data points enumerated in 704B(e)(2)(A) through (G), and further section 1071's purposes for the reasons stated above and in the descriptions of those data points in the section-by-section analyses below, and so should be collected and reported as soon as possible. In addition, data from these data points will be an important part of the privacy risk assessment that the Bureau will conduct after the first full year of data are received. In response to the commenters who expressed concern about privacy risks, the Bureau notes that when making modification and deletion decisions prior

to publication of the data, it intends to consider re-identification risk and other cognizable privacy risks. See part VIII below for additional information.

As explained above, numerous industry commenters stated that data points adopted pursuant to ECOA section 704B(e)(2)(H) would make the rule more burdensome, result in greater costs for not only financial institutions but also their small business customers, and potentially lead to a reduction in credit availability. The Bureau does not believe that the effects on the small business credit market from the data points adopted pursuant to ECOA section 704B(e)(2)(H) will be so pronounced. Rather, such data points will add only incremental costs to the rule,[592] and the Bureau has carefully crafted all the data points in the final rule to provide flexibility by allowing reporting of information that is already present in the credit file or easily gathered from the applicant. In addition, the final rule does not require verification, allows for responses of "I do not wish to respond" or similar, "not applicable," and "not provided by applicant and otherwise undetermined" when appropriate, and provides several safe harbors to facilitate compliance and reduce costs in the compilation and reporting of the data points.

Numerous industry commenters also stated that the small business credit market is different from the residential housing market disclosed in HMDA data, and the varied and complex nature of the small business application, underwriting and approval processes will cause the data collected pursuant to ECOA section 704B(e)(2)(H) to suggest false positives for discrimination. Although the potential risk of misinterpretation exists with all public data, the Bureau notes that any fair lending analysis of the public dataset should be considered preliminary to meaningful further investigation, and inferences from the public data alone are not determinative of unlawful discrimination.[593] Furthermore, the Bureau believes that the additional

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[592] See part IX.F.5 below for a discussion of the economic impacts of an alternative that only includes the data points specified in ECOA section 704B(e)(2)(A) through (G).

[593] In regard to the HMDA dataset for 2020, the Bureau publicly stated that "HMDA data are generally not used alone to determine whether a lender is complying with fair lending laws. The data do not include some legitimate credit risk considerations for loan approval and loan pricing decisions. Therefore, when regulators conduct fair lending examinations, they analyze additional information before reaching a determination about an institution's compliance with fair lending laws." *See* CFPB, *FFIEC Announces Availability of 2020 Data on Mortgage Lending*

information from these data points is more likely to eliminate false positives than to create them. For example, knowing applicants' time in business will help to avoid comparing credit outcomes for established businesses with outcomes for riskier start-ups and expecting them to be similar. In this way, regulators engaged in fair lending analysis, and the financial institutions they are examining or researching, will be able to avoid unnecessary further investigation.

Many industry commenters also suggested that information from data points adopted pursuant to ECOA section 704B(e)(2)(H) will be unreliable and not useful for data users. However, the Bureau considers the information required to be reported to be very useful in fulfilling the fair lending and business and community development purposes of section 1071, as explained in the section-by-section analysis of each of these data points below. Although, as one commenter pointed out, some of these data may change in the course of credit processing, HMDA data and the data from the data points specified in ECOA section 704B(e)(2)(A) through (G) often do the same. The Bureau believes that financial institutions will use the appropriate information from the credit file and report accurately, as the overwhelming majority of HMDA reporters do now.

As explained above, some commenters stated that many applicants will not want to provide the requested information and some may be concerned that the information will be used in the credit decision if too much information is requested. The Bureau does not believe that these problems will be widespread, and to the extent that they do manifest, the financial institution can use the appropriate responses to indicate that the applicant did not wish to provide information. The Bureau also believes that applicants for small business credit expect to be asked for numerous pieces of information, and the applicant-provided data points adopted pursuant to ECOA section 704B(e)(2)(H) (NAICS code, number of workers, time in business, and number of business owners) do not appear likely to raise red flags.

(June 17, 2021), https://www.consumerfinance.gov/about-us/newsroom/ffiec-announces-availability-of-2020-data-on-mortgage-lending/.

Other commenters were concerned that different types of financial institutions would fare differently regarding the data points adopted pursuant to ECOA section 704B(e)(2)(H), and this difference would create competitive distortions. The Bureau does not believe that the structure of a financial institution will have a large effect on the difficulty of reporting such data points. Because all covered financial institutions have the same responsibilities under this final rule, the Bureau believes that the effects on different financial institution types will be similar. Numerous commenters also stated that small financial institutions, such as community banks and small credit unions, would be disadvantaged because they lack the economies of scale to allow them to readily absorb the rule's costs. Several of these commenters requested an exemption for these institutions from any data points adopted pursuant to ECOA section 704B(e)(2)(H), but the Bureau has determined that such an additional exemption that focuses specifically on such data points is not appropriate. As explained in the section-by-section analysis of § 1002.105 above, the proposed exemption for certain institutions with limited small business credit originations is now finalized at a higher transaction level than proposed, exempting a larger number of small financial institutions from section 1071's data collection and reporting obligations. Furthermore, the usefulness of the data collected would be reduced if the dataset is incomplete for some financial institutions. In addition, the Bureau will provide assistance to small institutions and compliance vendors during the implementation period to help them transition to the new rule's requirements.

In regard to the commenters who discussed legal issues involved in this rulemaking, the Bureau notes that each of the data points adopted pursuant to ECOA section 704B(e)(2)(H) fulfills the purposes that Congress stated in section 1071, fair lending and business and community development, as explained in the section-by-section analyses that follow. In addition, the Bureau has carefully considered the evidence before it, including from the SBREFA process and public comments, and has based its decisions regarding these data points on that evidence in relation to the factors that Congress intended it to consider. Furthermore, as explained above, the

Bureau does not consider that the full data collected, whether pursuant to ECOA section 704B(e)(2)(A) through (G) or pursuant to section 704B(e)(2)(H), should be used alone to determine whether a lender is complying with fair lending laws. When regulators conduct fair lending examinations, they will consider additional information before reaching a determination about an institution's compliance. The Bureau considers the scope of data reported to be well within the parameters of congressional intent apparent in section 1071.

Other Data Points Considered

As mentioned above, small entity representatives and other stakeholders suggested some additional data points for the Bureau's consideration, and the Bureau considered others in the development of the proposed rule. Because of the operational complexities likely to be posed by each of these potential data points, as well as the reasons explained below, the Bureau chose not to propose to include any of the following data points in the rule. Nonetheless, the Bureau sought comment on whether the following potential data points or any others would further the purposes of section 1071 and thus should be considered for inclusion in the final rule.

Type of business/entity structure (sole proprietorship, C-corporation, limited liability company, partnership, etc.). This information could be useful in providing context to the ethnicity, race, and sex data regarding applicants' principal owners. However, the Bureau believed that collecting the number of principal owners, as proposed in § 1002.107(a)(21), would better serve this purpose.

Credit score. Collecting credit score and other credit information could be particularly useful for the fair lending purpose of section 1071. However, because of the different types of scores and different situations in which a financial institution would or would not access scores, the Bureau believed that this data point could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions in collecting and reporting this information. These complexities could also make it difficult for data users to understand and interpret credit score data.

Credit reporting information, including whether credit information was accessed. This data point could also be complicated and involve complex sub-fields, making it difficult for financial institutions to collect and report. As with credit score, these complexities could also make it difficult for data users to understand and interpret these data. In addition, it was not clear that this information would be useful without also collecting credit score.

Percentage ownership of each principal owner and percentage ownership by women and by minorities. This information could be useful in providing context to the ethnicity, race, and sex data regarding applicants' principal owners. However, the Bureau was concerned that requesting this type of percentage data could be confusing to applicants and could result in inconsistent responses across applicants and institutions. The Bureau believed that collecting the number of principal owners (those individuals who each directly own 25 percent or more of the equity interests of a business), as proposed in § 1002.107(a)(21), would better serve this same purpose.

Whether the applicant has an existing relationship with the financial institution and the nature of that relationship. This information could provide additional context for a financial institution's credit decision, and thus could be useful for both of section 1071's statutory purposes. However, the Bureau believed that the usefulness of the data collected might not justify the additional operational complexity of identifying and tracking such relationships for reporting.

Customer number, and/or unique (but anonymous) identification number for applicants or associated persons for tracking of multiple applications. This information could be useful to track multiple applications by a single small business within a particular financial institution, whether submitted at one time or over the course of the year. However, the Bureau believed that the potential difficulties posed by requiring the reporting of this information—particularly for applications that have been withdrawn or abandoned—would not be warranted in light of the utility of the data.

Comments Received

Type of business/entity structure. The Bureau received comments from some lenders, community groups, and others requesting the inclusion of a data point for type of business structure. The Bureau did not receive any comments specifically opposing the inclusion of type of business structure, though the Bureau understands the overwhelming industry opposition to all data points adopted pursuant to ECOA section 704B(e)(2)(H) likely implicates this one.

Commenters stated that collecting type of business structure would allow for better analysis of credit outcomes, because different structures may indicate varying levels of sophistication and can be viewed differently by creditors. One commenter pointed out that Black and Latino business owners are more likely to have non-employer businesses, and type of business structure could help identify those businesses and track their access to credit. That commenter also stated that without the information about business structure, it will not be possible to identify gaps in capital access between sole proprietorships (often minority owned) and other forms, and so collecting business structure will help ensure that future capital programs, whether private or public, adequately include or target business structures. One commenter stated that business structure, along with credit score, would be important for rooting out patterns of discriminatory or exclusionary lending practices in the deep South. A CDFI lender stated that being able to differentiate between sole proprietors versus corporations is also key for philanthropic efforts that may aid the work of mission-based lenders working with specific underserved communities, and added that it already collects this information for the SBA 7(a) program, Paycheck Protection Program, and the CDFI Fund. Discussing the Bureau's suggestion that collecting the number of principal owners would provide the desired context, a commenter stated that under the proposal, only a natural person who directly owns at least 25 percent of a business is counted as a principal owner, and thus a partnership, corporation, and sole proprietorship could appear similarly situated despite presenting different credit needs.

Credit score. The Bureau received numerous comments from community groups, community-oriented lenders, business advocacy groups, and others requesting the inclusion of a data point for credit score. The Bureau did not receive any comments specifically opposing the inclusion of credit score, though the Bureau understands the overwhelming industry opposition to all data points adopted pursuant to ECOA section 704B(e)(2)(H) as likely implicating this one.

Commenters stated that including a data point for credit score, along with other key underwriting criteria, was important for effective fair lending analysis. A joint letter from community and business advocacy groups stated that the Federal Reserve Banks in their annual small business surveys have found large disparities in credit access even after controlling for credit scores, and other commenters agreed that this was the case. Many compared the situation to HMDA, where credit scores were only recently required, suggesting that the lack of credit scores allowed lenders to avoid accountability. A number of community groups stated that, in addition to fair lending, credit scores allow users to understand the characteristics of applicants that are denied credit so as to identify areas of unmet need. A joint letter from community groups and community oriented lenders stated that more than half of Black individuals and 41 percent of Latinos have low or no credit scores, which impacts their ability to access financing. One community group stated that since the Bureau implemented the expanded HMDA data collection rules, they have determined that in their county Black mortgage applicants are more than 10 percent likelier than white applicants to be denied for credit history, and that having more robust information would allow them to better advocate to their financial partners for more equitable credit scoring models in small business lending. A CDFI lender stated that lenders rely heavily on credit scores to assess borrower risk and creditworthiness, and they are used in many cases to screen for pre-qualified and/or pre-approved applicants before moving further in the application process. Several rural community groups stated that credit score reporting would be important for analyzing potential discrimination in farm credit.

Numerous commenters suggested that requiring credit scores would not be as complicated or difficult as the Bureau stated in the proposed rule, pointing out that HMDA currently requires credit score reporting and this rule could use a similar method. Commenters said lenders that rely on an individual or composite credit score of business owners should be required to report that score and the scoring model used, as is currently required under HMDA. A CDFI lender stated that it would be straightforward for lenders to disclose borrower credit scores, type (personal or business), and scoring model and version in accordance with HMDA procedures, including the options to select not applicable and write in the name and credit scoring model if not listed. Once commenter suggested requiring only personal credit scores because business scores were not yet industry standard. A community group suggested that the Bureau use the Federal Reserve Bank of Atlanta's small business credit survey method, which they said accommodates a single score irrespective of how it was used by the lender. Another CDFI lender stated that it already collects credit score for the CDFI Fund. Several commenters stated that privacy would not be a problem, and some suggested that credit scores could be released in ranges or other non-specific methods to avoid any issue.

Disability status. Although the Bureau did not propose or seek comment on the possibility of including the disability status of applicant owners as a data point, a number of commenters requested that the Bureau do so. An advocacy group for persons with disabilities stated that this population is twice as likely as people without disabilities to be living in poverty, twice as likely to use costly nonbank lending, and twice as likely to be unbanked. They stated further that people with disabilities that are part of the labor force are more likely to own small businesses than those without disabilities, and that for a growing number of adults with disabilities, establishing small businesses has become a viable path to improve their economic stability and security. Finally, they stated that the absence of disability data renders people with disabilities invisible and creates an obstacle to understanding and analyzing potential discriminatory lending practices and creates a challenge in advocating for and designing

effective policies. Other commenters referred to and supported this organization's comment letter.

Some commenters stated that discrimination against people with disabilities is clearly present in society, and several suggested that including a disability data point would further enforcement and implementation of section 1071, the Americans with Disabilities Act, and various bank vendor procurement programs, amongst other laws and initiatives. One commenter stated that people with disabilities often face significant economic disparities such as lower net worth or thinner credit history that may create barriers to entrepreneurship. A CDFI lender stated that it already collects this information for the SBA 7(a) program.

Additional agricultural data. Although the Bureau did not propose or seek comment on the issue, two rural community groups requested that the final rule include additional data points regarding agricultural credit. One of these commenters stated that the Bureau should require reporting of farm marketing strategies, years of farmer experience, and certain kinds of farm production certifications (USDA Organic, animal welfare, labor standard certification, etc.) to help determine if all farm operations are treated equally in the lending process. The other requested that information regarding base acre payments (farm program benefit payments) be reported because information on program benefits attached to base acres is valuable to minority farmers' farm credit loan making and servicing. That commenter also asked that the Bureau require reporting on collateral requirements, on differences in appraised value or loans or loan modifications rejected based on failure to appraise, on refinancings precipitated by required graduation from Farm Service Agency loans, and on all forms of loan modifications that have historically been a central factor in farm loss for farmers of color.

Other requested data points. The Bureau received requests for several other additional data points that were not proposed and on which it did not seek comment. Commenters suggested that the Bureau require reporting on veteran status, limited English proficiency status, and senior citizen status in order to monitor risks to these groups. A CDFI lender stated that it

already collects veteran status for SBA 7(a) loans and other programs. They also stated that it collects information on low-income owned or controlled status for the CDFI Fund, though did not specifically ask the Bureau to require reporting of that information or veteran status.

Commenters also requested that the Bureau require reporting of the appraised value of collateral in relation to the loan amount, the origination date, community of residence (using ZIP code, school zone or other demographic data), the type of purchaser of the originated credit, and a legal entity identifier (LEI) for the small business applicant.

Final Rule

The Bureau is adopting a limited number of data points pursuant to the authority set forth in ECOA section 704B(e)(2)(H) that it believes will offer the highest value in light of section 1071's statutory purposes. The Bureau believes that the potential additional data points that it sought comment on would pose operational complexities, as would the other data points suggested by commenters. For these reasons, and the reasons explained below, the Bureau is not including any of the following data points in this final rule.

Type of business/entity structure. The Bureau believes that collecting the number of principal owners will be more useful than type of business structure in providing additional useful context to the ethnicity, race, and sex data regarding applicants' principal owners. In addition, the Bureau believes that the number of workers and gross annual revenue data points will provide useful context regarding the size and sophistication of the applicant, which appears to address the primary reason that commenters wanted type of business structure to be collected.

Credit score. Although the Bureau agrees with commenters that this data would be useful for fair lending analyses, it nonetheless could be quite complicated and involve complex sub-fields, which could pose operational difficulties for financial institutions, especially given the use of business credit scores as well as personal credit scores in small business lending.

Disability status. The Bureau did not propose or seek comment on including this data point, and so does not have the benefit of robust stakeholder input as to whether and how to

implement it. More importantly, ECOA does not include disability as one of the enumerated bases on which discrimination is prohibited, and so it is not clear that the Bureau has the legal authority to include this data point.

Additional agricultural data. The Bureau did not propose or seek comment on including these data points, and so does not have the benefit of robust stakeholder input as to whether and how to implement them. In addition, the Bureau does not have sufficient other information to assess the importance or feasibility of requiring that these data points be reported.

Other requested data points. The Bureau did not propose or seek comment on including these data points regarding veteran, limited English proficiency, and senior citizen status, and so does not have the benefit of robust stakeholder input as to whether and how to implement them. In addition, the Bureau does not have sufficient other information to assess the importance or feasibility of requiring that these data points be reported.

Credit reporting information, including whether credit information was accessed. Commenters did not focus on this potential additional data point that the Bureau sought comment on, instead focusing their requests on the related potential credit score data point discussed above. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Percentage ownership of each principal owner and *percentage ownership by women and by minorities*. The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Whether the applicant has an existing relationship with the financial institution and the nature of that relationship. The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

Customer number, and/or unique (but anonymous) identification number for applicants or associated persons for tracking of multiple applications. The Bureau did not receive comments on this potential additional data point that the Bureau sought comment on. For the reasons discussed above, the Bureau is not including this data point in the final rule.

107(a)(1) Unique Identifier

Proposed Rule

ECOA section 704B(e)(2)(A) requires financial institutions to collect and report "the number of the application . . . ." Regulation C includes a similar reporting requirement for a universal loan identifier,[594] though some insured credit unions and depositories whose lending activity falls below applicable thresholds are partially exempt and only need to report a non-universal loan identifier.[595] Both the universal loan identifier and the non-universal loan identifier use only alphanumeric characters, and do not allow use of identifying information about the applicant or borrower in the identifier. The universal loan identifier is "unique" in the national HMDA reporting market because it uses a unique LEI for the reporting institution and then the identifier is required to be unique within that institution.[596] The universal loan identifier must be no more than 45 characters and the non-universal loan identifier must be no more than 22 characters.[597]

The Bureau proposed to require that financial institutions report an alphanumeric identifier starting with the LEI of the financial institution. This unique alphanumeric identifier would have been required to be unique within the financial institution to the specific covered application and to be usable to identify and retrieve the specific file corresponding to the

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[594] 12 CFR 1003.4(a)(1)(i).

[595] 12 CFR 1003.3(d)(5).

[596] 12 CFR 1003.4(a)(1)(i)(A), (B)(2). The non-universal loan identifier is only required to be unique within the annual loan/application register in which the covered loan or application is included. 12 CFR 1003.3(d)(5)(ii).

[597] The universal loan identifier length limit is included in the Bureau's yearly HMDA Filing Instructions Guide. *See* CFPB, *Filing instructions guide for HMDA Data collected in 2023* (2022), https://ffiec.cfpb.gov/. The length limit for the non-universal loan identifier is in Regulation C § 1003.3(d)(5).

application for or extension of credit. The Bureau also proposed commentary with additional details, as discussed below.

For clarity, the Bureau included language in proposed comment 107(a)(1)-1 that would have explained that the identifier can be assigned at any time prior to reporting the application. Proposed comment 107(a)(1)-1 would also have provided the formatting requirements for the unique identifier. The Bureau proposed an identifier of 45 characters or fewer, as is currently required for HMDA. The Bureau made clear in the proposal that the unique identifier would not need to stay "uniform" throughout the application and subsequent processing. Proposed comment 107(a)(1)-1 would have also explained that refinancings or applications for refinancing must be assigned a different identifier than the transaction that is being refinanced.

Proposed comment 107(a)(1)-2 would have made clear that the unique identifier must not include any directly identifying information regarding the applicant or persons (natural or legal) associated with the applicant. The Bureau was aware that internal identification numbers assigned by the financial institution to the application or applicant could be considered directly or indirectly identifying information, and requested comment on this issue. The Bureau also noted that due to privacy risks the Bureau was proposing to not publish unique identifier in unmodified form; the Bureau sought comment on potential modifications to or deletion of this data point in the published application-level data. Proposed comment 107(a)(1)-2 would have also cross-referenced proposed § 1002.111(c) and related commentary, which would have prohibited any personally identifiable information concerning any individual who is, or is connected with, an applicant, in records retained under proposed § 1002.111.

As stated above, the Bureau proposed to require that the unique identifier begin with the financial institution's LEI. Pursuant to proposed § 1002.109(b)(1)(vi), any covered financial institution that did not currently use an LEI would have been required to obtain and maintain an LEI in order to identify itself when reporting the data. Although a "check digit"—a portion of an

identifying number that can be used to check accuracy—is required for the HMDA universal loan identifier, the Bureau did not propose to require its use in the 1071 unique identifier.

The Bureau sought comment on its proposed approach to the unique identifier data point. In addition, the Bureau requested comment on the use of the LEI in the unique identifier and the possible use of a check digit.

Comments Received

The Bureau received comments on the unique identifier data point from several lenders and trade associations. Some commenters supported the data point as proposed; several stated that it was a reasonable and appropriate means of implementing the statutory requirement. Another lender noted that it already reports this type of data for Paycheck Protection Program and CDFI Fund lending. A trade association stated that community banks prefer not to be required to create this identifier too early in the credit origination process. A national auto finance trade association noted that its members generally assign application or loan numbers to new credit applications, but not necessarily to credit line increases, and suggested that financial institutions will have this data without needing the Federal Reserve to issue a parallel rule to implement section 1071 for motor vehicle dealers.[598]

A community bank stated that the cost of creating a customer identification numbering system that does not use the employer identification number, taxpayer identification number, or Social Security number (SSN) would be passed on to the borrower. That commenter requested that the Bureau allow use of the last four digits of the employer identification number, taxpayer identification number, or SSN for identification purposes. They also expressed confusion as to how an LEI (which it may not currently have) could be incorporated with the loan number in its system for reporting, and stated that the Bureau did not provide sufficient guidance on how to incorporate the unique identifiers into its current system.

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[598] ECOA authority over motor vehicle dealers lies with the Board, not the Bureau, because Regulation B does not apply to a person excluded from coverage by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 2004 (2010).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(1) with a minor edit for clarity. Financial institutions will report an alphanumeric identifier, starting with the LEI of the financial institution, that is unique within the financial institution to the specific covered application. The identifier must be usable to identify and retrieve the specific file or files corresponding to the application for or extension of credit.

The Bureau is finalizing comment 107(a)(1)-1 with a minor change. As apparent from the instructions in comment 107(a)(1)-1, the Bureau chose to follow the well-known and workable HMDA format to avoid introducing new complications. With respect to the concerns raised by one commenter about the unique identifier data point, the Bureau notes that a *customer* identification number is not required. The unique identifier refers to the application or origination being reported, not the customer who applies for or borrows the funds. In addition, comment 107(a)(1)-1 makes clear that financial institutions may assign the unique identifier at any time prior to reporting the application, facilitating compliance. The Bureau believes that final § 1002.107(a)(1) will accommodate different institutions' numbering systems because the unique identifier can be created separately from those internal systems. In order to foster uniformity of format and avoid confusion as to what constitutes a "unique" identifier, comment 107(a)(1)-1 now requires that any alphabetical characters in the unique identifier be upper-case.

The Bureau is finalizing comment 107(a)(1)-2 with a minor change described below. Final comment 107(a)(1)-2 states that the unique identifier must not include any directly identifying information regarding the applicant or persons (natural or legal) associated with the applicant. In regard to the use of directly identifying information, such as an SSN or taxpayer identification number, the Bureau notes that section 1071 specifically forbids financial institutions from using personally identifiable information concerning any individual who is, or

is connected with, an applicant in compiling and maintaining data for reporting.[599] Although the Bureau has preliminarily determined not to release unique identifier data reported to the Bureau in unmodified form in the public, application-level dataset, inclusion of a small business's employer identification number or a natural person's SSN or taxpayer identification number could present a risk of fraud or identity theft. Thus, for clarity, the Bureau is including in comment 107(a)(1)-2 that SSN and employer identification number, in whole or partial form, are examples of directly identifying information that must not be used.

The final rule requires that the unique identifier begin with the financial institution's LEI. Final § 1002.109(b)(1)(vi) requires any covered financial institution that does not currently use an LEI to obtain and maintain an LEI in order to identify itself when reporting data to the Bureau. The Bureau does not believe that including the financial institution's LEI in its unique identifiers will pose particular difficulties for reporting institutions; as noted above, the unique identifier can be assigned at any time prior to reporting an application. The Bureau also believes that including the LEI will increase the specificity and usefulness of the identifier and the record it identifies.

The Bureau did not receive comments discussing the possible inclusion of a "check digit," which is required for the HMDA universal loan identifier but was not proposed as part of the 1071 unique identifier. The Bureau believes that, based on its expectations for small business lending data submission platform, a check digit will be unnecessary, as well as potentially complicated for small financial institutions to implement, and thus it is not included in the final rule.

[599] ECOA section 704B(e)(3).

107(a)(2) Application Date

Proposed Rule

ECOA section 704B(e)(2)(A) requires financial institutions to collect and report the "date on which the application was received."

The Bureau proposed to require reporting of application date in § 1002.107(a)(2) as the date the covered application was received by the financial institution or the date on a paper or electronic application form. Proposed comments 107(a)(2)-1 and -2 would have clarified the need for a financial institution to take a consistent approach when reporting application date, and would have provided guidance on how to report application date for applications not submitted directly to the financial institution or its affiliate (indirect applications). The Bureau also proposed a safe harbor in § 1002.112(c)(4), which would have provided that a financial institution does not violate proposed subpart B if it reports on its small business lending application register an application date that is within three calendar days of the actual application date pursuant to proposed § 1002.107(a)(2).

The Bureau sought comment on its approach to collecting application date in proposed § 1002.107(a)(2) and associated commentary. The Bureau also sought comment on how best to define the "application date" data point in light of the Bureau's definition of "covered application" in proposed § 1002.103.

Comments Received

The Bureau received feedback on its proposal to require reporting of application date in § 1002.107(a)(2) from several lenders, trade associations, and a community group. Most commenters to address this data point supported proposed § 1002.107(a)(2). A trade association stated that application date is currently collected in its financial institutions' work flows. A trade association urged the Bureau to define application date in a manner that is consistent with existing Regulation B, so to avoid inconsistency, though it did not identify any aspect of proposed § 1002.107(a)(2) that would be inconsistent with existing Regulation B. Similarly, a

bank urged the Bureau to align application date with HMDA—to increase efficiency for the customer, facilitate compliance, and avoid duplicative collections—but did not identify whether or how proposed § 1002.107(a)(2) would differ from how financial institutions report application date under Regulation C. A community bank urged the Bureau to provide a concrete definition of application date, explaining that a subjective definition would discourage banks from small business lending, and that application date is often difficult to pinpoint as there frequently is no written application and the application process may occur over time, both in-person and by phone.[600]

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(2) to require reporting of application date as the date the covered application was received or the date on a paper or electronic application form. The Bureau believes the flexibility to report either the date the covered application was received or the date shown on a paper or electronic application form will accommodate institutions' varied practices. While several commenters urged the Bureau to align reporting of application date with existing Regulation B and Regulation C, the commenters did not identify how the proposed definition would differ from those regulatory provisions, and the Bureau believes they do not conflict. For example, a financial institution may report application date based on the date a "covered application" was received, and final § 1002.103(a) defines a covered application largely based on Regulation B's definition of an application in existing § 1002.2(f). Similarly, Regulation C § 1003.4(a)(1)(ii) requires reporting of the date the application was received or the date shown on the application form. While a commenter urged the Bureau to provide a concrete definition of application date, the commenter never indicated whether or how the proposed definition was vague.[601]

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[600] Comments primarily directed at how to define an application under section 1071, rather than the date reported for that application, are discussed in connection with the section-by-section analysis of § 1002.103(a) above.

[601] As discussed in more detail in the section-by-section analysis of § 1002.103(b), if the covered application is requesting additional credit on an existing account, all data reported, including applicable dates, relate to the new request for credit rather than the initial origination.

Final § 1002.107(a)(2) states that application date may be the date "the covered application was received;" the Bureau has removed the phrase that followed in proposed § 1002.107(a)(2), which read "by the financial institution . . . " to reflect that not all covered applications will be received directly by the financial institution. The Bureau is also adopting new comment 107(a)(2)-2 to provide guidance on when an application is "received" for covered applications submitted directly to the financial institution or its affiliate.

Comment 107(a)(2)-1 is finalized with minor revisions for clarity and consistency, to provide guidance on maintaining a consistent approach to reporting application date. Final comment 107(a)(2)-3 (proposed as comment 107(a)(2)-2) provides guidance on how a financial institution reports application date where a covered application was not submitted directly to the financial institution or its affiliate. Lastly, final comment 107(a)(2)-4 is adopted to note the safe harbor in final § 1002.112(c)(1), which provides that a financial institution does not violate subpart B if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to final § 1002.107(a)(2).

107(a)(3) Application Method

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau believes that application method data will aid in fulfilling the purposes of section 1071.

The Bureau did not address the method of application as a potential data point under consideration in the SBREFA Outline. However, during the SBREFA process, one CDFI small entity representative suggested collecting information regarding the way an application was taken (in person, by phone, or online) in order to monitor for possible discouragement of

applicants.[602] Relatedly, several small entity representatives that took applications for credit primarily or entirely online asserted that such channels were less likely to result in discrimination and more likely to increase access to credit to women-owned and minority-owned small businesses.

In light of the feedback during the SBREFA process and further consideration by the Bureau of additional data that would aid in fulfilling the purposes of section 1071, the Bureau proposed to require financial institutions to collect and report application method. The Bureau proposed § 1002.107(a)(3) to define this data point as the means by which the applicant submitted the covered application directly or indirectly to the financial institution. The Bureau also proposed commentary to accompany proposed § 1002.107(a)(3).

The Bureau believed that data on application method would improve the market's understanding of how applicants apply for credit which, in turn, would facilitate fair lending enforcement and the business and community development purposes of section 1071. In addition, the Bureau believed that collecting data on application method would aid in analysis of multiple data points collected and reported by financial institutions, including the ethnicity, race, and sex of applicants' principal owners.

Finally, data on application method would assist in analyzing data reported under, and assessing compliance with, proposed § 1002.107(a)(20), which would have required financial institutions to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances. The Bureau explained that having application method reporting would allow the Bureau and other data users to determine, for example, which applications could be subject to data collection via visual observation or surname (because the financial institution met with the applicant in person) and, together with information reported under proposed

[602] SBREFA Panel Report at 30-31.

§ 1002.107(a)(20), which of those applications did and did not have information collected that way.

The Bureau proposed comment 107(a)(3)-1 to clarify that a financial institution would comply with proposed § 1002.107(a)(3) by reporting the means by which the applicant submitted the application from one of the following options: in-person, telephone, online, or mail. Proposed comment 107(a)(3)-1 would have explained how financial institutions are to choose which application method to report, including via a "waterfall approach" when they have contact with an applicant in multiple ways. Proposed comments 107(a)(3)-1.i through .iv would have provided detailed descriptions and examples of each of the four proposed application methods.

The Bureau proposed comment 107(a)(3)-2 to provide guidance on what application method a financial institution would report for interactions with applicants both online and by mail. In short, a financial institution would have reported application method based on the method by which it, or another party acting on its behalf, requested the ethnicity, race, and sex of the applicant's principal owners pursuant to proposed § 1002.107(a)(20). Proposed comment 107(a)(3)-2 also would have provided separate examples of when the application method should be reported as "online" and "mail."

The Bureau sought comment on its proposed approach to this data point.

Comments Received

The Bureau received comments on its proposed application method data point from a number of banks, trade associations, and community groups. Several commenters supported the Bureau's proposal to require financial institutions to report data on application method; some noted that such data would facilitate fair lending enforcement and/or further the community development purpose of section 1071. A community group asserted that data on the application method would enable the comparison of application outcomes based on the application channel at specific institutions and could also help assess whether applicants are receiving comparable access to comparable credit across application channels. Another community group stated that

data on application method would help shed light on the issue of whether newer, online lenders are more effective at reaching underserved populations and businesses. One commenter suggested the Bureau create more categories, particularly to distinguish email from web portal because an application received by email often reflects a more personal relationship than does an application submitted via web portal.

In contrast, several banks and trade associations opposed the proposed requirement to collect application method data and urged the Bureau to drop it from the final rule. A few commenters said that this data point was added "late" in the rulemaking process or without adequate public input.

Industry commenters explained that application method data are not currently collected nor recorded in the loan file. A bank stated that it would need to collect the data manually because it does not have a way to record or report the information and asserted that this data collection requirement would affect its ability to serve the credit needs of its community. Several other commenters noted that this data point is not a factor in the credit decision and argued that there is no information or insight that can be gleaned from it. Some commenters also questioned how the data point would provide value in fair lending analysis. One commenter suggested the data have limited value and that the Bureau's policy goals can be achieved by combining publicly available data with section 1071's statutory requirements; for example, collection of census tract data will indicate whether a loan was originated in a "credit desert," thereby eliminating the need for the application method data point.

Some commenters asserted that the proposed waterfall approach was problematic and would introduce complexity into reporting application method data. These commenters explained that there are multiple interactions between the lender and the applicant throughout the application process and suggested that reporting application method using the proposed waterfall approach would require the financial institution to document each interaction with an applicant. They further said that could lead to a cumbersome process in trying to determine exactly how an

application was received and could result in unintentional errors. One industry commenter stated that an application may start out as an email request, followed up by a phone call, and then be completed in person. This commenter suggested that there would be difficulty collecting the data accurately because the proposal did not allow for multiple methods of application, particularly because the definition of application is at the financial institution's discretion. A bank suggested that the Bureau drop the waterfall approach and allow financial institutions to designate the best way to determine application method. A group of trade associations likewise requested that the Bureau drop the waterfall approach, and instead have financial institutions report the application method where the ethnicity, race, and sex of the applicant's principal owners was requested. A few commenters suggested that the application method should be based only on the initial contact. Two of these commenters indicated that basing the application method on initial contact would provide clear requirements in the event that the applicant provides information via two methods: for example, when an applicant applies online but later provides information by telephone.

A group of trade associations noted that while the data point is about the means by which the application was submitted, the proposed commentary discusses when a financial institution meets with the applicant or communicates with the applicant by telephone. This commenter stated that the proposed commentary was confusing and did not provide clear guidance on compliance.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(3) with a number of revisions to the associated commentary. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau believes that collecting data on application method would aid in fulfilling the purposes of section 1071, as explained below.

Initially, the Bureau believes that data on application method will improve the market's understanding of how applicants apply for credit. In addition, data on application method will

support 1071's statutory purposes by, *inter alia*, providing additional context for the business and community development needs of particular geographic regions. For instance, application method may help data users analyze the extent to which financial institutions may be providing access to credit online or by telephone in "credit deserts" where financial institutions do not have branch operations.

In addition, the Bureau believes that collecting data on application method will aid in analysis of multiple data points collected and reported by financial institutions, including the ethnicity, race, and sex of applicants' principal owners. For example, these data will assist the Bureau and other data users in identifying whether applicants are more or less likely to provide this (and other) 1071 information in different application channels. This information may also assist in determining whether a financial institution has procedures to collect applicant-provided data at a time and in a manner that are reasonably designed to obtain a response, as required by § 1002.107(c).

The Bureau explained in the NPRM that having application method data would be useful in analyzing data reported under, and assessing compliance with, proposed § 1002.107(a)(20) related to collecting the ethnicity and race of principal owners via visual observation or surname in certain circumstances. However, as explained in the section-by-section analysis of § 1002.107(a)(19) below, the Bureau has removed the visual observation or surname requirement from this final rule. Consequently, the proposed waterfall approach is less relevant for assessing compliance with final § 1002.107(a)(19). In combination with the concerns expressed by commenters regarding compliance complexities, including the need to document multiple interactions between the financial institution and applicant, the Bureau has decided not to adopt the proposed waterfall approach for reporting application method.

The Bureau is thus adopting comments 107(a)(3)-1.i through .iv with revisions to reflect the removal of the waterfall. The Bureau believes these changes will also address a commenter's concern regarding potential confusion about the proposed commentary's treatment of meetings

and other interactions with applicants. Relatedly, the Bureau is not finalizing proposed comment 107(a)(3)-2, which would have provided guidance on reporting for interactions with applicants both via mail and online under the waterfall approach.

In addition, the Bureau has added new guidance in comment 107(a)(3)-1 to clarify what a financial institution reports if it retains multiple versions of the application form. The Bureau has also made a few minor revisions in comments 107(a)(3)-1.i through .iv for clarity. Final comment 107(a)(3)-1 lists the options a financial institution reports for the means by which an applicant submitted the application. In final comment 107(a)(3)-1.i, the Bureau has clarified that the in-person application method applies, for example, to those applications submitted at a branch office, including applications hand delivered by an applicant. In final comment 107(a)(3)-1.ii, the Bureau has clarified that an application submitted via telephone call is reported as "telephone." In final comment 107(a)(3)-1.iii, the Bureau has clarified that an application submitted via website, mobile application (commonly known as an app), fax transmission, or text-based electronic communication is also reported as "online." The Bureau does not believe it is appropriate to distinguish between applications submitted by email and applications submitted through a web portal, on the basis that an application that is emailed reflects a more personal relationship, as suggested by a commenter. The Bureau believes that both application methods are appropriately reportable as "online" because they reflect an electronic communication. The Bureau notes that various electronic communication methods provided in final comment 107(a)(3)-1.iii can reflect a personal relationship. For example, an applicant may have begun communications with the financial institution through email, followed by text messages, and then submitted the application through the financial institution's website. All of these methods can potentially reflect a personal relationship.

The Bureau removed the hand delivery at a teller window example in comment 107(a)(3)-1.iv because, under the final rule, an application hand delivered by an applicant at a branch is reported as "in-person" pursuant to final comment 107(a)(3)-1.i. Regarding a

suggestion from commenters that the Bureau use the method by which ethnicity, race, and sex of the principal owners are collected for reporting this data point, the Bureau does not believe that such an approach is necessary given that it is not finalizing its proposed requirement to collect principal owners' ethnicity and race via visual observation or surname in certain circumstances. In addition, the Bureau does not believe that application method should be based on initial contact, as suggested by a few commenters. As explained by commenters, there could be multiple interactions between the lender and applicant throughout the pre-application and application process. Thus, the initial interaction may not amount to an application submission because, for example, the initial contact was simply an inquiry.[603] In light of commenters' concerns regarding the potential difficulties in identifying application method, the Bureau believes that its approach to final § 1002.107(a)(3), which is tied to an applicant submitting an application, is preferable to the suggestions made by commenters.

Regarding commenters' concerns about the utility of this data point, the Bureau believes that application method data will facilitate the fair lending and business and community development purposes of section 1071, as explained above. This information cannot be replicated by combining data points specifically enumerated in section 1071, such as census tract, with other publicly available data. Application method is not intended solely to identify "credit deserts," as the commenter appeared to suggest, and although census tract information might provide information as to where the proceeds will be applied (or the location of the applicant's headquarters/main office, or another location), that does not necessarily indicate where (or how) the financial institution interacted with the applicant. With respect to comments stating that application method is not currently collected nor is it considered as part of the credit decision, the Bureau believes that removal of the proposed waterfall approach will make collecting this data easier than contemplated in the proposed rule.

[603] Under § 1002.103(b)(2), a covered application does not include inquiries and prequalification requests.

Finally, this data point was introduced with sufficient time for the public to provide feedback and offer alternatives. The data point was suggested by small entity representatives during the SBREFA process and was included in the SBREFA Panel Report. It was also included in the proposed rule and the Bureau specifically sought—and obtained—comment on it. As noted, the Bureau has made changes as a result of that feedback.

107(a)(4) Application Recipient

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau believes that information regarding how an application is received will enhance small business lending data and aid in fulfilling the purposes of section 1071.

The Bureau proposed § 1002.107(a)(4), which would have required financial institutions to collect and report the application recipient, meaning whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party. Proposed comment 107(a)(4)-1 would have clarified that if a financial institution is reporting actions taken by its agent consistent with proposed comment 109(a)(3)-3, then the agent is considered the financial institution for the purposes of proposed § 1002.107(a)(4).

The Bureau sought comment on its proposed approach to this data point.

Comments Received

The Bureau received comments on the proposed application recipient data point from industry and community groups. A community group expressed its support, noting that in combination with the application method data point under proposed § 1002.107(a)(3), it would help stakeholders determine whether traditional banking or online lending is most effective in reaching underserved small businesses or whether the effectiveness of the lending model

depends on local context and conditions. A trade association also expressed its support, stating that the information can help data users understand the relationship between lender and applicant. This commenter further noted that recipient data would provide context for other collected and reported data and also improve transparency around when and whether an intermediary is considered a financial institution for the purposes of this data collection. In addition, a CDFI lender stated its general support of the Bureau's proposal to collect application recipient data.

In contrast, a number of banks and trade associations opposed the Bureau's proposal to collect application recipient data for various reasons. One trade association raised a concern that the application recipient data point was not included in the SBREFA Outline and, along with several other industry commenters, pointed out it is not one of the data points expressly enumerated in ECOA section 704B(e)(2). Several industry commenters stated that the data are not currently collected and a few of these commenters further stated that such data are not used or considered in the underwriting decision. Several industry commenters argued that the data point is burdensome and two banks stated they would need to collect the data manually because their systems are not equipped to collect the data. Other industry commenters questioned the value of the data point or how it fulfills the statutory purposes of section 1071. One industry commenter stated it is not dispositive of fair lending violations. Two banks urged the Bureau to drop the data point from the final rule or provide an exemption for certain institutions. One of these banks urged the Bureau to drop the data point from the final rule because it does not have affiliates nor does it accept applications indirectly and thus would not provide any data. The other bank commented that community banks should be exempt if they do not use actual third parties, but instead use a third-party online application system within the bank's firewall, and suggested that the only reason this data point should apply is if a bank is truly working with a third party, not a vendor who helps manage online tools. A trade association urged the Bureau to

eliminate the application recipient data point from the final rule until a later determination can be made regarding its necessity.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(4) and related commentary with a small modification for clarity. Final § 1002.107(a)(4) requires the financial institution to report whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party. Final comment 107(a)(4)-1 explains that if a financial institution is reporting actions taken by its agent consistent with comment 109(a)(3)-3, then the agent is considered the financial institution for the purposes of § 1002.107(a)(4). The comment also provides an example. The Bureau believes data on application recipient will facilitate fair lending analysis and enable a better understanding of business and community development needs. Pursuant to ECOA section 704B(e)(2)(H), the Bureau believes that collecting data on application recipient will aid in fulfilling the purposes of section 1071.

Regarding commenters' concerns that application recipient data are not currently collected nor used in underwriting decisions, the Bureau anticipates that financial institutions know and track how they receive applications for small business loans. The Bureau does not believe it would be difficult to track this information, even if the financial institution does not currently collect the information.

With respect to the comments received that question how application recipient data fulfill the purposes of section 1071, the Bureau believes that collecting data on application recipient, in combination with application method, as discussed above, will improve the market's understanding of how small businesses interact with financial institutions when applying for credit which, in turn, will facilitate fair lending analysis, including the identification of risks in small business lending. Regarding the comment that application recipient data are not dispositive of fair lending violations, the Bureau agrees that such data would not be dispositive of a violation

on their own, but believes data on application recipient can be used in combination with other data points or information to provide a more robust analysis. With respect to promoting the business and community development purposes of section 1071, the Bureau believes that data on application recipient will improve the public's understanding of the structure of small business lending originations across the market, the methods by which credit is originated for particular groups or underserved markets, and trends over time (for example, to the extent applicant preferences shift from in-person to online interactions). In addition, application recipient data may assist with an understanding of the business and community development needs of an area or applicant. For example, such data may help data users understand whether financial institutions making credit decisions are directly interacting with the applicant and/or generally operate in the same community as the applicant. Moreover, data on application recipient will allow the Bureau and data users to better understand the relationship between the covered financial institution and the applicant in the context of certain other data collected and reported under this final rule.

The Bureau is not removing the application recipient data point from the final rule or providing an exemption, as suggested by some commenters, for financial institutions that do not have affiliates, do not accept applications indirectly, and/or do not use third parties. Some financial institutions employ a wide variety of lending models in extending credit to small businesses. They may receive applications for credit directly from the applicant and some financial institutions may receive applications routed to them through third parties, such as brokers or vehicle or equipment dealers. Some financial institutions issue credit cards branded for particular retailers, for which applications are taken in person at the retailer's store locations. Some brokers and dealers may send applications to a single financial institution, while others may send them to multiple financial institutions at the same time. In these types of application scenarios involving third parties, the financial institution may not directly interact with the applicant at all during the application process. Information regarding whether the applicant

submitted the application directly to the financial institution is necessary to further the purposes of section 1071, including by improving the market's understanding of how small businesses interact with financial institutions when applying for credit and whether the financial institution is operating in the same community as the small business. This is true even if a particular financial institution does not accept applications indirectly or does not use third parties, and reporting of this data point should be simple for financial institutions in that situation.

Finally, this data point was introduced with sufficient time for the public to provide feedback and offer alternatives. It was also included in the proposed rule and the Bureau specifically sought—and obtained—comment on it. Given the wide variety of lending models financial institutions currently use when extending credit to small businesses, the Bureau believes it is timely and appropriate to include this data point in this final rule.

107(a)(5) Credit Type

Proposed Rule

Section 1071 requires financial institutions to collect and report "the type and purpose of the loan or other credit being applied for."[604] (The credit purpose data point is discussed in the section-by-section analysis of § 1002.107(a)(6) immediately below.) For HMDA reporting, Regulation C requires numerous data points that indicate the type of credit applied for or originated: the type of guarantees used; lien order; loan term; the presence of nontraditional contract terms including balloon, interest only, and negative amortization payments; variable rate information; open-end status; and reverse mortgage status.[605] Section 1071 provides no additional information or details regarding what aspects of credit type should be collected and reported.

The Bureau proposed in § 1002.107(a)(5) to require that financial institutions collect and report the following information regarding the type of credit applied for or originated: (i) The

[604] ECOA section 704B(e)(2)(B).

[605] Regulation C § 1003.4(a)(2), (14), (25), (27), (28), (37), and (38).

credit product; (ii) The type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated; and (iii) The length of the loan term, in months, if applicable. These aspects of credit type are discussed in turn below. This proposal was consistent with the approach presented in the SBREFA Outline, and would have required the financial institution to choose the credit product and guarantee(s) from a specified list. (These lists were provided in the commentary accompanying proposed § 1002.107(a)(5).) The lists included choices for "Other" and "Not provided by applicant and otherwise undetermined," as appropriate, to facilitate compliance.

The Bureau sought comment on its proposed approach to the credit type data point, including the lists of products and guarantees proposed and the other specific requests for input below.

Credit product. The first subcategory the Bureau proposed to include in the credit type data point was the *credit product* (*i.e.*, a commonly understood category of small business lending like term loans or lines of credit) which the Bureau considered to be an integral part of the statutory requirement to collect credit type.

Proposed comment 107(a)(5)-1 would have presented the instructions for collecting and reporting credit product and the proposed list of credit products from which financial institutions would select. Proposed comment 107(a)(5)-1 would have explained that a financial institution would comply with § 1002.107(a)(5)(i) by selecting the credit product requested from the list provided in the comment. It would also have explained that if an applicant requests more than one credit product, the financial institution reports each credit product requested as a separate application. Proposed comment 107(a)(5)-1 would have also explained that if the credit product for an application does not appear on the list of products provided, the financial institution would select "other" as the credit product and report the specific product via free-form text.

Proposed comment 107(a)(5)-2 would have explained that, pursuant to proposed § 1002.107(c)(1), a financial institution would be required to maintain procedures reasonably

designed to collect applicant-provided data, which includes credit product. However, if a financial institution was nonetheless unable to collect or otherwise determine credit product information because the applicant did not indicate what credit product it sought and the application was denied, withdrawn, or closed for incompleteness before a credit product was identified, the proposed comment would have explained that the financial institution would report that the credit product was "not provided by applicant and otherwise undetermined."

Proposed comment 107(a)(5)-3 would have explained how a financial institution would report a transaction that involves a counteroffer. The comment would have stated that if a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, a financial institution would report the application for the original credit product as denied pursuant to proposed § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution would report the disposition of the application based on the credit product that was offered, and would not report the original credit product applied for. In addition, proposed comment 107(a)(5)-6 would have explained when "other sales-based financing transaction" would be used for reporting.

The Bureau noted that, under its proposal, line increases would be reportable so that the small business lending market could be tracked accurately. See the section-by-section analysis of § 1002.103(a) above for additional details. However, the Bureau did not propose that line increases be included as a separate item in the credit product list.

The Bureau sought comment on its proposed approach to this subcategory, including the appropriateness and usefulness of the products included in the list, whether there were other products that should be added, and the proposed treatment of counteroffers. The Bureau also sought comment on how financial institutions currently handle increases in lines of credit and whether a line increase should be considered a credit product, and on whether an overdraft line

of credit should be considered a product separate from a line of credit and thus added to the product list.

Type of guarantee. The second data field the Bureau proposed to include in the credit type data point was *guarantee*. Proposed comment 107(a)(5)-4 would have presented the instructions for collecting and reporting type of guarantee and the proposed list of guarantees from which financial institutions would select. Proposed comment 107(a)(5)-4 would also have explained that a financial institution complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantee(s) obtained for an originated covered credit transaction, or that would have been obtained if the covered credit transaction were originated, from the list provided in the comment.

Proposed comment 107(a)(5)-4 would have also explained that the financial institution may select, if applicable, up to a maximum of five guarantees for a single application or transaction. Small business credit may have more than one guarantee, such as an SBA guarantee and a personal guarantee, and the Bureau believed that more complete information could be collected by requiring as many as five to be reported.

Proposed comment 107(a)(5)-4 would have also explained that if the type of guarantee for an application or originated transaction does not appear on the list of guarantees provided, the financial institution selects "other guarantee," and reports the type of guarantee as free-form text. As with credit product, the Bureau believed that allowing financial institutions to choose "other" when a guarantee for the application does not appear on the provided list would facilitate compliance. In addition, collecting this information on "other" guarantee types would assist the Bureau in monitoring trends in usage of other types of guarantees and key developments in the small business lending market, which the Bureau could use to inform any future iterations of the list.

Finally, proposed comment 107(a)(5)-4 would have provided that if no guarantee is obtained or would have been obtained if the covered credit transaction were originated, the

financial institution would select "no guarantee." Because a small business credit transaction does not always involve use of a guarantee, the Bureau did not propose to include "not provided by applicant and otherwise undetermined" as an option. If no guarantee was identified for an application, the financial institution would report "no guarantee."

The Bureau sought comment on its proposed approach to this subcategory, including the appropriateness and usefulness of the items listed, and whether there are other guarantees that should be added. The Bureau also sought comment on whether five is the appropriate upper limit for reporting guarantees.

Loan term. The third subcategory the Bureau proposed to include in the credit type data point was the *loan term*. Proposed comment 107(a)(5)-5 would have presented the instructions for collecting and reporting loan term. Specifically, it would have explained that a financial institution complies with proposed § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction, and that the loan term is the number of months after which the legal obligation will mature or terminate. The comment would have further explained how to measure the loan term and the possible use of rounding.

Proposed comment 107(a)(5)-5 would have also made clear that if a credit product, such as a credit card, does not have a loan term, the financial institution would report loan term as "not applicable." The financial institution would also report "not applicable" if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified.

The Bureau sought comment on its proposed approach to this subcategory.

Comments Received

The Bureau received comments on its proposed approach to the credit type data point from a number of banks, community-oriented lenders, trade associations, community groups, and others.

Several commenters, including community-oriented lenders, community groups, a trade association, and a business advocacy group, supported the credit type data point as proposed,

though some suggested small changes to the three individual subcategories discussed below. One commenter stated that to avoid the pitfalls that limited the use of HMDA data for spotting predatory trends in mortgages, the Bureau must collect sufficiently granular data on applicants and credit terms, including credit type. That commenter further stated that this information is critical because discrimination is not just evidenced in loan denials, but also less favorable credit terms. A community group stated that the information collected for the credit type data point would allow for more effective analysis than the current CRA small business information. A trade association stated that despite the added complexity of requiring three "data points" for the one listed in the statute, the Bureau has accounted for and addressed some of the concerns that community banks have raised related to credit type. That commenter went on to state its approval of the simple reporting of counteroffers and the ability to mark fields as "not provided by applicant" in the case of incomplete applications. Finally, a lender stated that it already collects the credit type information for the CDFI Fund.

Only one commenter opposed the credit type data point as a whole, stating that credit type and other data points would be a waste of time and efficiency.

Credit product. Two community groups and an auto finance trade association expressed support for the product list the Bureau proposed. The community groups stated that the list was nuanced and would provide useful differentiation between products. One explained that being able to determine which products were accessed could help in understanding bias in the credit market more accurately than CRA data currently allows for. An auto finance trade association specifically expressed support for the inclusion of "other" and "unknown" to facilitate compliance.[606]

One commenter stressed the importance of providing detail in distinguishing credit products, and several commenters requested changes to the credit products list. A joint letter

[606] The proposed rule used the terms "other" and "not provided by applicant and otherwise undetermined."

from community groups and business advocacy groups stated that there might be value in separating out mortgages, auto loans and equipment financing as discrete secured loan types but treating all other term loan applications together, rather than treating secured term loans as one category and unsecured term loans as another. A community group asked that refinances and renewals be added to the product list, stating that this information would help demonstrate community credit needs. That commenter went on to state that listing refinances in the credit purpose data point, as proposed, would be confusing, and that the Bureau should look at the ways refinances are reported under HMDA and CRA. Several minority business advocacy groups, along with a joint letter from community groups, community oriented lenders, and business advocacy groups, responded to the Bureau's request for comment by encouraging the Bureau to include "overdraft line of credit" in the list of credit products. These commenters stated that overdraft can contain hidden costs, so having a way to monitor lenders who provide it could be useful.. A trade association opposed the inclusion of overdraft line of credit in the credit products list, though it did not provide a reason. Several community groups commented that the Bureau should require reporting of collateral requirements and value, instead of simply requiring "secured" and "unsecured" for items in the credit product list. One of these commenters suggested that collateral info would shed light on underwriting changes and approaches during various economic conditions, allow stakeholders to understand why pricing might be lower on some loans and the risk that some loans might pose to borrowers.

A joint letter from community and business advocacy groups objected to the requirement to report each credit product requested as a separate application, stating that this would seem to require the lender to report each credit type requested as a separate application even when the applicant is seeking only one transaction but is open to alternative structures, and even though there would be only one action taken and one set of terms.

Type of guarantee. Several community groups expressed support for including guarantees as part of the credit type data point. These commenters stated that data on government guarantee

programs would allow for better analysis of their usage, including whether minority and women owned businesses are being steered to these loans. One of these commenters stated that requiring reporting on all types of guarantees would facilitate analysis of whether minority and women owned businesses were receiving more costly or onerous credit. That commenter also stated that personal guarantees can at times be abusive, and reporting of those would allow better monitoring of this issue. Although it did not specifically express support for requiring reporting of guarantees, a trade association for auto finance lenders stated that its members will have this information for reporting.

Two industry commenters objected to the collection of guarantees as part of the credit type data point on the grounds that the statute does not require reporting of guarantees and asking that the credit type data point be limited to credit product and loan term. Those commenters, and several others who did not object to the general guarantee reporting requirement, were concerned in particular about the requirement to report what guarantees *would have been obtained* if the transaction had been originated. Some commenters stated that such a requirement extends into mere speculation, and would undermine the accuracy, reliability, and consistency of the data. Another commenter stated that it would not be possible to report what guarantees would have been obtained, and joint letter from community groups and business advocacy groups stated that the requirement could be problematic in the case of a declined application because the lender would be speculating as to potential guarantees, such as personal guarantees, from owners or non-owners. That comment went on to recommend that the Bureau either limit the reporting of this field to offers and counteroffers that are made (*i.e.*, allow financial institutions to report type of guarantee as "not applicable" for declined applications, as is permitted with respect to the loan term and loan pricing data fields) or, for declined applications, require reporting only if the requested guarantee were a government or programmatic guarantee (such as SBA, USDA or some other third-party guarantee program).

A community group and two CDFI lenders requested that the list of guarantees be changed in certain ways. The community group stated that the data should distinguish whether the guarantee is offered by the natural person(s) owning the business or the business itself, because it matters whether a creditor can seize assets of a person or the business. One of the CDFI lenders requested that the guarantee categories be broken down further to detail collateral coverage, which is often the deciding factor on approval or denial, and because people of color own homes (and amass wealth) at much lower rates than whites. That commenter went on to suggest that these details could shed light on the credit needs of minority small business owners and whether financial institutions are applying collateral requirements equitably. The other lender requested that State guarantee and local guarantee be separated on the list, rather than the combined "state or local guarantee" that was proposed. That commenter stated that differentiating between the performance of these two levels of government would be critical for understanding the focus of future reforms or capital flows through these entities. The commenter also provided statistics suggesting that conflating State and local guarantees would not be as informative as separating them.

Loan term. A community group and a community-oriented lender stated their support for the proposed loan term provision. The community group stated that loan term length influences pricing and other terms and conditions, and would help in explaining differences in these features. That commenter also suggested that loan term should be straightforward to report for lenders. In addition, a national auto finance trade association stated that its members would have this information to report.

A number of banks and a trade association objected to the proposal to have the loan term measured from the first payment period rather than the date of origination. These commenters stated that they do not measure loan term in this way, and having to do so for reporting would cause unnecessary and significant compliance difficulties. They asked to be able to measure loan term from the date of origination of the credit. Another bank objected to the reporting of loan

term for applications, stating that applicants seldom make an application that specifies the desired loan term.

Although the proposed rule did not discuss how or whether merchant cash advance providers would report loan term, the Bureau did seek comment on proposed § 1002.107(a)(12)(v) and its commentary, the pricing provision for merchant cash advances, including whether to require additional pricing information for merchant cash advances, and whether merchant cash advances could be structured in ways that evade the proposed reporting requirement. Two commenters urged the Bureau to make clear that merchant cash advance providers must report loan term, and must not use the proposed rule's provision stating that "not applicable" could be reported for a product that has no loan term. These commenters discussed the importance of loan term in comparing different credit pricing and stated that merchant cash advances are sometimes abusive and are used disproportionately by minority businesses. These commenters also stated that loan term can be readily ascertained for merchant cash advances and they described different methods for doing so. One method suggested was that when a merchant cash advance is paid off before reporting, the provider should report the actual length of time to repayment. In addition, they suggested that for a partially paid merchant cash advance the provider could project the amount of time to repayment based on the amount already paid. One of these commenters, a cross-sector group of lenders, community groups, and small business advocates, stated that merchant cash advance providers establish an estimated loan term when they underwrite an advance, and that most merchant cash advance contracts have an estimated payment amount.

Final Rule

The Bureau is finalizing § 1002.107(a)(5) certain changes to facilitate compliance and enhance the quality and usefulness of the data reported. Final § 1002.107(a)(5) requires that financial institutions collect and report the following information regarding the type of credit applied for or originated: (i) the credit product; (ii) the type or types of guarantees that were

obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated; and (iii) the length of the loan term, in months, if applicable.

The Bureau believes that it is reasonable to interpret the statutory term "credit type" to comprise the three required subcategories, because they are critical to understanding the nature of small business credit applied for and provided, as explained below. For the reasons discussed herein, the Bureau believes that the subcategories of credit product (including collateral), guarantee type, and loan term will aid in fulfilling the purposes of section 1071. Financial institutions generally have all of the information required for this data point when they process applications (and the reporting regime is sufficiently flexible when they do not), so the Bureau does not believe there is anything in this approach that will impose particular operational difficulty. Additionally, the Bureau believes it is reasonable to interpret type of credit "applied for" to include the type of credit actually originated when an application results in an extension of credit.

The statutory term "type . . . of the loan" is ambiguous, and the Bureau reasonably interprets the term to include the credit product, any guarantee obtained, and the term of a loan because an accurate and useful record of the "type" of loan or credit would include those data fields. In the alternative, ECOA section 704B(e)(2)(H) authorizes the Bureau to require inclusion of "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]," and for the reasons discussed herein, the Bureau has also determined that the subcategories of credit product (including collateral), guarantee type, and loan term will aid in fulfilling those purposes.

Credit product. The Bureau is finalizing the credit product subcategory with certain changes to the associated commentary to facilitate compliance and enhance the quality and usefulness of the data reported. Final § 1002.107(a)(5)(i) requires financial institutions to compile and maintain data on the credit product applied for or originated. The Bureau continues to consider credit product to be an integral part of the statutory requirement to collect credit type.

The Bureau believes information about the various products sought by applicants will further the purposes of section 1071 by demonstrating, for example, how small businesses of different sizes or in different sectors choose to pursue, or ultimately access, different forms of credit.

The Bureau distinguishes between secured and unsecured term loans and lines of credit in its list of credit products because it believes that whether a term loan or line of credit is collateralized can have such a significant effect on things like approval rates and pricing that secured and unsecured products fundamentally differ in kind. For this reason, the Bureau believes that including information on the use of collateral in the credit product subcategory will help data users to avoid inaccurate interpretations of data. The Bureau believes that whether a loan is secured or unsecured will be part of an application or loan file and, as a result, will not be operationally difficult to report once a financial institution's section 1071 compliance system is set up.

Final comment 107(a)(5)-1 presents the instructions for collecting and reporting credit product and the list of credit products from which financial institutions will select. Comment 107(a)(5)-1 explains that a financial institution complies with § 1002.107(a)(5)(i) by selecting the credit product applied for or originated from the list provided in the comment. The Bureau believes that the list of credit products provided in final comment 107(a)(5)-1 aligns with the most common types of credit products in small business lending. Final comment 107(a)(5)-1 also explains that if the credit product for an application does not appear on the list of products provided, the financial institution selects "other" as the credit product and reports the specific product via free-form text. The Bureau believes that allowing financial institutions to choose "other" when the credit product for the application does not appear on the provided list will facilitate compliance. In addition, collecting this information on "other" credit products will assist the Bureau in tracking product trends and key developments in the small business lending market, which the Bureau can use to inform any future iterations of the list.

Comment 107(a)(5)-1 also explains that if an applicant requests more than one credit product at the same time, the financial institution reports each credit product requested as a separate application. The issue of how to collect and report multiple products applied for at the same time affects several data points, but is most salient for credit type. The Bureau believes that requiring a separate application to be reported for each credit product requested will yield more complete and useful data, and that a financial institution will not experience operational difficulties in copying the relevant information, identical for most data points, to separate lines in the small business lending application register. However, the Bureau has changed the language regarding this requirement from the proposed rule, in order to clarify that when the applicant is seeking only one transaction but is open to alternative product types, the financial institution reports only one application. Comment 107(a)(5)-1 now includes instructions on how to report credit product when the applicant only requests a single covered credit transaction, but has not decided which particular product to request. The Bureau believes that this new language will facilitate compliance and lead to the collection of more accurate data. The issue of reporting requests for multiple covered credit transactions at one time is discussed more fully in the section-by-section analysis of § 1002.103(a) above.

As explained above, many commenters suggested changes to the list of products in comment 107(a)(5)-1. In regard to the requests to separate out mortgages, auto loans and equipment financing as discrete secured loan types, to include additional information about collateral, and to make "refinancing" a credit product rather than a credit purpose, the Bureau believes that its credit product taxonomy presents a clear, uncomplicated framework using the basic forms of credit extended to small businesses. Including types of collateral and different refinancings as part of credit products would complicate the taxonomy and introduce categorization difficulties, for example with partial refinancings. Under the final rule, these types of credit will be reported using the credit product applied for or originated, from the list in comment 107(a)(5)-1, and the extra information suggested may or may not be appropriately

included in the credit purpose data point under § 1002.107(a)(6), depending on the situation. Similarly, the Bureau believes that the overdraft aspect of overdraft lines of credit will best be reported using the credit purpose "overdraft," and that the credit product will then be reported as a line of credit, secured or unsecured. The Bureau believes that this arrangement will help preserve the uncomplicated framework of the credit products list. See the section-by-section analysis of § 1002.107(a)(6) below for further discussion.

As a result of further analysis and consideration, the Bureau has made one change from the proposal to the final credit products list in comment 107(a)(5)-1. The proposed "credit card account" product has now been separated into "credit card account, not private-label," and "private-label credit card account." The Bureau believes that private-label credit cards form a distinct and important market segment that operates differently from other credit cards, and this distinction will facilitate robust data analysis and better further the purposes of section 1071. The Bureau also believes that financial institutions will have the information needed for reporting these different types of accounts readily available, and so separating the two types will not cause operational difficulty. In addition to the change in the credit product list in comment 107(a)(5)-1, the Bureau has added new comments 107(a)(5)-2 and -3 to explain the difference between these card products and facilitate compliance. Final comment 107(a)(5)-2 provides a definition of credit card accounts that are not private-label and includes instructions on reporting these products. Final comment 107(a)(5)-3 provides a definition of private-label credit card accounts and includes instructions on reporting these products.

The Bureau is also finalizing comments 107(a)(5)-4, -5 (which were numbered as comments 107(a)(5)-2 and -3 in the proposal) and comment 107(a)(5)-6 as proposed. Final comment 107(a)(5)-4 describes the situation in which a financial institution reports that the credit product was "not provided by applicant and otherwise undetermined." The Bureau believes that permitting this response will facilitate compliance and enhance the quality of data collected. As discussed above, commenters supported the flexibility afforded by this kind of response.

Final comment 107(a)(5)-5 provides instructions on how a financial institution reports a transaction that involves a counteroffer. The comment states that if a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, a financial institution reports the application for the original credit product as denied pursuant to § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the disposition of the application based on the credit product that was offered, and does not report the original credit product applied for. The Bureau believes that, in the complex circumstances created by counteroffers, the meaning of the type of credit "applied for" is ambiguous, and it is reasonable to interpret the credit product "applied for" to mean the credit product considered via the applicant's response to the counteroffer. For a discussion of the Bureau's treatment of counteroffers more generally, see the section-by-section analysis of § 1002.107(a)(9) below.

Final comment 107(a)(5)-6 explains that for an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction, a financial institution selects "other sales-based financing transaction" as the credit product, and provides a cross reference to comment 104(b)-1. The Bureau believes that this explanation will facilitate reporting of applications involving this important market segment.

Type of guarantee. The Bureau is finalizing the requirement to report guarantees as a subcategory of the credit type data point with changes to enhance the quality of the data collected and facilitate compliance. The final rule requires a financial institution to report the type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated.

The Bureau considers the guarantee obtained for an extension of credit to be part of the credit "type" because it is fundamental to the nature of the transaction in that it meaningfully impacts terms such as interest rates, such that guarantee information can help to explain potential

disparities in outcomes and reduce inaccurate conclusions, aiding in fulfilling the fair lending purpose of section 1071. Indeed, in common parlance, small business credit transactions are often referred to using the name of the guarantee (*e.g.*, "a 7(a) loan," referring to the SBA 7(a) guarantee). Because various types of guarantees are available for different credit products, the Bureau believes that guarantee type should constitute a separate subcategory within the credit type data point, so that data users can conduct separate analyses with respect to credit product and guarantees, and to avoid excessive complexity in the credit product data field. The Bureau further believes that information on the distribution of government loan guarantees (such as those provided in SBA programs) across different geographic areas and applicant groups will allow a better understanding of how those programs function on the ground, aiding in fulfilling the business and community development purpose of section 1071. As with collateral, information on guarantees is generally a part of an application or loan file and the Bureau does not believe it will be operationally difficult to report once a financial institution's 1071 compliance system is set up.

Final comment 107(a)(5)-7 (which was numbered as comment 107(a)(5)-4 in the proposal) presents the instructions for collecting and reporting type of guarantee and the list of guarantees from which financial institutions will select. The Bureau believes the list of guarantee types provided in comment 107(a)(5)-7 aligns with the most common types of guarantees used in small business lending. Final comment 107(a)(5)-7 also explains that a financial institution complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantee(s) obtained for an originated covered credit transaction, or that would have been obtained if the covered credit transaction were originated, from the list provided in the comment.

The Bureau agrees with the commenters who suggested that clarity was needed on how to report guarantee type when the covered credit transaction is not originated. Consequently, comment 107(a)(5)-7 now states that if an application is denied, withdrawn, or closed for incompleteness before any guarantee has been identified, the financial institution selects "no

guarantee." The Bureau believes that this reporting option will facilitate compliance and result in the collection of more reliable data. The Bureau also agrees that separating State and local guarantees, so that they can be tracked individually, will enhance the quality of the data collected. Comment 107(a)(5)-7 now includes separate items for these guarantee types, and states that the financial institution chooses State government guarantee or local government guarantee, as applicable, based on the entity directly administering the program, not the source of funding. The Bureau believes that this instruction will facilitate compliance and enhance the quality of the data collected. The Bureau also believes that differentiating between State and local guarantees will not cause operational difficulty for reporters because the financial institution will have the information in the loan file.

The Bureau understands that there may be some value in collecting the additional information suggested by commenters on whether a natural person or business makes a guarantee and the nature of the collateral backing a guarantee. However, the Bureau believes that these items will increase the complexity and operational difficulty of compliance in reporting the type of guarantee and has not included them in the final rule.

Loan term. The Bureau is finalizing the requirement to report loan term as part of the credit type data point with certain changes to the associated commentary to facilitate compliance and enhance the quality of the data collected. Final § 1002.107(a)(5)(iii) requires a financial institution to report the length of the loan term, in months, if applicable.

As with the consumer lending market, the pricing and sustainability of closed-end credit transactions for small businesses are associated with term length, and without awareness of the term of the loan, data users will have less of an understanding of the types of credit being made available to applicants. Credit with a one-month term may differ not just in degree but in kind from credit with a 60-month term. The Bureau thus believes that the length of the loan term is a fundamental attribute of the type of credit that applicants are seeking such that it should be treated as a separate subcategory within credit type. As with other elements of the credit type

data point, loan term information will allow data users to reduce inaccurate conclusions or misinterpretations of the data, aiding in fulfilling both the fair lending and business and community development purposes of section 1071. Likewise, the loan term will be part of the application or loan file and should not be operationally difficult to report once a financial institution's 1071 compliance system is set up.

Final comment 107(a)(5)-8 (which was numbered as comment 107(a)(5)-5 in the proposal) presents the instructions for collecting and reporting loan term. Specifically, it explains that a financial institution complies with § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction, and that the loan term is the number of months after which the legal obligation will mature or terminate. In the proposed rule, this comment included language that would have required financial institutions to measure the loan term in the way that loan terms are generally described in real property transactions. However, the Bureau agrees with those commenters who stated that such a provision would create compliance difficulties. Although the final comment continues to allow the loan term to be measured for real property transactions in the way the Bureau proposed, it makes clear that loan term for small business credit is generally measured from the date of origination and should be reported that way.

Final comment 107(a)(5)-8 also makes clear that if a credit product, such as a credit card, does not have a loan term, the financial institution reports loan term as "not applicable." The Bureau believes that permitting the use of "not applicable" in these situations will facilitate compliance and aid in the collection of appropriate data. However, the Bureau does not consider products that have an estimated loan term, such as certain merchant cash advances and other sales-based financing transactions, as products that do not have a loan term. The Bureau agrees with those commenters who suggested that merchant cash advance providers should report loan term so that appropriate comparisons can be made with other products. Consequently, comment 107(a)(5)-8 now provides that for merchant cash advances and other sales-based financing

transactions, the financial institution complies with § 1002.107(a)(5)(iii) by reporting the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. The Bureau notes that loan term for a merchant cash advance or other sales-based financing transaction can also be the estimated loan term disclosed in a State or locally required disclosure, if applicable. The comment also explains that if more than one loan term is estimated, specified, or disclosed, the financial institution reports the one it considers to be the most accurate, in its discretion. The Bureau believes that these instructions will enhance the quality of the data collected and facilitate compliance by providing clear guidance on these providers' reporting responsibilities. The Bureau chose not to use the other loan term measurements that commenters suggested because they would likely have introduced significant operational difficulty. The Bureau believes that merchant cash advance and other sales-based financing providers will not have operational difficulty reporting an estimate that they already possess. If a merchant cash advance or other sales-based financing provider does not estimate, specify, or disclose a loan term as part of the processing or underwriting of the application or transaction, the provider may report that the loan term is "not applicable."

The proposed rule's loan term comment would have also provided that the financial institution would report "not applicable" if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. However, in order to facilitate compliance, enhance the quality of information collected, and for consistency with the other data points in the final rule, final comment 107(a)(5)-8 now provides that for a credit product that generally has a loan term, the financial institution reports "not provided by applicant and otherwise undetermined" if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. The Bureau believes that the availability of this response will facilitate the reporting of the loan term subcategory for applications in these situations.

107(a)(6) Credit Purpose

Proposed Rule

Section 1071 requires financial institutions to collect and report "the type and purpose of the loan or other credit being applied for."[607] (The credit type data point is discussed in the section-by-section analysis of § 1002.107(a)(5) immediately above.)

The Bureau proposed in § 1002.107(a)(6) to require that financial institutions collect and report the purpose or purposes of the credit applied for or originated. Proposed comment 107(a)(6)-1 would have presented instructions for collecting and reporting credit purpose and would have provided the proposed list of credit purposes from which financial institutions would select.

The proposed list of credit purposes was similar to the list in the SBREFA Outline, with certain adjustments. First, the items on the SBREFA list that described types of collateral, such as commercial real estate, were updated to more clearly reflect that the financial institution would be collecting and reporting the *purpose* of the loan, and not the form of collateral, though the form of collateral might be referred to in describing that purpose. In addition, the proposed listed purposes involving real property would have differentiated between dwelling and non-dwelling real property. The Bureau believed that this distinction would help in collecting more precise and useful data. To facilitate compliance the Bureau proposed to include "not applicable" in the purposes list for use when an application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card. Proposed comment 107(a)(6)-5 would have also explained the use of "not applicable" as a response.

Proposed comment 107(a)(6)-2 would have explained that if the applicant indicated or the financial institution was otherwise aware of more than one purpose for the credit applied for

[607] ECOA section 704B(e)(2)(B).

or originated, the financial institution would have reported those purposes, up to a maximum of three, using the list provided, in any order it chose.

Proposed comment 107(a)(6)-3 would have explained that if a purpose of the covered credit transaction did not appear on the list of purposes provided, the financial institution would report "other" as the credit purpose and report the purpose as free-form text. For efficiency and to facilitate compliance, proposed comment 107(a)(6)-3 would have also explained that if the application had more than one "other" purpose, the financial institution would choose the most significant "other" purpose, in its discretion, and would report that "other" purpose. The comment would have then explained that a financial institution would report a maximum of three credit purposes, including any "other" purpose reported.

Proposed comment 107(a)(6)-4 would have explained that, pursuant to proposed § 1002.107(c)(1), a financial institution would maintain procedures reasonably designed to collect applicant-provided information, which would include credit purpose. However, if a financial institution was nonetheless unable to collect or determine credit purpose information, the financial institution would have reported that the credit purpose was "not provided by applicant and otherwise undetermined."

In order to facilitate compliance, the Bureau also proposed comments 107(a)(6)-6 and -7. Proposed comment 107(a)(6)-6 would have clarified that, as explained in proposed comment 104(b)-4, subpart B did not apply to an extension of credit that was secured by 1-4 individual dwelling units that the applicant or one or more of the applicant's principal owners did not, or would not, occupy. Proposed comment 107(a)(6)-7 would have clarified the collection and reporting obligations of financial institutions with respect to the credit purpose data point, explaining that the financial institution would be permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)-1 to the applicant. Proposed comment 107(a)(6)-7 would have further explained that the financial institution would also be permitted to ask about purposes not included on the list provided in proposed comment 107(a)(6)-1. Finally, proposed

comment 107(a)(6)-7 would have clarified that if an applicant chose a purpose or purposes that were similar to purposes on the list provided, but used different language, the financial institution would report the purpose or purposes from the list provided.

The Bureau sought comment on its proposed approach to the credit purpose data point. In addition, the Bureau sought comment on whether there were any purposes that should be added to or modified on its proposed list. In particular, the Bureau sought comment on the potential usefulness of including "agricultural credit" and "overdraft line of credit" in the credit purposes list. Finally, the Bureau requested comment on whether further explanations or instructions with respect to this data point would facilitate compliance.

Comments Received

The Bureau received comments on its proposed approach to the credit purpose data point from a number of lenders, trade associations, and community groups, along with a minority business advocacy group. Several community groups expressed support for the credit purpose data point as proposed by the Bureau, and a CDFI lender explained that it already collects this information. A community group stated that the proposal accurately captured the wide variety of credit purposes and then expressed specific support for distinguishing dwellings from non-dwellings, allowing reporting of three credit purposes, and inclusion of the "other" category with a free-form text box. In addition, this commenter suggested that the proposed method for credit purpose collection could work well with the CRA.

A trade association representing community banks also supported the proposal for credit purpose, especially the flexibility provided by the "not applicable" and "not provided by applicant and otherwise undetermined" options, and the provision allowing a financial institution to report the credit purposes in any order it chooses, when the institution is aware of more than one purpose. That commenter said that these accommodations would facilitate compliance while still achieving the policy goals of the law. A trade association representing auto finance lenders also stated support for the flexibility provided by the "not applicable" and "not provided by

applicant and otherwise undetermined" options. Two banks opposed the credit purpose proposal, explaining that it would require extensive changes and burdensome ongoing operations, and that the interplay with other regulatory requirements was unclear. One of these commenters also questioned the usefulness of the data collected. However, neither commenter suggested alternative ways to implement the statutorily required credit purpose data point.

Several commenters asked that the Bureau clarify certain aspects of the credit purpose proposal. Two industry commenters requested clarification of the circumstances when institutions should use "not provided by applicant and otherwise undetermined" as opposed to "not applicable." Several industry commenters requested guidance on when to use "owner-occupied" versus "non-owner occupied" for non-dwelling real property. Another asked about how to report when the loan is mixed-use (business and consumer purpose). A joint letter from community groups and community oriented lenders requested that the Bureau clarify that the category "Working capital (includes inventory or floor planning)" also includes salaries, rents, and other daily expenses. A credit union trade association suggested that the Bureau clarify how transactions should be reported when made directly to a sole proprietor, not to the business directly, explaining that credit unions may find it confusing to report a loan purpose that implies that the business itself is the recipient.

Several commenters requested more substantial changes in the proposed credit purpose data point. Two joint comment letters, each representing multiple community groups and other entities, requested that the Bureau require more granular reporting in certain situations, especially with regard to real property loans. These comments suggested collecting real property loan data on rental purpose, whether buildings are mixed-use, the number and type of units in buildings, as well as a way to easily connect to a HMDA record for any loan that is reported under both regimes. One of these comments asked that the Bureau make it easier to determine if a capital expense loan is used to maintain a business or expand it. Another community group requested that the Bureau disaggregate the purchase-construction-repair purpose from

refinancing for things like real estate, vehicles, and equipment, perhaps by adding a separate data point. Another requested that refinancings (along with renewals) should be listed as a credit product in the credit type data point, rather than as a credit purpose. That same commenter requested that financial institutions not be allowed to use their own list of purposes, as proposed, and suggested that the Bureau consider providing a sample application form, which would include the rule's list of credit purposes, to facilitate data collection.

Several industry commenters responded to the Bureau's request for comment on including "agricultural credit" as a credit purpose. These commenters mostly requested that new purposes specifically geared to agricultural lending be included, though they did not offer any examples of such purposes. The commenters emphasized that agricultural lending is different from other business lending and suggested that choosing from the credit purposes listed would be difficult for this market. A community group stated that it might be confusing to list agricultural credit as a credit purpose as the credit product data point would collect that they are farm loans.[608]

Several community groups and a minority business advocacy group responded to the Bureau's request for comment on whether the final rule should include "Overdraft line of credit" as a credit purpose. These commenters supported inclusion of overdraft as a purpose, stating that it should be monitored for potential abuses, especially abuses in communities of color. No industry commenters discussed the possible inclusion of overdraft lines of credit as a credit purpose.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(6) and associated commentary with certain revisions for clarity, to improve the usefulness of the data collected, and to accommodate a new coverage exclusion for HMDA-reportable transactions. Final

[608] The Bureau notes that the proposed rule did not expressly list agricultural loans (or similar) on either the credit products list or credit purposes list.

§ 1002.107(a)(6) requires that financial institutions collect and report the purpose or purposes of the credit applied for or originated.

Final comment 107(a)(6)-1 provides instructions for collecting and reporting credit purpose and presents the list of credit purposes from which financial institutions will select. The final list of purposes is very similar to the proposed list but deletes two purposes that describe credit likely to be HMDA reportable, includes one additional purpose ("overdraft") and makes minor edits to accommodate those changes and for clarity. The Bureau believes that the list of credit purposes provided in comment 107(a)(6)-1 appropriately aligns with the purposes of credit sought in the small business credit market.

Because the Bureau is adopting an exclusion for HMDA-reportable credit, the proposed purposes list's differentiation between dwelling and non-dwelling real property is no longer necessary. In addition, the purposes in the list that pertained to dwellings were very likely to be HMDA-reportable, and so have been removed in the final rule. See the section-by-section analysis of § 1002.104(b) above for further discussion of this exclusion.

The Bureau agrees with the commenter who suggested that "Working capital (includes inventory or floor planning)" will often also include salaries, rents, and other daily expenses. However, the final rule does not include these items in the credit purposes list description of working capital because the Bureau believes the term is already clear, and listing these items may cause confusion as to other working capital items that are not listed.

The Bureau has not added "Agricultural credit" or specific purposes associated with agricultural credit to the list of credit purposes in the final rule. First, although "farm loans" are not listed as a credit product in the credit type data point, the NAICS data point in final § 1002.107(a)(15) will make clear when the small business borrower is an agricultural business. In addition, other business types are not included in the credit purposes list and doing so with agriculture could cause confusion. As far as including specific agricultural purposes in the purposes list, the commenters who suggested this did not provide examples, and the Bureau did

not propose such purposes. Going forward, the Bureau may learn of specific agricultural credit purposes from the "Other" free-form text box, and if appropriate, potentially add them to the rule later.

The Bureau agrees that overdraft should be separately identified as a credit purpose in the list in comment 107(a)(6)-1 in order to observe its use in the market. Rather than "Overdraft line of credit" as referenced in the proposal's preamble, the Bureau is using the term "Overdraft." In order to facilitate compliance regarding overdraft as a credit purpose, the Bureau is adding new comment 107(a)(6)-8 to the final rule, which makes clear that when overdraft is an aspect of the covered credit transaction applied for or originated, the financial institution reports "Overdraft" as a purpose of the credit. The new comment also explains that the financial institution reports credit type pursuant to § 1002.107(a)(5)(i) as appropriate for the underlying covered credit transaction, such as "Line of credit—unsecured." The Bureau does not believe that reporting overdraft as a credit purpose will create operational difficulties for financial institutions because the information will be readily apparent as an aspect of the credit. Finally, new comment 107(a)(6)-8 makes clear that providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B.

The Bureau is finalizing comments 107(a)(6)-2 through -5 with minor edits to accommodate the removal of purposes related to the exclusion for HMDA-reportable transactions and for clarity. Final comment 107(a)(6)-2 explains that if the applicant indicates or the financial institution is otherwise aware of more than one purpose for the credit applied for or originated, the financial institution reports those purposes, up to a maximum of three, using the list provided, in any order it chooses. Since applicants may have more than one purpose for a credit transaction, the Bureau believes it is appropriate to require collection and reporting of more than one credit purpose for this data point in that situation. The Bureau believes that having financial institutions report up to three credit purposes will provide useful data. The Bureau also

believes that allowing financial institutions discretion as to the order of the credit purposes reported will facilitate compliance.

Final comment 107(a)(6)-3 explains that if a purpose of an application does not appear on the list of purposes provided, the financial institution reports "other" as the credit purpose and reports the credit purpose as free-form text. The Bureau believes that allowing financial institutions to choose "other" when a credit purpose for the application did not appear on the provided list will facilitate compliance. In addition, the Bureau believes that collecting this information on "other" credit purposes will assist in monitoring trends in this area and key developments in the small business lending market, which the Bureau can use to inform any future changes to the list.

Final comment 107(a)(6)-4 makes clear that, pursuant to final § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes credit purpose. However, the comment further explains that if a financial institution is nonetheless unable to collect or determine credit purpose information, the financial institution reports that the credit purpose is "not provided by applicant and otherwise undetermined." The Bureau agrees with the industry commenters who stated that this provision would provide flexibility and believes that permitting use of this response will facilitate compliance and enhance the quality of data reported.

In order to facilitate compliance, final comment 107(a)(6)-5 explains that if the application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card, the financial institution may report credit purpose as "not applicable." As with the "not provided by applicant and otherwise undetermined" purpose, the Bureau agrees with the industry commenters who felt that this provision would provide appropriate flexibility. The Bureau does not believe that there will be confusion about the situations for which "not provided by applicant and otherwise undetermined" (as explained in final comment 107(a)(6)-4) and "not applicable" (as explained in final comment 107(a)(6)-5) are

appropriate to use. The commenters who suggested that such confusion might occur did not explain why the proposed language would not be sufficient.

Final comment 107(a)(6)-6 provides details on the collection of credit purposes by financial institutions. The comment states that, pursuant to § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including credit purpose. In addition, the financial institution is permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)-1 to the applicant. The financial institution is also permitted to ask about credit purposes not included on the list provided in comment 107(a)(6)-1. If the applicant chooses a purpose or purposes not included on the provided list, the financial institution follows the instructions in comment 107(a)(6)-3 regarding reporting of "other" as the credit purpose. If an applicant chooses a purpose or purposes that are similar to purposes on the list provided, but uses different language, the financial institution reports the purpose or purposes from the list provided. The Bureau believes that the explanations and instructions in the final commentary accompanying § 1002.107(a)(6) will reduce any confusion as to how a financial institution reports this data point when an application involves multiple credit purposes, and in other situations.

The Bureau believes that prohibiting financial institutions from using their own credit purpose lists, as one commenter suggested, would not be appropriate because the Bureau does not have sufficient information to create a definitively comprehensive credit purposes list and wishes to provide institutions the flexibility appropriate to their market segment. In regard to that commenter's suggestion that the Bureau provide a sample application form, this issue is discussed in the section-by-section analysis of appendix E below. In addition, the Bureau does not believe additional clarification regarding how to report credit purpose for business loans made to sole proprietors is necessary.

Because the Bureau is providing a complete exclusion for HMDA-reportable transactions in the final rule, the Bureau is not finalizing proposed comment 107(a)(6)-6, which would have

provided a cross-reference to the partial exclusion for dwelling-secured credit in the proposed rule.

New comment 107(a)(6)-7 explains that real property is owner-occupied if any physical portion of the property is used by the owner for any activity, including storage. The Bureau adds this explanation in response to comments asking for clarity on this issue. The Bureau believes that the language provided clearly indicates the meaning of "owner-occupied" for reporting purposes and will facilitate compliance and help in the collection of uniform data.

In regard to the commenters that objected to the entire credit purpose data point as excessively burdensome and not providing useful information, the Bureau notes that this data point was specified by Congress in section 1071 as one that financial institutions must collect and report; these commenters did not suggest a different method of collection. The Bureau also believes, along with the national trade association representing small banks whose comment is described above, that the reporting accommodations included in the credit purpose provision will facilitate compliance while still achieving the policy goals of section 1071.

Although some additional useful information might be collected if the Bureau were to expand the credit purpose data point to include the more granular reporting requested by community groups, such changes would make the collection more difficult for financial institutions as well as potentially confusing for small business applicants; the Bureau does not believe that further granularity is necessary at this time, especially at the risk of obtaining potentially less accurate or complete data overall. In regard to making "refinancing" a credit product rather than a credit purpose as proposed, the Bureau believes that its credit product taxonomy presents a clear, uncomplicated framework using the basic forms of credit extended. Making refinancing a product would complicate the taxonomy and introduce categorization difficulties, for example with partial refinancings. As for including renewals, the section-by-section analysis of § 1002.103(b) above discusses this issue.

107(a)(7) Amount Applied For

Proposed Rule

Section 1071 requires financial institutions to collect and report "the amount of the credit or credit limit applied for, and the amount of the credit transaction or the credit limit approved."[609] The Bureau stated in the SBREFA Outline that it was considering requiring financial institutions to report the amount applied for data point using the initial amount of credit or credit limit requested by the applicant at the application stage, or later in the process but prior to the financial institution's evaluation of the credit request.[610]

The Bureau proposed § 1002.107(a)(7) to require a financial institution to collect and report "the initial amount of credit or the initial credit limit requested by the applicant." Proposed comment 107(a)(7)-1 would have explained that a financial institution is not required to report credit amounts or limits discussed before an application is made, but must capture the amount initially requested at the application stage or later. In addition, proposed comment 107(a)(7)-1 would have stated that if the applicant does not request a specific amount, but the financial institution underwrites the application for a specific amount, the financial institution reports the amount considered for underwriting as the amount applied for. Finally, proposed comment 107(a)(7)-1 would have instructed that if the applicant requests an amount as a range of numbers, the financial institution reports the midpoint of that range.

To address the situation where the financial institution requests an amount applied for but the applicant nonetheless does not provide one, proposed comment 107(a)(7)-2 would have explained that, in compliance with proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, which includes the credit amount initially requested by the applicant. However, if a financial institution is nonetheless unable to collect or otherwise determine the amount initially requested, the

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[609] ECOA section 704B(e)(2)(C).

[610] SBREFA Outline at 28.

financial institution would have been required to report that the amount applied for is "not provided by applicant and otherwise undetermined."

Proposed comment 107(a)(7)-3 would have provided instructions for reporting the amount applied for in regard to firm offers. Proposed comment 107(a)(7)-3 would have explained that when an applicant responds to a "firm offer" that specifies an amount or limit, which may occur in conjunction with a pre-approved credit solicitation, the financial institution reports the amount applied for as the amount of the firm offer, unless the applicant requests a different amount. If the firm offer does not specify an amount or limit and the applicant does not request a specific amount, proposed comment 107(a)(7)-3 would have explained that the amount applied for is the amount underwritten by the financial institution.

Proposed comment 107(a)(7)-4 would have explained that when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts sought or extended. The Bureau noted that a request to withdraw additional credit amounts at or below a previously approved credit limit amount on an existing open-end line of credit would not be a covered application, and so proposed comment 107(a)(7)-4 would not have applied to such a situation.

The Bureau sought comment on its proposed approach to the amount applied for data point. The Bureau also requested comment on how best to require reporting of amount applied for in situations involving multiple products or credit lines under a single credit limit. The Bureau also requested comment on potential methods for avoiding misinterpretations of disparities between the amount applied for and the amount approved or originated. Finally, the Bureau requested comment on its proposed approach to reporting when a range of numbers is requested.

Comments Received

The Bureau received comments from lenders, trade associations, community groups, and others regarding this proposed data point. Community groups and a CDFI lender supporting the Bureau's approach to the collection of the amount applied for data point. One commenter said that it works with minority farmers whose loans are approved for far less than what they originally applied for and that the data would give them information regarding lending practices involving minority farm businesses. Several commenters stated that amount applied for and amount approved or originated are key data for fair lending purposes. One said that Black-, Latino-, and Asian-owned businesses have been substantially less likely to receive the full small business loan amount requested than white-owned small businesses. Another commenter requested that the Bureau scrutinize lenders when the application and approval amounts are conspicuously close, especially if there is a disproportionate impact on women and minority-owned businesses, because some lenders may dissuade applicants from making a specific request and steer them to the considered underwriting amount that is lower than the financing need of the small business.

A community group noted that amounts should not be reported in ranges since the statute requires reporting of amounts and furthermore, that ranges are not useful for assessing whether lenders are responding adequately to credit needs. This community group also commented that with respect to line increases, it makes sense for the lender to report the additional amount instead of the additional and original amount because it is more precise in terms of being able to assess whether credit needs are being met.

Several industry commenters and a group of State banking regulators expressed concerns about collecting the data in light of the lending process where the "amount applied for" can fluctuate throughout the application stage. One trade association commented that financial institutions should not be required to report amounts stated before an application is made because applicants state a loan amount early on but that loan amount usually changes throughout the

process for various reasons. Another stated that many business credit applications include offers, counteroffers, and negotiations. One commenter stated that even though the initial amount requested appears useful it does not reflect the true dynamic of the small business lending process. The commenter reasoned that it is not uncommon during the application process to see the actual loan amount fluctuate as the entrepreneur further refines their capital needs, and that makes tracking this type of information not particularly relevant or reflective of the process. A credit union trade association recommended that financial institutions have the discretion to report an "amount applied for" that is determined at a later stage, rather than at the first request of the applicant, because reporting the initial credit request could inaccurately represent the lending process. A group of state banking regulators commented that some applicants may not request an amount or may request a range, and some financial institutions will not require such information at the outset. They stated that mandating reporting of a requested loan amount would impose increased compliance burdens and has the potential to disrupt the relationship aspect of small business lending.

Two industry commenters requested the Bureau clarify how financial 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 and $40,000. These commenters stated they 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. They reasoned that 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. A bank suggested that when an applicant indicates a range, each financial institution should be able to decide whether to report the low, midpoint, or high end of the range so long as it is consistent for the financial institution's entire small business lending application register.

Two business advocacy groups noted that uncertainty regarding key definitions could create compliance challenges and requested that the Bureau provide additional clarity as to the

meaning of "applied for." A bank stated that its systems do not have a way to collect and record this data point and that it would need to collect it manually, which would affect its ability to serve its customers and community.

The Bureau did not receive comments on how best to require reporting for situations involving multiple products or credit lines under a single credit limit or potential methods for avoiding disparities between amount applied for and amount originated or approved.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(7) and associated commentary with revisions and an addition in the commentary for clarity. The Bureau notes that for HMDA, Regulation C § 1003.4(a)(7) requires reporting of "the amount of the covered loan or the amount applied for, as applicable," which requires reporting of the amount applied for only when the credit is not originated. Because section 1071 uses the conjunction "and" rather than "or," the Bureau reads section 1071 to require collection and reporting of the amount applied for regardless of whether the application is ultimately approved or originated.[611] The Bureau believes its interpretation of "the amount of the credit or credit limit applied for" pursuant to ECOA section 704B(e)(2)(C) is reasonable and appropriate.

With respect to the commenter that indicated that some lenders may dissuade applicants from making a specific request and steer them to the considered underwriting amount, which may be lower than their financing needs, the Bureau believes that it is necessary to capture both the amount applied for and amount approved or originated to fulfill the statutory purposes of section 1071, including facilitating fair lending enforcement. The Bureau believes the amount applied for and the amount approved data points are necessary to identify potentially discriminatory practices, such as discouragement or steering, in the lending process. For example, greater differences between amount applied for and amount originated among protected

[611] The amount approved or originated data point is addressed in the section-by-section analysis of § 1002.107(a)(8).

groups could indicate a fair lending concern. The Bureau notes that if a financial institution were to seek to unduly influence or alter the amount requested by the applicant in order to avoid reporting it, such conduct would violate the requirement in final § 1002.107(c) to not discourage an applicant from responding to requests for applicant-provided data and to maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response.

Regarding commenters' concerns that the amount applied for can change throughout the lending process, the Bureau acknowledges that there could be complexity in pinpointing the specific initial amount requested by an applicant in the fluid process of a small business credit application. The Bureau acknowledges that this complexity could make this data point challenging for financial institutions to collect and report. Nonetheless, the statute requires that the amount applied for be reported, and the information is important for both of section 1071's statutory purposes. The Bureau is finalizing comment 107(a)(7)-1 with minor edits for clarification. Final comment 107(a)(7)-1 provides that the financial institution reports the initial amount of credit or the credit limit initially requested by the applicant at the application stage and is not required to report credit amounts or limits discussed before an application is made. The Bureau believes that this guidance will provide a flexible compliance regime that will accommodate different business practices. A financial institution will not be required to report amounts discussed before the application is made, which will accommodate preliminary informal interactions. Regarding the recommendation that financial institutions have the discretion to report an amount determined at a later stage rather than the initial request of the applicant, the Bureau notes that the statute requires the amount applied for to be reported even though a small business credit application process can be fluid. Therefore, a financial institution should report the initial request of the applicant if the lending process has already reached the application stage. In regard to ranges of amounts requested, the Bureau does not believe that permitting financial institutions to decide whether to report the low, midpoint, or high end of the range, as requested by a commenter, would yield data that will be comparable to the other data collected

for this data point because different financial institutions will be applying different rules for what to report. The Bureau believes that more uniform information will be more useful and should not create extra difficulty for financial institutions to collect. Therefore, to facilitate compliance, final comment 107(a)(7)-1 provides that for amounts that were requested as a range of numbers, the financial institution reports the midpoint of the range. In addition, for clarity, the Bureau moved guidance on what to report if an applicant does not request a specific amount to final comment 107(a)(7)-2, as explained below.

With respect to the comment that an amount may not be initially required or that some applicants may not request an amount or may request a range, the Bureau understands that a specific amount may not be provided by the applicant and that a specific amount is often not required by many financial institutions for products such as credit cards, as the financial institution assigns the credit limit as part of the credit evaluation process. Final comment 107(a)(7)-2 provides that in situations where the applicant does not request a specific amount at the application stage, but the financial institution underwrites the application for a specific amount, the financial institution reports the amount that was considered in underwriting. Final comment 107(a)(7)-2 also provides that if a particular type of credit product does not involve a specific amount requested, then the financial institution reports "not applicable." The Bureau believes this method will aid compliance with section 1071 and yield appropriate data by avoiding the need to report a preliminary number when a financial institution's business practices do not result in there being such a number to report. For clarity, the Bureau moved guidance regarding amounts that are otherwise undetermined that was addressed in proposed comment 107(a)(7)-2 to final comment 107(a)(7)-5, as explained below.

Regarding the request that the Bureau clarify how institutions should report the amount applied for when a firm offer of credit specifies a range of possible amounts, the Bureau added guidance in final comment 107(a)(7)-3 that addresses this situation. "Firm offers" involve solicitations to small businesses when they have been pre-approved for a term loan, line of

credit, or credit card.[612] The Bureau understands that financial institutions often provide an amount in such solicitations and the Bureau believes that when the applicant knows the amount of the pre-approval before responding, that figure could appropriately be considered as the amount applied for. However, if no amount appears in the pre-approved solicitation, the Bureau considers that an applicant responding to the firm offer has not requested a specific amount, and reporting of the amount underwritten would be appropriate. Final comment 107(a)(7)-3 provides that when an applicant responds to a firm offer, a financial institution reports the amount applied for as the amount of the firm offer, unless the applicant requested a different amount. If, on the other hand, the firm offer did not contain a specified amount and the applicant did not request one, then the financial institution reports the amount applied for as the amount that was underwritten. The Bureau did not propose guidance that addresses what financial institutions report when a firm offer specifies a range of possible amounts. The Bureau agrees with the commenters that such offers should be treated similarly to those situations where a firm offer did not specify an amount. To address this scenario, final comment 107(a)(7)-3 states that if the firm offer specifies an amount or limit as a range of numbers and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution. The Bureau believes that this guidance will aid compliance and yield useful data.

The Bureau is finalizing comment 107(a)(7)-4 as proposed. The comment explains that when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts extended.

The Bureau added final comment 107(a)(7)-5 to address situations where the initial amount applied for cannot be determined. Specifically, the comment provides that under § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect

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[612] *See* 15 U.S.C. 1681a(*l*); *see also* Regulation B comment 12(b)(7)-1 (describing offers of credit).

applicant-provided data, which includes the credit amount initially requested by the applicant (other than for products that do not involve a specific amount requested). However, the Bureau understands that there may be situations in which amount applied for was not collected and could not be otherwise determined. Thus, final comment 107(a)(7)-5 provides that if a financial institution is unable to collect or otherwise determine the amount initially requested, the financial institution reports that the amount applied for is "not provided by applicant and otherwise undetermined." The Bureau believes that providing this reporting flexibility will facilitate compliance by accommodating different business practices.

With respect to the commenter that indicated that its systems do not have a way to collect this data point, the Bureau believes that the data on the amount applied for will generally be available in the loan files and should not present particular difficulties in reporting. Regarding the request from commenters that the Bureau provide additional clarity as to the meaning of applied for, the commenters did not indicate specific issues in the amount applied for data point that require clarification. The Bureau believes it has addressed in this final rule the requests for clarity from other commenters as well as other clarifications the Bureau believes are appropriate.

107(a)(8) Amount Approved or Originated

Proposed Rule

Section 1071 requires financial institutions to collect and report "the amount of the credit transaction or the credit limit approved."[613]

Proposed § 1002.107(a)(8) would have required that the amount approved or originated data point be collected and reported as follows: (i) for an application for a closed-end credit transaction that is approved but not accepted, the financial institution collects and reports the amount approved by the financial institution; (ii) for a closed-end credit transaction that is originated, the financial institution collects and reports the amount of credit originated; and

[613] ECOA section 704B(e)(2)(C).

(iii) for an application for an open-end credit transaction that is originated or approved but not accepted, the financial institution collects and reports the amount of the credit limit approved.

Proposed comment 107(a)(8)-1 would have provided general instructions for the amount approved or originated data point, explaining that a financial institution reports the amount approved or originated for credit that is originated or approved but not accepted. For applications that the financial institution, pursuant to proposed § 1002.107(a)(9), would have reported as denied, withdrawn by the applicant, or incomplete, the financial institution would have reported that the amount approved or originated is "not applicable."

Proposed comment 107(a)(8)-2 would have explained that when a financial institution presents multiple approval amounts from which the applicant may choose, and the credit is approved but not accepted, the financial institution reports the highest amount approved. Proposed comments 107(a)(8)-3 and -4 would have provided specific instructions for identifying and reporting the amount approved or originated for closed-end transactions, including refinancings.

Proposed comment 107(a)(8)-5 would have provided instructions regarding counteroffers and the amount approved or originated data point, explaining that if an applicant agrees to proceed with consideration of a counteroffer for an amount or limit different from the amount for which the applicant applied, and the covered credit transaction is approved and originated, the financial institution reports the amount granted. Proposed comment 107(a)(8)-5 would have further explained that if an applicant does not agree to proceed with consideration of a counteroffer or fails to respond, the institution reports the action taken on the application as denied and reports "not applicable" for the amount approved or originated. The proposed comment would have provided a reference to proposed comment 107(a)(9)-2, which discusses the action taken data point in relation to counteroffers.[614]

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[614] See the section-by-section analysis of § 1002.107(a)(9) for a complete discussion of how the final rule treats reporting obligations for applications involving counteroffers.

The Bureau sought comment on its proposed approach to the amount approved or originated data point. The Bureau also requested comment on potential methods for avoiding misinterpretations of disparities between the credit amount or limit applied for and the credit amount or limit originated or approved and on the possible use of ranges of numbers for reporting the amount applied for and amount approved or originated data points. In addition, the Bureau requested comment on whether it would be useful and appropriate to require reporting of the amount approved as well as the amount originated for closed-end credit transactions.

Comments Received

The Bureau received comments on the amount approved or originated data point from lenders, trade associations, and community groups. Almost all of the comments received supported the Bureau's proposal. A bank and a trade association commented that the Bureau's proposal is a reasonable and appropriate means of implementing the statutory requirement. A community group and a CDFI lender highlighted the usefulness of the data for fair lending purposes, including identifying potentially discriminatory lending practices. The CDFI lender suggested that the data can help show how financial institutions compare across key metrics and reveal capital gaps in the market that lenders may be able to fill. Two commenters supported the proposal's requirement that data collection on amount approved or originated be required for transactions that are approved but not accepted, not just those that are originated. A trade association commented that different standards are appropriate for closed-end and open-end products, while a community group noted that it is appropriate to report the credit limit in cases of open-end credit. Another trade association emphasized the Bureau's proposal regarding counteroffers and that it appropriately allows for negotiations prevalent in small business lending. A community group requested that the Bureau not permit reporting of amounts in ranges, stating that the statute requires reporting of specific amounts and that ranges are not useful for assessing whether lenders are responding to credit needs adequately.

Two banks expressed concerns about the overall proposed requirement to collect data on amount approved or originated. One suggested that the data are meaningless because the majority of loan requests at a community bank are not submitted formally and in most cases the amount approved is what was requested. That bank also noted that it would be rare for the amount to change and it does not have a way to currently track the information, thus adding burden. Another bank recommended that financial institutions should not be generally required to report information on applications where no credit was extended, such as applications that were not completed by the applicant or where the applicant did not accept the terms. This bank reasoned that the amount approved data point is irrelevant because the loan was not originated and that it does not further the purposes of section 1071 because the information would not help the Bureau materially understand credit opportunities nor help ensure fair lending laws are enforced.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(8) and associated commentary as proposed. The Bureau is also adding new comment 107(a)(8)-6. The Bureau reads the statutory language "the amount of the credit transaction or the credit limit approved" to require the amount of the credit limit approved to be reported for open-end applications, and the amount of the credit transaction to be reported for closed-end applications. The Bureau believes the phrase "the amount of the credit transaction or the credit limit approved" to be ambiguous in regard to closed-end transactions because the most common meaning of the word "transaction" in the context for closed-end credit transactions would be an originated loan. Thus, the Bureau reasonably interprets the statute as requiring reporting of the amount originated for closed-end credit transactions. In the alternative, section 1071 authorizes the Bureau to include any "additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau believes that it is appropriate to use its exception authority under ECOA section 704B(g)(2) to require the amount originated, rather than the amount approved, for

originated closed-end credit transactions, because excluding the amount approved for originated closed-end transactions, and requiring collection of the amount originated instead, would enhance the utility and quality of the data being reported, thus further the fair lending and business and community development purposes of section 1071.

In response to the commenters' suggestion that data on applications should not be reported in situations where the application is withdrawn or incomplete as well as the commenter's suggestion that the data are meaningless, the Bureau believes there is value in the data to be reported, even if no amount is reported for the amount approved or originated data point. Other information to be reported for the application that was, pursuant to § 1002.107(a)(9), withdrawn by the applicant or incomplete, can help further the fair lending and community development purposes of section 1071. For example, data from applications that are withdrawn or incomplete can help identify potential discriminatory practices in the application process and also indicate demand for credit by small business applicants. This would not be possible if data on applications that are withdrawn or incomplete are not reported. Accordingly, final comment 107(a)(8)-1 explains that for applications a financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that the amount originated or approved is "not applicable." The Bureau also believes that reporting "not applicable" for amount approved or originated in certain circumstances will facilitate compliance for this data point.

The Bureau does not believe, as suggested by one commenter, that data on applications where the applicant did not accept the terms would not further the statutory purposes of section 1071. The data will help facilitate fair lending enforcement by indicating the credit that had been offered to different types of applicants when the transaction does not close and there is no amount originated to report. Reporting data with respect to the amount approved will also aid in

fulfilling the business and community development purpose of section 1071 by providing a more complete picture of the credit being offered to different businesses and communities.[615]

As stated above, the Bureau is finalizing the commentary to § 1002.107(a)(8) as proposed. Final comment 107(a)(8)-2 provides guidance on reporting the amount approved or originated data point when the transaction involves multiple approval amounts. The Bureau believes that reporting the highest amount approved when credit is approved but not accepted will most accurately reflect the amount of credit that was made available to the applicant in this situation. Final comments 107(a)(8)-3 and -4 provide guidance on reporting amount approved or originated for closed-end transactions and refinancings, respectively. Final comment 107(a)(8)-5 provides guidance on reporting amount approved or originated when the transaction involves counteroffers.

The Bureau is adding comment 107(a)(8)-6 to provide guidance on reporting amount approved or originated with respect to existing accounts. Comment 107(a)(8)-6 provides that the financial institution reports only the additional credit amount approved or originated for an existing account, and not any previous amounts that were extended. The Bureau believes this will help facilitate compliance for this data point.

The Bureau did not receive specific comments with respect to this data point on methods for avoiding misinterpretations of disparities between credit amount or limit applied for and credit amount or limit originated or approved and whether it would be useful and appropriate to require reporting of amount approved as well amount originated for originated closed-end credit transactions. The Bureau is therefore not requiring reporting of that additional data.

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[615] The Bureau similarly believes that reporting the amount originated on closed-end credit transactions that are originated also fulfills the purposes of section 1071. For these transactions, reporting of the amount originated would aid in fulfilling the enforcement of fair lending laws by indicating the credit that had been provided to different types of applicants in actual transactions. It would also aid in fulfilling the business and community development purpose of section 1071 by providing a more complete and accurate picture of the credit actually being provided to different businesses and in different communities.

107(a)(9) Action Taken

Proposed Rule

ECOA section 704B(e)(2)(D) requires financial institutions to report the "type of action taken" on an application.

The Bureau proposed in § 1002.107(a)(9) to require reporting of the action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. In addition, the Bureau proposed to categorize all incomplete applications as a single category of "incomplete," rather than following the approach in Regulation C of separately reporting denials based on incompletes and notices of incompleteness. Although the Bureau considered expanding the action taken codes to those currently used in Regulation C (including preapprovals or purchased loans), the Bureau did not believe those additional fields would have been appropriate or necessary in the context of section 1071 given the diversity of processes and other complexities in the small business lending space and because section 1071, unlike HMDA, does not expressly reference loan purchases.

Proposed comment 107(a)(9)-1 would have provided additional clarity on when a financial institution should select each of the proposed action taken codes. The financial institution would have identified the applicable action taken code based on final action taken on the covered application.

Proposed comment 107(a)(9)-2 would have provided instructions for reporting action taken on covered applications that involve a counteroffer, along with examples. The Bureau's proposed treatment of counteroffers would have aligned with how counteroffers are treated under existing § 1002.9 notification procedures and how they are reported under Regulation C.[616] The Bureau also considered, but did not propose, adding an action taken category or flag for

[616] Regulation C comment 4(a)(8)(i)-9.

counteroffers. The Bureau believed the addition of a counteroffer flag or field would have provided limited useful information beyond what would have been captured under the proposal.

Proposed comment 107(a)(9)-3 would have discussed reporting action taken for rescinded transactions. Proposed comment 107(a)(9)-4 would have clarified that a financial institution reports covered applications on its small business lending application register for the year in which final action is taken. Finally, proposed comment 107(a)(9)-5 would have provided guidance for reporting action taken if a financial institution issues an approval that is subject to the applicant meeting certain conditions.

The Bureau sought comment on proposed § 1002.107(a)(9) and its associated commentary.

Comments Received

The Bureau received comment on its proposal in § 1002.107(a)(9) to require reporting of action taken from a wide range of lenders, trade associations, and community groups.

Action taken categories in general. A number of commenters, including community groups, lenders, and a trade association supported the action taken reporting categories in proposed § 1002.107(a)(9). Two industry commenters agreed that proposed § 1002.107(a)(9) was a reasonable and appropriate means of implementing section 1071. One community group stated that the action taken codes are an essential metric to enforce fair lending laws and that the proposed action taken categories are substantially similar to those used for HMDA reporting, and so will be familiar to lenders. A joint letter from community groups, community oriented lenders, and business advocacy groups similarly supported use of the action taken fields that are also used for HMDA reporting. A trade association noted that action taken information is not typically collected by motor vehicle dealers in indirect vehicle finance transactions, but may be included by the finance source as part of the credit application decision.

Some commenters focused on particular proposed action taken categories, urging the Bureau to retain a proposed action taken category and not combine categories. For example, a

several lenders and community groups specifically supported collection on incomplete and withdrawn applications. They asserted that it is important to collect data on applications that do not go through the full lending process (*i.e.*, through loan decisioning) in order to identify potential discouragement. Several commenters further explained that capturing incomplete and withdrawn applications would be important for fair lending assessments, as it would identify potential disparities in treatment, discouragement, and steering. In response to the Bureau's request for comment on whether to combine the "withdrawn by applicant" and "incomplete" categories, a community group supported the Bureau's proposed approach to keep the categories separate. The commenter asserted that data analysis and fair lending assessments would be more accurate if the withdrawn and incomplete categories are kept separate, as they represent different actions by the applicant. Another community group commenter supported distinct action taken categories for approvals and denials, noting, for example, research finding disparities in credit denials for Black, Latino, and Asian small businesses.[617] A lender, however, urged the Bureau to use caution in interpreting and analyzing data collected under section 1071, noting for example that a high denial rate for different types of businesses (*e.g.*, small or minority-owned businesses) could be reflective of a financial institution's high volume of applications from such small businesses and not of a pattern of discriminatory lending.

In response to the Bureau's request for comment on whether to retain the "approved but not accepted" category, two community groups urged the Bureau to include this category among the available action taken options. The commenters argued that the approved but not accepted category could be used to identify instances where an applicant was offered loan terms that did not meet the needs of the small business (such as high pricing or other unfavorable terms), and could be tracked to identify potential disparities among women-owned or minority-owned small

[617] *See* Fed. Rsrv. Bank of Atlanta, *Small Business Loan Turndowns, Personal Wealth and Discrimination* (July 2002), https://www.federalreserve.gov/pubs/feds/2002/200235/200235pap.pdf.

businesses, or other vulnerable populations. Another commenter argued that data may be misconstrued if approved but not accepted loans are treated as "denials."

In contrast, several community banks urged the Bureau to remove certain proposed action taken categories. For example, a community bank argued against use of withdrawn by applicant or denied action taken codes, stating that there was no reason to report such applications and it would violate the applicant's trust. A different community bank urged the Bureau to remove the incomplete category, noting that financial institutions treat incompleteness as a denial under existing Regulation B (because it requires an adverse action notice or a notice of incompleteness), and that such events are better captured as denials or withdrawals.

In the NPRM, the Bureau also sought comment on whether the Bureau's proposal to categorize all incomplete applications as a single category of "incomplete" (closed or denied) should instead be reported consistent with the approach in Regulation C, which provides separate categories for denials (including on the basis of incompleteness) and files closed for incompleteness (if the financial institution sent a written notice of incompleteness). A few industry and community group commenters specifically supported diverging from Regulation C and reporting denials based on incompleteness as "incomplete" applications, rather than "denied" applications. A CDFI lender and a community group stated that doing so would be in line with the intent of section 1071 and would lead to more accurate data by reserving the denied category exclusively for creditworthiness and underwriting factors. One trade association stated that such reporting would be easier to comply with and provide less opportunity for data errors, while another trade association noted that additional subcategories of incomplete would create confusion and add difficulty for financial institutions.

In contrast, several banks and a group of bank trade associations urged the Bureau to align reporting of incomplete applications with HMDA reporting. A bank commented that aligning with HMDA would increase efficiency for the customer, facilitate compliance, and ensure that financial institutions only need to collect data once. Similarly, several commenters

argued that misalignment with HMDA would add substantial difficulty for financial institutions required to report under HMDA. However, some of those same commenters also stated that they were sympathetic to the Bureau's underlying reasons for wanting to report all incomplete applications in one category, and argued that this was further reason to exclude all HMDA transactions. A bank asked for clarification on how to report an application that results in adverse action based on incompleteness.

Treatment of counteroffers. The majority of commenters to address the issue, including several lenders, trade associations, and a community group, supported the Bureau's proposal as related to counteroffers. In response to the Bureau's request for comment on whether counteroffers that are not accepted should be reported as "approved but not accepted," rather than "denied," several commenters, including a community group and a CDFI lender, supported the Bureau's proposal that declined counteroffers would be recorded as denials and accepted counteroffers would be reported as originations. Several CDFI lenders further commented that this proposal would avoid lenders seeking to game the system and avoid reporting denials by giving unreasonable counteroffers likely to be denied by the applicant. In contrast, a trade association argued that counteroffers that are not accepted should be reported as "approved but not accepted" as it would better reflect the availability of credit. A bank asked how to report an accepted counteroffer that does not ultimately lead to an origination, and urged consistency with HMDA.

In response to the Bureau's request for comment on whether to specifically capture data on counteroffers, several industry commenters supported the Bureau's proposal to not separately track counteroffers. One of these commenters urged the Bureau to not separately track counteroffer terms (such as the amount requested and approved) as it would create burden for financial institutions, and if the offer was ultimately accepted, would not provide meaningful data. Similarly, other industry commenters argued that determining what is a counteroffer would be difficult and it would be infeasible to capture all data points for each counteroffer. A bank

said that small business lending involves many discussions between the lender and the applicant, and so capturing counteroffers would be extraordinarily complex and require additional training. The industry commenters also stated that capturing counteroffers could lead to confusion and data errors. One of the commenters further urged the Bureau to align with Regulation C, which it asserted does not require reporting of counteroffers.

On the other hand, a CDFI lender and a joint letter from community and business advocacy groups urged the Bureau to require reporting of any counteroffers and their terms. These commenters suggested the Bureau modify the action taken fields to add "counteroffer accepted" and "counteroffer rejected," and require reporting of pricing information on these options. The joint letter argued that separate reporting of counteroffers would provide visibility into pricing of credit offers made but not accepted or offers that otherwise do not result in an origination. The commenter further took issue with the aspect of the proposal that would require a lender to report it has denied an application, when it has in fact it had approved it on different terms. A CDFI lender similarly argued that the proposal provides a loophole for financial institutions, and urged the Bureau to require reporting of pricing on the initial request and any counteroffers to prevent exploitative lending. The commenter acknowledged, however, that the Bureau's proposal does not penalize entities seeking to provide assistance to businesses, which often entails multiple counteroffers to best meet the business's needs.

Finally, the joint letter from community and business advocacy groups asserted that the proposed definition of a counteroffer is problematic. Under the proposal, a counteroffer was described to occur when a financial institution offers to grant credit on terms other than those originally requested by the applicant. The commenter stated, however, that nothing requires a lender to initially solicit from applicants what terms they are seeking (other than amount applied for and credit type), and so it would not be clear when to treat an offer as a "counteroffer" for purposes of the rule.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(9) with a minor revision for consistency, to require reporting of the action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. Most commenters to address this issue generally supported the Bureau's proposed action taken categories, noting that the approach was a reasonable one and would assist in fair lending enforcement.

Although the Bureau sought comment on whether to remove or combine certain of the action taken categories, the Bureau is finalizing the list of categories as proposed in § 1002.107(a)(9). The Bureau is not eliminating the "approved but not accepted category"; data collected under this category would reflect demand for credit, and as noted by some commenters, could potentially be used to identify offers made that do not meet the needs of small businesses. Moreover, no commenter expressly urged the Bureau to remove the "approved but not accepted" category. The Bureau is also retaining the "withdrawn by the applicant" and "incomplete" action taken categories. As noted by some commenters, capturing data on incomplete and withdrawn applications is important to identifying potential discrimination and discouragement during the application process, and thus consistent with the purposes of section 1071. Next, the Bureau is keeping "withdrawn by the applicant" and "incomplete" as separate action taken categories; the categories represent different actions by the applicant, and so keeping them distinct will lead to more accurate data analysis, including better fair lending analysis. Moreover, the Bureau believes a high incidence of incomplete applications could potentially indicate that there is an issue with the level of assistance provided by a financial institution (for example, not providing reasonable support or assistance to ensure an applicant satisfies all credit conditions; or providing more support to some applicants than others). Although a couple of community banks urged the Bureau to remove the "denied," "withdrawn by applicant," or "incomplete" action

taken categories as unnecessary or inconsistent with current lender practice, the Bureau believes retaining those categories further the purposes of section 1071, as described above.

The Bureau is also finalizing § 1002.107(a)(9) to require a financial institution to report all incomplete applications—whether the application is closed or denied based on incompleteness—as the "incomplete" action taken category. While this proposed approach is not consistent with Regulation C comments 4(a)(8)(i)-4 and -6, there could be potential errors in the data if financial institutions report incomplete denials separate from notices of incompleteness. As noted by commenters, grouping all incomplete applications together would lead to more useful data by reserving the denied category solely for creditworthiness and underwriting decisions. Moreover, as noted by several commenters, grouping all incomplete applications in one category would be easier for financial institutions to implement. Although several industry commenters urged the Bureau to align reporting of incomplete applications with Regulation C in order to increase efficiency and facilitate compliance, those concerns are mitigated by the Bureau's decision to exclude reporting of all HMDA-reportable transactions, as set forth in final § 1002.104(b)(2). Indeed, one of the commenters advocating for alignment with Regulation C also stated that they were sympathetic to the Bureau's reasons for wanting all incomplete applications reported under a single category. In response to a commenter's question regarding the reporting of applications where an adverse action notice is provided based on incompleteness, under final § 1002.107(a)(9), the financial institution would report such an application as "incomplete," rather than "denied." In response to another commenter's concern that data may be misconstrued if approved but not accepted loans are treated as "denials," the Bureau notes that there is a separate action taken category for "approved but not accepted" (see final § 1002.107(a)(9) and associated commentary for reporting of that action code).

The Bureau is also finalizing as proposed its treatment of counteroffers in final comment 107(a)(9)-2. The Bureau agrees with commenters that this approach (requiring that counteroffers that are not accepted to be reported as "denied," rather than "approved but not accepted") would

prevent lenders from trying to improperly influence how their data are reported by extending unreasonable counteroffers that are likely to be denied. This approach is also consistent with existing § 1002.9 notification procedures and reporting of counteroffers under Regulation C,[618] and so will be familiar to financial institutions. In response to a commenter's concern that this approach would not capture the availability of credit (as rejected counteroffers would be reported as "denials"), the Bureau believes the considerations noted above—preventing gamesmanship and consistency with existing Regulation B and Regulation C—outweigh the potential benefit of alternate reporting. In response to a commenter's question about how a financial institution reports an accepted counteroffer that does not ultimately lead to an origination, the Bureau directs the commenter to final comment 103(a)(9)-2, which provides that if an applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer.

The Bureau is also finalizing comment 107(a)(9)-2 to not separately track counteroffers as an additional action taken category or flag. As noted by some commenters, it would be potentially infeasible to capture all data points for every back-and-forth counteroffer with an applicant, and attempting to do so would likely lead to confusion, heightened complexity, and data errors. The Bureau also believes that even without a counteroffer flag or field, the data will capture many of the terms of an accepted counteroffers (such as pricing, guarantee, etc.), as well as the amount initially requested by the applicant. Therefore, the addition of a counteroffer flag or field would provide limited useful information beyond what will already be captured under section 1071. Moreover, while a counteroffer flag or field might be useful as a screening tool for potential discrimination (for example, if women-owned businesses or minority-owned businesses are provided higher rates of counteroffers or denials compared to male- or non-Hispanic white-

[618] Regulation C comment 4(a)(8)(i)-9.

owned businesses), a flag alone would lack any specificity that could be leveraged for further fair lending analysis.

While several commenters urged the Bureau to require reporting of accepted and rejected counteroffers, as well as their pricing terms, the Bureau does not believe the benefits of additional reporting would outweigh the added complexity, logistical challenges, and potential data accuracy issues involved in reporting counteroffers. For example, while some commenters suggested adding counteroffer rejected and counteroffer accepted action taken categories, and to require reporting of pricing, the commenter does not explain how a financial institution would report multiple back-and-forth counteroffers connected to a single covered application, which some commenters report is typical in small business lending. Moreover, focusing solely on the pricing term of a counteroffer would leave unknown other material terms of a counteroffer, such the amount offered, duration, or a requirement to have a co-signer or guarantor. In response to commenters' concerns that not capturing counteroffers would mean a lack of visibility into counteroffers that are made but not accepted, the Bureau agrees that such information would not be captured, however, as described above, the Bureau believes that reporting of such data would add significant complexity, could undermine data quality, and would provide only limited additional benefits. Regarding some commenters' criticism that the definition of a counteroffer is flawed because it presumes a lender has solicited all requested terms from the applicant, the Bureau believes the description of a counteroffer in final comment 107(a)(9)-2 as an offer to grant credit or terms other than those originally requested by the applicant is a reasonable one: an applicant will likely specifically request the terms most important to the applicant, the definition is consistent with existing Regulation B and Regulation C and so will be familiar to financial institutions, and the commenters do not propose an alternative.

The Bureau is finalizing the commentary to § 1002.107(a)(9) with minor revisions for clarity and consistency. Final comment 107(a)(9)-1 provides additional clarity on when a financial institution should select each of the proposed action taken codes. The comment further

clarifies that a financial institution identifies the applicable action taken code based on final action taken on the covered application.

Final comment 107(a)(9)-2 provides instructions for reporting action taken on covered applications that involve a counteroffer, along with examples. As described above, final comment 107(a)(9)-2 provides that if a financial institution makes a counteroffer to grant credit on terms other than those originally requested by the applicant and the applicant declines to proceed with the counteroffer or fails to respond, the institution reports the action taken as a denial on the original terms requested by the applicant. If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer.

Final comment 107(a)(9)-3 discusses reporting action taken for rescinded transactions. Final comment 107(a)(9)-4 clarifies that a financial institution reports covered applications on its small business lending application register for the year in which final action is taken. Finally, final comment 107(a)(9)-5 provides guidance for reporting action taken if a financial institution issues an approval that is subject to the applicant meeting certain conditions.

107(a)(10) Action Taken Date

Proposed Rule

In addition to requiring financial institutions to collect and report the type of action they take on an application, ECOA section 704B(e)(2)(D) requires financial institutions to collect and report the "date of such action."

The Bureau proposed § 1002.107(a)(10) to require action taken date to be reported as the date of the action taken by the financial institution. Proposed comments 107(a)(10)-1 through -5 would have provided additional details on how to report the action taken date for each of the action taken categories in proposed § 1002.107(a)(9). For example, proposed comment 107(a)(10)-1 would have explained that for denied applications, the financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant.

Proposed comment 107(a)(10)-4 would have explained that for covered credit transactions that are originated, a financial institution generally reports the closing or account opening date. That proposed comment also stated that if the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement.

The Bureau sought comment on its proposed approach to the action taken date data point as well as whether it should adopt data points to capture application approval date and/or the date funds are disbursed or made available.

Comments Received

The Bureau received comments on the proposed action taken date data point from lenders, trade associations, and consumer groups. One commenter expressed its support for the data points regarding an application, including action taken date, noting that the data will provide insight regarding the quality of the capital accessed and that it will be useful in identifying potentially discriminatory lending practices, as well as highlight capital gaps in the marketplace that lenders may be able to fill. Furthermore, this commenter noted that the data will show how financial institutions compare across key metrics and help determine if the institution has equitable lending. Industry commenters expressed their support for the proposed data point as a reasonable and appropriate means of implementing the statutory requirement. A CDFI lender noted that defining "action taken date" as the one in which the financial institution acts is correct.

Several commenters provided feedback on whether the Bureau should adopt separate data points for application approval date and the date funds were disbursed or made available. A trade association opposed adoption of separate data points for the date the application was approved and the date the funds were disbursed or made available. This trade association reasoned that it would add degrees of complexity to the compliance process and the Bureau would be chasing de minimis data points that have diminishing value. A bank also opposed the separate data points explaining that the Bureau would already gather enough information from gathering the

application date and the action taken date to find timing discrepancies and suggested the Bureau focus more on underwriting data to determine discriminatory and other fair lending issues. A CDFI lender explained that in many cases the gap between an approval and disbursal of funds can be affected by several factors outside a lender's control, such as an applicant's availability to sign closing documents.

On the other hand, three commenters urged the Bureau to adopt separate data points for application approval date and the date funds were disbursed or made available. A community group commented that separate data fields would be important for fair lending and community development purposes because if any institutions are delaying the availability of funds for unreasonable periods of time after loan approval, they would not be serving community needs, and it could also possibly indicate fair lending problems if protected classes disproportionately experience delays. Another community group suggested that discrimination in the agricultural industry occurs when loan approvals are delayed or not approved in a timely manner. This community group noted that untimely disbursement of funds could drastically impact the opportunity for a small business to succeed. They further noted that farmers lose entire seasons of income when the operating loans which they timely applied for are not approved in a timely manner. A third community group stated that lenders have a history of delaying loan approvals for farmers of color compared to white farmers.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(10) and its associated commentary with minor edits for clarity and consistency. The Bureau believes the action taken date data point is a reasonable interpretation of ECOA section 704B(e)(2)(D), which requires financial institutions to collect and report the "date of such action" taken on an application. The Bureau notes that its approach for this data point largely mirrors the Regulation C approach for action taken date in § 1003.4(a)(8)(ii) and related commentary, with modifications to align with the action taken categories in final § 1002.107(a)(9).

Final § 1002.107(a)(10) requires financial institutions to report the date of the action taken by the financial institution on the application. Final comments 107(a)(10)-1 through -5 provide guidance on how to report the action taken date for each of the action taken categories provided in final § 1002.107(a)(9). For applications that were denied, final comment 107(a)(10)-1 provides that a financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant. For applications that were withdrawn by the applicant, final comment 107(a)(10)-2 provides that a financial institution reports either the date the express withdrawal was received or the date shown on the notification form in the case of a written withdrawal. For applications that were approved but not accepted by the applicant, final comment 107(a)(10)-3 provides that a financial institution reports any reasonable date, such as the approval date, the deadline for accepting the offer, or the date the file was closed. The comment notes, however, that the financial institution should generally be consistent in its approach.

The Bureau is finalizing comments 107(a)(10)-4 and -5 with minor edits for clarity and consistency to facilitate compliance. Final comment 107(a)(10)-4 provides that for applications that result in an extension of credit, a financial institution generally reports the closing or account opening date. However, if the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement. The comment further provides that the financial institution should generally be consistent in its approach. Final comment 107(a)(10)-5 provides that for applications that are closed for incompleteness, a financial institution reports either the action taken date or the date the denial or incompleteness notice was sent to the applicant.

The Bureau is not adopting in this final rule a requirement that financial institutions report both the date the application was approved and the date the funds were disbursed. Two of the commenters who requested this change specifically focused on loan approval delays, which seems to indicate the issue is with delays in the loan approval process rather than the timing of

the fund disbursements or credit availability. The application date and action taken date together will provide information about the length of time it takes for an application to reach the credit decision. In addition, the Bureau believes that the time between a loan's approval and the date of funds availability is dependent on many factors, some of which may not be within the control of the financial institution, as suggested by a commenter. Accordingly, the Bureau is not adopting a requirement that financial institutions report, in all cases, the date the funds were disbursed or made available.

107(a)(11) Denial Reasons

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau proposed § 1002.107(a)(11) to require financial institutions to collect and report the principal reason or reasons an application was denied.

Proposed § 1002.107(a)(11) would have required reporting of the principal reason or reasons the financial institution denied the covered application. Proposed comment 107(a)(11)-1 would have explained that a financial institution complies with proposed § 1002.107(a)(11) by reporting the principal reason or reasons it denied the application, indicating up to four reasons, and the financial institution would report only the principal reason or reasons it denied the application, even if there are fewer than four reasons. The proposed comment provided an example to illustrate. The proposed comment would have also stated that the reason(s) reported must accurately describe the principal reason or reasons the financial institution denied the application. Finally, the proposed comment provided a list of denial reasons from which financial institutions would select the principal reason or reasons for denying a covered application.

Proposed comment 107(a)(11)-1 would also have explained that a financial institution would have reported the denial reason as "other" where none of the enumerated denial reasons

adequately describe the principal reason or reasons it denied the application, and the institution would report the denial reason or reasons as free-form text. Proposed comment 107(a)(11)-2 would have clarified that a financial institution complies with proposed § 1002.107(a)(11) by reporting that the requirement is not applicable if the action taken on the application, pursuant to § 1002.107(a)(9), is not a denial.

The Bureau sought comment on its proposed approach to the denial reasons data point, including whether the denial reason categories listed in proposed comment 107(a)(11)-1 sufficiently cover the common credit denial reasons in the small business lending industry. The Bureau also sought comment on the potential utility of denial reason data as well as on the potential burdens to industry in reporting denial reasons, in light of the proposed denial reason categories and the data's ability to aid in fulfilling the purposes of section 1071.

Comments Received

The Bureau received comments on the denial reasons data point from lenders, trade associations, and community groups. A number of these commenters supported the Bureau's proposal to collect data on denial reasons, stating that it would aid in fair lending analysis and further the community development purpose of section 1071. A community group said that an analysis of different types of lenders could determine whether industry-wide practices could be creating unnecessary barriers, and denial reason data could help to illuminate those practices. Some commenters noted that denial reasons can help policymakers and the public determine legitimate reasons that small businesses do not qualify for certain forms of credit and will, in turn, enable policymakers to work towards solutions. A trade association commented that the data has the potential to help identify ways to improve service in underserved communities and agreed this is an opportunity to provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps as needed. Another community group stated that this data point is one of the single most important items the Bureau can collect in its aim to carry out section 1071 and illuminate the reasons behind disparate results in small business lending. A

bank commented that reporting of denial reasons would help identify roadblocks to gaining access to credit.

Commenters generally agreed with the Bureau's approach to collecting reasons for denial. Community groups supported the range of the Bureau's proposed list of reasons for denial as well as the Bureau's proposal for a financial institution to select up to four reasons. A trade association commented that the proposed list of reasons for denial adequately cover the potential reasons and noted that the list largely aligns with the HMDA/Regulation C denial reasons. This commenter also noted the importance of the option for financial institutions to select "other" and report additional denial reason information as free-form text.

Several community groups suggested that personal credit score must be included as an option as it is often cited as the reason for denial. They asserted that if low credit scores or other reasons for denial correlate with a business owner's race or location, but do not correlate with loan performance, then it would be important for lenders to use alternative methods for assessing creditworthiness that do not have a disparate impact on business owners of color or certain communities. Another commenter suggested that the Bureau consider clarifying the government criteria option, recommending that the option should only be used if no other principal reason applies and should come after other reasons to ensure that it does not mask those other reasons. A trade association suggested that the Bureau allow financial institutions the discretion to choose whether to report the data; however, that commenter also indicated that if the Bureau were to require the denial reasons data point then the proposed denial reasons did represent a full picture of the typical reasons for denial. Other commenters suggested the Bureau follow the flexible approach of financial institutions providing denial reasons in ECOA adverse action notices. Two banks asked the Bureau to compare the reporting requirement against other reporting regimes, such as HMDA and CRA, to avoid duplicative and inconsistent reporting.

Some industry commenters opposed the Bureau's proposal to collect denial reasons. A few commenters stated that these data are not tracked or maintained. A bank said stated they will

need to build a new and independent tracking system if the data are mandated. A joint trade association letter noted that in indirect vehicle financing transactions, dealerships are not often provided and do not have access to reasons why a third-party financing source denied a credit application. A bank questioned what the Bureau intends to do with the data and stated that it is not necessary to meet the goals and requirements of section 1071. The bank further asserted that it would eventually result in additional regulatory requirements that continue to push small and mid-size lenders from the small business lending market. Another bank raised concerns about reporting denial reason data, asserting that there are multiple factors involved in the decisions and the use of raw data without any other means to evaluate the individual decisions made could lead to allegations of discrimination against banks based solely upon data that reflect disparate impact based on ethnicity, race, or gender. Another commenter expressed a similar concern that requiring denial reasons under certain categories could lead to damaging misinterpretations. A trade association urged the Bureau to drop the denial reasons data point from the final rule, stating that the requirement is drafted in a rigid manner that is unlikely to produce accurate or reliable data. That commenter also stated that the Bureau and other regulatory agencies already have access to these data because financial institutions are already providing denial reasons under the ECOA adverse action notice requirement. In addition, commenters further noted that the proposed denial reason data point is incompatible with the Bureau's flexible approach to providing adverse action reasons in ECOA adverse action notices.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(11) and associated commentary with minor revisions. The final rule requires that financial institutions collect and report, for denied applications, the principal reason or reasons the financial institution denied the covered application. The Bureau believes data regarding denial reasons will further the fair lending and business and community development purposes of section 1071. Data on denial reasons will allow data users to better understand the rationale behind denial decisions, help

identify potential fair lending concerns, and provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps as needed. Robust data on application denial reasons across applicants, financial institutions, products, and communities should help target limited resources and assistance to applicants and communities, thus furthering section 1071's business and community development purpose. Furthermore, data on denial reasons will help data users analyze potential denial disparities, and could facilitate more efficient and less burdensome fair lending examinations. Therefore, pursuant to ECOA section 704B(e)(2)(H), the Bureau determines that collecting data on denial reasons would aid in fulfilling the purposes of section 1071.

Final comment 107(a)(11)-1 explains that a financial institution reports the principal reason or reasons it denied the application, indicating up to four reasons and makes clear that the financial institution reports only the principal reason or reasons it denied the application. Final comment 107(a)(11)-1 also provides a list of denial reasons from which financial institutions select the principal reason or reasons for denying a covered application. In addition, final comment 107(a)(11)-1 explains that a financial institution reports the denial reason as "other" when none of the enumerated denial reasons adequately describes the principal reason or reasons it denied the application, and reports the denial reason or reasons as free-form text. The Bureau believes that including the option to select "other" will facilitate compliance and that collecting such information will enable the Bureau to observe trends and key developments in the small business lending market. In addition, the Bureau may use the information to inform any future iterations of the list.

The Bureau is making a revision in comment 107(a)(11)-1.iii to change "use of loan proceeds" to "use of credit proceeds" to reflect commonly understood categories of small business lending like term loans or lines of credit. The Bureau is also making a clarification in comment 107(a)(11)-1.iii to broaden the scope of the "use of credit proceeds" denial reason. Final comment 107(a)(11)-1.iii explains that a financial institution reports the denial reason as

"use of credit proceeds" if it denies an application because, as a matter of policy or practice, it places limits on lending to certain kinds of businesses, products, or activities it has identified as high risk. The Bureau is removing the example provided in the proposed rule because the Bureau does not believe an example is necessary and financial institutions know what they consider to be high risk to them. Moreover, financial institutions may have different policies on credit activities or products they consider high risk such that a high risk activity or product to one financial institution may not be considered high risk to another.

The Bureau is also making a minor revision in comment 107(a)(11)-1.v to clarify that a denial reason based on collateral refers to collateral that was insufficient or otherwise unacceptable to the financial institution. The Bureau also removed the example that appeared in proposed comment 107(a)(11)-1.vi.

The Bureau is making a minor change in comment 107(a)(11)-1.vii to clarify that a denial reason based on "government criteria" refers to government loan program criteria. Government loan program criteria for this purpose refers to those loan programs backed by government agencies that have specific eligibility requirements. Accordingly, final comment 107(a)(11)-1.vii lists "government loan program criteria" as a denial reason option.

The Bureau does not share the concerns raised by commenters that denial reason data may lead to unjustified conclusions that do not necessarily meet the goals and purposes of section 1071. Rather, as explained above, the Bureau believes data on denial reasons can help identify potential lending concerns and help data users analyze potential denial disparities. In fact, the Bureau believes that including denial reasons in 1071 data should reduce the risk of inaccurate accusations of fair lending violations, as it would allow financial institutions to point to potentially legitimate reasons for disparities.

With respect to the comments that denial reasons are not currently tracked or maintained, the Bureau believes that most financial institutions already have information on denial reasons, or at least should be prepared to provide the information. The Bureau understands from

commenters that there may be creditors that are not subject to the adverse action notice requirements under Regulation B and such institutions may face greater challenges in implementing the denial reason data reporting requirement than those institutions that are already subject to Regulation B requirements.[619] Nevertheless, the Bureau believes that data on denial reasons will further the fair lending and business and community development purposes of section 1071 by helping to identify potential fair lending concerns and providing financial institutions with data to evaluate their lending criteria and address potential gaps. Moreover, data on denial reasons not only help identify potential fair lending concerns, but are critical to understanding the rationale behind a financial institution's decision to deny credit, which can provide small business applicants the information they need to be able to access capital.

For transactions involving indirect vehicle financing where the dealership may not have the reasons why a third-party financing source denied a credit application, the Bureau believes that the entity that makes the final credit decision will be able to provide or obtain the reasons for denying a credit application. See section-by-section analysis of § 1002.109(a)(3) for a discussion of which institutions have a reporting obligation in transactions involving multiple financial institutions.

With respect to the suggestion from a commenter that the Bureau should allow financial institutions to report denial reason data voluntarily, the Bureau believes optional reporting is not the appropriate approach, given the need for consistent and meaningful data to further the purposes of section 1071.

Regarding the suggestion that the denial reason data point in the final rule should mirror the HMDA reporting requirements or other reporting regimes, the Bureau's approach to the final rule is to largely mirror the Regulation C reporting requirements but with modifications that better reflect the business or agricultural lending (rather than mortgage lending) context. The

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[619] Existing § 1002.9(a)(3) requires creditors to provide the specific reasons for adverse action taken or to notify business credit applicants of their right to request the reasons for denying an application or taking other adverse action.

Bureau believes that aligning closely to a known regulatory scheme, such as Regulation C, will facilitate compliance. Regarding the suggestion that the Bureau provide more flexibility so that financial institutions can report the reasons that were provided in an adverse action notice, the Bureau believes, and as a commenter noted, the denial reasons proposed and finalized in this rule are a comprehensive list and represent a full picture of the common denial reasons for small business credit. In addition, the Bureau believes the inclusion of "other" as a reason for denial and the free-form text field, which will enable financial institutions to report a denial reason that is not otherwise listed, will provide flexibility, and will facilitate compliance.

107(a)(12) Pricing Information

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau proposed, in § 1002.107(a)(12), to require financial institutions to report certain pricing information for covered credit transactions. Specifically, proposed § 1002.107(a)(12)(i)(A) would have required financial institutions to report the interest rate that is or would be applicable to the covered credit transaction; proposed § 1002.107(a)(12)(ii) would have required financial institutions to report the total origination charges for a covered credit transaction; proposed § 1002.107(a)(12)(iii) would have required financial institutions to report the broker fees for a covered credit transaction; proposed § 1002.107(a)(12)(iv) would have required financial institutions to report the total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction; proposed § 1002.107(a)(12)(v) would have required financial institutions to report, for merchant cash advances or other sales-based financing transactions, the difference between the amount advanced and the amount to be repaid; and proposed § 1002.107(a)(12)(vi) would have required financial institutions to report information about any prepayment penalties applicable to the covered credit transaction.

Proposed comment 107(a)(12)-1 would have clarified that, for applications that the financial institution reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports pricing information as "not applicable." Proposed § 1002.107(a)(12) would have applied only to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

Comments Received

The Bureau sought comment on proposed § 1002.107(a)(12) and its commentary, including on additional information that could help reduce misinterpretations of disparities in pricing, such as more information about the nature of the collateral securing the credit. The Bureau also sought comment on ways to reduce burden on financial institutions with respect to overlaps or conflicts between State law disclosure requirements and the Bureau's proposal. Numerous commenters addressed the proposed pricing data point in their feedback. The Bureau addresses feedback on proposed § 1002.107(a)(12) generally in this section; feedback on specific aspects of proposed § 1002.107(a)(12)(i) through (vi) is addressed in the section-by-section analyses that follow.

Many commenters expressed views on whether the Bureau should require financial institutions to report any pricing data. Some commenters, including community groups, trade associations, a lender, and a technology service provider, supported the inclusion of pricing information. These commenters stated pricing information will help data users understand not simply whether credit is available to certain borrowers, but the terms of such credit. Several community groups said that pricing information would help with fair lending analysis, with one community group stating that academic research and mystery shopping tests suggested the presence of discrimination in the small business lending market. Other community groups said that pricing information would allow users to identify unmet business needs. A community group commented that lenders were already collecting much of the proposed pricing data for SBA and

CDFI programs, while a trade association supported the proposal but noted that CDFIs would need more time to comply than larger financial institutions.

Industry commenters generally opposed including pricing information in the final rule. These commenters made several arguments in support of their position. First, they asserted that the final rule should include only data points specifically enumerated in the statute. One commenter suggested that because pricing was not expressly enumerated in the statute, Congress therefore did not intend for the data collected and reported pursuant to section 1071 to include pricing information. Other commenters said that pricing data (along with other data points adopted pursuant to ECOA section 704B(e)(2)(H)) would increase the burden on financial institutions because, for example, pricing information can change throughout the application and underwriting process. And several industry commenters who generally objected to the inclusion of any data points pursuant to section 704B(e)(2)(H) claimed that lenders lack systems that can calculate or collect all the proposed pricing data.

Second, these commenters stated that commercial financing is less standardized than consumer financing, such that pricing is influenced by a wide variety of factors that they believed would not be adequately reflected in the 1071 data. Factors cited included the credit score of the applicant, the nature and value of collateral, the loan purpose and type, the presence of bundled services, the applicant's cash flow, the type of business, the size of any down payment, the strength of any guarantee, and debt service coverage ratio. Commenters elaborated on certain factors specific to certain financial institutions or transaction types. For example, a few commenters stated that community banks might make loans with higher interest rates than other lenders to comply with safety and soundness requirements. Some agricultural lenders and a trade association commented that farm credit borrowers periodically receive patronage dividends from lenders, which effectively lowers the cost of credit. And a group of trade associations representing the insurance premium financing industry stated that the pricing of insurance

premium financing is determined almost entirely by the value of the unearned premiums, negating the benefit of pricing data for these transactions.

The absence of information about these other factors affecting the price of credit, commenters argued, would cause data users to draw inaccurate conclusions when analyzing pricing in the 1071 data. As a result, commenters claimed, financial institutions would suffer reputational harm from erroneous accusations of fair lending violations or other harmful pricing practices. However, a community group commented that advocates knew how to responsibly use pricing data and typically approach regulators or industry before publicizing pricing discrepancies. Industry commenters also argued that misleading data would reduce financial institutions' willingness to consider individualized factors in the lending process, restricting the availability of credit to small business applicants.

Many industry commenters also opposed the disclosure of any pricing information because of competition and privacy concerns. These commenters claimed that disclosure would reveal confidential information that would put financial institutions at a disadvantage. For example, competitors could attract borrowers with loans that were cheaper but inferior in other respects. These commenters also asserted that disclosure of pricing information would harm the privacy interests of applicants, especially in small communities where users could re-identify borrowers.

Instead of including pricing information in the final rule, several industry commenters suggested that analysis of pricing data was more appropriate in the supervision and examination context. One trade association asserted that requiring pricing data in the rule would be redundant of, or usurp, the supervisory activities of the prudential regulators because those agencies also collect and use pricing information in their exams. Another group of trade associations said the Bureau could use information it gathers in the course of exercising its supervision authority to determine whether pricing data could further fair lending purposes before requiring such data in the rule.

In contrast to industry commenters, who generally objected to reporting any pricing information, community groups requested additional pricing information. Specifically, numerous community groups and a minority business advocacy group, as well as some lenders and a technology service provider, asked the Bureau to require financial institutions to report the annual percentage rate (APR) for a covered credit transaction. These commenters stated that APR was the only easily understandable, uniform, and comprehensive single pricing measure for comparing diverse transactions. These commenters generally did not argue that the proposed pricing data point lacked value, but that APR would provide additional information that was superior in certain respects. For example, a cross-sector group of lenders, community groups, and small business advocates asserted that the diversity of transactions in the small business lending market increased the value of APR, because comparing loan pricing would be difficult without a single measure. This group further stated that unlike the proposed pricing data, which lacked a time period, APR standardizes the cost of a transaction over a year.

A few commenters believed that APR would make the pricing data easier for data users to understand. Some stated that although sophisticated data users might be able to estimate APR from the proposed data points, the 1071 data should allow anyone to gain information about small business loan pricing. Also, the cross-sector group's comment discussed above noted that many small business owners are familiar with APR from their consumer financing transactions.

Regarding burden, several of these commenters asserted that calculating APR was feasible in the small business lending market, with many noting that APR is a formula amenable to calculation through an automated process using generally available software. For non-traditional transactions such as merchant cash advances, commenters suggested estimating the term length from repayment data or from the term, if any, that the financial institution calculated during the underwriting process. Indeed, some of these commenters also believed that the market was evolving toward the use of APR for commercial finance transactions. They cited the New York and California commercial financing disclosure laws, as well as private disclosure

initiatives that include the APR, such as the SMART Box and Small Business Borrower's Bill of Rights.[620] A CDFI lender predicted that financial institutions would eventually use a single disclosure to comply with all State disclosure laws, which would resolve any issues with differing APR methodologies among the states. A bank commented that if the Bureau required pricing information, it should adopt only APR because reporting APR was simpler than reporting multiple pieces of pricing information.

A few commenters suggested alternatives if the Bureau did not adopt APR, including requiring APR for a subset of transactions for which calculating APR was feasible or having the Bureau calculate and publish APR data itself.

Although industry commenters largely did not address APR, a few offered arguments against its inclusion in the final rule. A group of trade associations questioned the existence of a trend toward the use of APR in commercial financing, noting that only California and Virginia had adopted commercial financing disclosure laws at the time of the NPRM. This group also speculated that Congress believed APR may be inappropriate for the small business lending market because it did not extend TILA to commercial credit in the Dodd-Frank Act. Other commenters discussed the burden of reporting APR. Several banks stated that lenders would need to change their systems to calculate APR for small business loans. A State bankers association asserted that the terms of small business loans did not allow APR to be calculated. And a CDFI lender stated that APR calculations are infeasible for loans made under the SBA's 7(a) program.[621] Such loans, the commenter explained, have fees that may vary based on the type or purpose of the loan, which makes the APR difficult to determine accurately.

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[620] *See* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; N.Y. S.B. S5470B (July 23, 2020), https://legislation.nysenate.gov/pdf/bills/2019/S5470B; Innovative Lending Platform Ass'n, *The SMART Box Model Disclosure—In Depth*, https://innovativelending.org/smart-box-model-disclosure-depth/ (last visited Mar. 20, 2023); Responsible Bus. Lending Coal., *Small Business Borrower's Bill of Rights* (2021), http://www.borrowersbillofrights.org/bill-of-rights.html.

[621] *See* Cong. Rsch. Serv., *Small Business Administration 7(a) Loan Guaranty Program*, https://fas.org/sgp/crs/misc/R41146.pdf (updated June 30, 2022) (discussing the SBA's flagship 7(a) loan guarantee program).

Finally, some commenters directed their feedback to the scope of the proposed pricing data point. Some community groups asked the Bureau to require pricing information for all counteroffers because, they asserted, such information would illuminate situations where lenders are prepared to extend credit on less desirable terms than those requested by the applicant. An industry commenter recommended limiting the pricing information to originated transactions because it believed pricing information for approved applications held no fair lending value. But some community groups commented that including approved applications in reported pricing data would further fair lending purposes, such as allowing data users to evaluate whether financial institutions are offering high-priced loans to minority applicants that the applicants do not accept. A trade association commented that the pricing information should include only interest rate and origination charges but offered no explanation for its position.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12) and associated commentary with certain adjustments. Final § 1002.107(a)(12)(i) through (vi) require reporting of the following for covered credit transactions that are originated or approved by the financial institution but not accepted by the applicant: interest rate; total origination charges; broker fees; the total amount of all non-interest charges that are scheduled to be imposed over the first annual period; for a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid; and information about any applicable prepayment penalties. The details of final § 1002.107(a)(12)(i) through (vi) are discussed in turn in the section-by-section analyses that follow; the discussion here focuses on the Bureau's overall approach to the pricing data point.

The Bureau is finalizing comment 107(a)(12)-1 as proposed, which clarifies that, for applications that the financial institution reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports pricing information as "not applicable."

As discussed in the NPRM, the Bureau believes that pricing data will further both the fair lending purpose and the business and community development purpose of section 1071. The majority of small businesses are run by a single owner without extensive financial experience or expert staff to navigate the commercial credit marketplace, which lacks many of the Federal protections found in consumer lending.[622] Heightened risks to fair lending and small business development may arise from different pricing for the same products and the selective marketing of higher-priced or even predatory and unsustainable products. Because price-setting is integral to the functioning of any market, any analysis of the small business lending market—including to enforce fair lending laws or identify community and business development opportunities—would be less meaningful without this information.

Research conducted for the Department of Commerce has found that minority-owned businesses tend to pay higher interest rates on business loans than those that are not minority-owned,[623] and a report by the Federal Reserve Bank of Atlanta found that minority-owned firms more frequently applied for potentially higher-cost credit products, and were also more likely to report challenges in obtaining credit, such as being offered high interest rates.[624] In addition, research conducted for the SBA has found that Black- and Hispanic-owned businesses were less likely to have business bank loans and more likely to use more expensive credit card financing.[625] The 2020 Small Business Credit Survey by a collaboration of Federal Reserve

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[622] For example, TILA's standardized disclosure requirements for residential mortgage loans and limits on linking compensation to mortgage loan terms, including pricing, do not apply to business loans. *See, e.g.*, 15 U.S.C. 1639b, Regulation Z § 1026.36 (TILA's prohibition on basing mortgage loan originator compensation on loan terms).

[623] Minority Bus. Dev. Agency, U.S. Dep't of Com., *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, at 3, 5, 21, 36-37 (2010), https://archive.mbda.gov/page/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses.html.

[624] Fed. Rsrv. Bank of Atlanta, *Report on Minority Owned Firms: Small Business Credit Survey* (Dec. 2019), https://www.fedsmallbusiness.org/-/media/project/smallbizcredittenant/fedsmallbusinesssite/fedsmallbusiness/files/2019/20191211-ced-minority-owned-firms-report.pdf.

[625] Alicia Robb, *Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms*, at 47 (2018) (prepared for Off. of Advocacy, Small Bus. Admin.), https://advocacy.sba.gov/2018/02/01/financing-patterns-and-credit-market-experiences-a-comparison-by-race-and-ethnicity-for-u-s-employer-firms/.

Banks found that small business applicants to nonbank lenders, such as online lenders and finance companies, were more likely to report high interest rates or unfavorable terms than applicants to depository institutions.[626] To the extent that the recovery from the lingering economic disruptions following the COVID-19 pandemic is still ongoing when covered financial institutions begin collecting data under this final rule, and in regard to emergencies affecting small business access to credit that may occur in the future, tracking pricing in this segment of the market is particularly important.

The Bureau believes pricing data are important because they offer useful insight into underwriting disparities and are necessary for data users to examine predatory pricing or pricing disparities. For example, they might show that a particular market segment is expanding and apparently filling an important need, but the new credit offered might be predatory in nature. Pricing information will allow the Bureau and others to understand the situation more accurately. Data collection without pricing information could have the unintended consequence of incentivizing irresponsible lending, as providers seeking to increase representation of underserved groups could be encouraged to adopt high-cost models of lending.

Without information on pricing, data users would be unable to screen for fair lending pricing risks, and regulators would be less able to focus their enforcement and supervision resources appropriately on situations of greater possibility for questionable activities. In addition, if potential discriminatory conduct is monitored effectively in regard to credit approvals, but not in regard to pricing, industry compliance systems may focus solely on approvals and denials and ignore potential pricing disparities. Having pricing data available will also increase transparency and help demonstrate to lenders where business opportunities exist to offer sustainable credit to underserved markets. In addition, it could demonstrate to small businesses the availability of more affordable credit.

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[626] However, the survey noted that online lenders tended to receive applications with lower credit scores so applicant risk could play a role in higher interest rates for nonbank lenders. *See* 2020 Small Business Credit Survey at 15.

Pricing information that is separately enumerated as the interest rate and general categories of fees will allow data users to more precisely analyze the components of a credit transaction's price. For example, data users will be able to identify potentially discriminatory price disparities within upfront fees charged to borrowers at origination that may not be visible in a single pricing metric. Similarly, information about which components of a transaction's price may be relatively more expensive should allow data users to better identify business and community development initiatives because they will be able to target their initiative at the particular component, such as the interest rate, that may be most responsible for the relatively high price of the transaction. The Bureau's decision not to require reporting of APR, as requested by some commenters, is discussed in more detail below.

The Bureau disagrees with commenters who suggested the pricing data point lacks congressional authorization. ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." This provision reflects Congress's understanding that certain information not explicitly identified in section 1071 may advance the statutory purposes. As described herein, the pricing data point satisfies this standard.

The Bureau understands that the small business lending market is flexible and tailored to the situations of small business applicants and borrowers. For this reason, pricing for small business credit is affected by numerous factors, some of which are not reflected in the 1071 data. For example, the final rule does not require financial institutions to report applicants' credit scores, which would provide useful information for explaining pricing differences between transactions. But the Bureau believes that commenters have understated the amount of information the final rule includes about factors relevant to pricing. For example, the final rule includes information about the existence and nature of collateral;[627] the credit purpose and

[627] *See* final § 1002.107(a)(5) (indicating whether credit is secured or unsecured); final § 1002.107(a)(6) (suggesting, along with the credit type data point, whether a loan is secured by a dwelling).

type;[628] the applicant's industry,[629] size,[630] and history;[631] the type of guarantee;[632] and the type of the lender.[633] This information will provide important context for pricing data.

More broadly, the 1071 data need not reflect every determinant of credit pricing to provide value to users. The pricing data will further fair lending enforcement by allowing regulators to better understand fair lending risks and allocate their resources accordingly. As explained in the NPRM, HMDA data have long served a similar function. Some commenters questioned the analogy to HMDA data, citing greater standardization in the mortgage market. But the same basic utility—signaling fair lending risk—exists even if the nature of the signal differs. Indeed, with respect to entities it supervises, the Bureau similarly uses pricing data, when available in small business examinations, to help identify fair lending risk.

Regarding suggestions that the Bureau consult supervisory and examination data before adopting any pricing data requirements, the Bureau has relied on its experience in these areas while developing the final rule. The Bureau does not believe this rule is redundant of the supervision and examination activities of any Federal agency. Moreover, confidential supervisory information available only to Federal regulators is no substitute for a publicly available dataset.

Furthermore, comments that focus narrowly on comparisons between applicants ignore the business and community development purpose of section 1071. Data users can examine pricing data at a more general level to further this purpose. For example, government entities

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[628] *See* final § 1002.107(a)(5) (credit type); final § 1002.107(a)(6) (credit purpose). The Bureau also notes that insurance premium finance transactions are not covered by the final rule (*see* final § 1002.104(b)(3)). Thus, the unique challenges of interpreting pricing information cited by commenters for those transactions will not affect data users.

[629] *See* final § 1002.107(a)(15) (NAICS code).

[630] The gross annual revenue and number of workers data points are related to the applicant's size. *See* final § 1002.107(a)(14) and (16).

[631] *See* final § 1002.107(a)(17) (time in business).

[632] *See* final § 1002.107(a)(5)(ii) (guarantees).

[633] *See* final § 1002.109(b) (financial institution identifying information).

could develop loan programs designed to increase the availability of credit to certain small businesses whose existing financing options carry high prices.

Regarding comments about the harmful consequences of potentially misleading data, the Bureau anticipates noting when disclosing the 1071 data that the data alone generally do not offer proof of compliance with fair lending laws.[634] And the Bureau expects community groups to use the data responsibly, with knowledge of these limitations, which such groups say they have. The Bureau does not believe, as suggested by commenters, that pricing data would reduce the availability of credit to small business applicants. Instead, by helping to reduce fair lending risk and identify business and community development opportunities, the pricing data will help expand access to credit. Privacy and confidentiality concerns about the pricing data are discussed in part VIII.B.6.x below.

The Bureau understands that many financial institutions will incur costs to collect and report pricing information. The Bureau has attempted to reduce the difficulty of collecting and reporting these data in several ways. For example, final § 1002.107(a)(12) is limited to approved applications and originated transactions. These are transactions for which financial institutions generally would have to determine the price to approve (or originate) the transaction. Other transactions—*i.e.*, those that are denied, withdrawn by the applicant, or incomplete—are likely to have pricing information that is subject to change or that has not yet been determined. In addition, final § 1002.107(a)(12) generally takes a broad, functional approach to the reportability of pricing information, rather than defining reportability according to complex factors such as how a fee is denominated or the nature of the collateral securing a transaction. The Bureau believes this will simplify the collection and reporting process. Despite any remaining burden for

[634] For example, the FFIEC cautions users of HMDA data that "HMDA data are generally not used alone to determine whether a lender is complying with fair lending laws." CFPB, *Summary of 2021 Data on Mortgage Lending* (2022), https://www.consumerfinance.gov/data-research/hmda/summary-of-2021-data-on-mortgage-lending/.

financial institutions, the Bureau believes that pricing data are important for achieving both of section 1071's purposes.

Further reducing the potential difficulty of reporting pricing data, the Bureau has decided against requiring financial institutions to report APR at this time. Calculating and reporting APR across the diverse types of commercial transactions covered by the final rule may require complex estimates to generate necessary variables for the APR formula. Many merchant cash advances, for example, lack a disclosed periodic payment amount. Thus, financial institutions would have to estimate this term, if they do not do so now, to calculate an APR. Although financial institutions may estimate some of the necessary information during underwriting, they may not estimate it according to the same formula, and may not maintain such information in a system designed for data reporting. The Bureau understands that many financial institutions will calculate APR to comply with State commercial financing disclosure laws.[635] But many financial institutions are not currently subject to such State laws, or are subject to State laws that do not require APR disclosure.[636] As noted in the NPRM, the Bureau will continue to monitor regulatory developments in the small business lending market. The Bureau considered requiring reporting of APR only for transactions where it is less complex to calculate, as some commenters suggested. But a limited-transaction APR reporting requirement would negate two important benefits that commenters cited for APR: using it to compare diverse types of transactions and to apply a single intuitive pricing measure for nontraditional types of financing.

The Bureau understands commenters' concerns over the accessibility and comparability of rate and fees versus APR. Final § 1002.107(a)(5)(iii) requires financial institutions to report loan term; the Bureau has added to final comment 107(a)(6)-8 a requirement that financial

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[635] Cal. Dep't of Fin. Prot. & Innovation, *Commercial Financing Disclosures* (2022), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf; N.Y. Dep't of Fin. Servs., *Proposed Disclosure Requirements for Certain Providers of Commercial Financing Transactions* (2022), https://www.dfs.ny.gov/system/files/documents/2022/09/rp_23nycrr600_text_20220914.pdf.

[636] Utah Dep't of Fin. Insts., *Commercial Financing Registration and Disclosure Act* (2022), https://le.utah.gov/xcode/Title7/Chapter27/C7-27_2022050420220504.pdf.

institutions report, for merchant cash advances and other sales-based financing, the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. This information will provide important context for data users comparing the pricing of different transactions and help address the criticism over the lack of a time period for pricing data. Regarding accessibility, the Bureau believes the pricing data will be generally understandable by data users. Most of the pricing data are similar to information found on existing consumer and commercial credit disclosures, including the State commercial financing disclosures cited by commenters. Additionally, the Bureau anticipates that government agencies, researchers, press organizations, community groups, and others will publish research and reports using the small business lending data, just as they do now with HMDA data. These publications may render pricing information in a form more accessible to other users.

Finally, the Bureau is not adopting modifications to the scope of the pricing data point. As discussed above, limiting the pricing data to approved and originated transactions reduces the difficulty of reporting while providing important information about the pricing decisions of financial institutions. The Bureau does not believe, as suggested by a commenter, that approved but not accepted applications lack value for fair lending analysis. Rather, these applications are similarly valuable because they also reflect transactions for which the lender has made a credit decision and set the pricing for the transaction. Lastly, limiting final § 1002.107(a)(12) to interest rate and origination charges would deprive data users of the benefits of other pricing information. The importance of each aspect of the pricing data point is discussed in the section-by-section analyses that follow.

107(a)(12)(i) Interest Rate

Proposed Rule

Proposed § 1002.107(a)(12)(i)(A) would have required financial institutions to report the interest rate that is or would be applicable to the covered credit transaction. If the interest rate is adjustable, proposed § 1002.107(a)(12)(i)(B) would have required the submission of the margin,

index value, and index name that is or would be applicable to the covered credit transaction at origination.[637]

Proposed comment 107(a)(12)(i)-1 would have clarified that if a covered credit transaction includes an initial period with an introductory interest rate, after which the interest rate adjusts, a financial institution complies by reporting information about the interest rate applicable after the introductory period. Proposed comment 107(a)(12)(i)-2 would have explained that a financial institution reports the interest rate applicable to the amount of credit approved or originated reported in proposed § 1002.107(a)(8) if a covered credit transaction includes multiple interest rates applicable to different credit features. Lastly, proposed comment 107(a)(12)(i)-3 listed a number of indices to report and directed that if the index used does not appear on the list of indices provided, the financial institution reports "other" and provides the name of the index via free-form text field.

Proposed § 1002.107(a)(12)(i)(B) would have provided that, for adjustable interest rates based upon an index, a financial institution must report the margin, index value, and index name that is or would be applicable to the covered credit transaction at origination. Proposed comment 107(a)(12)(i)-4 would have clarified that a financial institution complies with proposed § 1002.107(a)(12)(i)(B) by reporting the index value at the time the application is approved by the financial institution. The Bureau sought comment on whether the index value should be reported based on a different time period or whether the index value should be reported at the time of approval.

The Bureau sought comment on proposed § 1002.107(a)(12)(i) and its commentary, including whether a different measure of pricing would provide more accurate data, whether additional information about pricing (for example, amortization type or adjustment frequency) would provide beneficial data to help ascertain fair lending risk and further the business and

[637] It should be noted that not all covered credit transactions include an interest rate. Final § 1002.107(a)(12)(v) applies to certain covered credit transactions that do not include an interest rate. The discussion of final § 1002.107(a)(12)(iv) below also addresses other covered credit transactions that may not include an interest rate.

community development purpose of section 1071, and whether there are additional indices that should be included in the list from which financial institutions choose to report the applicable index on adjustable rate transactions. Lastly, the Bureau sought comment on whether there may be covered credit transactions where the interest rate may change after origination based on factors such as if the borrower maintains an account at the financial institution or if some other condition is met, and if so, whether additional commentary would be helpful to provide more guidance on which rate to report in that circumstance.[638]

Comments Received

The Bureau received comments specifically regarding the collection of interest rate from banks and trade associations, among others. While some commenters supported the Bureau's proposal, several industry commenters had questions regarding how the provision would work. The community group stated that interest rate information is beneficial as long as data users have access to both the initial interest rate and the interest rate after a potential initial rate reset. An industry commenter agreed that interest rate information would be helpful in conducting fair lending analyses. In contrast, a bank commenter asserted that interest rate information is of limited value.

Regarding the details of the Bureau's proposal to collect interest rate, a bank commenter noted that commercial loans may have more than one interest rate. With respect to indices for variable rate transactions and the Bureau's solicitation of comment on whether the index value should be reported based on a different time period or if at approval is the most appropriate time to measure, a group of trade associations asserted in their comment that the index value is often not related to the timing of approval or origination, and will not provide useful data, while a bank commented that it would be less burdensome to report the index value used to establish the interest rate rather than the value at the time of approval. A State bankers association asserted

[638] The Bureau did not receive any comments on this solicitation.

that the index value at approval may not have any connection to the price of the loan, providing the example of agricultural lending where the rate and terms are set after the financial institution approves the loan. Two industry commenters noted that the index value could change between approval and origination. Another bank requested that Constant Maturity Treasury (CMT) rate be included in the list of indices. Two trade associations inquired as to how to report an internal index used to set the rate on a variable rate transaction, while a bank commenter stated that use of internal indices that are unique to a financial institution would make interest rate data difficult to interpret.

A bank requested clarification of the term "introductory period." Another bank asserted that for a variable interest rate transaction with a five-year introductory period, the interest rate data reported at approval will be outdated and inaccurate when the period ends. Finally, a trade association inquired as to how a financial institution would report an interest rate that is unknown at origination, such as a line of credit whose interest rate changes based on the amount advanced.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(i) with one addition, as well as with other adjustments and additions to the commentary to address comments received regarding introductory interest rate periods and adjustable interest rates. Final § 1002.107(a)(12)(i) requires financial institutions to report the interest rate that is or would be applicable to the covered credit transaction. If the interest rate is adjustable, final § 1002.107(a)(12)(i)(B) requires the submission of the margin, index value, introductory rate period expressed in months (if applicable), and the index name that is or would be applicable to the covered credit transaction. As with all aspects of pricing within § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

The Bureau believes that collection of the interest rate on the covered credit transaction furthers both the fair lending purpose and the business and community development purpose of section 1071 by allowing regulators, small business advocates, and industry to conduct fair lending reviews and monitor the market for emerging high-cost products. In addition, the availability of this pricing metric will provide pricing transparency and will encourage the development of successful lending models because policymakers, community organizations, investors, banks seeking partnerships, and others will have better visibility into which business models are successful at providing sustainable credit to minority-owned, women-owned, and other underserved small businesses.

Furthermore, research has found that minority-owned businesses tend to obtain, or be offered, higher interest rates on business credit than non-minority-owned businesses.[639] The collection of interest rate (along with fees) will allow the Bureau, other government agencies, and other data users to have insight into the existing market, monitor the market for potentially troubling trends, and conduct fair lending analyses that adequately take into account this important metric.

In general, interest rate information should be in or readily determinable from the credit file, and thus available for reporting. To the extent that it is not, the Bureau notes that certain State-level commercial lending disclosures, notably those of California and New York, require the disclosure of APR.[640] Because the interest rate must be known to calculate APR, the Bureau believes that final § 1002.107(a)(12)(i) imposes little burden on financial institutions that already include the interest rate on such disclosures required by State law, as well as on the contract between the financial institution and the applicant.

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[639] U.S. Dep't of Com., *Minority Business Development Agency, Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, at 3, 5, 21, 36-37 (2010), https://archive.mbda.gov/page/executive-summary-disparities-capital-access-between-minority-and-non-minority-businesses.html.

[640] *See* N.Y. S.898, section 803(c) (signed Jan. 6, 2021) (amending S.5470-B), https://legislation.nysenate.gov/pdf/bills/2021/s898; Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235.

As noted above, final § 1002.107(a)(12)(i) remains largely the same as proposed § 1002.107(a)(12)(i). However, the Bureau has added to final § 1002.107(a)(12)(i)(B) a requirement that financial institutions report the initial rate period expressed in months (if applicable) (along with the margin, index value, and the index name that is or would be applicable to the covered credit transaction, as proposed). The Bureau agrees with commenters that for transactions with a variable interest rate where there is an initial rate and the interest rate resets after a certain period, at the time the financial institution approves the transaction and sets the interest rate, the financial institution will not know the future value of the index used to create the interest rate. By collecting the number of months of the initial period (if any), the rule will allow data users to determine the accurate interest rate applicable to the transaction because they will have the name of the index and the timing of the index value. For example, as written in final comment 107(a)(12)(i)-2, if a financial institution originates a covered credit transaction with a fixed initial interest rate of 0 percent for six months following origination, after which the interest rate will adjust according to a Prime index rate plus a 3 percent margin, the financial institution reports the 3 percent margin, the number "6" for the length of the initial rate period, Prime as the name of the index used to adjust the interest rate, and "not applicable" for the index value.

New comment 107(a)(12)(i)-1 clarifies that a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated as reported pursuant to final § 1002.107(a)(8). The Bureau is adopting this comment to address the issue raised by a commenter as to how a financial institution would report an interest rate that is unknown at origination or where the rate changes based on the amount advanced, such as with some lines of credit.

The Bureau is adopting comment 107(a)(12)(i)-2 (renumbered from 107(a)(12)(i)-1 in the proposal) with several alterations. Final comment 107(a)(12)(i)-2 clarifies that if a covered credit transaction includes an initial period with an introductory interest rate of 12 months or less, after

which the interest rate adjusts upwards or shifts from a fixed to a variable rate, a financial institution complies with the provision by reporting information about the interest rate applicable after the introductory period. If a covered transaction includes an initial rate period of more than 12 months after which the interest rate resets, a financial institution complies with the provision by reporting information about the interest rate applicable prior to the reset period. Final comment 107(a)(12)(i)-2 also provides two examples to illustrate these scenarios. The Bureau's revisions to this comment address a commenter's request to clarify the term "introductory period" (which the Bureau has done by clarifying that an introductory period includes an initial period of 12 months or less after which the interest rate adjusts upward or shifts from a fixed to a variable rate), as well as another commenter's concern that in a transaction with a five-year introductory period, the interest rate reported at approval will be outdated and inaccurate when the period ends.

Final comment 107(a)(12)(i)-3 (renumbered from proposed comment 107(a)(12)(i)-2 with one non-substantive adjustment) clarifies that if a covered credit transaction includes multiple interest rates applicable to different credit features, a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated reported pursuant to final § 1002.107(a)(8). The comment also provides an example.

Final comment 107(a)(12)(i)-4 (renumbered from proposed comment 107(a)(12)(i)-3) includes a list of indices for reporting the appropriate index for variable rate transactions, and also specifies that a financial institution reports "other" and reports the index name in free-form text if the applicable index is not listed. The Bureau has added CMT to the list of indices in the comment, as requested by a commenter. In response to requests from a number of commenters for clarification as to how a financial institution should report internal indices, the Bureau has also added "Internal Index" to the list of indices in the comment. The Bureau believes that allowing financial institutions to choose "other" when an index used does not appear on the provided list will facilitate compliance. In addition, collecting this information on "other" indices

will assist the Bureau in monitoring trends in this area and key developments in the small business lending market, which the Bureau could use to inform any future iterations of the list.

Final comment 107(a)(12)(i)-5 (renumbered from proposed comment 107(a)(12)(i)-4) clarifies that a financial institution complies with § 1002.107(a)(12)(i) by reporting the index value used to set the rate that is or would be applicable to the covered transaction. Proposed comment 107(a)(12)(i)-4 would have required financial institutions to report, for covered transactions with an adjustable interest rate, the index value applicable at the time the application was approved by the financial institution. Some commenters stated that the index value at the time of approval may have no relationship to the index value used to set the interest rate and that it would be less burdensome to report the index value used to establish the interest rate rather than the value at the time of approval. To address these concerns, the Bureau has adjusted final comment 107(a)(12)(i)-5 to require reporting of the index value used to set the rate that is or would be applicable to the covered transaction. In most cases, this will be the index value at the time of approval, because the financial institution will set the pricing when the credit decision is made, but in cases where there might be a difference, this comment as revised will ensure that financial institutions are reporting the index value actually used to establish the interest rate, rather than the value that otherwise exists at the time of approval.

107(a)(12)(ii) Total Origination Charges

Proposed Rule

Proposed § 1002.107(a)(12)(ii) would have required financial institutions to report the total origination charges for a covered credit transaction. Total origination charges are the total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars.

Proposed comment 107(a)(12)(ii)-1 would have clarified that charges imposed uniformly in cash and credit transactions are not reportable. Proposed comment 107(a)(12)(ii)-2 would

have provided guidance on reporting charges imposed by third parties. Proposed comment 107(a)(12)(ii)-3 would have clarified that broker fees are included in the total origination charges.[641] Proposed comment 107(a)(12)(ii)-4 would have provided guidance on reporting charges for other products or services paid at or before origination. And proposed comment 107(a)(12)(ii)-5 would have listed examples of reportable charges.

The Bureau sought comment on proposed § 1002.107(a)(12)(ii) and its commentary, including whether concepts and guidance adapted from Regulation Z, such as proposed comment 107(a)(12)(ii)-1 on comparable cash transactions, were applicable in the small business lending context such that they should be incorporated as drafted. The Bureau also sought comment on whether to enumerate certain types of charges separately in the 1071 data, and whether to include or exclude certain types of charges in the total origination charges.

Comments Received

The Bureau received comments specifically regarding total origination charges from several banks and trade associations, along with a community group and a joint letter from a cross-sector group of lenders, community groups, and small business advocates.

A few industry commenters questioned the utility of information about total origination charges. For example, several commenters asserted that proposed § 1002.107(a)(12)(ii) would not provide useful data because the amount of origination charges may vary based on factors not captured by the 1071 data, such as geographical differences in appraisal fees. A group of trade associations stated that including broker fees while itemizing them separately in another data field would inflate the amount of origination charges. And a bank preferred to report only origination points but believed that such data would provide only limited value. This commenter did not define origination points but the Bureau understands the term to refer to one way that financial institutions denote fees paid to the lender for originating the loan. However, the cross-

[641] For more information on broker fees, see the section-by-section analysis of § 1002.107(a)(12)(iii) below.

sector group commented that total origination charges would be especially helpful for data users examining the cost of merchant cash advances because these transactions include upfront fees not otherwise captured in the pricing data.

A few commenters asserted that reporting total origination charges would be burdensome. For example, several industry commenters stated that calculating the finance charge under Regulation Z, which defines certain charges similar to the proposed total origination charges data field, is complex and not performed for commercial credit transactions. And a trade association suggested that the proposed treatment of certain charges, such as a borrower's premium for property insurance, was unclear.

Several commenters addressed specific aspects of total origination charges. For example, a community group stated that charges imposed uniformly in cash and credit transactions should be reportable because, they asserted, such charges are rare and the existence of such an exclusion may encourage fee shifting. Conversely, a trade association stated that any charge imposed uniformly on all applicants should be excluded because such a charge could not be the source of a pricing disparity. Several industry commenters stated that third-party charges should be excluded because the imposition of such fees is often outside a financial institution's control, while a group of trade associations found the treatment of such charges confusing. Finally, another trade association stated that aligning the definition of total origination charges to Regulation C's definition of origination charges used to report data under HMDA[642] would provide helpful clarity because the Regulation C definition is understood to include only charges retained by the financial institution.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(ii) with additional clarifying commentary. Final § 1002.107(a)(12)(ii) requires financial institutions to

[642] 12 CFR 1003.4(a)(18)

report the total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars. As with all aspects of pricing within § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

The Bureau is finalizing comments 107(a)(12)(ii)-1 through -5 as proposed. In addition, the Bureau is adopting final comment 107(a)(12)(ii)-6, which clarifies the reporting of a net lender credit provided by a financial institution to an applicant at origination.

As discussed in the NPRM, total origination charges provide information about an important component of pricing for small business credit: the upfront cost of originating and extending credit. This relatively specific information enables insight into credit pricing that would be obscured by more general information, such as the trade-offs between the interest rate and the upfront charges. Indeed, new comment 107(a)(12)(ii)-6 enhances users' ability to examine the relationship between components of credit pricing by clarifying how to report net lender credits provided to the applicant. For example, without information about net lender credits, transactions where a borrower accepted a lender credit at origination in exchange for a higher interest rate would appear to have inflated prices. Moreover, by generally covering all upfront fees and credits regardless of how they are structured and denominated, final § 1002.107(a)(12)(ii) limits financial institutions' opportunity to shift fees to excluded charges by giving similar fees different names. Thus, final § 1002.107(a)(12)(ii) will enable users to better understand pricing disparities and identify potential business and community development opportunities.

The Bureau disagrees with commenters who claimed that information about total origination charges would not have value. Although such charges are affected by factors not included in the 1071 data, final § 1002.107(a)(12)(ii) will still provide insight into pricing in the small business lending market. General information about upfront charges will enable users to

better understand fair lending disparities, even if they cannot conclusively determine the existence of unlawful disparities from the data alone. And users need not attempt to make precise comparisons among individual applicants to identify business and community development needs and opportunities. Regarding broker fees, the Bureau believes that such charges are an important component of the upfront cost of credit and notes that Regulation Z also includes them in the finance charge.[643] Also, broker fees are separately itemized in final § 1002.107(a)(12)(iii) so that users who are concerned about the impact of including broker fees can deduct them from the total origination charges.

Regarding commenters' concerns about burden, the Bureau understands that some financial institutions find calculation of the finance charge in Regulation Z § 1026.4—which is similar to final § 1002.107(a)(12)(ii)'s description of total origination charges—to be complex. But final § 1002.107(a)(12)(ii) is simpler in several important respects. First, final § 1002.107(a)(12)(ii) excludes all credit costs occurring after origination of a covered credit transaction, such as interest and time-price differential. And final § 1002.107(a)(12)(ii) adopts a more inclusive approach to upfront charges than Regulation Z's finance charge, which has numerous provisions addressing specific fees.[644] This simplified approach should make the total origination charges less burdensome to calculate than the finance charge. Regarding a commenter's question about the treatment of a borrower's premium for property insurance, this charge is handled using the general approach to charges for other products or services described in comment 107(a)(12)(ii)-4: such charges are included in the total origination charges only if the financial institution requires the purchase of such other product or service as a condition of or an incident to the extension of credit.

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[643] *Compare* final comment 107(a)(12)(ii)-3, *with* Regulation Z § 1026.4(a)(3).

[644] For example, the finance charge excludes application fees charged to all applicants for credit, and numerous fees in transactions secured by real property. *See* Regulation Z § 1026.4(c)(1) (application fees) and (7) (real estate-related fees).

The Bureau is not making certain specific changes to the total origination charges data field suggested by commenters. First, final § 1002.107(a)(12)(ii) maintains the exclusion for charges imposed uniformly in cash and credit transactions, similar to the exclusion in Regulation Z's finance charge, because the Bureau believes that pricing data better serves section 1071's statutory purposes when it focuses on the cost of credit that the lender is imposing rather than capturing all costs that may be associated with a particular transaction (whether financed or not). Furthermore, the Bureau is not excluding charges simply because a financial institution imposes them uniformly on all applicants for credit. Even if such charges—given their uniformity—were to hold no value for fair lending analysis, they would still be part of the upfront cost of credit that data users may wish to examine in identifying business and community development needs and opportunities. Final § 1002.107(a)(12)(ii) also adopts the proposal's treatment of third-party charges, with such charges being reportable only if a financial institution either requires the use of a third party as a condition of or an incident to the extension of credit, even if the applicant can choose the third party; or retains a portion of the third-party charge, to the extent of the portion retained.[645] This approach focuses final § 1002.107(a)(12)(ii) on those upfront third-party charges that are effectively set by the lender as a cost of credit. The Bureau believes this approach is consistent with that requested by commenters who did not want third-party charges to be reportable if they were outside of a financial institution's control. Regulation Z's finance charge definition uses a similar standard for third-party charges, and the Bureau is not aware of significant confusion over its applicability. Finally, Regulation C's definition of total origination charges, which is taken directly from the amount disclosed to borrowers of closed-end consumer credit transactions secured by real property,[646] is limited in ways that the Bureau believes would reduce the value of final § 1002.107(a)(12)(ii) in the small business lending context. For example, new comment 107(a)(12)(ii)-6 clarifies that financial

[645] *See* final comment 107(a)(12)(ii)-2.

[646] Regulation Z § 1026.38(f)(1).

institutions may report a negative amount to reflect a net credit provided by the lender, but such credits could not be included in Regulation C's total origination charges data point.

107(a)(12)(iii) Broker Fees

Proposed Rule

Proposed § 1002.107(a)(12)(iii) would have required financial institutions to report the broker fees for a covered credit transaction. Broker fees are the total amount of all charges included in the total reportable origination charges that are fees paid by the applicant directly to a broker or to the financial institution for delivery to a broker, expressed in dollars. Proposed comment 107(a)(12)(iii)-1 would have provided an example of reporting different types of broker fees. Proposed comment 107(a)(12)(iii)-2 would have clarified that financial institutions would use a "best information readily available" standard regarding fees paid directly to a broker by an applicant.

The Bureau sought comment on proposed § 1002.107(a)(12)(iii) and its commentary, including on the knowledge that financial institutions might have about direct broker fees and the challenges of reporting such information.

Comments Received

The Bureau received comments specifically regarding broker fees from several lenders, trade associations, and community groups. A community group stated that information about broker fees would help data users monitor for abusive practices. Conversely, a group of trade associations asserted that the Bureau had not established that broker fees were inflating the cost of credit in the small business lending market. This commenter also speculated that Congress was unconcerned with broker fees in this market because it had not extended certain TILA protections to commercial transactions or explicitly identified broker fees in section 1071.

Several commenters addressed the reporting of broker fees paid directly to the broker. A trade association commented that the amount of such fees may be difficult for a financial institution to obtain, while a bank said that documenting efforts to verify direct broker fees

would be burdensome. A community group said that the Bureau's proposed "best information readily available" standard was reasonable, while a joint letter from community groups and business advocacy groups asked the Bureau to separately itemize indirect broker fees in order to provide more information about charges that are imposed by the lender.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(iii) and associated commentary as proposed. As with all aspects of pricing within § 1002.107(a)(12), this requirement to report broker fees applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

As discussed in the NPRM, loan brokers play an important role in the small business lending market. The market has shifted to include more nonbank and nontraditional lenders offering different types of financial products, which creates opportunities for intermediaries, such as brokers, who might assist applicants in navigating among potential lenders or products.[647] These intermediaries offer benefits to applicants but also create risks for those applicants arising from misaligned incentives.[648] Indeed, the small business lending market lacks certain substantive protections against misconduct that are found in the consumer credit market, such as the prohibition on basing certain loan originator compensation on the terms of a transaction.[649]

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[647] *See, e.g.*, 2022 Small Business Credit Survey (reporting that 40 percent of respondents applied for credit at either an online lender or a finance company in 2021).

[648] *See* Fin. Stability Oversight Council, *2016 Annual Report*, at 126 (2016), https://home.treasury.gov/system/files/261/FSOC-2016-Annual-Report.pdf (discussing intermediaries in alternative lending arrangements and explaining that "[i]n other markets, business models in which intermediaries receive fees for arranging new loans but do not retain an interest in the loans they originate have, at times, led to incentives for intermediaries to evaluate and monitor loans less rigorously"). Because of the potential risks involved in multi-party business arrangements, the FFIEC's Interagency Fair Lending Examination Procedures emphasize the importance of understanding the role that brokers play in a financial institution's lending process. Fed. Fin. Insts. Examination Council, *Interagency Fair Lending Examination Procedures*, at 3 (2009), https://www.ffiec.gov/PDF/fairlend.pdf (instructing examiners to consider an institution's organization of its credit decision-making process, including identification of the delegation of separate lending authorities and the extent to which discretion in pricing or setting credit terms and conditions is delegated to various levels of managers, employees, or independent brokers or dealers and an institution's loan officer or broker compensation program).

[649] Regulation Z § 1026.36 (implementing TILA's prohibition on basing residential mortgage loan originator compensation on loan terms).

Information about broker fees will help data users better understand the small business lending market in general and the impact broker fees have on credit pricing in particular. Although broker fees are included in final § 1002.107(a)(12)(iii)'s definition of total origination charges, separately enumerating the total broker fees will allow data users to better understand the role that brokers play in the price of small business credit. For example, data users will be able to analyze whether broker fees specifically appear to be creating fair lending risk or higher-priced transactions for certain communities. Empowering data users to engage in this level of analysis will aid in fulfilling both the fair lending enforcement and business and community development purposes of the statute.

The Bureau acknowledges the lack of data regarding the extent to which broker fees may or may not be inflating the cost of credit. This insufficiency, however, is exactly what 1071 data are intended to help address. Moreover, final § 1002.107(a)(12)(iii) is valuable to data users even in the absence of any problematic pricing practices regarding brokers because it will help shed light on an important aspect of commercial financing arrangements. The final rule includes numerous data points, including much of the pricing data point, that do not capture information that about intrinsically or especially abusive conduct, but that will help data users identify fair lending concerns and identify business and community development needs and opportunities. Regarding Congress's intent, the Bureau notes that section 1071 expressly authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]."[650] As discussed herein, final § 1002.107(a)(12)(iii) satisfies this requirement.

The Bureau understands that financial institutions often may not have complete access to information regarding the amount of broker fees that an applicant pays directly to a broker. Thus, final comment 107(a)(12)(iii)-2 clarifies that a financial institution may rely on the best

[650] ECOA section 704B(e)(2)(H).

information readily available to the financial institution at the time final action is taken. Information readily available can include, for example, information provided by an applicant or broker that the financial institution reasonably believes regarding the amount of fees paid by the applicant directly to the broker. The Bureau believes commenters may be overestimating the burden associated with this standard, which contemplates only consulting information "readily" available rather than performing a searching inquiry into the amount of direct broker fees. As noted in the NPRM, the same standard is used for reporting certain HMDA data under Regulation C, and it does not appear to be unduly burdensome in that context.[651] Additionally, many nonbank financial institutions will need to determine the amount of broker fees in certain circumstances to comply with State commercial financing disclosure laws.[652]

Finally, the Bureau is not requiring separate itemization of indirect broker fees at this time. Such fees could be imposed for a variety of reasons and in a variety of ways; the Bureau believes that additional information and stakeholder feedback would be beneficial before adopting such a requirement.

107(a)(12)(iv) Initial Annual Charges

Proposed Rule

Proposed § 1002.107(a)(12)(iv) would have required financial institutions to report the total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction, expressed in dollars.

Proposed comment 107(a)(12)(iv)-1 would have provided an example of how to calculate the amount to report. Proposed comment 107(a)(12)(iv)-2 would have highlighted that a financial institution should exclude interest expenses from the initial annual charges reported.

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[651] *See* Regulation C comments 4(a)(31)-4 and 4(a)(32)-5.

[652] For example, California's commercial financing disclosure law requires lenders to determine the finance charge, which includes "any charge that would be a finance charge under 12 C.F.R. Part 1026.4." Cal. Code Regs. tit. 10, section 943(a)(1), https://dfpi.ca.gov/wp-content/uploads/sites/337/2022/06/PRO-01-18-Commercial-Financing-Disclosure-Regulation-Final-Text.pdf. In turn, Regulation Z § 1026.4(a)(3) generally includes fees charged by a mortgage broker, whether paid directly or indirectly. California law also requires separate disclosure of broker fees that are included in the amount financed by the borrower. Cal. Code Regs. tit. 10, section 956(a)(5).

Proposed comment 107(a)(12)(iv)-3 would have noted that a financial institution should not include any charges for events that are avoidable by the applicant, including for example, charges for late payment, for exceeding a credit limit, for delinquency or default, or for paying items that overdraw an account. Proposed comment 107(a)(12)(iv)-4 would have provided examples of initial annual charges that may be scheduled to be imposed during the initial annual period, including monthly fees, annual fees, and other similar charges. Finally, proposed comment 107(a)(12)(iv)-5 would have clarified that a financial institution complies with the provision by reporting as the default the highest amount for a charge scheduled to be imposed, and provides an example of how to calculate the amount reported when the scheduled fee to be imposed may be reduced based upon a specified occurrence.

The Bureau sought comment on proposed § 1002.17(a)(12)(iv) and its commentary, including whether to include or exclude certain types of charges as reportable under initial annual charges. The Bureau also sought comment on the likelihood that financial institutions would schedule charges in the second year of a covered credit transaction and beyond specifically in an effort to avoid reporting the charges for purposes of section 1071. Finally, the Bureau sought comment on how it should treat situations where the applicant has informed the financial institution that it expects to regularly incur "avoidable charges," and whether such charges should be reported as a scheduled charge.

Comments Received

The Bureau received comments specifically regarding the collection of initial annual charges from lenders, trade associations, and community groups.

A community group stated that the Bureau should finalize the provision as proposed, but that the Bureau should conduct research to determine if lenders are shifting fees beyond the first year. Several community groups and a lender requested that the Bureau require financial institutions to also report charges scheduled to be imposed after the first year to avoid encouraging lenders to impose charges disproportionately in the later years of the loan's term.

With respect to avoidable fees, a community group stated that the Bureau should include all fees that could be imposed at the lender's discretion in order to avoid evasion. A bank and a joint letter from bank trade associations argued that including avoidable fees that the applicant intends to incur would unfairly inflate the prices of some loans and create documentation problems for lenders. One commenter asserted that, for loans with terms shorter than one year, financial institutions should not be made to speculate as to what constitutes the initial period on short term loans and what could occur during the initial annual period regarding charges.

A State bankers association expressed concern that the terms "scheduled" and "initial period following origination" were not defined in the NPRM. That commenter and a bank asserted that many charges that may be incurred during the first year may be uncertain, such as an inspection fee for a construction project where the timing of inspections is determined by events occurring after origination. The State bankers association also stated that some loans may have multiple transactions within a one-year period, such as a line of credit that was originated and then increased, and asserted that it is unclear whether associated charges would be reported twice or combined.

Final Rule

For the reasons set forth herein, the Bureau is adopting § 1002.107(a)(12)(iv) and associated commentary with additions and adjustments to commentary to address comments regarding speculative charges and transactions with terms of less than one year. Final § 1002.107(a)(12)(iv) provides that a financial institution reports only charges scheduled to be imposed over the first annual period of the covered credit transaction. The Bureau understands that there are a variety of ways that small business credit transactions may be structured. This includes, for example, whether there is an interest rate imposed on the transaction, whether there are finance charges, and whether there are a myriad of other fees that may be scheduled to be paid or are contingent upon some occurrence. In addition, the Bureau understands that scheduled fees may constitute a substantial part of the cost of a covered credit product, and without

knowledge of those fees, the cost of the credit would be incomplete. The Bureau believes that final § 1002.107(a)(12)(iv) enables data users to have a more accurate understanding of the cost of the covered credit transaction than if the data lacked information about scheduled fees.

There may be small business credit transactions that do not include an interest rate, but do include a monthly finance charge. If the financial institution were only required to report the interest rate on these types of transactions, the true cost of credit would be obscured because the monthly finance charge would not be reported. In addition, small business credit, like consumer credit, may include a number of other fees, such as annual fees and other similar charges. The information collected and reported under final § 1002.107(a)(12)(iv) allows data users to have a more complete picture of the cost of the covered credit transaction and promotes market transparency, thus furthering the business and community development purpose of section 1071. In addition, this pricing data furthers the fair lending purpose of section 1071 as it enhances the ability to understand the cost of credit and any disparities that may exist.

The Bureau believes that by requiring only scheduled charges to be reported (rather than the submission of all potential charges, some of which could be speculative), the data reported will be more accurate than if a financial institution were to make an educated guess as to what unscheduled charges will be imposed over the first annual period. Final § 1002.107(a)(12)(iv) does not require a financial institution to itemize the charges reported thereunder. The Bureau also believes that requiring charges to be itemized would add a considerable amount of complexity for financial institutions in collecting and reporting the initial annual charges, given the range of fees that could be charged and the variations in how they might be imposed.

A financial institution complies with final § 1002.107(a)(12)(iv) by not including charges for events that are avoidable by the applicant; this restriction is explained more fully in final comment 107(a)(12)(iv)-3 (unchanged from the proposal), which provides examples of types of avoidable charges. As noted above, the Bureau believes that the accuracy of the data reported is enhanced by only including charges that are scheduled to be imposed and not including potential

charges that are contingent upon an action (or inaction) by the borrower. The Bureau also believes that only requiring financial institutions to report such charges for the first year, and not the life of the loan, will reduce any burden associated with reporting the data. This information should be included in the contract and, at most, would require a simple calculation to arrive at the total charges for the initial annual period. An example of how to calculate the initial annual charges for the first annual period is found in final comment 107(a)(12)(iv)-1. Additionally, to address comments received regarding uncertain or speculative charges, the Bureau has revised final comment 107(a)(12)(iv)-1 to state explicitly that, in a transaction where there will be a charge in the initial annual period following origination but the amount of that charge is uncertain at the time of origination, a financial institution complies by not reporting that charge as scheduled to be imposed during the initial annual period following origination.

The Bureau is finalizing comments 107(a)(12)(iv)-2 (providing that a financial institution complies with the provision by excluding any interest expense from the initial annual charges reported) and -4 (providing examples of charges scheduled to be imposed during the initial annual period) as proposed. The Bureau is also finalizing comment 107(a)(12)(iv)-5 as proposed. This comment provides additional explanation about what amount to report when the financial institution provides a discount on the charge if certain conditions are met. The Bureau understands that some financial institutions may provide a discount on specific charges when certain conditions are met. For example, a financial institution may provide a discount on a monthly charge if the borrower maintains a checking account at the financial institution. In such a circumstance, final § 1002.107(a)(12)(iv)-5 requires the financial institution to report the non-discounted amount to maintain consistency across the data that are reported by all financial institutions.

The Bureau is adopting new comment 107(a)(12)(iv)-6 to clarify that, for a transaction with a term less than one year, a financial institution complies with the provision by reporting all charges scheduled to be imposed during the term of the transaction. This comment was added to

address requests for clarification regarding how to report the data for transactions with terms less than one year as well as what is meant by initial annual period.

107(a)(12)(v) Additional Cost for Merchant Cash Advances or Other Sales-Based Financing

Proposed Rule

Proposed § 1002.107(a)(12)(v) would have required financial institutions to report additional cost data for merchant cash advances or other sales-based financing transactions. Specifically, this cost is the difference between the amount advanced and the amount to be repaid, expressed in dollars. Proposed comment 107(a)(12)(v)-1 would have provided an example of the difference between the amount advanced and the amount to be repaid for a merchant cash advance.

The Bureau sought comment on proposed § 1002.107(a)(12)(v) and its commentary, including whether to require additional pricing information for merchant cash advances, and whether merchant cash advances could be structured in ways that evade the proposed reporting requirement, such as by omitting or making variable the amount to be repaid.

Comments Received

The Bureau received comments specifically regarding this aspect of the proposal from several industry and community group commenters. Several joint letters from community groups, community oriented lenders, and business advocacy groups, as well as a trade association, asked the Bureau to require reporting the loan term for merchant cash advances or other sales-based financing transactions. These commenters stated that the loan term was necessary to compare the pricing of merchant cash advances, and offered potential methodologies for estimating unknown loan terms, including those from State commercial financing disclosure laws. A lender asked the Bureau to accommodate future transaction types by allowing financial institutions to report amounts under § 1002.107(a)(12)(v) even if the transaction is not a merchant cash advance or other sales-based financing transaction. Finally, a cross-sector group of lenders, community groups, and small business advocates agreed that

§ 1002.107(a)(12)(v), along with the other pricing data, would capture the cost of merchant cash advances.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(12)(v) and comment 107(a)(12)(v)-1 as proposed. Final § 1002.107(a)(12)(v) requires financial institutions to report the difference between the amount advanced and the amount to be repaid, expressed in dollars, for merchant cash advances or other sales-based financing transactions. As with all aspects of pricing within final § 1002.107(a)(12), this requirement applies to credit transactions that either have been originated or have been approved by the financial institution but not accepted by the applicant.

As discussed in the NPRM, some types of commercial financing contain pricing terms that are difficult to reflect in data about interest rate and fees. For example, under a typical merchant cash advance, a merchant receives a cash advance and promises to repay it (plus some additional amount) to the merchant cash advance provider. Merchant cash advance providers generally do not provide an interest rate, and while they may charge fees at origination or during the first year, the majority of a merchant cash advance's cost to the merchant comes from the additional amount repaid by the merchant on top of the amount advanced. This additional amount may be expressed as a multiple of the amount advanced in the form of a factor rate or percentage, or it may be derived by comparing the total payback amount to the amount actually advanced. This additional amount is typically not characterized as interest, so it would not be reported under final § 1002.107(a)(12)(i). Nor is this additional amount characterized as a fee charged at origination or scheduled to be imposed during the first year after the transaction, so it would not be reported under final § 1002.107(a)(12)(ii) or (iv). Without an additional pricing data field to capture this additional amount along with any other fees the merchant cash advance provider charges, data users attempting to analyze merchant cash advance pricing would miss most of the cost of credit associated with these transactions. Therefore, the inclusion of this

data field aids in fulfilling both the fair lending enforcement and business and community development purposes of the statute.

The Bureau believes that collecting and reporting this data will impose relatively little burden on financial institutions, because they can determine the additional amount repaid by computing the difference between the amount of revenue purchased and the purchase price typically found in the merchant cash advance contract. Commenters generally did not make assertions to the contrary.

As discussed in the section-by-section analysis of § 1002.107(a)(5) above, the Bureau is requiring, for merchant cash advances and other sales-based financing transactions, that financial institutions report the loan term, if any, that the financial institution estimated, specified, or disclosed in processing or underwriting the application or transaction. This information will allow data users to better understand and use the information reported pursuant to final § 1002.107(a)(12)(v). However, the Bureau is not adopting one commenter's suggestion regarding future transaction types that may resemble merchant cash advances or other sales-based financing, as the Bureau believes such transactions should be adequately covered by the "other sales-based financing" label and thus this information would be reportable for such transactions.

107(a)(12)(vi) Prepayment Penalties

Proposed Rule

Proposed § 1002.107(a)(12)(vi)(A) would have required financial institutions to report whether the financial institution could have included a prepayment penalty under the policies and procedures applicable to the covered credit transaction. Proposed § 1002.107(a)(12)(vi)(B) would have required financial institutions to report whether the terms of the covered credit transaction include a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due. Proposed comment 107(a)(12)(vi)-1 would have provided

additional information on how to determine whether the applicable policies and procedures allow a financial institution to include prepayment penalties in the loan agreement.

The Bureau sought comment on proposed § 1002.107(a)(12)(vi) and its commentary, including whether to enumerate other types of contingent charges separately in the 1071 data to more accurately reflect the cost of covered credit transactions. The Bureau also sought comment on whether there are alternative data that would provide similar insight into whether certain borrowers are being steered into covered credit transactions containing prepayment penalty terms or other similar contingent terms.

Comments Received

The Bureau received comments regarding the reporting of prepayment penalty information from lenders, trade associations, and community groups. A number of community groups supported the proposal to collect prepayment penalty information. One asserted that information on prepayment penalties is important for data users to determine whether such charges are targeting underserved borrowers. Another noted that research by the Federal Reserve Board shows that many small business borrowers do not expect the balloon finance charge that many merchant cash advances and other transactions impose for prepayment.[653] A joint letter from community and business advocacy groups requested that the Bureau ensure that financial institutions cannot evade the reporting requirement by changing how prepayment penalties are described.

A number of trade associations and banks questioned the necessity of prepayment penalty data and claimed that it would be misleading. A group of trade associations stated that the Bureau offered no evidence that these penalties impact community development or are used in a discriminatory fashion. The same commenter also asserted that nearly all merchant cash advance providers collect a charge for prepaying the amount advanced, but this charge would not be

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[653] Barbara Lipman & Ann Marie Wiersch, Bd. of Governors of the Fed. Rsrv. Sys., *Browsing to Borrow: "Mom & Pop" Small Business Owners' Perspectives on Online Lenders and Products* (June 2018), https://www.federalreserve.gov/publications/files/2018-small-business-lending.pdf.

reflected in the proposed prepayment penalty data point, leading to the data appearing to inflate the apparent cost of non-merchant cash advance credit. A State bankers association asserted that nondiscriminatory reasons exist for certain loans to have prepayment penalties even if a lender's general policies and procedures do not provide for them, so the reported data could not be used to detect steering. A bank stated that the proposal would not detect steering because it does not clarify whether the prepayment penalty applies to the transaction requested or the transaction approved.

Two trade association comments asserted that lending policies are written in general terms and do not address prepayment penalties. Another trade association commented that it is possible that every loan "could" have a prepayment penalty.

A number of commenters requested that the Bureau change the scope of the data collection. A lender stated that the data collection should be limited to a binary flag and not require details on the potential penalties themselves. Two banks and a State bankers association stated that the data collection should be limited to whether a prepayment penalty was actually charged because a lender's policies might change during the reporting year and are dependent on external factors, such as the requirements of a third-party guarantor. A joint letter from community and business advocacy groups asserted that the Bureau should require reporting of the amount of any prepayment penalty and the term over which the penalty could be imposed. Finally, a cross-sector group of lenders, community groups, and small business advocates stated that the data collection should be modified to capture the balloon finance charge that nearly all merchant cash advances, and many other small business loans, charge on prepayment. This commenter stated that, because this charge is the finance charge that would be paid over the original term of the loan, it would not be considered a "penalty."

Final Rule

For the reasons set forth herein, the Bureau is adopting final § 1002.107(a)(12)(vi) with one technical correction, adopting comment 107(a)(12)(vi)-1 as proposed, and adding new

comment 107(a)(12)(vi)-2 regarding charges that become due immediately on prepayment. Final § 1002.107(a)(12)(vi)(A) requires a financial institution to report whether it could have included a charge to be imposed for paying all or part of the transaction's principal before the date on which the principal is due under the policies and procedures applicable to the covered credit transaction (notwithstanding whether such a provision was in fact included in this specific credit transaction). Final § 1002.107(a)(12)(vi)(B) requires financial institutions to report whether the terms of the covered credit transaction do in fact include such a charge. These provisions allow data users to determine what percentage of covered credit transactions could contain a prepayment penalty term, what percentage of such transactions actually contain such a term, and, together with other data points, the demographic profile of borrowers whose contracts do and do not include the term. The two provisions work together to allow data users to better determine whether certain borrowers are being steered towards covered credit transactions containing prepayment penalty terms.

Final comment 107(a)(12)(vi)-1 elaborates on the requirement to report whether financial institutions could have included a prepayment penalty in the covered credit transaction to clarify that the applicable policies and procedures are those that the financial institution follows when evaluating applications for the specific credit type and credit purpose requested. The Bureau believes this provision will ensure that similar credit products are being analyzed together and reduces the possibility that potential fair lending risk is incorrectly identified. In response to commenters who said that financial institutions' policies may change during the reporting year, the Bureau notes that comment 107(a)(12)(vi)-1 explains that the relevant policies and procedures are those in effect at the time of the covered credit transaction. A financial institution would not report based on different policies and procedures that might be adopted later in the reporting period.

New comment 107(a)(12)(vi)-2 explains that a financial institution complies with final § 1002.107(a)(12)(vi) by reporting as a prepayment penalty any balloon finance charge that may

be imposed for paying all or part of the transaction's principal before the date on which the principal is due and provides an example which illustrates a balloon finance charge that should be reported. As explained above, one commenter stated that most merchant cash advances and many other transactions have finance charges that would be paid over the entire term of the loan but that immediately become due on prepayment. The Bureau agrees that it was not sufficiently clear that these balloon finance charges would have been covered under the proposed description of a prepayment penalty. In addition, another commenter asked the Bureau to make clear that financial institutions cannot evade the reporting requirement by changing how prepayment penalties are described. New comment 107(a)(12)(vi)-2 was added to address both of these concerns.

In response to commenters asserting that prepayment penalty data are unnecessary or misleading, the Bureau notes that small business loan contracts may include prepayment penalties and the penalties can be sizable and structured as a percent of the remaining outstanding balance. The Bureau also understands that there may be concern among stakeholders, including community groups, that certain small business applicants may be steered toward loans containing prepayment penalty terms. The collection of data regarding which contracts contain a prepayment penalty and whether a prepayment penalty could have been imposed on specific contract types allows the data to be analyzed for fair lending purposes to see if certain groups are more frequently entering into contracts containing prepayment penalties. From a market competition standpoint, financial institutions may want to know how frequently their competitors are using prepayment penalties, and collection of these data could improve market transparency and new product development opportunities. The Bureau is not convinced by commenters' assertions that the data will not be valuable nor that it should require reporting of additional data related to prepayment penalties. The Bureau believes the type of data required to be reported pursuant to final § 1002.107(a)(12)(vi) strikes the right balance between collecting

information helpful to analyze for the purposes mentioned above and not requiring financial institutions to provide information regarding prepayment penalties.

107(a)(13) Census Tract

Proposed Rule

Section 1071 requires financial institutions to collect and report "the census tract in which is located the principal place of business of the . . . applicant."[654] This provision is similar to Regulation C, which requires reporting of the census tract in certain circumstances if the property securing the loan (or proposed to secure the loan, if the transaction was not originated) is in a county with a population of more than 30,000.[655] Under Regulation C, the financial institution generally finds the census tract by geocoding using the address of the property. Geocoding is the process of using a particular property address to locate its geographical coordinates, and from those coordinates one can identify the corresponding census tract.

CRA reporting of business loans by depository institutions also requires reporting of census tract. The Bureau understands that CRA allows reporting of a census tract based on the address or location where the proceeds of the credit will be principally applied.[656]

The Bureau proposed § 1002.107(a)(13) to require financial institutions to collect and report the census tract data point using a "waterfall" approach. The proposed rule would have required a financial institution to collect and report the census tract in which is located: (i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or (ii) If the information in (i) is unknown, the address or location of the main office or headquarters of the applicant; or (iii) If the information in both (i) and (ii) is unknown, another address or location associated with the applicant. In addition, the proposed rule would have required that the financial institution also indicate which one of the three types

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[654] ECOA section 704B(e)(2)(E).

[655] Regulation C § 1003.4(a)(9)(ii)(C). Regulation C also requires reporting of the property address for all applications.

[656] *See* 2015 FFIEC CRA Guide at 16.

of addresses or locations listed in (i), (ii), or (iii) the census tract is based on. Although the proposed rule did not specifically require it, the Bureau assumed that financial institutions or their vendors would generally use a geocoding tool to analyze the appropriate address to identify a census tract number.

The proposed approach would have required a financial institution to report the census tract of the proceeds address if it was available but would not have required a financial institution to ask about it specifically. Financial institutions would have been able to apply the waterfall approach to the addresses they were currently collecting; they would not have been required to specifically ask for the proceeds or headquarters addresses. In addition, the proposed method would have allowed a financial institution to report that it was unsure about the nature of the address if it had no information as to the nature or function of the business address it possessed.

Proposed comment 107(a)(13)-1 would have provided general instructions on using the waterfall reporting method, with examples for guidance. The Bureau believed that this comment would facilitate compliance and sought comment on whether any additional instructions or examples would be useful.

Proposed comment 107(a)(13)-2 would have explained that a financial institution would comply with proposed § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment would also have made clear that a financial institution would not be required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects.

Proposed comment 107(a)(13)-3 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which would include at least one address or location for an applicant for census tract reporting. However, the comment would have further explained that if a financial institution was nonetheless unable to collect or otherwise determine

any address or location for an application, the financial institution would report that the census tract information was "not provided by applicant and otherwise undetermined."

The Bureau proposed a safe harbor in § 1002.112(c)(1) (renumbered as § 1002.112(c)(2) in the final rule), which would have stated that an incorrect entry for census tract would not be a violation of ECOA or subpart B if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. Proposed comment 107(a)(13)-4 would have cross-referenced that provision. See the section-by-section analysis of § 1002.112(c)(2) below for additional discussion of this safe harbor.

During the SBREFA process, some small entity representatives explained that they generally collect the main office address of the small business, which for sole proprietorships will often be a home address, and were generally not aware of the proceeds address. The Bureau's proposed waterfall approach would accommodate this situation by allowing financial institutions to report census tract using the address that they currently collect. While several small entity representatives were already geocoding applicants' addresses, others were concerned about the burden associated with geocoding for HMDA and one expressed a preference for the CRA method of geocoding, as did several other stakeholders. Accordingly, the Bureau sought comment on the difference between geocoding for HMDA and for CRA, and any specific advantages or disadvantages associated with geocoding under either method. In regard to a small entity representative's request for a Federal government tool capable of batch processing for geocoding of addresses, the Bureau noted that it was considering the utility of such a tool. As the SBREFA Panel recommended, the Bureau sought comment on the feasibility and ease of using existing Federal services to geocode addresses in order to determine census tract for section 1071 reporting purposes (such as what is offered by the FFIEC for use in reporting HMDA and CRA data).

The Bureau sought comment on its proposed approach to the census tract data point. In addition to the specific requests for input above, the Bureau noted that the waterfall method was

intended to allow CRA reporters to provide the same data for both reporting regimes, but requested comment on whether the proposed method would achieve this goal and, if not, whether and how this data point should be further coordinated with CRA.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and others. Several commenters supported the inclusion of the census tract data point, and many specifically discussed and supported the proposed waterfall approach to reporting. One CDFI lender stated that it currently collects this information for the CDFI Fund. Several community groups discussed the importance of knowing where loans were made to combat redlining and ensure that socially disadvantaged farmers and other small businesses can have appropriate access to credit. A community group and a trade association agreed with the Bureau's proposal that the waterfall method would allow section 1071 reporting to match CRA requirements. Another trade association said that financial institutions would be able to use an address provided by the applicant and agreed that reporting of the proceeds address would allow coordination with CRA, though it did not comment on the proposed waterfall. Although they supported the waterfall approach, two community groups requested that financial institutions be required to ask for the location where the proceeds of the credit would be used, stating that this method would allow for better coordination with CRA and better fulfillment of the purposes of section 1071.

Several industry commenters stated that the census tract data point would be confusing and difficult to report. One commenter pointed out that multiple applicant addresses and address changes for applicants would complicate reporting. A national auto finance trade association stated that its members do not work with census tracts and that technical and process changes would be necessary to deliver this data.

A trade association stated that geocoding will be a significant burden for many credit unions, the vast majority of which do not collect census tract information for small business

loans. That commenter further stated that although some CDFI credit unions collect census tract information, many are completely unfamiliar with census tracts—particularly credit unions that are not HMDA reporters. The commenter also said that the FFIEC geocoder does not permit batch inputs, which it said further slows application processes. Finally, the commenter requested that the Bureau develop a free tool that permits batch inputs and better enables efficient and cost-effective compliance.

Two banks and a trade association commented that many banks that are not HMDA reporters are unfamiliar with census tracts. Commenters also stated that the FFIEC geocoder works efficiently for addresses in and close to metro areas, but not as easily for more rural addresses, and in relation to new subdivisions and developments. They further pointed out that when an address is not "matched" in the FFIEC system, it requires manual plotting, which is time-consuming and difficult, and stated that a bank that makes strictly agricultural loans might find many non-matching addresses. Finally, two of these commenters suggested that reporting the State and county codes should be sufficient when there is no match in the FFIEC geocoder.

Several industry commenters specifically objected to the waterfall reporting method, which they stated was confusing and difficult, and many suggested it should not be mandatory. Some of these commenters requested clarification on how to report if there are multiple proceeds addresses, or if the bank learns of a different proceeds address after the loan closes. In addition, two commenters asked that the Bureau clarify whether the census tract should match the mailing address of the applicant or the physical address.

Numerous banks and trade associations stated that section 1071 reporting requirements, especially the census tract data point, overlapped or conflicted with HMDA and CRA reporting requirements, creating unnecessary difficulties. Most of these commenters asked that the Bureau coordinate these requirements and provide a complete exemption from section 1071, HMDA, or CRA for loans that overlap. Commenters requesting exemptions did not explain why the use of

the proceeds address would not allow coordination between section 1071 and CRA census tract reporting.

Some industry commenters expressed concern that census tract information, especially when combined with the NAICS business type and other reported data, could facilitate reidentification of small business applicants. These commenters stated that this risk would be greater in rural areas.

Comments addressing the Bureau's proposed safe harbor for use of certain geocoders are addressed in the section-by-section analysis of § 1002.114(c)(1) below.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(13) and associated commentary with a minor edit for clarity. Final § 1002.107(a)(13) requires that financial institutions collect and report the census tract data point using the "waterfall" approach described above.

In regard to the comments expressing concern about the burden associated with collecting and reporting census tract information using a geocoder and by other means, the Bureau notes that census tract is specifically enumerated as a data point in the statute. In addition, the Bureau believes that its reporting method for the census tract data point leverages existing industry information collection practices and will result in useful information to further section 1071's purposes while avoiding imposing much additional burden on financial institutions. The waterfall method allows a financial institution to report census tract using an address it already has, with no further investigation; allows a financial institution to avoid further investigation when it is unsure about the nature of the address reported; and allows current CRA reporters to report the same address for this rule as they do for CRA.[657] In addition, the waterfall method

[657] As explained below, the current CRA rulemaking envisions replacing small business and small farm CRA data collection with the 1071 data collection, but in the event CRA data is still reported under the current regime for some period of time after compliance with this rule is required, the Bureau believes that the ability to report the same data in the interim should reduce any operational difficulties related to census tract. *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

prioritizes the proceeds address, which the Bureau considers to be particularly useful for both the fair lending and business and community development purposes of section 1071.

The waterfall approach adopted in the final rule requires a financial institution to report the census tract of the proceeds address if it is available, but does not require a financial institution to ask about it specifically. This provision is meant to address potential concerns about reporters spending time on complex, fact-specific questions and unintentionally misreporting this data point, which could occur if financial institution staff have to determine what kind of address they are reporting based on insufficient information. The Bureau believes that this option will be particularly helpful if the application is denied or withdrawn early in the application process before the nature of any address provided by the applicant is clear.

Requiring financial institutions to inquire as to the address where the proceeds will be applied, as some commenters requested, might result in slightly more proceeds addresses being reported. However, the Bureau does not believe that the extra information reported in certain instances would be worth the extra difficulty across all small business applications. In addition, the Bureau believes that the waterfall approach in collecting census tract data provides sufficient flexibility; making use of the waterfall voluntary, as some commenters suggested, would result in less useful information being collected while only reducing difficulty by a small amount. In regard to the comment asking whether the physical or mailing address or location should be used, the Bureau notes that the credit proceeds will be applied at a physical location, and the main office or headquarters of a business will also occupy a physical location. The third option in the waterfall, "another address or location," does not suggest the nature of such an address, but the financial institution will need to have enough information to determine a census tract for that location.

As explained above, the Bureau understands that CRA currently requests reporting of a census tract based on the address or location where the proceeds of the credit will be principally

applied.[658] The Bureau also believes that CRA reporting on this data point is reasonably flexible, and a financial institution will be able to coordinate the two compliance regimes to report the same census tract. The commenters who stated that this data point would conflict with CRA reporting did not explain why they believed this to be so, and other industry commenters agreed that the census tract data point for section 1071 would allow coordinated reporting with CRA. The Bureau also notes that the recent CRA interagency proposed rule, if finalized, would eventually replace CRA small business and small farm data with data collected pursuant to section 1071, in which case this issue would likely be moot.[659]

Although the Bureau sought comment on the differences between HMDA and CRA census tract reporting, no commenters provided information on this issue. In regard to commenter concerns about overlaps or conflicts with HMDA reporting, the Bureau notes that the final rule excludes HMDA-reportable transactions from coverage, as discussed in the section-by-section analysis of § 1002.104(b)(2) above, so that concern is now moot as well.

The Bureau notes that section 1071's description of the census tract data point refers to the census tract for the applicant's "principal place of business."[660] The Bureau considers the waterfall approach in final § 1002.107(a)(13) to be a reasonable interpretation of the undefined statutory term "principal place of business," which the Bureau understands not to have a standard definition, and thus believes to be ambiguous. First, the Bureau believes that the address or location of the main office or headquarters of the applicant fits easily into one of the common meanings of "principal place of business." In addition, the Bureau anticipates that, generally, the address where the loan proceeds will be applied will also be the main office or headquarters

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[658] *See, e.g.*, Off. of the Comptroller of Currency, Fed. Rsrv. Sys., Fed. Deposit Ins. Corp., *Community Reinvestment Act*; *Interagency Questions and Answers Regarding Community Reinvestment*; *Guidanc*e, 81 FR 48506, 48551-52 (July 25, 2016).

[659] *See* 87 FR 33884, 33997, 34005 (June 3, 2022).

[660] ECOA section 704B(e)(2)(E).

address.[661] The primary exception to this principle will be in the case of credit intended for purchase, construction/improvement, or refinancing of real property; under these circumstances, the Bureau reasonably interprets the term "principal place of business" to mean the principal location for business activities relating to the extension of credit at issue. Although "another address or location associated with the applicant" might not always be the principal place of business of the applicant, the Bureau considers this information to be the financial institution's best option for reporting data on the principal place of business when the nature of a location is unknown.

In the alternative, section 1071 authorizes the Bureau to include any "additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau has determined that requiring reporting of the proceeds address will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on the location of the activity financed for fair lending analysis and understanding where the business and community development is occurring. Requiring reporting of another address or location associated with the applicant when both the proceeds address and the main office or headquarters address are not available will provide location data when otherwise none would be present, thus also aiding in fulfilling both the fair lending and business and community development purposes of section 1071 by providing more useful information on location for fair lending analysis and understanding where the business and community development will likely be occurring. In addition, requiring data on the nature of the address

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[661] According to U.S. Census 2019 SUSB data, there are 6,081,544 firms with fewer than 500 employees (which will be used, for this purpose, as a rough proxy for a "small business"); those firms collectively have 6,588,335 establishments (*i.e.*, locations). This means that, at most, approximately 8 percent of firms with fewer than 500 employees could have more than one location. *See* U.S. Census Bureau, *2019 SUSB Annual Datasets by Establishment Industry* (Feb. 2022), https://www.census.gov/programs-surveys/susb/data/tables.html. According to the U.S. Census Bureau's Non-employer Statistics, there are 27,104,006 non-employer establishments (regardless of revenue size). Non-employer firms account for fewer than 4 percent of all sales, though, and the vast majority are sole proprietorships. While not impossible, the Bureau believes it is very unlikely that non-employer firms would have more than one location. *See* U.S. Census Bureau, *All Sectors: Nonemployer Statistics by Legal Form of Organization and Receipts Size Class for the U.S., States, and Selected Geographies: 2019* (2019), https://data.census.gov/cedsci/table?q=NONEMP2019.NS1900NONEMP&tid=NONEMP2019.NS1900NONEMP&hidePreview=true.

reported will aid in fulfilling both the fair lending and business and community development purposes of section 1071 by facilitating accurate analyses of the data reported. Also, in the alternative, to the extent that "the principal place of business of the . . . applicant" is understood to mean only "main office or headquarters address" (which, as explained above, the Bureau does not adopt as its interpretation of the statutory term) the Bureau believes it is appropriate to use its exception authority under ECOA section 704B(g)(2) to provide that financial institutions in certain situations may report the proceeds address or "another address or location associated with the applicant," because the Bureau believes those addresses will carry out the purposes of section 1071 more appropriately than requiring the main office or headquarters address in every situation.

The Bureau is finalizing comment 107(a)(13)-1 through -4 with a minor edit for consistency. Comment 107(a)(13)-1 provides general instructions on using the waterfall reporting method, with examples for guidance, which will facilitate compliance.

Final comment 107(a)(13)-2 explains that a financial institution complies with § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. The comment also makes clear that a financial institution is not required to investigate beyond its standard procedures as to the nature of the addresses or locations it collects. The Bureau believes that this guidance strikes the right balance by allowing flexibility in reporting, and also requiring appropriate good faith compliance in exercising that flexibility, thereby yielding quality data. In regard to commenters' concerns about reporting census tract when there are multiple proceeds addresses, the Bureau notes that the rule requires reporting using the address where the proceeds will be or would have been *principally* applied, and allows for other addresses to be used if that address is unknown. As final comment 107(a)(13)-2 makes clear, as long as a financial institution determines which address to use in good faith, it will be in compliance with the rule. The Bureau believes that including detailed

instructions on how to determine which proceeds address to report would increase the difficulty of reporting while only marginally enhancing the quality of the data reported. In regard to the comment about what to report when the proceeds or other address changes, because comment 107(a)(13)-2 requires that the address/location be identified in good faith, an address that the financial institution knows is no longer accurate would not be appropriate to use in determining the census tract when a more accurate address is available.

Final comment 107(a)(13)-3 explains that pursuant to final § 1002.107(c)(1) a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes at least one address or location for an applicant for census tract reporting. However, the comment further explains that if a financial institution is nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution reports that the census tract information was "not provided by applicant and otherwise undetermined." Based on the Bureau's understanding of financial institutions' application procedures, the Bureau believes it is highly unlikely that a financial institution will not obtain some type of address for the applicant. Nonetheless, the Bureau permits financial institutions to report this data point using the "not provided by applicant and otherwise undetermined" response in order to facilitate compliance in those rare instances when the financial institution does not have the data requested. The reference in the comment to final § 1002.107(c)(1) makes clear, however, that a financial institution must maintain procedures reasonably designed to collect at least one address. As with the previous comment, the Bureau believes that this comment strikes the right balance by facilitating compliance and also emphasizing the requirement to collect appropriate data.

Final comment 107(a)(13)-4 cross-references a safe harbor the Bureau is finalizing in § 1002.112(c)(2), which states that an incorrect entry for census tract will not be a violation of ECOA or subpart B if the financial institution obtains the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. See the section-by-section analysis of

§ 1002.112(c)(2) below for additional discussion of this safe harbor. In regard to commenters' requests for a new Federal geocoding tool that allows for batch processing, the Bureau continues to explore this option.

Finally, as discussed above, some commenters were concerned about reidentification risk in regard to census tract reporting, especially when combined with NAICS industry codes and other data, and especially in rural areas. The Bureau appreciates concerns regarding the potential re-identification risk posed by the publication of unmodified census tract data. Accordingly, the Bureau believes that, if it decides to publish census tract, modification may be appropriate to mitigate potential re-identification risk to small business applicants and related natural persons. The Bureau notes that it will consider carefully what data will be publicly released, and will carefully protect applicant privacy, while preserving the utility of the dataset. See part VIII.B.6.xi below for discussion of this issue.

107(a)(14) Gross Annual Revenue

Proposed Rule

Section 1071 requires financial institutions to collect and report "the gross annual revenue of the business in the last fiscal year of the . . . applicant preceding the date of the application."[662]

Proposed § 1002.107(a)(14) would have required reporting of the gross annual revenue of the applicant for its preceding full fiscal year prior to when the information is collected. The Bureau proposed to require reporting of a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believed that a precise value would be more useful for data users, including the Bureau.

[662] ECOA section 704B(e)(2)(F).

Proposed comment 107(a)(14)-1 would have clarified that a financial institution need not verify gross annual revenue information provided by the applicant to comply with proposed § 1002.107(a)(14), as some small entity representatives and other stakeholders suggested. The proposed comment would have explained that the financial institution may rely on statements of or information provided by the applicant in collecting and reporting gross annual revenue. The proposed comment would have also stated, however, that if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. The Bureau believed that a requirement to verify gross annual revenue could be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not collect gross annual revenue currently. The Bureau also did not believe that such a requirement was necessary in fulfilling either of section 1071's statutory purposes. However, the Bureau believed that reporting verified gross annual revenue when the financial institution already possesses that information would not be operationally difficult and would enhance the accuracy of the information reported.

Proposed comment 107(a)(14)-1 would have also provided specific language that a financial institution could use to ask about an applicant's gross annual revenue and would have explained that a financial institution could rely on the applicant's answer. The Bureau believed this language would facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some small entity representatives and other stakeholders suggested.

Overall, the Bureau believed that this approach in proposed comment 107(a)(14)-1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information and providing language that a financial institution may use to ask for such information—should reduce the complexity and difficulty of collecting gross annual revenue information.

The Bureau believed that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of proposed § 1002.106(b) through, for example, an initial screening question asking whether the applicant's gross annual revenue is below $5 million, but then the specific gross annual revenue amount could not be collected. Therefore, the Bureau proposed comment 107(a)(14)-2, which would have first clarified that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the gross annual revenue of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is "not provided by applicant and otherwise undetermined." The Bureau believed that permitting this reporting flexibility would reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and the gross annual revenue could not be collected.

Proposed comment 107(a)(14)-3 would have clarified 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. The proposed comment would have stated that, for example, if the financial institution does not normally collect information on affiliate revenue, 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. The Bureau believed that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. Proposed comment 107(a)(14)-3 would have concluded by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. This approach regarding affiliate revenue in

proposed comment 107(a)(14)-3 was consistent with the approach regarding affiliate revenue for purposes of determining whether an applicant is a small business under proposed § 1002.106(b). The Bureau believed that this operational equivalence between proposed § 1002.107(a)(14) and proposed § 1002.106(b) would facilitate compliance and enhance the consistency of the data.

In the NPRM, the Bureau expressed skepticism regarding some small entity representatives' suggestions to allow estimation or extrapolation of gross annual revenue based on partially reported revenue, noting, for example, that a seasonal business's bank statements for its busy season would likely yield an inflated gross annual revenue when extrapolated to a full year. The Bureau sought comment on whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. The Bureau also noted that estimation or extrapolation of gross annual revenue would be sufficient for the purposes of determining small business status under proposed § 1002.106(b), subject to the requirement under proposed comment 107(a)(14)-1 that a financial institution must report verified gross annual revenue information if available.

The Bureau sought comment on its proposed approach to the gross annual revenue data point, as well as the specific requests for comment above. As the SBREFA Panel recommended, the Bureau also sought comment on how the timing of tax and revenue reporting can best be coordinated with the collection and reporting of gross annual revenue. In addition, the Bureau sought comment on the effect of cash flow versus accrual accounting on reporting of gross annual revenue.

Comments Received

The Bureau received comments on its proposed approach to the gross annual revenue data point from a range of lenders, trade associations, and community groups. With the exception of several agricultural lenders, industry commenters generally did not object to the Bureau's proposal to require the collection and reporting of gross annual revenue as required by ECOA

section 704B(e)(2)(F) and three commenters (two community groups and a lender) expressed support for the proposed gross annual revenue data point. One of the community groups asserted that the gross annual revenue of the small business is a critical data element since research shows that smaller businesses are less likely to receive loans and that this data point is needed to assess whether banks are meeting credit needs of small businesses. The other community group remarked that it was critically important to allow for analysis looking at smaller buckets of small businesses based on gross revenue.

Several agricultural lenders, echoing comments from a major agricultural credit trade association, argued that the Bureau should not require the collection or reporting of gross annual revenue information for agricultural credit and urged the Bureau to use its exception authority to eliminate this data point for agricultural credit. The commenters argued that collecting gross annual revenue information would pose substantial challenges for them given the prevalence of the "non-standard" agricultural borrower, including the majority of farmers who only farm on a part-time basis, and because many agricultural loans are currently decisioned with principal reliance on credit scoring systems, without considering revenue from farming or off-farm income. One agricultural lender explained that its underwriting standards include personal W-2 and other off-farm income, arguing that inclusion of that information in reporting this data point would be misleading as to the size of the business applying for a loan because off-farm income is not truly business income. The same commenter asserted that if, on the other hand, the off-farm income is not reported, the data would be misleading as they would show many loans approved to farmers with low business revenue (where they have sufficient personal income) and other loans denied to farmers with higher business revenue (because of insufficient personal income). Another commenter noted it was unclear how to calculate gross annual revenue for many agricultural credit transactions because for both estate planning and asset preservation purposes, many family farms are set up using complex business entities consisting of multiple trusts, corporations, partnerships, and limited liability entities, and that this means that the applicant

signing the note may differ from the denoted mortgagors and guarantors, but all of whom are family members or business entities they own. Many of these agricultural lenders suggested that instead of gross annual revenue information, the appropriate metric for agricultural credit should be "gross sales of agricultural or aquatic products" as defined by the Farm Credit Administration in the prior year.

Some bank commenters suggested the Bureau align with other reporting regimes (such as HMDA and CRA) by adopting a definition of gross annual revenue based on annual revenue relied upon to make the credit decision. Several explained inconsistencies among regulatory approaches to gross annual revenue, pointing out the Bureau's proposal would require collecting gross annual revenue from the preceding fiscal year, whereas HMDA reporting requires use of the income considered in making the credit decision and the CRA utilizes gross annual revenue used to make the credit decision. Several commenters asserted that using a prior year's gross annual revenue would be problematic for many small businesses that cannot produce usable financial statements, including tax returns, immediately upon the close of a fiscal year. One such commenter elaborated that tax returns, which are often the only available income statements, may not be ready until September, resulting in many lenders relying on a tax return from two years ago or using a pro forma revenue outline. Another bank commenter asserted that using similar, but differently defined, data points between section 1071 and CRA would complicate the reporting process and could be avoided by aligning the definitions. One commenter recommended aligning with CRA for originated loans by using gross annual revenue used to make the credit decision, but for non-originated loans (which are not reported under the CRA) using gross annual revenue information that has been provided by applicants absent credit decisions (such as in cases of some withdrawn or incomplete applications).

Some commenters provided market intelligence related to the collection of gross annual revenue data. A trade association stated that collecting gross annual revenue information can be complicated because many small businesses have loan guarantors and co-borrowers. Another

trade association explained that in the vehicle financing context, the borrower employee who is responsible for acquiring the vehicle may not be familiar with the total revenue of the company and the owner(s) of the company may not want to share this information with all employees. A few industry commenters stated that there are many instances where gross annual revenue information is not collected in the normal course of business because underwriting may be based on other factors such as a cash flow analysis, net income, or debt-to-service ratio. For this reason, one of these commenters stated that it should be clear that applicants have no obligation to provide gross annual revenue information. Another asserted that where an applicant declines to provide gross annual revenue information, the Bureau is creating a significant regulatory challenge for the financial institution by requiring it to submit application-level information when it will not know for certain whether the business is a small business nor have any reliable way of obtaining gross annual revenue information absent a third-party provider, which do not exist for many industries. Conversely, a community group stated that gross annual revenue was likely to be collected as part of the underwriting process.

A number of industry commenters requested clarification regarding how to report gross annual revenue information. A few commenters requested guidance regarding appropriate sources for gross annual revenue information. One bank commenter requested consistency in what defines gross annual revenue and asked whether gross sales listed on a tax return constitute an acceptable source for this information. Another commenter asked the Bureau to delineate whether tax returns, accountant prepared financial statements, or internal profit and loss statements constitute acceptable source documentation.

Several industry commenters asked for guidance or made suggestions regarding how to calculate gross annual revenue. One asked whether the Bureau intends for gross annual revenue to be defined as the total of all income (account credits) for the year before subtracting any expenses (account debits). Another asked whether, in the case of a business that uses a calendar year for its fiscal year and applies for a loan early in the next fiscal year with many unknown

numbers related to the prior fiscal year, the applicant should provide an estimate or whether the applicant should provide the information from the next preceding fiscal year. Two commenters suggested that the Bureau clarify 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. Another asked if, in the case of an applicant that owns two or more businesses, the financial institution should only collect and report the gross annual revenue of the business being financed and not combined revenues of all owned businesses.

A number of industry commenters asked for clarification and made suggestions regarding how to report gross annual revenue for a startup business, a new line of business, or a business with a change in structure or ownership. A few commenters asked whether "zero" and/or "not available" is an acceptable response for a startup business. One commenter urged the Bureau to define gross annual revenue in a straightforward manner that does not impact credit opportunities (nor compliance) for newly formed businesses that do not have historical gross annual revenue. Another commenter suggested the Bureau address or exempt new businesses from section 1071 reporting. Two commenters asked whether "zero" or "not provided by applicant and otherwise undetermined" should be reported when a borrower is establishing a new line of business but already has revenue in other businesses; one also asked if treatment should differ based on whether or not the new business line was in the same industry as the existing businesses. A bank commenter opined that for a start-up business, the financial institution should use the actual gross annual revenue to date (including the reporting of $0 if a new business has had no revenue to date) and that pro-forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue. Another bank commenter suggested the Bureau develop FAQs and other documents that applicants can consult to help them determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line. Another industry commenter asked how to handle situations where there is a

change in structure or ownership of the business and it is unclear how the gross annual revenue should apply to the applicant.

Two industry commenters specifically suggested changes related to how to report the gross annual revenue of single purpose entities and other real estate financing vehicles. Both suggested allowing a financial institution to rely on the gross annual revenue generated by the property or the applicant's projected gross annual revenue for purposes of determining the small business status of the applicant. One also suggested specific revisions to the commentary to incorporate its suggestions.

The Bureau also received some general comments regarding the treatment of gross annual revenue information from an applicant's affiliate. A trade association expressed support for the Bureau's proposal to clarify that a financial institution need not verify gross annual revenue information provided by the applicant and is permitted—but not required—to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. Two community group comments urged the Bureau to require reporting on the gross annual revenue of parent companies and beneficial owners of limited liability companies in order to avoid obfuscating extensive property ownership.

Some industry commenters provided suggestions regarding how to handle gross annual revenue information from the parent companies or affiliates of applicants. A bank inquired whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the borrower should be factored into the gross annual revenue determination. A group of trade associations suggested specific technical revisions to the commentary for clarity. Two bank commenters noted there may be inconsistencies in the data where one institution looks like it is lending more to small(er) businesses because it opts not to include gross annual revenue of affiliates. Two other commenters asked that reportable gross annual revenue be the gross annual revenue of both the applicant and all of its affiliates. A bank recommended the Bureau further explain how to handle situations where the applicant is using multiple owned

businesses/affiliates to support sufficient cashflow, and whether there are repercussions for excluding/including multiple revenues used in the credit decision. A group of trade associations representing the commercial real estate industry asked the Bureau to provide additional guidance on what types of entities may be affiliates of an applicant, *e.g.*, as a result of common ownership or common control. Another trade association suggested that the Bureau make minor revisions to commentary to clarify that a lender that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions.

A few commenters specifically asked for clarity regarding the treatment of real estate affiliate revenue. These commenters explained that many of their loans are to real estate investors who often form and apply through a single-purpose limited liability company that has no gross annual revenue (and therefore would meet the proposed definition of a small business) but that may be affiliates of many other single-purpose limited liability companies and individual owners. These commenters noted that they typically underwrite these loans based on a schedule of other real estate in which the single purpose entity (or its sponsor) has an ownership interest and by using a global debt coverage calculation that considers the combined income of the applicant and all affiliated businesses, which can often exceed $5 million annually. A group of trade associations representing the commercial real estate industry stated that under the SBA's general principles of affiliation, the single purpose entities that own that other real estate would be affiliates of the applicant single purpose entity, because of the overlapping ownership interest. They also stated that the single purpose entities on the schedule of real estate could additionally be affiliates of the applicant single purpose entity where one or more officers, directors, managing members, or partners controls the board of directors or management of both the applicant single purpose entity and the single purpose entities on the schedule of real estate. A bank asked the Bureau to clarify that such businesses should be determined to be "small businesses" for which data collection and reporting is required only if the combined income of the business and its related affiliates does not exceed the threshold set. The group of trade

associations suggested revisions to the commentary that, in the case of single purpose entities, would allow a financial institution to consider the owners of any real property listed on a schedule of real estate as affiliates of the applicant and would also, under certain circumstances, allow a financial institution to estimate the gross annual revenue of any income-producing real property for purposes of determining an applicant's small business status. They also suggested that for an applicant that is a newly created single purpose entity, a financial institution should be permitted to apply the $5 million gross annual revenue threshold to either the gross annual revenue of the property for its most recent fiscal year under its prior owner or the single purpose entity's projected gross annual revenue.

Some commenters asked for guidance or argued in favor of using estimates and extrapolations when exact gross annual revenue information is unavailable. A bank asked if using an estimate was permitted when the applicant does not have prior fiscal year information completed. Another commenter suggested that when an applicant does not provide information regarding its gross annual revenue but that applicant's revenue is tracked through a technology company's online platform (*e.g.*, its sales on the company's online marketplace), a covered financial institution should be able to report gross annual revenue based on revenue information obtained from the platform data. The commenter argued that permitting use of this alternative data point would serve the purposes of section 1071 by enabling technology companies to collect and report information on a greater number of applications, while also reducing the compliance burden for financial institutions. Two commenters argued that for consistency, the Bureau should allow financial institutions to extrapolate or estimate an applicant's gross annual revenue, claiming that the Bureau proposed to allow *institutions* (not just applicants) to rely on extrapolated or estimated revenue data for determining whether or not a business is a small business.

Many industry commenters supported the Bureau's proposal to permit financial institutions to rely upon gross annual revenue information provided by the applicant without any

requirement to verify. Many of these commenters noted that they do not currently collect gross annual revenue information with every application and even if it is collected, they do not always verify the amount provided, as underwriting is often based on other factors such as a cash flow analysis or debt-to-service ratio. One commenter noted that the flexibility to use the gross annual revenue provided by the applicant and without verification allows financial institutions to continue using current, proven underwriting practices and does not add to the compliance burden by requiring additional revenue verification steps.

The Bureau received some general comments regarding its proposal to not require verification of gross annual information but to require reporting of verified information when available. Two banks requested further clarification regarding the meaning of "verification," one of whom argued that neither the identification and assessment of income figures (not the same as gross annual revenue) by a financial institution during the underwriting and credit decision process nor the post-origination independent testing and validation of the small business data file should be considered "verification." The other bank stated that exact gross annual revenue information is not always known until a tax return is completed and asked if the self-reported gross annual revenue information should be reported or the information found later on the tax return.

Two community groups urged the Bureau to require the verification of gross annual revenue information. One noted that tax returns are generally available and can be used to confirm the applicant's gross annual revenue information. The other asserted that because the accuracy of determining whether credit needs of small businesses are being met hinges on the accuracy of collecting and reporting the revenue size of the business and because using tax documents or cash flow information makes it feasible for the lender to verify annual revenue, the Bureau should require the verification of gross annual revenue information. This community group argued that if affiliates are not accounted for in data collection, the data could include businesses that exceed the revenue limits established by the Bureau, thereby reducing the

efficacy of the data in reporting on the experiences of small businesses in the lending marketplace. The commenter suggested that the Bureau thus investigate this issue and determine whether there are feasible methods a lender can use to identify the presence of affiliates.

Some industry commenters suggested the Bureau provide a safe harbor and/or remove its proposed requirement to report verified gross annual revenue information. Commenters requested the Bureau specify that the financial institution has no responsibility to verify the number supplied by the applicant. A few commenters also suggested the Bureau institute a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported. Commenters urged the Bureau to clarify that a financial institution is not liable for misinterpretation in answering questions or providing information to the applicant beyond the proposed gross annual revenue question. One commenter suggested that if it is the lender's practice to revise the application information in its system to reflect what it believes to be a verified number, the Bureau should permit the lender to report the verified number retained in its system, rather than requiring the lender to maintain both numbers in its system. This commenter also argued that a lender's verification of revenue should not result in the lender being required to change the applicant's self-classification as being a small business or not being a small business because the determination of whether or not an applicant is a "small business" needs to be made by the applicant at the time of application.

Several community groups and a CDFI lender expressed support for reporting gross annual revenue as a specific dollar amount rather than in ranges. These commenters emphasized the importance of having precise and accurate data on gross annual revenue because this information is a fundamental determinant of whether a business is deemed to be small and all of its attendant information is captured and collected as part of the 1071 dataset. One commenter argued gross annual revenue in discrete units rather than bands was needed to assess the availability of credit to the smallest businesses, especially those owned by women and people of color. Another commenter asserted that revenue categories should be more detailed than those in

the CRA small business loan data because research revealed the inadequacies with the CRA classifications since businesses with revenues below $500,000 had markedly less access to loans than businesses with revenues above this amount. This commenter argued in the alternative that should the Bureau adopt a range for gross annual revenue, it should select the mid-point with $10,000 increments as a continuous variable as the most accurate for capturing experiences of the range of small businesses in the lending marketplace.

With regard to the time frame for usability of gross annual revenue information, a bank stated that gross annual revenue information should only be usable for one fiscal year. A trade association suggested that financial institutions not be required to re-request gross annual revenue for new credit applications when they can rely on their records from previous transactions.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(14) and associated commentary with revisions for clarity and consistency. Final § 1002.107(a)(14) requires reporting of the applicant's gross annual revenue for its preceding fiscal year. The Bureau is requiring that financial institutions report a specific value for gross annual revenue—rather than a range—to simplify the reporting of gross annual revenue information for financial institutions and because it believes a precise value is more useful for data users, including the Bureau. However, the Bureau has not yet determined how it will publish gross annual revenue data in the dataset. The Bureau will consider whether modification techniques, such as ranges, may be appropriate after it conducts its full privacy analysis. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

The Bureau is not categorically exempting agricultural credit from the requirement to collect and report gross annual revenue, as requested by some commenters. The Bureau understands, as noted by commenters, that most farmers in this country farm on a part-time basis and that the gross annual revenue data point may pose challenges given the prevalence of "non-

standard" agricultural borrowers such as customers applying jointly despite having separate farming operations. The Bureau also understands from commenters that many Farm Credit System lenders decision applications without either considering off-farm income or revenue from farming; instead, lenders rely principally on credit scoring systems. Nevertheless, the Bureau believes that omitting the gross annual revenue data point for agricultural credit transactions would introduce inconsistency in data collected across different industries and would not support section 1071's statutory purposes. The Bureau notes that data users will be able to identify agricultural credit transactions using the reported 3-digit NAICS code and make any necessary adjustments in their analyses to account for particularities unique to agricultural industries. The Bureau also believes, as discussed below, that the suggested gross annual revenue question in final comment 107(a)(14)-1 will facilitate compliance for agricultural lenders that currently do not collect gross annual revenue, particularly because the financial institution may rely on the applicant's answer. As discussed above in the section-by-section analysis of § 1002.106(b), the Bureau does not believe that "gross sales of agricultural or aquatic products" in the prior year would be an appropriate metric for agricultural credit in this final rule, nor that this should form the basis for a separate small business definition for agricultural businesses.

The Bureau has considered the comments regarding the collection and reporting of gross annual revenue and it believes its approach in final comment 107(a)(14)-1—clarifying that a financial institution need not verify applicant-provided gross annual revenue information, and providing language that a financial institution may use to ask for such information—will reduce commenters' concerns regarding complexity and difficulty of collecting gross annual revenue information.

Final comment 107(a)(14)-1 clarifies that a financial institution reports the applicant's gross annual revenue for the fiscal year preceding when the information was collected. The Bureau believes this will clarify the timing requirements for collection of the gross annual revenue data point. The final comment provides specific language that a financial institution may

use to ask about an applicant's gross annual revenue and explains that a financial institution may rely on the applicant's answer (unless subsequently verified or updated), even if the applicant's statements or information is based on estimation or extrapolation. The Bureau believes this language will facilitate compliance for financial institutions that currently do not collect gross annual revenue, collect it only in limited circumstances, or would otherwise find its collection challenging, as some commenters suggested.

Final comment 107(a)(14)-1 also clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14). The comment explains that the financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue. The comment also states, however, that if the financial institution verifies the gross annual revenue provided by the applicant it must report the verified information. The Bureau understands, as noted by industry commenters, that a requirement to verify gross annual revenue would be operationally difficult for many financial institutions, particularly in situations in which the financial institution does not currently collect gross annual revenue. The Bureau does not believe that such a requirement is necessary to fulfill either of section 1071's statutory purposes. However, the Bureau believes that reporting verified revenue when the financial institution already possesses that information will not be operationally difficult and will enhance the accuracy of the information collected. For the same reasons and for the reasons outlined in its discussion of final comment 107(c)-5, the Bureau is clarifying in final comment 107(a)(14)-1 that a financial institution reports updated gross annual revenue data if it obtains more current data from the applicant during the application process. The comment states that if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

With respect to the suggestions that the Bureau further clarify the meaning of "verify," the Bureau believes that additional specificity in the rule itself could unnecessarily constrain

financial institutions. The Bureau interprets the word "verification" to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and underwriting the credit application, and potentially changing that information to reflect the determination. Gross annual revenue information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the application need not be reported. The Bureau agrees with the commenter who stated that post-origination independent testing and validation of the small business data file does not constitute "verification." In situations where a financial institution verifies only a portion of the small business's provided gross annual revenue figure (perhaps because the institution is relying on that portion for its credit decision), the financial institution has not verified the entire gross annual revenue amount provided by the applicant, and it may continue to rely on the applicant's statement or information, and it need not report the partially verified information.

The Bureau does not believe it would be appropriate to use a definition of gross annual revenue for this rule based on the annual revenue relied upon to make the credit decision. Given both the statutory language requiring the collection and reporting of "the gross annual revenue of the business in the last fiscal year" and section 1071's statutory purposes, the Bureau believes that using the small business's entire gross annual revenue, which may differ from revenue relied upon in making the credit decision, is the better approach to implement this data point in final § 1002.107(a)(14). Moreover, the Bureau notes that—unlike for this final rule—a business's gross annual revenue is not determinative of either HMDA or CRA coverage. Here, the Bureau believes it is important to obtain the applicant's entire gross annual revenue for more accurate identification of business and community development needs and opportunities. The Bureau thus agrees with commenters that gross annual revenue data are important to assess the availability of credit to the smallest firms, especially those owned by women, minorities, and LGBTQI+ individuals. Moreover, for credit transactions that are underwritten without consideration or

collection of a small business's gross annual revenue, no information would be reported for this data point under a relied-upon standard. Lastly, the Bureau believes it important to ensure that the gross annual revenue figure used to determine small business status is the same total figure as the gross annual revenue reported for the data point. Using different figures could create data discrepancies and disconnects and would ultimately result in greater compliance risk for financial institutions.

In addition, the Bureau does not believe that financial institutions need a safe harbor to ensure that whatever gross annual revenue number is supplied by the applicant can be reported or that it would be appropriate to remove the requirement to report verified gross annual revenue information when the financial institution in fact verifies it. Final comment 107(a)(14)-1 already clarifies that a financial institution need not verify gross annual revenue information provided by the applicant to comply with final § 1002.107(a)(14) and thus a safe harbor is not necessary to allow reporting of the gross annual revenue number supplied by the applicant. As one commenter explained, some financial institutions already revise application information in their systems with a verified gross annual revenue number and thus the Bureau does not believe that reporting verified revenue when the financial institution already possesses that information will be operationally difficult. In such situations, the financial institution may report the verified number retained in its system and is not required to maintain both numbers in its system. Moreover, the Bureau agrees with the commenter who stated that the accuracy of determining whether the credit needs of small businesses are being met hinges on collecting and reporting the revenue size of the business and thus the Bureau believes that reporting verified revenue when available will enhance the accuracy of the information collected.

With respect to requests for guidance from commenters regarding acceptable sources of gross annual revenue information, the Bureau does not believe it would be appropriate to require the use of any specific documentation. However, the Bureau notes that gross annual revenue information can be reasonably derived from a variety of sources including tax returns,

accountant-prepared financial statements, internal profit and loss statements, cash flow analyses, or any type of business income documentation that the financial institution reasonably relies on in the normal course of business.

With respect to comments regarding how to calculate gross annual revenue, the Bureau notes that the suggested applicant question in final comment 107(a)(14)-1 states that gross annual revenue is the amount of money the business earned before subtracting taxes and other expenses. The comment further states that an applicant may provide gross annual revenue calculated using any reasonable method. Different business units within the financial institution may use different methods to ascertain gross annual revenue, as long as the methods are used consistently within each business unit.

The Bureau believes that situations could arise in which the financial institution has identified that an applicant is a small business for the purposes of final § 1002.106(b) through, for example, a screening question asking whether the applicant's gross annual revenue is $5 million or less, but then the financial institution is unable to collect or determine a specific gross annual revenue amount. Therefore, the Bureau is finalizing comment 107(a)(14)-2 substantively as proposed. The comment first clarifies that pursuant to final § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including the gross annual revenue of the applicant. The final comment then states that if a financial institution is nonetheless unable to collect or determine the specific gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is "not provided by applicant and otherwise undetermined." The Bureau believes that permitting this reporting flexibility will reduce the complexity and difficulty of reporting gross annual revenue information, particularly when an application has been denied or withdrawn early in the process and gross annual revenue could not be collected.

The Bureau is finalizing comment 107(a)(14)-3 with minor revisions for clarity and consistency. The Bureau is adopting commenters' suggestions to add a cross reference to

comment 106(b)(1)-3 and to remove an example provided in the proposed commentary for additional clarity. This example would have provided that if the financial institution does not normally collect information on affiliate revenue, 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. The Bureau shares the commenter's concern that this comment may be interpreted to preclude a financial institution that does not collect affiliate revenue in all transactions from collecting affiliate revenue in some transactions and believes the comment is sufficiently clear without this example.

Final comment 107(a)(14)-3 also clarifies 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. For example, if the financial institution has not collected information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates. The Bureau is adopting suggested revisions to comment 107(a)(14)-3 and additionally notes that a financial institution that does not collect affiliate revenue in all transactions is not precluded from collecting affiliate revenue in some transactions. The Bureau believes this comment is responsive to one commenter's question about how to report gross annual revenue for an applicant with two businesses because it permits, but does not require, reporting of gross annual revenue for an applicant that includes the revenue of affiliates, which may include a business with common ownership. Final comment 107(a)(14)-3 concludes by explaining that in determining whether the applicant is a small business under proposed § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue. The Bureau noted that final comment 106(b)-3 follows the same approach to affiliate revenue for purposes of determining whether an applicant is a small business under final § 1002.106(b). The Bureau believes that this operational equivalence between final § 1002.107(a)(14) and final § 1002.106(b) will facilitate compliance and enhance data consistency.

The Bureau recognizes, as noted by commenters, that there may be inconsistencies in the data where one financial institution looks like it is lending more to small(er) businesses as it opts not to include gross annual revenue of affiliates versus another financial institution that opts to include such revenue when it reports the gross annual revenue of an applicant. However, the Bureau is not requiring reporting of the gross annual revenue of both the applicant and all of its affiliates, nor is it requiring reporting of revenue for parent companies and beneficial owners of limited liability companies. The Bureau believes that permitting, but not requiring, a financial institution to include the revenue of affiliates will carry out the purposes of section 1071 while reducing undue burden on financial institutions in collecting gross annual revenue information. The Bureau considered whether there are feasible methods to identify the presence of affiliate revenue, as a commenter suggested, but ultimately has determined that such an identifier could interfere with allowing a financial institution to rely on an applicant's self-reported gross annual revenue information and, in any case, would introduce additional complexity into reporting. In response to a question about whether revenue or income relied upon from co-signers or guarantors that are not affiliates of the applicant should be factored into the gross annual revenue determination, the Bureau notes that the final rule only *requires* the collection and reporting of gross annual revenue of the *applicant*.

The Bureau understands there may also be instances, as indicated by one commenter, where the applicant may use multiple owned businesses/affiliates to support sufficient cashflow, and in those instances, a financial institution may rely on an applicant's representations regarding gross annual revenue that include affiliates' revenue. For additional guidance on what types of entities may be affiliates of an applicant, *e.g.*, as a result of common ownership or common control, see the section-by-section analyses of §§ 1002.102(a) and 1002.106(b).

The Bureau has considered the comments regarding the treatment of real estate affiliate revenue, but is not adopting revisions to, in the case of single purpose entities, allow a financial institution to categorize all owners of any real property listed on an applicant's Schedule Of Real

Estate Owned as affiliates of the applicant. The Bureau is likewise not adopting revisions to allow a financial institution to estimate or project the gross annual revenue of any income-producing real property for purposes of determining the applicant's small business status. The Bureau agrees that under the SBA's general principles of affiliation, "common investments" affiliation can be based on shared investments in or joint ownership of real estate.[663] Thus, the owners of real estate that is also owned by the applicant may be affiliates of the applicant. However, the Bureau is not adopting the suggested revisions to commentary because affiliate determinations are inherently fact-specific and rebuttable,[664] and the Bureau does not believe it would be appropriate to categorize all entities as affiliates based on a form listing.

The Bureau has considered the comments regarding whether financial institutions should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and is making a minor revision in final comment 107(a)(14)-1 to emphasize a manageable method for collecting full gross annual revenue when a financial institution does not already do so. Specifically, final comment 107(a)(14)-1 clarifies that a financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue, even if the applicant's statement or information is based on estimation or extrapolation, and that an applicant may provide gross annual revenue calculated using any reasonable method. As such, when an applicant does not yet have fiscal year information completed (a hypothetical provided by a commenter), the applicant may choose to provide its gross annual revenue using any reasonable method, including estimating or extrapolating based on a prior fiscal year's tax return. The Bureau believes that this flexibility

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[663] *See* 13 CFR 121.103(f) ("Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or *firms with common investments*, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated.") (emphasis added); Small Bus. Admin., *Small Business Compliance Guide: A Guide to the SBA's Size Program and Affiliation Rules* (July 2020), https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf.

[664] *See, e.g.*, 13 CFR 121.103(f) ("Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.").

will help address concerns from commenters that tax returns may not be immediately available upon the close of a fiscal year. As noted by another commenter, an applicant may alternatively wish to provide revenue figures generated by a technology company's online platform (*e.g.*, through sales on the company's online marketplace). The Bureau notes that under final § 1002.107(b), however, a financial institution must report verified gross annual revenue information if available. Moreover, as provided by new comment 107(c)-5, a financial institution reports updated applicant-provided data if it obtains more current data during the application process; if this updated information is on data the financial institution has already verified, the financial institution reports the information it believes to be more accurate, in its discretion.

The Bureau also wishes to clarify some apparent confusion among some commenters who claimed that the proposal would have allowed *financial institutions* to extrapolate or estimate an applicant's revenue to determine whether or not a business is a small business. The proposal indicated that financial institutions could rely on extrapolated or estimated revenue information provided by *applicants*. The Bureau is making this position clear with final comment 107(a)(14)-1. The Bureau sought comment on whether *financial institutions* should be permitted to estimate or extrapolate gross annual revenue from partially reported revenue or other information, and how such estimation or extrapolation would be carried out. On this issue, the Bureau does not believe that it would be appropriate to permit such estimation or extrapolation for the identification of small businesses about whom data collection and reporting is required, and thus financial institutions' own extrapolation or estimation should likewise not be used in reporting gross annual revenue in order to maintain consistency.

With respect to comments asking how to report gross annual revenue for a startup business, a new line of business, and/or a business with a change in structure or ownership, the Bureau is adding new comment 107(a)(14)-4, which notes that in a typical startup business situation, the applicant will have no gross annual revenue for its fiscal year preceding when the information is collected because either the startup existed but had no gross annual revenue or it

simply did not exist in the preceding fiscal year. In these situations, the financial institution reports that the applicant's gross annual revenue in the prior fiscal year is "zero." The Bureau agrees with the commenter that suggested, for a start-up business, the financial institution should use the actual gross annual revenue for its preceding fiscal year (including the reporting of $0 if a new business has had no revenue to date) and that pro forma projected revenue figures should not be reported since these figures do not reflect actual gross revenue.

In situations where an applicant is establishing a new line of business but already has revenue in other businesses, such as in the case of a sole proprietor with an established in-home child-care center who now seeks financing to start a new line of business offering house-cleaning services, the Bureau notes that final comment 107(a)(14)-3 clarifies 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. This comment may also apply to situations where there is a change in structure or ownership of the business. In response to a question from a commenter, the Bureau does not believe that treatment of affiliate gross annual revenue information should differ based on whether or not the new business line was in the same industry as the existing businesses. The Bureau notes that according to the definition of affiliate provided in final § 1002.102(a), which refers to the SBA's rules for determining affiliation (13 CFR 121.103), affiliation is not limited to businesses in the same industry. The Bureau also notes that final § 1002.106(a) defines a business as having the same meaning as the term "business concern or concern" in 13 CFR 121.105, which expressly provides that a firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity and that the annual receipts and employees of the predecessor will be taken into account in determining size. This successor-in-interest rule would apply to

situations where a business reorganized, and a new entity emerges with essentially the same assets and liabilities as the old concern.[665]

The Bureau is not exempting new businesses from having application data reported, as suggested by one commenter, because the Bureau believes that doing so would contravene section 1071's statutory purposes. The Bureau does not believe that the final rule will disproportionately impact credit opportunities (or compliance) for newly formed businesses that do not have the historical gross annual revenue. However, as suggested by a commenter, the Bureau will track questions related to collecting and reporting gross annual revenue information and may develop FAQs or other materials as necessary to help financial institutions help applicants determine what number to supply for gross annual revenue, particularly when a business is starting up or establishing a new business line.

The final rule does not permit financial institutions the option to use the gross annual revenue figures provided by an applicant for up to three years from the date of an application for which the information was gathered, as requested by one commenter. However, under final § 1002.107(d), discussed below, the Bureau is permitting financial institutions to reuse previously collected gross annual revenue information when the data were collected within the same calendar year as the current covered application. The statutory requirement is for the applicant's gross annual revenue in the last fiscal year preceding the date of the application; the Bureau does not believe that revenue information from years *prior to* the last fiscal year would satisfy this requirement.

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[665] *See Size Appeal of Willowheart, LLC*, SBA No. SIZ-5484, at *4 (July 10, 2013).

107(a)(15) NAICS Code

Proposed Rule

The SBA customizes its size standards on an industry-by-industry basis using 1,012 6-digit NAICS codes.[666] The first two digits of a NAICS code broadly capture the industry sector of a business. The third digit captures the industry's subsector, the fourth captures the industry group, the fifth captures the industry code, and the sixth captures the national industry. The NAICS code thus becomes more specific as digits increase and the 6-digit code is the most specific.

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau proposed in § 1002.107(a)(15) to require that financial institutions collect and report an applicant's 6-digit NAICS code. Proposed comment 107(a)(15)-1 would have provided general background on NAICS codes and would have stated that a financial institution complies with proposed § 1002.107(a)(15) if it uses the NAICS codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting. Proposed comment 107(a)(15)-2 would have clarified that, when a financial institution is unable to collect or determine the applicant's NAICS code, it reports that the NAICS code is "not provided by applicant and otherwise undetermined."

The Bureau also proposed that financial institutions be permitted to rely on NAICS codes obtained from the applicant or certain other sources, without having to verify that information itself. Specifically, proposed comment 107(a)(15)-3 would have clarified that, consistent with proposed § 1002.107(b), a financial institution may rely on applicable applicant information or statements when collecting and reporting the NAICS code and would have provided an example

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[666] *See* U.S. Census Bureau, *North American Industry Classification System*, at 41 (2022) https://www.census.gov/naics/reference_files_tools/2022_NAICS_Manual.pdf. At the time of the NPRM, there were 1,057 6-digit NAICS codes. *See* U.S. Census Bureau, *North American Industry Classification System*, at 26 (2017) https://www.census.gov/naics/reference_files_tools/2017_NAICS_Manual.pdf.

of an applicant providing a financial institution with the applicant's tax return that includes the applicant's reported NAICS code. Proposed comment 107(a)(15)-4 would have provided that a financial institution may rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports, which provide the applicant's NAICS code.

The Bureau believed that collecting the full 6-digit NAICS code (as opposed to the 2-digit sector code) would better enable the Bureau and other stakeholders to drill down and identify whether disparities arise at a more granular level and would also enable the collection of better information on the specific types of businesses that are accessing, or struggling to access, credit. For example, a wide variety of businesses, including those providing car washes, footwear and leather goods repair, and nail salons, all fall under the 2-digit sector code 81: Other Services (except Public Administration). With a 2-digit NAICS code, all of these business types would be combined into one analysis, potentially masking different characteristics and different outcomes across these business types.

To address concerns related to the complexity of determining a correct NAICS code, the Bureau proposed a safe harbor to indicate that an incorrect NAICS code entry is not a violation of subpart B if the first two digits of the NAICS code are correct and the financial institution maintains procedures reasonably adapted to correctly identify the subsequent four digits (see proposed § 1002.112(c)(2)). The proposed NAICS-specific safe harbor would have been available to financial institutions in addition to the general bona fide error exemption under proposed § 1002.112(b).

The Bureau sought comment on its proposal to collect 6-digit NAICS codes together with the safe harbor described in proposed § 1002.112(c)(2). The Bureau also sought comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.

Comments Received

The Bureau received comments from a wide range of lenders, trade associations, community groups, and others regarding the reporting of a 6-digit NAICS code as proposed in § 1002.107(a)(15). Numerous community groups as well as a few lenders supported the Bureau's proposal and urged collection of a 6-digit NAICS code. Several commenters emphasized that 1071 data would adequately achieve a fair lending purpose only if they contain key variables that are used in underwriting and enable meaningful fair lending analysis. Commenters stated that NAICS codes provide critical context to understanding credit underwriting decisions and help ensure that fair lending analysis is focused on similarly situated businesses. A few commenters stated that these data must be reported so that lenders cannot hide behind data not collected as the justification for their lending disparities.

A bank and a bank trade association stated that NAICS code could potentially be helpful in demonstrating a non-discriminatory basis for credit decisions with respect to applicants in different industries. The trade association stated that, at most, the Bureau should only add limited data points pursuant to ECOA section 704B(e)(2)(H) that are considered by the financial institution in the credit underwriting process, citing NAICS code and time in business as examples.

Another trade association said that NAICS codes have the advantage of being independently defined and available for reference. The commenter stated that if a NAICS code is supplied by the applicant and published by the Bureau only in the aggregate, the NAICS code can contribute useful information without unduly burdening lenders.

Some commenters stated that a 2- or 3-digit NAICS code would be too high a level of aggregation to facilitate fair lending analysis. A CDFI lender stated that a 6-digit code will offer the most precise insight into the industries that lenders serve, whereas a 3-digit NAICS code will leave unnecessary ambiguity in the data. The commenter provided the example of a dry cleaner sharing the same 3-digit NAICS code as a mortuary and a parking lot.

Furthermore, a number of community groups and several lenders stated that 6-digit NAICS codes are useful for identifying certain industries' ability to access small business credit and to identify areas of unmet need. For example, one community group asserted that the ability to identify needs and opportunities for small businesses requires the ability to compare lending by sector to the total number of businesses in that sector based on other public data sources.

Moreover, some lenders and community groups said that it is already standard practice for many small business lenders to collect NAICS codes. For example, these commenters noted that lenders already collect NAICS codes for SBA loans, Equal Employment Opportunity Commission certifications, and CDFI loans.

In contrast, many industry commenters, along with several business advocacy groups and other commenters, generally opposed the data points proposed pursuant to ECOA section 704B(e)(2)(H), including NAICS code, as discussed in the section-by-section analysis of § 1002.107(a) above. In addition, the majority of industry commenters to address this issue specifically opposed collection of 6-digit NAICS codes. These commenters expressed concerns about the burden on both lenders and applicants and the complexity of determining the appropriate NAICS code. Concerns raised by commenters included, for example, that collecting NAICS codes would slow the loan application process; most lenders are unfamiliar with NAICS codes or do not currently collect them; lenders would have to change their operating procedures significantly which would create strain on staff and resources; and it would add more costs to the lending process which may be passed on to small business borrowers.

Many industry commenters also voiced concern regarding accuracy and data integrity, explaining that small businesses often do not know their NAICS code or may operate in multiple NAICS sectors. Other challenges cited by commenters included the business changing over time; codes having overlapping definitions; and classifications being prone to human error. For example, two trade associations noted that their members who made Paycheck Protection Program loans reported that many applicants were unfamiliar with NAICS codes. Additionally,

some industry commenters expressed concern about verifying applicant-provided data and potential liability if the NAICS code is incorrect. One commenter noted that NAICS code classifications could be subject to change based on SBA rulemaking and thus financial institutions would need to monitor such developments. A credit union trade association stated that the identification of business and credit needs can be accomplished without explicit reference to NAICS codes, such as by leveraging already existing data sources and voluntary surveys of business owners. In addition, the trade association asserted that sector-specific analysis of business credit supply and demand is best left to the SBA, which already collects NAICS information through its lending programs.

Several commenters raised concerns that requiring NAICS codes would add confusion to the lending process. A trade association argued that requiring NAICS codes will create frustration for the small business borrower, including delayed application processing, and additional time and operational burden by banks to ensure the information is gathered and entered. They asserted that while NAICS codes are generally provided with some tax documents, lenders found borrower confusion when making Paycheck Protection Program loans, particularly when certain NAICS codes allowed for a more generous loan amount and certain small businesses were unable to benefit from higher loan amounts for certain sectors due to mismatched NAICS codes. Another commenter stated that applicants may struggle to determine which code to report, especially if the nature of the business changes over time or falls under multiple categories.

A number of industry commenters also expressed concern regarding privacy risks in collecting the 6-digit NAICS code. These commenters highlighted the risk of borrower re-identification, particularly in rural areas and smaller communities. Some commenters stated that NAICS code combined with census tract would make it easy to re-identify a small business. In addition, while a community group supported collection of a 6-digit code, it stated that the public database should provide only 4-digit NAICS codes to address privacy concerns.

In addition, a few commenters asserted that collecting NAICS codes would not advance the purposes of section 1071, arguing that collecting NAICS codes does not provide information that would inform fair lending analysis. For example, one bank stated that NAICS code would be of minimal value to fair lending analytics given the complexity of small business lending, such as the scope and size of the business. Moreover, several banks stated that they do not currently collect NAICS codes and that NAICS codes are not used in underwriting or financial analysis purposes.

A few industry commenters supported collection of a 2-digit NAICS code, stating that this would achieve the intended policy goal without creating unnecessary burdens and heightened costs, as well as protect the privacy of market participants. A trade association for online lenders supported collection of a 4-digit NAICS code, stating it would provide sufficient information while mitigating risk of re-identification and avoiding potential impacts and delays to the borrower during the application process. A joint letter from community and business advocacy groups urged the Bureau to permit the submission of a 3-digit code where the applicant does not provide a 6-digit code. Finally, one commenter suggested that the Bureau coordinate with the U.S. Census Bureau to create a suffix to a business's NAICS code that would identify its minority-owned or women-owned status. The commenter stated that this would create efficiencies across organizations and provide an easier and more neutral method of collecting demographic information on applications. The commenter further noted that this suffix could be easily masked when loans are sent to underwriters to ensure it does not impact their decisions.

Final Rule

For the reasons set forth herein, the Bureau is revising § 1002.107(a)(15) to require that financial institutions collect a 3-digit NAICS code for the applicant. The Bureau is also finalizing proposed comments 107(a)(15)-1, -2, and -5, with minor adjustments for consistency. Final comment 107(a)(15)-1 explains what a NAICS code is, and final comment 107(a)(15)-2 addresses what to report if a financial institution is unable to collect or otherwise determine the

applicant's NAICS code. Proposed comments 107(a)(15)-3 and -4, which addressed a financial institution's reliance on information from the applicant and from other sources, have been removed as those issues are now addressed in final comment 107(b)-1. Final comment 107(a)(15)-3 (proposed as comment 107(a)(15)-5) cross-references the safe harbor in final § 1002.111(c)(3) for incorrect 3-digit NAICS code entries. The Bureau has considered commenters' concerns regarding the difficulties in obtaining an accurate NAICS code as well as the importance of NAICS codes for fair lending and community development analysis. The Bureau believes that collecting the 3-digit NAICS code will achieve the right balance between minimizing burden on financial institutions and small business applicants, while also providing valuable data to analyze fair lending patterns and identify industry subsectors with unmet credit needs.

The Bureau believes that NAICS code data will considerably aid in fulfilling both section 1071's fair lending purpose and its business and community development purpose, even if the NAICS code is not necessary for determining whether an applicant is a small business. While it will not provide the same level of detail as a 6-digit code, the 3-digit code will still help ensure that fair lending analysts are comparing applicants with similar profiles, thereby controlling for factors that might provide non-discriminatory explanations for disparities in underwriting and pricing decisions. Moreover, NAICS subsector codes are useful for identifying business and community development needs and opportunities of small businesses, which may differ widely based on industry, even controlling for other factors. For example, 3-digit NAICS codes will help data users identify subsectors where small businesses face challenges accessing credit and understand how small businesses in different industries use credit. Furthermore, the Bureau believes that publication of NAICS codes (subject to potential modification and deletion decisions by the Bureau, as discussed in part VIII below) will help provide for some consistency and compatibility with other public datasets related to small business lending activity, which generally use NAICS codes. This ability to synthesize 1071 data with other datasets may help the

public use the data in ways that advance both the business and community development and fair lending purposes of section 1071. The Bureau agrees with commenters' concerns that the 2-digit NAICS code would not provide sufficiently detailed information to aid regulators and the public in monitoring particular industries' access to small business credit.

The Bureau recognizes that covered financial institutions not currently using NAICS codes will need to gain familiarity with the NAICS code system and refer to NAICS subsector classifications for all relevant applications before reporting 3-digit NAICS codes to the Bureau. To address concerns related to the complexity of determining a correct NAICS code, particularly for covered financial institutions that do not currently use NAICS codes, the Bureau is permitting a financial institution to rely on applicable applicant information or statements when compiling and reporting the NAICS code, as well as permitting a financial institution to rely on a NAICS code obtained through the financial institution's use of business information products, such as company profiles or business credit reports (see final comment 107(b)-1). In other words, a financial institution may rely on oral or written statements from an applicant, other information provided by an applicant such as a tax return, or third-party sources such as business information products. The Bureau believes that being able to rely on NAICS codes obtained from the applicant or third-party sources significantly eases potential difficulties for financial institutions in collecting and reporting a 3-digit NAICS code and mitigates concerns about inadvertently reporting an inaccurate code.

In response to industry concerns regarding the accuracy of the NAICS code and the burden of verifying applicant-provided data, the Bureau emphasizes that financial institutions are permitted to rely on NAICS codes obtained from the applicant or third-party sources, without having to verify that information. Furthermore, the Bureau has expanded the NAICS code safe harbor in final § 1002.112(c)(3), which makes clear that the safe harbor extends to financial institutions that rely on an applicant's representations or on other information regarding the NAICS code. Final § 1002.112(c)(3) also provides a safe harbor for incorrect 3-digit NAICS

code entries, where the financial institution identifies the NAICS code itself, provided that it maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code. The Bureau has also removed the term "appropriate" from the regulatory text of § 1002.107(a)(15). The Bureau believes the term is unnecessary, particularly in light of the revisions to the NAICS code safe harbor in final § 1002.112(c)(3), and removing it may help avoid potential confusion regarding NAICS codes the financial institution obtains from the applicant or other sources.

Additionally, the Bureau understands that multiple NAICS codes may apply to a single business. While this may be more of a concern with 6-digit codes, if more than one 3-digit code applies to a single business, only one 3-digit NAICS code should be reported.

The Bureau acknowledges community groups' concern that collecting anything less than 6-digit NAICS codes will result in less precise data about industry classification. The Bureau nonetheless believes that its final rule requiring collection and reporting of 3-digit NAICS codes (along with the expanded safe harbor) strikes an appropriate balance in addressing the concerns raised by industry and the importance of NAICS code information in fair lending and community development analysis. The Bureau will monitor the utility of the NAICS code data point and, if warranted, may revisit the required number of digits in the future.

Although the Bureau will address re-identification concerns generally by modifying or deleting data upon publication, the Bureau notes that its shift to 3-digit NAICS codes will decrease the risk of re-identification of small business borrowers and related natural persons in rural areas and smaller communities. See part VIII below for further discussion about the privacy analysis and public disclosure of data.

107(a)(16) Number of Workers

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." In the proposed rule, the Bureau stated that it believed that data

providing the number of persons working for a small business applicant would aid in fulfilling the business and community development purpose of section 1071. These data would allow users to better understand the job maintenance and creation that small business credit is associated with and help track that aspect of business and community development.

Proposed § 1002.107(a)(16) would have required financial institutions to report the number of non-owners working for the applicant.

Proposed comment 107(a)(16)-1 would have discussed the collection of the number of workers. The proposed comment would have stated that in collecting the number of workers from an applicant, the financial institution would explain that full-time, part-time, and seasonal workers, as well as contractors who work primarily for the applicant, would be counted as workers, but principal owners of the business would not. The proposed comment would have further stated that if the financial institution was asked, it would explain that volunteers would not be counted as workers. This treatment of part-time, seasonal, contract, and volunteer workers would follow the SBA's method for counting employees,[667] with minor simplifications. The Bureau sought comment on whether further modifications to the number of workers data point were needed to facilitate this operational simplification.

Proposed comment 107(a)(16)-1 would have also explained that workers for affiliates of the applicant would only be counted if the financial institution were also collecting the affiliates' gross annual revenue.

The proposed comment would have further explained that the financial institution could rely on statements of or information provided by the applicant in collecting and reporting number of workers, but if the financial institution verifies the number of workers provided by the applicant, it must report the verified information.

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[667] *See* 13 CFR 121.106(a).

Proposed comment 107(a)(16)-1 would have also provided sample language that a financial institution could use to ask about the number of workers, if it does not collect the number of workers by another method. The Bureau provided the sample language in the proposed comment, which implements the simplified version of the SBA definition referenced above. The Bureau sought comment on this method of collection, and on the specific language proposed.

Proposed comment 107(a)(16)-2 would have first clarified that a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, including the number of workers of the applicant. The proposed comment would have then stated that if a financial institution is nonetheless unable to collect or determine the number of workers of the applicant, the financial institution reports that the number of workers is "not provided by applicant and otherwise undetermined."

The Bureau sought comment on its proposed approach to the number of workers data point, as well as on the specific requests for comment above. The Bureau also sought comment on whether financial institutions collect information about the number of workers from applicants using definitions other than the SBA's, and how the collection of this data point could best be integrated with those collections of information.

Comments Received

The Bureau received comments on its proposed number of workers data point from lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal. A few commenters urged the Bureau to adopt the number of workers data point, suggesting that it is important for business and community development purposes. A CDFI lender and community group commenter said that the number of workers data point will help provide a greater understanding of owner-operated and microbusiness needs and accessibility to affordable credit. Another community group commented that the data point provides insight into the number of jobs created, retained and/or supported by access to credit. This community group

further noted that the data point would also assist in analysis of whether businesses of various sizes fare differently in the lending marketplace. Many community groups expressed support for collecting data on the number of workers because they believe it will help indicate whether smaller businesses of various sizes will require more support and technical assistance when it comes to credit access. A minority business advocacy group commented that the data will help determine various levels of economic development and impact across the country. A few commenters agreed with the Bureau's proposed method of collecting the number of non-owner workers and including part-time staff, seasonal staff, and contractors that work primarily for the business.

A trade association commented that the important considerations are that the Bureau provide language for lenders to provide to applicants to help applicants correctly answer the question and that the Bureau emphasize that financial institutions may rely on statements made by the applicant without incurring risk. Another industry commenter suggested that the final rule enable principal owners to count themselves as workers because this method is more common in industry and would avoid confusion. A bank recommended that the final rule expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on the application form, supplemental documents or forms, or the sample data collection form. A CDFI lender suggested that the Bureau require financial institutions to report the breakdown of full-time and part-time workers.

The Bureau received many comments from industry opposing the proposal to collect data on the number of workers. Some commenters stated that data on the number of workers is not currently collected and that some customers do not readily have this information available, though several noted they had collected it for Paycheck Protection Program loans. A trade association stated that the data are unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Several commenters indicated that it is not a factor in the credit decision. A bank stated that it is not in

the banker's role to determine this information and there is no reason to collect and monitor this data point if the small business is a creditworthy borrower.

A few industry commenters questioned the value of this data point, arguing that it would not aid in fulfilling the fair lending purpose of section 1071. Two asserted that without context (for example, separating full-time versus part-time and contract workers) there seems to be little value in collecting the information. One suggested that collection is further complicated when the gross annual revenue of an affiliate is considered, because then the number of workers for the affiliate must be included. Several industry commenters also stated that the proposed general exclusion of affiliate employees is problematic because some of these employees may perform substantial services for the applicant.

A bank commented that the CRA already considers the impact of adding jobs through small business and community development loans. Another bank commented that SBA uses either the gross annual revenue or number of workers, depending on the type of business, to qualify businesses as small and because the Bureau's proposal already contains a gross annual revenue size test, it would be unnecessary to collect the number of workers because it is irrelevant to the credit decision and determining the size of the business.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(16) with an addition and a minor revision to the associated commentary. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau believes that data on the number of workers will aid in fulfilling the business and community development purpose of section 1071. Data on the number of persons working for a small business applicant will provide data users and relevant stakeholders with a better understanding of the job maintenance and creation that small business credit provides.

In response to comments regarding the complexity and difficulty in collecting information about the number of workers, the Bureau is adding a new comment to require that

financial institutions report the number of workers using ranges rather than reporting the specific number of workers. Final comment 107(a)(16)-1 provides that a financial institution complies with § 1002.107(a)(16) by reporting the number of people who work for the applicant using the ranges prescribed in the Filing Instructions Guide. The Bureau believes that reporting the number of workers in ranges rather than a specific numerical value will eliminate some of the collection difficulties expressed by commenters, such as determining the exact number of employees when that number varies throughout the year.

The Bureau is finalizing comment 107(a)(16)-2 (renumbered from comment 107(a)(16)-1 in the proposed rule) with some revisions as well as additional guidance on how a financial institution may collect information about the number of workers in light of final comment 107(a)(16)-1. Specifically, a financial institution may collect the number of workers from an applicant using the ranges specified by the Bureau in the Filing Instructions Guide (as indicated in final comment 107(a)(16)-1) or as a numerical value. Final comment 107(a)(16)-2 retains from proposed comment 107(a)(16)-1 the discussion on collecting the number of workers, including the sample language to provide to applicants to ask about the number of workers and the statement that a financial institution may rely on the applicant's response, but the Bureau is making minor edits for clarity. The Bureau agrees with commenters that these provisions are helpful, and is including them to facilitate compliance.

The Bureau agrees with commenters' recommendations that financial institutions should be able to rely on statements made by the applicant and should be permitted to collect required data from applicants through a variety of means. First, the rule does not limit the means by which the number of workers data can be collected, and though it provides optional language to use, it does not require the use of that language. The Bureau believes that allowing financial institutions to rely on applicant-provided data will sufficiently safeguard accuracy such that the resulting data will aid in fulfilling the purposes of section 1071. The Bureau also believes that reporting the verified number of workers when the financial institution already possesses that information

will not be operationally difficult, and will enhance the accuracy of the information collected. To facilitate compliance with the regulation, the Bureau provides guidance related to reliance on all applicant-provided data, including number of workers, in final comment 107(b)-1. Generally, that comment permits reliance on statements of the applicant or information provided by an applicant; however, if a financial institution verifies information, it reports the verified data. For more information on relying on statements made by or provided by an applicant, see the section-by-section analysis of § 1002.107(b).

The Bureau is finalizing comment 107(a)(16)-3 (renumbered from proposed comment 107(a)(16)-2) with a minor edit for clarity. Final comment 107(a)(16)-3 cites to § 1002.107(c), which provides that a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of workers of the applicant. Comment 107(a)(16)-3 further explains that a financial institution reports that the number of workers is "not provided by applicant and otherwise undetermined" if, despite such procedures, the financial institution is unable to collect or determine the information. The Bureau believes that allowing this response will facilitate compliance when an applicant does not provide the requested data.

The final rule does not require financial institutions to report the distinction between various worker categories such as full time versus part time, as recommended by some commenters. The Bureau believes that requiring distinctions between various worker categories could introduce unnecessary complexity and compliance challenges. The final rule also does not include principal owners in the number of workers, as recommended by a commenter. The final rule requires the separate collection of the number of principal owners in final § 1002.107(a)(20), and the Bureau believes that this differentiation will improve the granularity and usefulness of the data collected.

The Bureau acknowledges comments noting that some financial institutions do not collect or maintain data on number of workers nor is the information used in their credit

decisions. However, the Bureau believes that number of workers is critical to further the business and community development purpose of section 1071 and the Bureau does not believe it will be particularly difficult for financial institutions to obtain this information if they do not do so already. The Bureau has also provided sample language in final comment 107(a)(16)-2 that a financial institution may use to ask an applicant about the number of workers.

With respect to questions from commenters about how the number of workers data point meets section 1071's purposes, as discussed above the Bureau believes the data will provide insight into small business credit that contributes to job creation and maintenance, as well as other trends in the small business market's ability to grow and maintain workers, and the full set of data required to be collected and reported under this final rule should provide sufficient context for meaningful understanding of this data point. Regarding the comment that the CRA already considers the impact of adding jobs through small business and community development loans, the Bureau notes that data collected under section 1071 vary from data collected under CRA and the institutions subject to section 1071 are not necessarily subject to CRA. Regarding the concerns raised by commenters that the number of workers for an applicant's affiliates must be counted if the affiliates' gross annual revenues are considered, the Bureau notes that the applicant is already providing information on affiliate(s) in this situation, and the financial institution can simply ask a question regarding number of workers, perhaps using the language provided in final comment 107(a)(16)-2, and tell the applicant to include affiliate information.

107(a)(17) Time in Business

Proposed Rule

ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." In the proposed rule, the Bureau stated that it believed that data providing the time in business of a small business applicant would aid in fulfilling both the business and community development and fair lending purposes of section 1071.

The Bureau proposed § 1002.107(a)(17) to require a financial institution to collect and report the time the applicant has been in business, described in whole years, as relied on or collected by the financial institution. Proposed § 1002.107(a)(17) would have required the data be reported in whole years, rather than ranges of time, because a financial institution would have a definite number of years if it collects this information presently, and the Bureau believed that time in business reported in whole years would make the data more granular and useful.

Proposed comment 107(a)(17)-1 would have provided guidance on how to report one of the two methods (relied on or collected) for reporting the time-in-business data point. The proposed comment would have explained that, regardless of which method is used, the financial institution must report the time in business in whole years, or indicate if a business has not begun operating yet, or has been in operation for less than a year. Proposed comment 107(a)(17)-1 would have explained that when the financial institution relies on an applicant's time in business as part of a credit decision, it reports the time in business relied on in making the credit decision. However, the comment would have further explained that proposed § 1002.107(a)(17) would not require the financial institution to rely on an applicant's time in business in making a credit decision.

Proposed comment 107(a)(17)-1 would have also explained that the financial institution may rely on statements or information provided by the applicant in collecting and reporting time in business; however, pursuant to proposed § 1002.107(b), if the financial institution verifies the time in business provided by the applicant, it must report the verified information. This guidance would have applied whether the financial institution relies on the time in business in making its credit decision or not, although the Bureau believed that verification would be very uncommon when the financial institution is not relying on the information.

Proposed comment 107(a)(17)-2 would have provided instructions on how to report the time in business relied on in making the credit decision. The proposed comment would have stated that when a financial institution evaluates an applicant's time in business as part of a credit

decision, it reports the time in business relied on in making the credit decision. For example, the proposed comment would have further explained, if the financial institution relies on the number of years of experience the applicant's owners have in the current line of business, the financial institution reports that number of years as the time in business. Similarly, if the financial institution relies on the number of years that the applicant has existed, the financial institution reports the number of years that the applicant has existed as the time in business. Proposed comment 107(a)(17)-2 would have then concluded by stating that a financial institution reports the length of business existence or experience duration that it relies on in making its credit decision, and is not required to adopt any particular definition of time in business.

Proposed comment 107(a)(17)-3 would have stated that a financial institution relies on an applicant's time in business in making a credit decision if the time in business was a factor in the credit decision, even if it was not a dispositive factor. The proposed comment would have provided the example that if the time in business is one of multiple factors in the financial institution's credit decision, the financial institution has relied on the time in business even if the financial institution denies the application because one or more underwriting requirements other than the time in business are not satisfied.

Proposed comment 107(a)(17)-4 would have clarified that if the financial institution does not rely on time in business in considering an application, pursuant to proposed § 1002.107(c)(1) it shall still maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's time in business. The proposed comment would have explained that in collecting time in business from an applicant, the financial institution complies with proposed § 1002.107(a)(17) by asking for the number of years that the applicant has been operating the business it operates now. The proposed comment would have further explained that when the applicant has multiple owners with different numbers of years operating that business, the financial institution collects and reports the greatest number of years of any owner. Proposed comment 107(a)(17)-4 would have then concluded by making clear that the financial institution

does not need to comply with the instruction if it collects and relies on the time in business by another method in making the credit decision.

Proposed comment 107(a)(17)-5 would have explained that pursuant to proposed § 1002.107(c)(1) a financial institution shall maintain reasonable procedures to collect information provided by the applicant, which includes the time in business of the applicant, but if the financial institution is unable to collect or determine the time in business of the applicant, the financial institution reports that the time in business is "not provided by applicant and otherwise undetermined."

The Bureau sought comment on its proposed approach to this data point. The Bureau also sought comment on whether time-in-business information may be less relevant or collectable for certain products or situations (such as retailer-branded credit cards acquired at point of sale) and whether reporting "not applicable" should be allowed in those instances. In addition, the Bureau sought comment on whether there should be an upper limit on time in business—for example, to allow reporting of "over 20 years" for any applicant of that duration, rather than requiring reporting of a specific number of years.

Comments Received

The Bureau received comments on its proposed time in business data point from a number of lenders, trade associations, and community groups. A number of commenters supported the Bureau's proposal to collect time in business data with some pointing out the importance of time in business for the fair lending and community development purposes of section 1071. A trade association noted that time in business data are potentially useful for lenders, policymakers, regulators, and communities and that this is a common credit consideration for the type of small business lending undertaken by certain financial institutions. This trade association asserted that the data can help explain differences in underwriting risk among small business applicants and avoid misinterpretation of the dataset by distinguishing potentially riskier new businesses from established businesses. A community group stated that

this data point is needed to assess if access to credit is reasonably available and whether there are geographical barriers that do not seem present in other areas based on analysis of the data. This commenter further stated that such analysis can help stakeholders identify and ameliorate any access to credit barriers for younger firms.

A bank and a trade association commented that this data point could be helpful in demonstrating a non-discriminatory basis for different credit decisions and may provide helpful context for evaluating the basis for credit decisions and conducting an accurate, fact-based fair lending analysis. A community group stated that lenders already collect or consider the number of years a small business has been in operation as it is an element of loan risk and underwriting. This commenter further stated that time-in-business data would allow the assessment of whether businesses of similar duration are likely to receive credit at comparable terms, such as by comparing Black-owned, Latino-owned, and Asian-owned start-ups with white-owned start-ups. A number of commenters noted in discussing data points, including time in business, that fair lending analysis requires a robust set of key variables that are used in underwriting. Relatedly, other commenters stated that data collected under the Bureau's rule must be sufficient to allow data users to understand the characteristics of applicants that are denied credit so as to identify areas of unmet need and also to be able to compare declined applicants with those who are approved for credit to look for evidence of discrimination.

Commenters specifically pointed out the importance of collecting information regarding whether a business is a start-up. A community group noted start-ups and younger businesses generally have more difficulties qualifying for credit, and other commenters pointed out that it is well known that start-ups often struggle to access financing.

In contrast, the Bureau received many comments from lenders and trade associations generally opposing the Bureau's proposal to collect time in business. One trade association questioned how asking how long a company has been in operation furthers fair lending purposes. A few banks stated that the information is not considered for underwriting purposes or relevant

to the creditworthiness of the applicant. An agricultural lender asserted that time in business data can be unknown, misleading, or not relevant. A few industry commenters asserted that time in business data are not currently collected or maintained by lenders. Some commenters said collecting time in business data would impose compliance burden and one also said that it would add friction to the application process. A bank stated that customers do not have this type of information readily available when applying for a commercial loan. Another bank noted that the data point adds a layer of complexity, will not provide useful information that advances section 1071, and goes beyond what other laws, such as HMDA, require financial institutions to collect. A trade association commented that time in business is unfamiliar to the applicant or difficult to obtain and will result in additional complexity, confusion, and significant operational and regulatory costs. Another trade association said this data point involves complexities because many small businesses cannot provide an exact amount of time in business due to name changes, mergers and acquisitions, and other routine events that complicate this calculation. A bank stated that its borrowers rarely keep good enough records to properly state the date they began doing business. An agricultural lender stated that time in business can be difficult to determine for a farming operation that may have begun as a lifestyle venture or arose from multiple generations of farming.

Some commenters expressed concerns with the data to be collected as well as the method of reporting. A bank stated that it makes loans for startup companies and relies on the applicant's experience in the given industry rather than the length of time they have operated their current business; however, underwriting for an established business uses the length of time that specific business has been in operation. Although the Bureau's proposal allows for the consideration of business experience or business longevity, this commenter and several others asserted that the resulting data gathered will not be comparable and analysis of that data will be meaningless. Another bank stated that in most cases, the credit decision is a combination of the number of years the applicant has been in business and the number of years the principals have been in the

industry, but if one institution reports the number of years the applicant has been in business and another reports the number of years of experience of the principals, they would not appear to be as similarly situated as they are; therefore, it will be impossible to make comparisons or draw accurate conclusions with respect to the information submitted. Another bank pointed out this same issue and stated that the mixture of responses would lead to unreliable information, unjustifiable conclusions, and unjustified burden on applicants and financial institutions. Other banks and a trade association also indicated that the credit decision can be based on a combination of the number of years the applicant has been in business and the number of years the principals have been in the industry. Two of these commenters also said that the Bureau did not provide guidance on how to report the data in these circumstances.

A bank trade association commented that many small business borrowers create new entities for various reasons and expressed concern that the data collected could suggest lenders are giving more favorable treatment to new small businesses as opposed to existing ones. Another trade association stated that collecting time in business using management or owner experience rather than the age of the business itself undercuts the Bureau's rationale that time in business could explain the difference in underwriting risk among small business applicants and avoid misinterpretation of data. This commenter recommended that time in business be collected at the financial institution's option. A bank was concerned that time in business data may make it appear to discriminate against start-up businesses, explaining that its practice has been to avoid providing financing for start-up businesses unless it can secure government guaranties because in distressed areas where the bank generally lends, start-up businesses have historically been unable to sustain a repayment history for the loan term due to business closure and liquidation. Therefore, the bank explained, if comparing this information for fair lending, it will appear that they are discriminating against start-up businesses when there are studies showing that minority-owned businesses are under-financed as start-ups.

Several commenters requested the Bureau provide clarification on certain aspects of reporting the data point or made recommendations for reporting the data. A bank suggested that the Bureau collect the time the business has been active regardless of ownership experience or time the current owners have owned this business. A community group recommended that financial institutions be required to report the time in business used when underwriting the loan because time in business could refer to either the time period since the business was formally incorporated or the time period of operation. A bank requested clarification on temporary lapses in business and how to report seasonal businesses. Several agricultural lenders and a trade association suggested that if this data point is not dropped then the Bureau should tie it to the established Farm Credit data point, "Year began Farming," because Farm Credit associations already collect "Year began farming." These commenters reasoned that there would be needless confusion in the context of agricultural credit if there were separate and competing definitions of "Time in business" and "Year began farming." A bank recommended that the easiest way to report time in business information is with a number in the column; however, it suggested that for newer businesses, particularly for those with less than one year in business, the number should be reported in ranges, *e.g.*, 0-6 months or 7-12 months. A community group said that credit card lenders should not be able to routinely report "not applicable" for this data point because the information should not be too hard to ask for on an application form. A bank and a trade association requested 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. These commenters also requested that the Bureau include in the final rule a safe harbor from liability for reporting the applicant-provided time in business. Another trade association also recommended that the Bureau clarify that financial institutions may rely on statements made by the applicant without incurring risk.

A bank commented that putting an upper limit on years to report is not a good idea and said that time in business should always be reported as a specific number of years. The bank

reasoned that there are businesses that struggle at the 5 year mark, the 10 year mark, or the 50 year mark. According to this bank, one should not assume that applicants are "fine" because those years are above an arbitrary number the Bureau has chosen.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(a)(17) with revisions to the regulatory text and commentary. As explained below, financial institutions will be required to report the time the applicant has been in business, but the Bureau has revised the requirements to provide financial institutions more flexibility in collecting the information. Pursuant to its authority under ECOA section 704B(e)(2)(H), the Bureau determines that collecting data on time in business will further the purposes of section 1071, as further explained below.

The Bureau believes that time in business will advance both statutory purposes of section 1071. Research illustrates the role that start-ups and new businesses play in the business ecosystem and in promoting important community development aims, such as creating new jobs.[668] Financial institutions often have special credit policies regarding start-ups and other young businesses, including whether the institution will extend credit to start-ups at all, the type(s) of credit products start-ups and new businesses can apply for, and the amount of credit for which they can be approved. Studies generally show that start-ups experience greater difficulty in accessing credit.[669]

Time in business data will benefit data users, including financial institutions, policymakers, economic analysts, and communities by allowing them to better identify the

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[668] *See, e.g.*, Small Bus. Admin., *2018 Small Business Profiles*, at 1-2 (2018), https://www.sba.gov/advocacy/2018-small-business-profiles-states-and-territories?utm_medium=email&utm_source=govdelivery; John Haltiwanger *et al.*, *Who Creates Jobs? Small versus Large versus Young*, 95(2) Review of Econ. & Stat., at 347-61 (2013), https://direct.mit.edu/rest/article/95/2/347/58100/Who-Creates-Jobs-Small-versus-Large-versus-Young.

[669] For example, a Federal Reserve Bank of New York report, based on data from the 2016 Small Business Credit Surveys that included information from 12 Federal Reserve Banks, provides statistics on how start-ups are less likely to receive credit as compared to mature businesses, even with comparable credit scores. *See* Fed. Rsrv. Bank of N.Y., *Small Business Credit Survey: Report on Start-up Firms*, at iv (2017), https://www.newyorkfed.org/medialibrary/media/smallbusiness/2016/SBCS-Report-StartupFirms-2016.pdf.

proportion of small businesses seeking credit that are start-ups or relatively new businesses, the type(s) of credit offered to these groups, the geographic setting of these businesses, the types of financial institutions that are reaching such businesses, and where communities might focus business development efforts. The data may also aid policymakers in addressing issues impacting the growth of small start-ups. The data, particularly as to unmet demand, could help interested financial institutions identify lending opportunities to reach more start-ups and new businesses, promoting both business and community development. This data point will also facilitate fair lending analyses by providing a useful control to identify similarly situated applicants and eliminate some false positives, while also allowing monitoring of potential disparate treatment of relatively new minority- and women-owned small businesses.

The Bureau understands from commenters that there are complexities associated with collecting time in business information from an applicant for various reasons, including applicant difficulty providing an exact time because of prior name changes, events that affected the applicant's structure, multi-generational ownership, and others discussed by commenters above. In light of the feedback received, the Bureau has revised the requirements for reporting time in business information, based on the financial institution's procedures. The Bureau is also not finalizing this data point to include data as relied on by the financial institution to make a decision. Rather, the final rule requires financial institutions to report time in business as collected or otherwise obtained. Although this requirement is similar to reporting the time in business relied on, the new language makes clear that the financial institution reports the time in business collected or obtained regardless of whether it relied on that information in underwriting the application. Commenters indicated that they may base their credit decision on a combination of factors, such as the time the applicant has been in existence and the time the owners have been in the industry, while other commenters indicated that they do not collect or use time in business for underwriting purposes. The Bureau believes that standardizing the time in business data point to be based on what the financial institution collects or obtains streamlines the requirement and

provides flexibility for the financial institution to report time in business information based on its credit policies or programs rather than having to select a time in business method specifically for reporting pursuant to this rule. Accordingly, the Bureau is not finalizing "as relied on or collected by the financial institution" in the regulatory text. Final regulatory text for § 1002.107(a)(17) requires reporting of the time the applicant has been in business; however, the Bureau is providing further details guidance in commentary regarding time in business collection and reporting, as explained below. As some commenters suggested, allowing different methods for measuring time in business will have an effect on the comparability of the data, but information about the time in business actually collected by the financial institution for its own purposes will be useful for fair lending analysis and will impose less operational difficulty than requiring reporting based on a single definition. For example, this method will allow a financial institution to use the "year began farming" date, as suggested by some commenters, to report time in business without further inquiry.

Final comment 107(a)(17)-1.i provides that a financial institution reports time in business in whole years if, as part of its procedures, it collects or obtains the number of years an applicant has been in business. Final comment 107(a)(17)-1.i also provides guidance to make clear that if the financial institution reports the number of whole years, the financial institution rounds down to the nearest whole year. Final comment 107(a)(17)-1.ii provides that if a financial institution does not collect or obtain the number of years an applicant has been in business, but as part of its procedures it determines whether or not the applicant has been in business less than two years, then the financial institution reports the applicant's time in business as either less than two years or two or more years. Final comment 107(a)(17)-1.iii provides that if a financial institution does not collect or obtain time in business, either as number of years or a determination as to whether the applicant has been in business less than two years, then the financial institution complies with the rule by asking the applicant whether it has been in business less than two years or two or more years. The Bureau is not finalizing the provision in proposed comment 107(a)(17)-1.ii to

require financial institutions to indicate whether an applicant has not begun operating yet or has been in operation less than a year. In addition, the Bureau is not requiring that newer business applicants' time in business be reported in ranges, as one commenter suggested. The Bureau believes that time in business information reported in whole years or an indication of over or under two years can provide data users with robust information regarding start-ups and newer businesses as well as the maturity of other businesses, thus furthering the purposes of section 1071 while also simplifying collection and reporting. Issues such as whether to report the time in business based on the time of incorporation or time of business opening, lapses in business operation such as for a seasonal business, and new business entities that do not actually constitute a new enterprise should all be considered within the financial institution's discretion in collecting time in business. The Bureau does not believe that these scenarios will have a significant effect on the quality of the data reported, but crafting a rule that takes them into account could considerably increase the operational difficulty of compliance.

Final comment 107(a)(17)-2 provides that a financial institution that collects time in business as part of its procedures is not required to collect or obtain time in business information pursuant to a specific definition for the purposes of this rule. The comment provides examples of how a financial institution may define time in business, including by asking the applicant when the business started or based on the owner's experience in the industry. As discussed above, the Bureau understands from commenters that a financial institution may collect and/or consider for underwriting both the number of years the applicant has been in business and the number of years of experience an owner has in the industry. In response to a comment requesting clarification and to mitigate other commenter concerns, final comment 107(a)(17)-2 provides that if a financial institution collects the number of years the applicant has existed as well as another measure of time in business, such as the number of years of experience an owner has in the industry, the financial institution reports the number of years the applicant has existed as the time in business. The Bureau believes that this method will result in more uniform and

comparable data on time in business and should not cause operational difficulty because the financial institution will be reporting information that it already collects.

Comment 107(a)(17)-3 (renumbered from proposed comment 107(a)(17)-6) is finalized with minor clarifications. Final comment 107(a)(17)-3 provides that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes time in business; however, if the financial institution is nonetheless unable to collect this information, then the financial institution reports "not provided by applicant and otherwise undetermined" for the time in business data point. The Bureau believes that providing this reporting option will facilitate compliance.

The Bureau acknowledges commenters' arguments that time in business is not collected by some financial institutions now nor used by such institutions for underwriting purposes. However, other industry commenters indicated that they do collect and use time in business for underwriting (for example, commenters stated the credit decision is based on a combination of the number of years the applicant has been in business and the number of years the principals or owners have in the industry).

Commenters also expressed concern with the burden associated with collecting time in business information. The Bureau does not believe it would be too difficult for financial institutions to collect this information if they do not already do so, and the ability to merely ask whether a business has existed for less than two years or two years or more should reduce any complexity for applicants in providing the information. The Bureau also believes that collection of time in business will further the dual purposes of section 1071, as discussed above. The final rule does not permit time in business information be reported at the financial institution's option, as the Bureau believes that if it made this data point optional, very little data would be reported.

With respect to the concern raised by a commenter that reporting time in business information may cause a financial institution to appear to discriminate against start-up businesses because of its policy to avoid providing financing to start-ups, the Bureau believes that time in

business information will help mitigate concerns of data misrepresentation and help explain the credit decision made by a financial institution. For example, data indicating that an applicant is relatively new with little experience or financial history could explain why the financial institution denied the application or approved it for less than what was applied for.

With respect to the recommendation 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, the final rule provides this flexibility for financial institutions. The final rule also allows the financial institution to collect applicant-provided data, including time in business information, from appropriate third-party sources. See final § 1002.107(b).

The Bureau is not adopting a safe harbor from liability for reporting the applicant-provided time in business for the reasons provided in the section-by-section analysis of § 1002.112(c). Guidance related to relying on information provided by an applicant and appropriate third-party sources, including time in business information, is provided in final comment 107(b)-1. (Similar content was included in proposed comment 107(a)(17)-1.) That comment explains that a financial institution needs report verified information only if it verifies information from the applicant for its own business purposes. Because the rule makes clear that a financial institution may rely on statements made by or information from the applicant regarding time in business and need not verify its accuracy, the Bureau does not believe that a safe harbor is necessary. For more information on relying on information provided by an applicant, see the section-by-section analysis of § 1002.107(b).

107(a)(18) Minority-Owned, Women-Owned, and LGBTQI+-Owned Business Statuses

Background

ECOA section 704B(b) requires financial institutions to inquire whether applicants for credit are minority-owned and/or women-owned businesses and to maintain a record of the responses to that inquiry separate from the applications and accompanying information. Section 704B(c) provides that applicants for credit may refuse to provide information requested pursuant

to 704B(b). ECOA section 704B(e)(2)(H) authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." The Bureau is finalizing § 1002.107(a)(18) to address how a financial institution would collect and report an applicant's minority-owned and women-owned business statuses, along with LGBTQI+-owned business status which the Bureau believes would aid in fulfilling the purposes of section 1071.

The Bureau proposed appendix F to provide instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19). However, there was some duplication between what was contained in proposed appendix F and in proposed § 1002.107(a)(18) and (19) and associated commentary.

As discussed further herein, final § 1002.107(a)(18) differs from proposed § 1002.107(a)(18) in a number of ways, largely to streamline the rule and facilitate compliance. First, the final rule combines proposed § 1002.107(a)(18) and (19) into final § 1002.107(a)(18). Next, final § 1002.107(a)(18) also requires collection of LGBTQI+-owned business status. Finally, the commentary to final § 1002.107(a)(18) incorporates the information contained in proposed appendix F.

Proposed Rule—Proposed § 1002.107(a)(18) and (19)

In order to implement the section 1071 requirement that financial institutions inquire whether applicants for credit are minority-owned and/or women-owned businesses, the Bureau proposed § 1002.107(a)(18) to address minority-owned business status, and § 1002.107(a)(19) to address women-owned business status. The text of these proposed provisions was otherwise identical in their language. Proposed § 1002.107(a)(18) and (19) would have required financial institutions to collect and report whether an applicant is a minority-owned or women-owned business, respectively. Proposed § 1002.107(a)(18) and (19) would also have required financial institutions to collect and report whether minority-owned business status or women-owned

business status, respectively, was being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). When the financial institution requests minority-owned and women-owned business statuses from an applicant, the financial institution would have been required to inform the applicant that the financial institution cannot discriminate on the basis of the applicant's minority-owned or women-owned business status, or on whether the applicant provides this information. Finally, proposed § 1002.107(a)(18) and (19) would have referred to proposed appendix F for additional details regarding how financial institutions are required to collect and report minority-owned or women-owned business statuses, respectively. Proposed appendix F would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding the applicant's minority-owned business status and women-owned business status and inform the applicant of a prohibition on financial institutions requiring applicants to provide this information.[670]

Proposed comments 107(a)(18)-1 and 107(a)(19)-1 would have clarified that a financial institution would be required to ask an applicant if it is a minority-owned business or women-owned business, respectively, for each covered application unless the financial institution is permitted to report minority-owned business status or women-owned business status, respectively, based on previously collected data. Additionally, the financial institution would have been required to permit an applicant to refuse to answer the financial institution's inquiry and to inform the applicant that it is not required to provide the information. The financial institution would have reported the applicant's response, its refusal to answer the inquiry (such as when the applicant indicates that it does not wish to provide the requested information), or its failure to respond (such as when the applicant fails to submit a data collection form) to the inquiry.

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[670] Proposed appendix G would have included a similar requirement to notify applicants that they are not required to provide information regarding principal owners' ethnicity, race, and sex and of a similar prohibition on financial institutions requiring that applicants provide such information.

Proposed comments 107(a)(18)-2 and 107(a)(19)-2 would have explained that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's minority-owned business status or women-owned business status, respectively, or on whether the applicant provides the information. These proposed comments would also have clarified that a financial institution may combine this non-discrimination notice regarding minority-owned business status or women-owned business status, respectively, with the similar non-discrimination notices that a financial institution is required to provide when requesting women-owned business status or minority-owned business status, respectively, and a principal owner's ethnicity, race, and sex if a financial institution requests such information in the same data collection form or at the same time.

Proposed comments 107(a)(18)-3 and 107(a)(19)-3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record an applicant's response regarding minority-owned business status and women-owned business status pursuant to proposed § 1002.107(a)(18) or (19), respectively, separate from the application and accompanying information. These proposed comments would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comments 107(a)(18)-4 and 107(a)(19)-4 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution shall maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's minority-owned business status or women-owned business status, respectively. However, if a financial institution did not receive a response to its inquiry, the financial institution would have reported that the applicant's minority-owned business status or women-owned business status, respectively, is "not provided by applicant."

Proposed comments 107(a)(18)-5 and 107(a)(19)-5 would have stated that notwithstanding proposed § 1002.107(b) (regarding verification of applicant-provided information), a financial institution would have reported the applicant's response, its refusal to

answer the inquiry, or its failure to respond to the inquiry pursuant to proposed § 1002.107(a)(18) or (19), respectively, even if the financial institution verifies or otherwise obtains an applicant's minority-owned business status or women-owned business status for other purposes. Moreover, a financial institution would not have been required or permitted to verify the applicant's responses to the financial institution's inquiries pursuant to proposed § 1002.107(a)(18) or (19) regarding minority-owned business status or women-owned business status, respectively.

Proposed comments 107(a)(18)-6 and 107(a)(19)-6 would have clarified that a financial institution does not report minority-owned business status or women-owned business status, respectively, based on visual observation, surname, or any basis other than the applicant's response to the inquiry that the financial institution makes to satisfy proposed § 1002.107(a)(18) or (19), respectively, or, if the financial institution was permitted to report based on previously collected data, on the basis of the applicant's response to the inquiry that the financial institution previously made to satisfy § 1002.107(a)(18) or (19), respectively.

Proposed comments 107(a)(18)-7 and 107(a)(19)-7 would have clarified that a financial institution may report minority-owned business status or women-owned business status, respectively, based on previously collected data if the financial institution is permitted to do so pursuant to proposed § 1002.107(c)(2) and its commentary.

The Bureau sought comment on its proposed approach to these data points, including the proposed methods of collecting and reporting the data. The Bureau also requested comment on whether additional clarification regarding any aspect of these data points is needed. In particular, the Bureau sought comment on whether applicants are likely to have difficulty understanding and determining the information they are being asked to provide and, if so, how the Bureau may mitigate such difficulties.

Proposed Rule—Proposed Appendix F

Proposed appendix F would have provided instructions to aid financial institutions when collecting minority-owned business status pursuant to proposed § 1002.107(a)(18) and women-owned business status pursuant to proposed § 1002.107(a)(19).

The Bureau proposed appendix F pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, in order to facilitate compliance with the statutory requirements to collect minority-owned and women-owned business statuses pursuant to 704B(b)(1). Further, the Bureau proposed appendix F pursuant to its obligation in 704B(g)(3) to issue guidance to facilitate compliance with the requirements of section 1071, including assisting financial institutions in working with applicants to determine whether the applicants are women-owned or minority-owned businesses.

The Bureau sought comment on the proposed instructions, and generally sought comment on whether additional clarification regarding any aspect of the proposed instructions was needed. The Bureau further requested comment on whether additional or different instructions were needed for financial institutions that choose not to use a paper data collection form to collect minority-owned business status or women-owned business status, such as collecting such information using a web-based or other electronic data collection form, or over the telephone. The Bureau also sought comment regarding the challenges faced by both applicants and financial institutions by the data collection instructions prescribed in appendix F and specifically requested comment on ways to improve the data collection of minority-owned business status and women-owned business status.

Comments Received—Women-Owned and Minority-Owned Business Statuses

The Bureau received comments on proposed § 1002.107(a)(18) and (19) and appendix F from some industry and community group commenters. Commenters uniformly supported the Bureau's proposal that the financial institution would rely solely on the applicant to determine

minority-owned and women-owned business statuses, and that institutions should not be required or permitted to verify an applicant's response. One commenter requested that a financial institution not be required to conduct any follow-up if an applicant fails to provide the information. Another noted that owners and ownership status may change from day to day. One said that the back-office functions of financial institutions will need to ensure the data are being reported correctly and identify any issues in the data, which will require an increase in staff.

A commenter asserted that applicants should be permitted to self-report whether they have been certified by a third-party organization as a minority- and/or women-owned business and the name of the certifying organization, which it said would promote the objectives of section 1071 by encouraging responses of relevant and verifiable information. Another commenter suggested that the Bureau coordinate with the U.S. Census to create a minority and women-owned business suffix to a business's NAICS code which identifies their minority or women-owned business status.

Regarding appendix F, some commenters supported the proposed approach to collecting information. Several commenters requested that the Bureau eliminate duplication and include all mandatory statements in the rule text, rather than in the appendices.

Comments Received—LGBTQI+-Owned Business Status

As discussed in the section-by-section analysis of § 1002.102(k) and (*l*) above, regarding the definitions for LGBTQI+ individual and LGBTQI+-owned business, the Bureau sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status.

The Bureau received comments from several banks, individual commenters, and community groups on this issue. Some commenters did not support including such a data point in the final rule, generally stating that asking for such information would be offensive, would be considered an invasion of privacy, or would damage bank-customer relationships. One

commenter said that applicants are unlikely to provide this information and that an applicant's LGBTQ+-owned business status is not considered in the lending process and thus should not be part of this data collection.

A few commenters also stated that asking for such information could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when they already face bias and discrimination. These commenters also raised concerns about the privacy and security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only authorized persons but also potentially to hackers. These commenters argued that although there is some protection in the Federal employment law context due to the U.S. Supreme Court's opinion in *Bostock v. Clayton County*,[671] there are States where discrimination against LGBTQ individuals is legal and thus inferences about one's sexuality could have serious negative impacts. They also expressed concern that this information could be used for unintended purposes. One commenter also expressed a concern that previously collected information about an applicant's LGBTQ+-owned business status could be used inappropriately.

Other commenters supported inclusion of LGBTQ+-owned business status in the final rule, generally asserting the collection of information about a business' LGBTQ+-owned status is appropriate and necessary under the law. One commenter stated that businesses owned by LGBTQ+ individuals face discrimination and bias and urged the Bureau to use its ECOA section 704B(e)(2)(H) authority to require the collection of such information. Another commenter argued that data about lending availability to LGBTQ-owned businesses will enhance the Bureau's ability to enforce fair lending laws to protect them from discrimination in credit, and identify their credit needs. Another commenter stated that collecting applicants' LGBTQ+-owned business status is necessary to ensure that LGBTQ+ small business owners are being

[671] 140 S. Ct. 1731 (2020). See the section-by-section analysis of § 1002.107(a)(19), under *Proposed Rule—Collecting Sex*, for a discussion of the Court's holdings in *Bostock*.

treated fairly by lenders and fulfill the purposes of section 1071. One commenter suggested that the Bureau include an inquiry to identify businesses who have experienced impermissible sex discrimination under ECOA without requiring information on the owners' specifically held identities if they do not wish to disclose them. This commenter suggested this would be consistent with the Bureau's proposal regarding the collection of ethnicity and race.

A commenter also stated that there is public and congressional support for the collection of LGBTQ+-owned business status information, noting that H.R. 1443, the LGBTQ Business Equal Credit Enforcement and Investment Act, would have amended ECOA to include a definition for "LGBTQ-owned business" and require the collection of LGBTQ-owned business status.[672]

Commenters suggested that the Bureau adopt the same approach it proposed using for collecting minority-owned and women-owned business statuses, by providing applicants with a definition for LGBTQ-owned business status and allowing respondents to indicate whether they are or are not such a business. Another commenter recommended that financial institutions not be allowed to collect or report such information on the basis of visual observation, surname analysis, or any method other than applicant-provided responses. This commenter also stated that financial institutions should not be permitted or required to verify an applicant's LGBTQ+-owned business status.

Final Rule—Business Status in General

For the reasons set forth herein, the Bureau is adopting § 1002.107(a)(18) with a number of changes to require collection of minority-owned business status, to incorporate collection women-owned business status (from proposed § 1002.107(a)(19)) and to add LGBTQI+-owned business status, along with a number of conforming changes to the commentary. The Bureau has also incorporated information from proposed appendix F into the commentary to final

[672] H.R. 1443, 117th Cong. (2021).

§ 1002.107(a)(18),[673] added additional commentary for parity with final § 1002.107(a)(19) regarding collection of principal owners' ethnicity, race, and sex, and updated a number of cross-references.

Final § 1002.107(a)(18) requires the collection of information regarding whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, § 1002.107(a)(18) requires that a financial institution inform the applicant that the financial institution cannot discriminate on the basis of minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides this information.

Final comment 107(a)(18)-1 clarifies that a financial institution must ask an applicant whether it is a minority-owned, women-owned, and/or LGBTQI+-owned business. A financial institution must permit an applicant to refuse (*i.e.*, decline) to answer the inquiries and must inform the applicant that it is not required to provide the information. The financial institution must report the applicant's substantive responses, that the applicant declined to answer, or its failure to respond to an inquiry, as applicable.

Final comment 107(a)(18)-2 clarifies that a financial institution must provide the applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business when inquiring about these business statuses. A financial institution satisfies this requirement if it provides the definitions set forth in the sample data collection form in appendix E.

Final comment 107(a)(18)-3 clarifies that a financial institution may combine on the same paper or electronic data form the business status questions along with the data requested in § 1002.107(a)(19) (principal owners' ethnicity, race, and sex) and § 1002.107(a)(20) (number of principal owners).

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[673] In certain instances where language in proposed appendix F and commentary to proposed § 1002.107(a)(18) and (19) were similar, language in the final regulatory text or commentary has been revised to improved clarity. In other instances, language from proposed appendix F is imported wholesale to provide clarity and streamline the rule.

Final comment 107(a)(18)-4 (renumbered from comment 107(a)(18)-2 in the proposal and incorporating additional information from proposed appendix F) explains that a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of an applicant's business statuses or on whether the applicant provides the information. Under the final rule, a financial institution must also inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled (this disclosure would have been optional under the NPRM). The Bureau believes that this notice should be compulsory, rather than voluntary, to ensure that applicants receive information about the data collection rule and its purposes. See the section-by-section analysis of § 1002.107(a)(19) for further explanation and discussion of comments received on this issue.

Final comment 107(a)(18)-5 explains that a financial institution must maintain the record of an applicant's responses to the financial institution's inquiry separate from the application and accompanying information.

Final comment 107(a)(18)-6 explains that if a financial institution does not receive a response to the financial institution's inquiry for purposes of § 1002.107(a)(18), the financial institution reports that the applicant's business statuses were "not provided by applicant."

Final comment 107(a)(18)-7 explains that a financial institution reports that the applicant responded that it did not wish to provide the information about an applicant's business statuses if the applicant declines or refuses to provide the information by selecting such a response option on a paper or electronic form. The financial institution reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

Final comment 107(a)(18)-8 explains that if an applicant both provides a substantive response to the financial institution's inquiry regarding business status and also checks the "I do not wish to provide this information" box or similar for that question, the financial institution reports the applicable business status(es) provided by the applicant (rather than reporting that the applicant declined to provide the information).

Final comment 107(a)(18)-9 explains that, notwithstanding § 1002.107(b) (regarding verification of applicant-provided data), a financial institution must report the applicant's substantive response(s), that the applicant declined to answer the inquiry, or the applicant's failure to respond to the inquiry, even if the financial institution verifies or otherwise obtains an applicant's business statuses for other purposes, and provides an example of such a situation.

With regard to commenters who asserted that applicants should be able to rely upon minority-owned or women-owned business status certifications received from a third-party organization, the Bureau believes that the definitions of minority-owned or women-owned business statuses from third-party organizations may not align with the definitions found in section 1071 and codified in this rule, and thus reliance on them would not be appropriate. As addressed above, final comment 107(a)(18)-2 clarifies that a financial institution must provide applicants with definitions of the terms minority-owned business, women-owned business, and LGBTQI+-owned business, as provided in this rule, when asking questions about these business statuses.

Final Rule—LGBTQI+-Owned Business Status

For the reasons set forth herein, the Bureau is exercising its authority under ECOA section 704B(e)(2)(H) to require financial institutions to request information about whether an applicant is a LGBTQI+-owned business. The Bureau believes that the collection of this information will further section 1071's statutory purposes. Specifically, the Bureau believes that the collection of this information will help address an information gap about small business

lending and facilitate fair lending enforcement and the identification of business and community development needs and opportunities for small businesses.

Based on the limited information available, the Bureau believes that LGBTQI+-owned businesses may experience particular challenges accessing small business credit. For example, one report found that, while LGBTQ businesses were equally likely to apply for financing, they were less likely to receive it, with about 46 percent of LGBTQ-owned businesses reporting that they had received none of the financing that they had applied for in the past year, as compared to 35 percent of non-LGBTQ businesses that applied for funding. The report noted that LGBTQ-owned businesses were more likely than non-LGBTQ businesses to explain their denial was due to lenders not approving financing for "businesses like theirs" (33 percent versus 24 percent), among other reasons.[674] The same report also found that LGBTQ-owned businesses that applied for Paycheck Protection Program funding in 2021 were less successful in receiving funding applied for than non-LGBTQ businesses.[675]

ECOA section 704B(e)(2)(H) provides the Bureau with broad discretion to collect "any" additional data it determines would aid in fulfilling the purposes of section 1071. As discussed, the Bureau has determined that the collection of business applicants' LGBTQI+-owned business status information, in addition to requiring information on principal owners' specifically held sex/gender identity, as discussed in the section-by-section analysis of § 1002.107(a)(19) below, will facilitate the purposes of section 1071 and is thus exercising its authority under section 1071 to require its collection.

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[674] Spencer Watson *et al.*, Ctr. for LGBTQ Economic Advancement & Research and Movement Advancement Project, *LGBTQ-Owned Small Businesses in 2021*, 10-11 (July 2021), http://www.lgbtq-economics.org/research/lgbtq-small-businesses-2021 (analyzing 2021 data from Small Business Credit Survey administered by the Federal Reserve Banks). As used in the report, the term "LGBTQ-owned business" refers to businesses where individuals who identify as lesbian, gay, bisexual, transgender, or queer own 50 percent or more of the business. *Id.* at note a.

[675] *Id.* at 8-9 (only 54 percent of LGBTQ-owned businesses received all the Paycheck Protection Program funding they applied for in 2021, and 17 percent received none of the funding applied for, compared to 68 percent and 10 percent of all non-LGBTQ owned businesses, respectively).

Similar to the proposed (and final) approaches for collecting women-owned and minority-owned business statuses, financial institutions are required to provide the definition of "LGBTQI+-owned business" under § 1002.102(*l*) when requesting information about an applicant's LGBTQI+-owned business status as provided by final comment 107(a)(18)-2. Financial institutions are also required to provide the same notices when requesting an applicant's LGBTQI+-owned business status, such as the notice that the applicant is not required to provide the information under final comment 107(a)(18)-1 and other notices under final comment 107(a)(18)-4. Other provisions set out in commentary for minority-owned and women-owned business statuses likewise apply to LGBTQI+-owned business status; for example, a financial institution reports only the applicant's response to the inquiry about its LGBTQI+-owned business status, even if it verifies or otherwise obtains an applicant's LGBTQI+-owned business status for other purposes. *See, e.g.*, comments 107(a)(18)-6, -7, and -9.

Final comment 107(a)(18)-5 also clarifies that an applicant's responses about whether it is an LGBTQI+-owned business must be kept separately from the small business's application form and accompanying documents. ECOA section 704B(b)(2) requires a financial institution to maintain a record of the "responses to [the] inquiry" required by section 704B(b)(1) separate from the application and accompanying information. As explained in part E.2 in the *Overview* to this part V, the Bureau interprets section 704B(b)(2) to refer to an applicant's responses to protected demographic information, which includes whether the applicant is a minority-owned business and/or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. This is because these data points require financial institutions to request demographic information that has no bearing on the creditworthiness of an applicant and that financial institutions would not be otherwise able to request absent the data collection requirements under section 1071 and the final rule as a result of Regulation B's general prohibition on inquiring about the sex of an applicant or any other person in connection with a

credit transaction.[676] Likewise, the Bureau considers the LGBTQI+-owned business status data point to be protected demographic information that has no bearing on an applicant's creditworthiness, as also noted by some commenters, and which financial institutions would be unable to collect without the requirement to do so in final § 1002.107(a)(18). As a result, the Bureau believes that it is necessary to require a financial institution to maintain an applicant's response to the inquiry about whether it is a LGBTQI+-owned business separately from the rest of the business's application and accompanying information under final § 1002.111(b), similar to the requirement with respect to responses about an applicant's minority-owned and women-owned business statuses.

The Bureau acknowledges commenters' concerns that requesting information as to whether applicants are LGBTQI+-owned businesses could be offensive, be considered an invasion of privacy by applicants, or damage bank-customer relationships. Final comment 107(a)(18)-4 provides that a financial institution must inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. Sample language for this notice, which provides a brief, plain language explanation of the purpose of the data collection, appears in the sample data collection form in appendix E. The Bureau believes providing such context will help to mitigate negative reactions an applicant may have to a financial institution's request for such information. Further, as stated on the sample data collection form, applicants have the right to refuse to provide this information, as provided under comment 107(a)(18)-1.

The Bureau acknowledges commenters' arguments that applicants are unlikely to respond to the inquiry about LGBTQI+ status and that therefore financial institutions should not be required to ask. However, the Bureau and other data users are unable to conduct comprehensive

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[676] 86 FR 56356, 56386-87 (Oct. 8, 2021); *id.* at 56501-02. *See also* 12 CFR 1002.5(b).

fair lending and business and community development analyses without this data point, even as applicants are individually entitled to refuse to provide it.

Some commenters expressed concern that LGBTQI+-owned business status could be detrimentally used against LGBTQI+ individuals and their businesses. As discussed in greater detail in part VIII below, the Bureau acknowledges that an individual person's LGBTQI+ status likely is sensitive personal information that could pose personal privacy risks as well as other non-personal commercial privacy risks. Part VIII also contains a more comprehensive analysis of how privacy interests may be appropriately protected. In addition, the Bureau is finalizing § 1002.110(e), which prohibits financial institutions and third parties from disclosing protected demographic information except in limited circumstances.

107(a)(19) Ethnicity, Race, and Sex of Principal Owners

ECOA section 704B(e)(2)(G) requires financial institutions to compile and maintain certain information, including the race, sex, and ethnicity of an applicant's principal owners. However, section 1071 does not set out what categories should be used when collecting and reporting this information. The Bureau proposed § 1002.107(a)(20) to address how a financial institution would collect and report the ethnicity, race, and sex of an applicant's principal owners.

Proposed § 1002.107(a)(20) would have required financial institutions to collect and report the ethnicity, race, and sex[677] of the applicant's principal owners as well as whether this information is being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). It would have also required financial institutions to report, in certain circumstances, whether ethnicity and race are being reported by the financial institution on the basis of visual observation or surname analysis. Proposed § 1002.107(a)(20) would have required financial institutions to collect and report ethnicity, race, and sex data as prescribed in

[677] While ECOA section 704B(e)(2)(G) uses "race, sex, and ethnicity," the Bureau reordered them to "ethnicity, race, and sex" for purposes of the proposal, so that they would appear alphabetically and for consistency with how they appear in Regulation C. The Bureau is using the same approach for this final rule.

proposed appendix G. Proposed appendix G would have included a requirement that a financial institution inform an applicant that the applicant is not required to respond to the financial institution's questions regarding its principal owners' ethnicity, race, or sex and would have also included a prohibition on financial institutions requiring applicants to provide this information. Proposed § 1002.107(a)(20) would have also required that when the financial institution requests ethnicity, race, and sex information from an applicant, the financial institution must inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information. The Bureau also put forth for public comment a sample data collection form in proposed appendix E that financial institutions would be able use to collect ethnicity, race, and sex information.

The Bureau is finalizing the statutory requirement to collect principal owners' ethnicity, race, and sex in § 1002.107(a)(19). Below, the Bureau first discusses its general approach to collecting principal owners' ethnicity, race, and sex. Second, the Bureau discusses finalizing its proposal to collect ethnicity and race information using certain aggregate categories and disaggregated subcategories. Third, the Bureau discusses its approach to requiring the collection of sex by applicant self-identification (using only a free-form text field for a paper or electronic form, or by self-description for applications taken orally) and without the use of response categories. Finally, the Bureau discusses its decision not to require collection of principal owners' ethnicity and race via visual observation and/or surname analysis. The Bureau has incorporated information from proposed appendix G into the commentary to final § 1002.107(a)(19)[678] and has updated a number of cross-references.

[678] In certain instances where language in proposed appendix G and commentary to proposed § 1002.107(a)(20) were substantially similar, language in the final regulatory text or commentary has been revised to improve clarity. In other instances, language from proposed appendix G is imported wholesale to provide clarity and streamline the rule.

Proposed Rule—Collecting Ethnicity, Race, and Sex, In General

Proposed comment 107(a)(20)-1 would have clarified how a financial institution collects ethnicity, race, and sex information. It would have stated that unless a financial institution is permitted to report ethnicity, race, and sex information based on previously collected data pursuant to proposed § 1002.107(c)(2), a financial institution must ask an applicant to report its principal owners' ethnicity, race, and sex for each covered application and that the financial institution must permit an applicant to refuse to answer the financial institution's inquiry. It would have required financial institutions to inform the applicant that it is not required to provide the information. Proposed comment 107(a)(20)-1 would have further clarified that the financial institution must report the applicant's responses, its refusal to answer the inquiries, or its failure to respond to the inquiries, and explain that in certain situations, discussed in proposed comments 107(a)(20)-7 and -8 and in proposed appendix G, a financial institution may also be required to report one or more principal owners' ethnicity and race (but not sex) based on visual observation and/or surname analysis. Proposed comment 107(a)(20)-1 would have cross-referenced proposed appendix G for additional instructions.

Proposed comment 107(a)(20)-2 would have explained that a financial institution must inform the applicant that the financial institution shall not discriminate on the basis of a principal owner's ethnicity, race, or sex or on whether the applicant provides that information. It would have also clarified that a financial institution may combine this non-discrimination notice with the similar non-discrimination notices that a financial institution would have been required to provide when requesting minority-owned business status and women-owned business status if a financial institution had requested minority-owned business status, women-owned business status, and/or a principal owner's ethnicity, race, and sex in the same data collection form or at the same time.

Proposed comment 107(a)(20)-3 would have explained how, pursuant to proposed § 1002.111(b), financial institutions must record applicants' responses regarding a principal

owner's ethnicity, race, and sex pursuant to § 1002.107(a)(20) separate from the application and accompanying information. This proposed comment would have also provided examples of how responses could be recorded separately from the application and accompanying information.

Proposed comment 107(a)(20)-4 would have clarified that a financial institution is required to maintain procedures reasonably designed to collect applicant-provided information pursuant to proposed § 1002.107(c)(1), including the ethnicity, race, and sex of an applicant's principal owners. However, if a financial institution is nonetheless unable to collect the principal owners' ethnicity, race, or sex from the applicant and if the financial institution is not required to report the principal owners' ethnicity and race based on visual observation and/or surname, the financial institution would have been required to report that the principal owner's ethnicity, race, or sex (as applicable) is "not provided by applicant."

Proposed comment 107(a)(20)-12 would have clarified that a financial institution is neither required nor permitted to verify the ethnicity, race, or sex information that the applicant provides for purposes of proposed § 1002.107(a)(20), even if the financial institution verifies or otherwise obtains the ethnicity, race, or sex of the applicant's principal owners for other purposes. The Bureau also solicited comment on whether it would be useful to expressly codify this application of the principle in the commentary.

Additionally, the proposed comment would have explained that, if an applicant refuses to respond to the inquiry pursuant to proposed § 1002.107(a)(20) or fails to respond to this inquiry, the financial institution reports that the applicant declined to provide the information or did not respond to the inquiry (as applicable), unless the financial institution is required to report ethnicity and race based on visual observation and/or surname analysis. Finally, the proposed comment would have explained that the financial institution does not report ethnicity, race, or sex pursuant to proposed § 1002.107(a)(20) based on information that the financial institution collects for other purposes.

Proposed comment 107(a)(20)-5 would have explained that generally an applicant determines its principal owners and decides whether to provide information about principal owners. It would have further stated that, nonetheless, a financial institution may be required to report ethnicity and race information based on visual observation and/or surname analysis and may need to determine if a natural person with whom the financial institution meets in person is a principal owner. It would have explained how a financial institution determines who is a principal owner in the event that the financial institution may be required to report ethnicity and race information based on visual observation and/or surname. It would have also provided examples of how the financial institution can make that determination and noted that the financial institution is not required to verify any responses regarding whether a natural person is a principal owner.

The Bureau sought comment on those proposed general aspects of collecting and reporting principal owners' ethnicity, race, and sex, including comments on the challenges that financial institutions may have implementing them.

Comments Received—Collecting Ethnicity, Race, and Sex, In General

The Bureau received comments regarding the collection of ethnicity, race, and sex for applicants' principal owners, in general, from a wide range of commenters including lenders, trade associations, community groups, individual commenters, a software vendor, and others. Within these general comments, commenters addressed a number of issues including alignment with HMDA, lack of applicant responses, verification of applicant-provided data, privacy issues, and concerns related to burden and cost. These issues, and others, are discussed in turn below.[679]

[679] The Bureau also received comments about specific aspects of the Bureau's proposal for collecting and reporting principal owners' ethnicity, race, and sex information, including collecting ethnicity and race using aggregate categories and disaggregated subcategories; collecting sex; and collecting ethnicity and race via visual observation and/or surname analysis in certain circumstances. Such comments are discussed further below in this section-by-section analysis of § 1002.107(a)(19).

General support and concerns. The Bureau received comments from lenders, trade associations, community groups, and others regarding its proposal, at a general level, for collecting information about the ethnicity, race, and sex of principal owners.

Many commenters supported the Bureau's proposal and the creation of a comprehensive small business lending database. These commenters said that collecting information about the ethnicity, race, and sex of small business applicants' principal owners will help address a lack of such information in existing lending data; facilitate enforcement of fair lending laws; and enable stakeholders to understand and identify needs and opportunities, remove barriers, and advocate for women-owned, minority-owned, and small businesses. Some commenters also emphasized generally that the data disclosure would shed light on racial and gender gaps and discrimination, which they noted are long-standing issues and which have been exacerbated by the COVID-19 pandemic. One commenter characterized the collection of this information as long overdue.

Many commenters expressing general support for the Bureau's proposal emphasized that the demographic data collected under the final rule must be robust, disaggregated, detailed, and include information on underwriting criteria and on race, gender identity, sexual orientation, and disability status in order to enable meaningful analysis.

Several lenders and a business advocacy group stated that the data would help lenders improve their lending practices. One commenter that Congress's adjustments to the SBA's Paycheck Protection Program in the program's second round, to prioritize minority-owned and women-owned businesses and microbusinesses and set aside funds for CDFIs, could not have happened without access to Paycheck Protection Program lending data, including demographic data. Another commenter stated that the small business lending data collection is necessary to gather critical data on lending beyond what is collected by the SBA.

Some commenters emphasized that HMDA data, which include demographic and socioeconomic information, have provided valuable insight on racial and income disparities in the home mortgage lending market and have been an important tool to hold lenders accountable

as well as to determine how to meet unmet credit needs. Several commenters also emphasized that after Congress included demographic information as part of the HMDA data collection, the number of mortgages to people of color and people with modest incomes increased; these commenters anticipate a similar outcome for small business lending after data collected under this final rule are published.

One commenter stated that the collection of demographic data for each of an applicant's principal owners would help provide the public with a sense of the varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses and help determine if businesses with different minority ownership levels have distinct borrowing experiences.

The Bureau also received comments expressing generally applicable concerns and requests for clarification about its proposal for collecting ethnicity, race, and sex information. Several commenters said that the Bureau's proposal includes duplicative content in the proposed rule text, commentary, and appendices, which they said could complicate compliance. These commenters recommended that any mandatory requirements be in the final regulatory text, rather than spread out among the regulation, commentary, and appendices. Another commenter asserted that the proposed rules for collecting demographic information are too complex.

Another argued that a significant hurdle in implementing the Bureau's proposal is that while ECOA requires financial institutions to be blind to factors such as ethnicity, race, and sex in lending, they must collect and report information on those same factors under the Bureau's proposed rule (including by visual observation and surname analysis under certain circumstances). This commenter asserted that the Bureau's proposal is irreconcilable with ECOA and cannot be reasonably implemented without compromising the data collected. Another commenter predicted that requiring financial institutions to collect ethnicity, race, or sex information would lead to possible favoritism, discrimination, and stereotyping. (Similar

concerns were raised specifically with respect to collection of ethnicity and race information by visual observation and/or surname analysis; these commenters are discussed separately below.)

One commenter asked the Bureau to clarify how a financial institution should report an applicant's principal owners' ethnicity, race, and sex information if a representative of a small business applicant states they need to check with the principal owners for such information, but the application is withdrawn or declined before the information is provided. The commenter stated that because borrowers may apply to many lenders for a loan, reporting on withdrawn applications would skew collected loan data. The commenter also asked for clarification about how to report under similar circumstances, where an application has been approved, but still no information has been provided. This commenter suggested the Bureau provide options for a financial institution to report that an applicant "declined to answer" for applicants that specifically refused to provide responses and "not available" for other circumstances, including withdrawn applications or applicant non-responsiveness.

Another commenter suggested that the Bureau should collect demographic data for "applicants," which it characterized as the natural persons completing the application. This commenter argued that such information would further the fair lending purposes of section 1071, because loan applicants may be subject to different treatment based on factors such as their ethnicity, race, or gender, citing a study finding that prospective loan applicants were subject to differential treatment on the basis of their race and gender in the pre-application stage.[680]

An industry commenter asked whether a financial institution could collect demographic information at a greater level of specificity than proposed by the Bureau. Another asked whether a financial institution is permitted to reconcile discrepancies or inaccuracies in self-reported ethnicity or race data with the use of software or other relevant information.

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[680] Nat'l Cmty. Reinvestment Coal., *Racial and Gender Mystery Shopping for Entrepreneurial Loans: Preliminary Overview* (2020), https://ncrc.org/wp-content/uploads/2020/02/NCRC-Mytery-Shopping-Race-and-Gender-v8.pdf.

Alignment with HMDA. Some industry commenters urged the Bureau to align the collection of principal owners' ethnicity, race, and sex information under the final rule with the collection of such information for mortgage applicants under Regulation C, whether exactly or to the greatest extent possible. One commenter also suggested alignment with existing Regulation B, which also requires the collection of certain demographic information for certain mortgages.[681] These commenters said that consistency between the HMDA and section 1071 data collections would reduce confusion for financial institutions and applicants, facilitate efficient data collection such as by allowing data to be collected only once for applications covered by both HMDA and section 1071, facilitate compliance, reduce burden, and make the collected data more usable across regulations.

Several commenters identified issues that could arise for applications reportable under both section 1071 and HMDA, if the data collection requirements under the two regulatory regimes did not match. They said that financial institutions could potentially be required to collect data using different forms and to have systems capable of maintaining separate sets of data for the same transaction under the Bureau's proposal. Some also said that applicant confusion about the differences between the two regimes may reduce applicants' willingness to provide the requested information. (Commenters more specific concerns about how overlapping data collection obligations would work are discussed in more detail below.) Some commenters generally urged the Bureau to either align the HMDA and section 1071 data collection requirements or to exempt loans from one regime that are reportable under the other to avoid such issues.

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[681] Under existing Regulation B, a creditor is required to collect applicant ethnicity, race, sex, marital status, and age information for an application for credit primarily for the purchase or refinancing of a dwelling occupied or to be occupied by the applicant as a principal residence, where the extension of credit will be secured by the dwelling. 12 CFR 1002.13(a). Regulation B provides that the ethnicity and race information shall be requested either by using specified aggregate ethnicity and race categories, or the aggregate and disaggregated ethnicity and race categories set forth under Regulation C. *Id.*

Concerns related to specific transactions or institutions.[682] Some commenters expressed support for, or concerns about, the collection of principal owners' ethnicity, race, and sex information in the context of specific types of transaction or institutions.

Some commenters raised general concerns about the proposed collection of ethnicity, race, and sex information by small banks or community banks. A few commenters said that requesting ethnicity, race, and sex information has the potential to negatively impact their relationships with their customers. One stated that such inquiries could make customers distrustful of their banks and raise privacy concerns, and urged the Bureau to consider the impact that the collection of such information may have on the relationship-based banking model of community banks.

A number of commenters, including many agricultural lenders, expressed general support for the collection of demographic data. One commenter stated that the proposed collection of demographic information would help reveal and prevent unfair agricultural lending practices. Other commenters stated support for demographic data collection, provided that the rule's definition of small business is tailored for the agricultural credit context. One commenter expressed concern about the burden for collecting and reporting demographic information for agricultural lenders and farmers.

Some commenters emphasized particular difficulties for collecting ethnicity, race, and sex information for credit applications taken in retail environments (also referred to as "point of sale" applications/transactions). These commenters noted that credit applications taken in retail store environments differ from those typically taken at banks because customers expect speed and efficiency in the application process, and expressed their concern that the Bureau's proposal

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[682] The Bureau received a number of comments responding to the Bureau's proposal regarding the collection of protected demographic information vis-à-vis certain types of institutions and transactions, many of which are discussed in the section-by-section analyses of § 1002.104 (covered transactions and excluded transactions), § 1002.105 (covered financial institutions and exempt institutions), and § 1002.107(c) (time and manner of collection). The Bureau also received comments on specific aspects of the Bureau's proposal to collect principal owners' ethnicity, race, and sex information, in the context of specific types of institutions and transactions. See the Bureau's discussion of such comments in the referenced parts of this preamble for more detail.

would add complexity and length to application processes, due in part to detailed questions about ethnicity, race, and sex. These commenters also expressed concerns about having retail store associates ask for this information. Commenters said that many retailers may use oral, interview-style, in-store application processes, and that retail store associates do not have the training to make such inquiries or handle customer questions or reactions. Several commenters also stated that small business applicants may feel uncomfortable providing ethnicity, race, and sex information in public retail spaces. Another commenter predicted that the majority of small business credit applications submitted at the point of sale would lack demographic information. Some of these commenters also urged the Bureau to exempt private label and co-branded credit applications, along with other types of credit originated at or facilitated through retailers such as revolving lines of credit and installment loans (*e.g.*, point of sale credit), from the rule's requirements in various ways—such as by exempting all such applications, or those for lines of credit below $50,000, from the requirement to collect demographic information.

A group of trade organizations stated that insurance premium finance transactions should not be included within the scope of the final rule, in part because State insurance law generally prohibits or discourages insurance agents from collecting information about race, religion, national origin, or ethnicity of an insured business's owners on behalf of lenders, and insurers do not collect such information as a result.

Several other trade associations urged the Bureau to clarify how the rule's data collection requirements apply to indirect vehicle finance transactions. Beyond generally urging the Bureau to exempt such transactions from the final rule, two trade associations stated a survey of their automobile and truck dealer members reflected concerns about training employees to collect ethnicity, race, and sex information, particularly with respect to implementing the Bureau's proposed visual observation and surname data collection requirement.

Lack of applicant responses. Several commenters raised concerns about a potential lack of applicant responses to the proposed demographic information questions.[683] A bank stated that it encounters difficulties in meeting the HMDA reporting requirements because mortgage loan applicants are reluctant to provide demographic information and it anticipates similar reactions from small businesses. Other commenters argued that low demographic response rates in the Paycheck Protection Program indicates that most small business applicants will likely decline or fail to provide demographic information. Thus, some commenters said, records with missing demographic data will likely need to be either excluded from fair lending analyses or data users will have to use proxies for the missing information, asserting that this outcome calls into question the benefits of the data collection versus the costs. Another commenter said that the high number of applications for small business credit made online, and situations where the person providing information for a given application may be one of several owners or a company officer and not an owner themselves, may also lead to a high percentage of applicants who do not provide responses. One commenter asserted that small business owners may react negatively to the amount of paperwork associated with this rule's data collection requirements and as a result decide not to provide their principal owners' information. Finally, a commenter suggested that the Bureau require demographic information to be collected after a credit decision has been made, rather than before.

Verification. Several industry commenters and a women's business advocacy group argued that financial institutions should not be required or permitted to verify applicant-provided data about a principal owner's ethnicity, race, or sex. One commenter suggested that the Bureau should determine if there are ways for it to verify if reported data are accurate and correct.

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[683] A number of commenters also expressed concerns about data quality in the specific context of their comments about the Bureau's proposal to require financial institutions to collect at least one principal owners' race and ethnicity information via visual observation and/or surname under certain circumstances. These comments are discussed in more detail below.

(Similar comments specifically regarding collection of information via visual observation or surname are discussed in more detail below.)

Reduced demand for traditional credit. Several industry commenters asserted that the collection of principal owners' protected demographic information could potentially make borrowing from traditional lenders less attractive for small businesses due to applicant discomfort or objections to inquiries for such information. One predicted that applicants may, as a result, turn to credit cards, payday loans, or nontraditional online financing for their credit needs.

Privacy. Several industry commenters stated that small business customers may find the collection of protected demographic information that could become public to be an invasion of privacy. They generally expressed concern that such information could be used to re-identify borrowers, which could in turn harm the reputation or image of a small business applicant. A bank said this concern is particularly salient in small communities, and that if public information is used to determine the identities of a bank's customers and the pricing terms offered to them, it could result in a competitive disadvantage for the bank versus other lenders.

Burden and costs for collecting ethnicity, race, and sex information. Several industry commenters raised concerns about the burden or compliance costs for financial institutions associated collecting principal owners' ethnicity, race, and sex information under the proposal. Other commenters raised similar concerns in the context of specific types of transactions or institutions, or related to specific aspects of the Bureau's proposal for collecting this information, which are discussed in the relevant parts of this section-by-section analysis.

One commenter expressed concern that financial institutions may need to increase the prices and fees for credit to cover increased compliance costs related to the collection and storage of ethnicity, race, and sex information. Another stated that collecting principal owners' ethnicity, race, and sex information would require online lenders to make system changes, which it said would be different from those needed by traditional lenders. This commenter urged the

Bureau to allow lenders to report aggregate, as opposed to application level, data to reduce this burden. Another commenter said that because does not currently collect ethnicity information currently and its core processing system does not include a field for this information, it would need to collect this data field manually.

One commenter stated that collecting information for up to four principal owners as proposed would be burdensome for both financial institutions and applicants. A lender said that reporting such information for all principal owners would take a large amount of space on its small business lending application register. That commenter also suggested that the Bureau require demographic information for only one principal owner instead of all principal owners, asserting that this would not impact the quality of the data because the applicant's minority-owned and women-owned business statuses would still be collected.

In contrast, another lender did not anticipate incurring significant costs related to the collection of ethnicity, race, and sex information because it already gathers such information or similar information for other small business lending programs and funding opportunities such as the SBA's 7(a) Loan Program; the Paycheck Protection Program; the Wells Fargo Diverse Community Capital Program; and the CDFI Fund. The commenter stated that adjusting to section 1071 data collection requirements will primarily entail updating software, compliance training, and updating materials. The commenter anticipated minimal ongoing costs that will be considered normal costs of doing business and said it does not plan on raising fees or restricting access to credit as a result. The commenter also urged the Bureau to coordinate with the CDFI Fund to streamline section 1071 reporting requirements.

Direct reporting to the Bureau or third parties, or use of other data sources. A number of industry commenters suggested that protected demographic information should be self-reported by applicants directly to a central database or registry, whether maintained by the Bureau or by third parties

Some commenters urged the Bureau to work with Secretaries of State so that demographic data generally or information about a business's minority-owned, women-owned, and/or LGBTQI+-owned business statuses are voluntarily registered at the same time that a small business registers with its State. One commenter stated that this would allow small businesses to provide information to a trusted entity and lenders could then verify demographic data with the relevant State—thus avoiding delays and confusion from applicants during the loan application process.

Other commenters suggested that the Bureau provide ways for small businesses to report their demographic information directly to the Bureau. Several suggested the Bureau develop a form for the collection of ethnicity, race, and sex information that could be sent directly to the Bureau. Others suggested that the Bureau establish a tool, portal, or online system for applicants to input their demographic information or to certify their desire to not provide information. One commenter stated that the regulatory trend has shifted from requiring collection and reporting of beneficial ownership information by financial institutions to having small businesses report directly to the government. Generally, these commenters said that applicants should be provided with a unique identifier, either by the Bureau or the financial institutions, that could be used to match applicant demographic information with loan information. Several commenters said that the financial institution should also be given the ability to match its records with the central database, to enable their internal fair lending compliance monitoring efforts. Some commenters also suggested the Bureau coordinate with other Federal agencies, such as the SBA, U.S. Department of the Treasury, Internal Revenue Service, or the U.S. Census Bureau, to develop the database, gather information for other data points, or purge records as necessary.

Some of these commenters stated that direct reporting to the Bureau would avoid the need for financial institutions to collect ethnicity and race information via visual observation or surname analysis. These commenters also stated that this would resolve privacy concerns applicants may have in providing demographic information to their lenders. Commenters also

asserted that direct reporting would inform applicants of the Bureau's role in the data collection, promote applicant self-reporting of demographic information, and likely increase response rates because it would provide applicants with assurances of confidentiality and because applicants would not be concerned that financial institutions would improperly use the data.

Several commenters argued that direct reporting to the Bureau would have other benefits for financial institutions, including lessening or eliminating the risk of inappropriate use of demographic data by financial institutions; reducing a financial institutions' compliance costs and burden; avoiding the need for financial institutions to establish firewalls; lowering litigation and regulatory risk; reducing the risk of reputational harm for asking for sensitive data; and lowering barriers to entry in financial services. Commenters also stated that direct reporting would be more efficient for applicants because information would be maintained in one place and could be updated as needed, as opposed to being provided for each application. Commenters further suggested that the Bureau would benefit from receiving real-time data on applicant demographics, which they claimed would simplify and enhance analysis and publication and would allow the Bureau to directly manage the collection, storage, and standardization of the data.

Some commenters suggested that instead of requiring financial institutions to collect data, the Bureau should coordinate with other government agencies, like the Internal Revenue Service and the U.S. Census Bureau, which already collect demographic and other data on small businesses, to avoid burden to financial institutions and which would result in the Bureau having better data to use for analyses. One commenter suggested that the Bureau should use the demographic analysis approach being used by the U.S. Census Bureau and develop educational materials for financial institutions about the methodology. Another commenter suggested the Bureau buy information from Google or Facebook.

Applicant and financial institution education and guidance. A range of commenters urged the Bureau to provide education and guidance about the final rule for applicants, the

public, and financial institutions. The commenters generally stated that the Bureau should engage in an education and/or media campaign to explain the final rule and its purposes to develop trust with small business communities and comfort for applicants by explaining the role of the data collection for facilitating fair lending and to encourage small businesses to provide their protected demographic information.

Many of these commenters also suggested that the Bureau develop guidance and materials such as frequently asked questions and factsheets to explain the rule and its purposes. A few commenters suggested developing materials for applicants regarding the ethnicity, race, and sex data collection inquiries, such as how to respond if a principal owner is multi-ethnic or multi-racial, so applicants can accurately respond and financial institution employees are not asked to interpret or clarify such requirements.

Commenters also recommended developing guidance materials for financial institutions to use in explaining the final rule, including training resources and disclosures to explain the reasons and purpose for the data collection. They also suggested that such materials be translated into the top ten languages spoken in the United States according to the U.S. Census Bureau.

Final Rule——Collecting Ethnicity, Race, and Sex, In General

For the reasons set forth herein, the Bureau is finalizing the requirement to collect principal owners' ethnicity, race, and sex with certain changes. Among other things, the Bureau is: (1) finalizing its proposed requirement for financial institutions to collect ethnicity and race information using aggregate categories and disaggregated subcategories, using the specific categories and subcategories in the proposal; (2) finalizing the requirement for financial institutions to collect information about a principal owner's sex, which generally will permit an applicant to respond to an inquiry about the principal owner's "sex/gender" through free-form text or self-description for oral applications; and (3) not finalizing its proposed requirement to collect and report at least one principal owner's ethnicity and race information on the basis of

visual observation and/or surname analysis under certain circumstances. These three specific aspects of the final rule are each discussed in detail below.

Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) requires financial institutions to collect and report information about the ethnicity, race, and sex of small business applicants' principal owners. In line with the proposal, final § 1002.107(a)(19) provides that when requesting such information from an applicant, the financial institution must inform the applicant that it cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on the basis of whether the applicant provides this information (non-discrimination notice).

The final rule does not require a financial institution to report whether the reported ethnicity, race, and sex information was based on previously collected data (as permitted by proposed comment 107(c)(2)-7). This information would have provided additional context for the Bureau and others when application method was reported as being other than in-person but ethnicity or race information were reported as collected through visual observation or surname. Because the Bureau has decided not to require the use of visual observation and surname analysis in the final rule, however, the Bureau does not believe that capturing information about data reuse is still necessary and thus has removed that requirement from final § 1002.107(a)(19) to streamline and facilitate compliance.

The Bureau acknowledges commenters' concerns about repetition across the rule's regulatory text, commentary, and appendices, and has made a number of changes to reduce duplication and otherwise streamline this aspect of the final rule to facilitate compliance. In particular, the Bureau has removed proposed appendix G, relocating unique content into the commentary for final § 1002.107(a)(19). The Bureau has also adjusted the commentary accompanying final § 1002.107(a)(19) to reflect changes to the regulatory text described above, as well as the addition of LGBTQI+-owned business status where women- and minority-owned business statuses are mentioned.

Final comment 107(a)(19)-1 generally clarifies how a financial institution must ask an applicant for its principal owners' ethnicity, race, and sex. The financial institution must permit an applicant to refuse to answer the financial institution's inquiries and must inform the applicant that it is not required to provide the information. It also establishes how a financial institution reports the applicant's responses to its inquiries about ethnicity, race, and sex.

Final comment 107(a)(19)-2 (incorporating instruction 3 from proposed appendix G) explains that a financial institution must provide an applicant with the definition of principal owner in final § 1002.102(o) and that a financial institution satisfies the requirement if it provides the definition as set forth in the sample data collection form in final appendix E.

Final comment 107(a)(19)-3 (incorporating instruction 2 from proposed appendix G) explains that a financial institution may combine on the same paper or electronic data collection form the questions about a principal owner's ethnicity, race, and sex with the number of the applicant's principal owners pursuant to § 1002.107(a)(20) and the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses pursuant to § 1002.107(a)(18).

Final comment 107(a)(19)-4 (based on proposed comment 107(a)(20)-2) explains that the non-discrimination notice required when a financial institution requests a principal owner's ethnicity, race, and sex may be combined with the non-discrimination notice that is required when requesting information about an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, when such information is collected on the same form or at the same time. The comment has been updated to reflect the addition of LGBTQI+ business status to final § 1002.107(a)(18), and to state that a financial institution must (as opposed to "may" as proposed) inform an applicant that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled, for reasons discussed further below.

Final comment 107(a)(19)-5 (based on proposed comment 107(a)(20)-3) provides that a financial institution must maintain the record of an applicant's responses to inquiries pursuant to § 1002.107(a)(19) separate from the application and accompanying information, and cross-references final § 1002.111(b) and comment 111(b)-1.

Final comment 107(a)(19)-6 (based on proposed comment 107(a)(20)-4) addresses reporting when information about a principal owner's ethnicity, race, or sex is not provided by an applicant. While a financial institution must maintain procedures reasonably designed to collect applicant-provided data, the comment acknowledges that there may be circumstances under which an applicant does not provide ethnicity, race, or sex information. The final comment has also been updated to include explanatory examples, including examples from proposed appendix G (instruction 13).

Final comment 107(a)(19)-7 (adapted from instruction 12 in proposed appendix G) addresses how a financial institution reports an applicant's response that it declines to provide information about a principal owner's ethnicity, race, or sex.

Final comment 107(a)(19)-8 (adapted from instruction 16 in proposed appendix G) addresses how a financial institution reports an applicant's conflicting responses for its principal owner's ethnicity, race, or sex information, when the applicant selects a response option indicating it does not wish to provide the information but also selects an answer option providing a substantive response to the question at issue.

Final comment 107(a)(19)-9 (based on proposed comment 107(a)(20)-12) explains that a financial institution reports principal owners' ethnicity, race, and sex information as provided by the applicant, even if the financial institution verifies or otherwise obtains such information for other purposes. This comment no longer references collection of ethnicity and race via visual observation or surname.

Final comment 107(a)(19)-10 (substantially adapted from instruction 25 of proposed appendix G and proposed comments 107(a)(20)-6.iv,-7.iv, and-8) addresses how to report ethnicity, race, and sex information for an applicant with fewer than four principal owners.

Final comment 107(a)(19)-11 (substantially adapted from instruction 26 of proposed appendix G) explains that a financial institution reports one or more principal owners' ethnicity, race, or sex information based on previously collected data under § 1002.107(d), the financial institution does not need to collect any additional ethnicity, race, or sex information for other principal owners (if any).

Final comment 107(a)(19)-12 (substantially adapted from instruction 24 of proposed appendix G) explains that a guarantor's ethnicity, race, and sex is not collected or reported unless they are also a principal owner of the applicant.

General support and concerns. The Bureau agrees with commenters that the statutorily required collection of detailed ethnicity, race, and sex information about small business applicants' principal owners will facilitate the stated purposes of section 1071 to assist in the enforcement of fair lending laws and enable communities, governmental entities, and creditors to understand and identify needs and opportunities of women-owned, minority-owned, and small businesses.[684] The collection of ethnicity, race, and sex information in the HMDA context under Regulation C, for example, is essential to the Bureau's efforts to monitor financial institutions for fair lending compliance in the home mortgage market and to efforts by the Bureau, policymakers, and others to identify trends, gaps, and potential solutions for addressing any issues uncovered by the data. Recent changes to Regulation C to collect disaggregated ethnicity and race data have also added to the Bureau's and others' understanding of the home mortgage marketplace.[685] The Bureau believes that the collection of principal owners' ethnicity, race, and

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[684] *See* ECOA section 704B(a).

[685] In 2015, the Bureau issued a final rule (2015 HMDA Rule) amending Regulation C to incorporate several changes made under the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* 80 FR 66128 (Oct. 28, 2015). One of the changes that was implemented was the collection of mortgage applicants' race and ethnicity information using aggregate categories and disaggregated subcategories. *Id.* This data has been used by the Bureau,

sex information will similarly provide important insights into the small business lending market and help enable the identification of potential discriminatory lending.

The Bureau also agrees that in combination with other collected information such as the number of an applicant's principal owners under final § 1002.107(a)(20) and whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned small business under final § 1002.107(a)(18), the collection of principal owners' ethnicity, race, and sex information will help the Bureau and others to understand lending market dynamics at different levels of ownership by individuals of certain ethnicities, races, and/or sexual or gender population subgroups. Transparency will not only help facilitate fair lending enforcement, but reduce uncertainty for financial institutions and help them to identify areas of unmet credit demand into which they could consider increasing product availability. In turn, small business owners will benefit from increased credit availability. The Bureau believes that other information about a covered application is still important for fulfilling section 1071's statutory purposes even when the applicant has declined to provide any protected demographic information. Such information can still provide insight into lending to small businesses pursuant to section 1071's business and community development purpose. Moreover, the lack of demographic information for a covered application itself could be important information for the Bureau and others to assess potential reasons for and solutions to correct such information gaps in the future.

Regarding the comment its proposed rules for collecting demographic data are too complex, and comments that suggested streamlining these provisions, the Bureau notes that it is not finalizing the proposed requirement to collect ethnicity and race via visual observation or surname data. As a result, the Bureau has removed that provision, and related requirements, from the final rule. The Bureau has also moved all instructions and information about collecting and reporting ethnicity, race, and sex information to the commentary for final § 1002.107(a)(19). The

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for example, to examine how home buying experiences differ among Asian American and Pacific Islander subgroups. *See* CFPB, *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.

Bureau believes these changes streamline and simplify the ethnicity, race, and sex data collection requirements, which will facilitate financial institutions' compliance with the final rule.

Regarding a commenter's assertion that this data collection requirement conflicts with ECOA, the Bureau notes that section 1071 amends ECOA to *require* the collection of the race, sex, and ethnicity of the principal owners of small businesses. Moreover, ECOA also provides that inquiries to collect data under section 1071 are not considered discrimination under the statute.[686] The final rule also includes protections against the improper use of protected demographic information, including the firewall requirement in final § 1002.108, the provision restricting re-disclosure of protected demographic information in final § 1002.110(e), and the recordkeeping requirements in final § 1002.111(b).

Regarding a commenter's request for clarification as to how a financial institution should report these data if responses were provided by an applicant's representative before action is taken on the application, or that an applicant declined to provide the requested information. As discussed above, final comments 107(a)(19)-1, -6, and-7 clarify the various reporting options for reporting data collected pursuant to final § 1002.107(a)(19): financial institutions will be required to report an applicant's responses to the ethnicity, race, and sex inquiries; their selection of a response that they decline to provide information (*e.g.*, by selecting an answer option of "I do not wish to provide this information" or similar); and a response of "not provided by the applicant" if an applicant does not provide any response. The final rule also requires an applicant to report the action taken on an application under § 1002.107(a)(9), including whether originated or if the application was withdrawn by the applicant or is incomplete. Given these provisions, the Bureau does not believe it is necessary to include an option for a financial institution to indicate that the applicant or a principal owner was not available, as suggested by the commenter.

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[686] 15 U.S.C. 1691(b)(5).

The Bureau is not requiring the collection of demographic information for a natural person completing an application on behalf of a small business, as suggested by a commenter. ECOA section 704B(e)(2)(G) specifically requires financial institutions to compile and maintain information about the ethnicity, race, and sex of "the principal owners of the business." The statute does not require financial institutions to collect such information for any other individuals. The Bureau acknowledges the possibility of discrimination occurring against an applicant's non-principal owner representative, but in light of the statutory directive to collect demographic information about the applicant' principal owners, and the associated complexity that adding such a requirement could involve, the Bureau does not believe that it would be appropriate to adopt such a requirement at this time. The Bureau may, however, revisit at a later date whether the collection of such information would aid in fulfilling the purposes of section 1071 in the future as it enhances its understanding of the small business credit marketplace.

Regarding a commenter's inquiry as to whether a financial institution could collect more specific demographic data than required by the rule. Final § 1002.107(a)(19) establishes that financial institutions must inquire about applicants' principal owners' ethnicity, race, and sex and must permit applicants to provide certain specified responses; certain responses include the option of providing additional information via free-form text field.

One commenter asked whether a financial institution can reconcile discrepancies or inaccuracies in applicants' self-reported ethnicity or race data. Final comment 107(a)(19)-1 provides that the financial institution is not permitted to report a principal owner's ethnicity, race, or sex on any basis other than applicant-provided data, which may include previously provided data pursuant to final § 1002.107(d). As a result, financial institutions must report applicant responses as provided by the applicant, even if the institution perceives possible discrepancies or inaccuracies.

Alignment with HMDA. The Bureau generally agrees with commenters that some degree of alignment with the HMDA data collection requirements under Regulation C would promote

consistency and may reduce potential confusion for financial institutions, applicants, and data users. However, the Bureau does not believe that the collection of data as to small business owners should necessarily be the same in each aspect as it is for home mortgage applicants. Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. Further, both Regulation C and this final rule were developed in consideration of the information available to the Bureau at the time of each rulemaking, including comments received in response to the Bureau's proposals and current research and standards as to the measurement of such factors. As demographic data collection best practices and standards evolve, the Bureau considers such information in its decision-making. The Bureau refers readers to the relevant parts of this section-by-section analysis for discussion of its rationale for its decisions on the collection of ethnicity, race, and sex.

The Bureau notes that it is exempting HMDA-reportable transactions from the data collection requirements of this final rule due to, in part, to commenters' concerns about potentially duplicative and/or inconsistent requirements for reporting ethnicity, race, and sex. See the section-by-section analysis of § 1002.104(b)(2) for additional information.

Concerns related to specific transactions or institutions. The Bureau is not adopting special rules for the collection of protected demographic information for particular types of transactions or lenders. The Bureau believes it is important to collect nationwide, comprehensive ethnicity, race, and sex data for all covered applications to fulfill the purposes of section 1071. However, the Bureau acknowledges commenters' concerns about the potential challenges in collecting such information in certain situations or for certain types of lenders and appreciates, in particular, the importance of trust in furthering important relationships between small businesses and their local banks. For this reason, among others, the Bureau is not finalizing its proposal to collect ethnicity and race information via visual observation or surname analysis, as explained further in the relevant part of this section-by-section analysis below.

To help applicants' understanding of the section 1071 data collection, the Bureau has made edits to the sample data collection form in final appendix E to include sample text that explains the purpose of the rulemaking and clarifies that the inquiries on the form for an applicant's status as a minority-owned, women-owned, and/or LGBTQI+-owned small business and its principal owners' ethnicity, race, and sex information are required under Federal law. The sample form, of course, continues to note that applicants are not required to provide any of the requested demographic information. The Bureau also anticipates developing materials to help small businesses understand the rule, as described at the end of part I above.

The Bureau does not believe that agricultural credit transactions should be viewed or treated differently from other covered transactions under the final rule, with regard to the collection of principal owners' ethnicity, race, or sex information. As explained in the section-by-section analysis of § 1002.104, generally there is insufficient information available about agricultural credit markets; nevertheless, there is evidence that these markets are affected by historical and/or continuing discrimination. Moreover, farms are an important means of capital formation for families and communities. Collecting principal owners' ethnicity, race, and sex information for agricultural credit transactions will help facilitate the Bureau's and others' understanding of the agricultural credit sector of the small business lending marketplace and will help to further the enforcement of fair lending laws for that part of the market. The Bureau also anticipates that the collection of this information may increase access to responsible and affordable agricultural credit for a diverse cross-section of the population, by helping creditors and others identify needs of and opportunities for small farms, including those that are minority-, women-, and/or LGBTQI+-owned.

Likewise, the Bureau is not adopting separate rules or exemptions for credit applications taken at point of sale. As explained further in the section-by-section analysis of § 1002.107(c), regarding the time and manner of collection, the Bureau generally believes that the same rules should apply across all covered credit transactions and covered financial institutions, and that the

arguments made by point of sale providers are not unique in nature or can be addressed through other means. Likewise, the Bureau does not believe there should be special considerations for the collection of ethnicity, race, and sex information for private label credit, for which commenters raised similar concerns.

Because the Bureau is exempting insurance premium financing transactions from coverage under the final rule in § 1002.104(b)(3), commenters' concerns summarized above about collecting protected demographic information for such transactions are rendered moot.

With regard to comments raising concerns about collecting ethnicity, race, and sex information in the context of indirect auto finance transactions, the Bureau refers readers to its discussion at the section-by-section analysis of § 1002.109(a)(3). As discussed there, the Bureau believes that auto dealers are generally unlikely to be collecting 1071 data on behalf of covered financial institutions because they are often the last entity with authority to set the material credit terms of a covered credit transaction. But even in situations where dealers are acting as conduits and are thus collecting information on behalf of another financial institution, comment 5(a)(2)-3 to the Board's Regulation B states that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.[687] The Bureau also does not believe that any specialized knowledge is necessary to collect 1071 data if dealers do collect such data.

Lack of applicant responses. The Bureau acknowledges concerns raised by commenters about the potential for low applicant response rates to the required inquiries for information about their principal owners' ethnicity, race, and sex. As discussed in the NPRM, such concerns motivated the Bureau's proposal to require financial institutions to collect at least one principal

[687] This language aligns with comment 5(a)(2)-3 in the Bureau's Regulation B, to which the Bureau is adding a reference to subpart B for additional clarity.

owner's ethnicity and race information through visual observation and/or surname analysis under certain circumstances. The Bureau explained that the similar data collection requirement for the HMDA data collection has been an important tool in supporting response rates.

As discussed in more detail regarding the Bureau's proposal that financial institutions collect principal owners' ethnicity and race via visual observation or surname in certain circumstances, the Bureau believes that such a requirement could help support response rates in the right context. However, at this time, the Bureau has elected to address concerns about applicants' potential unwillingness to voluntarily provide their principal owners' ethnicity, race, and sex information by providing further clarification as to the requirement that an institution maintain procedures to collect applicant-provided data at a time and in a manner that are reasonably designed to obtain a response under final § 1002.107(c). For example, final § 1002.107(c)(2) sets forth minimum criteria when collecting applicant-provided data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response, including seeking to collect such information before notifying an applicant of action taken on a covered application, ensuring that the request for applicant-provided data is prominently displayed or presented, ensuring the collection does not have the effect of discouraging applicants from providing a response, and ensuring that applicants can easily respond to a request for the data. The Bureau also anticipates developing materials to educate small business owners about the small business lending data collection and its purposes, which may impact their willingness to provide demographic information. Further, as discussed in the section-by-section analysis of final appendix E, the sample data collection form will also include language that explains, in plain language, the purpose for the collection of demographic information under the final rule. At this time, the Bureau believes that these measures will improve applicant response rates to the protected demographic information inquiries under the final rule. However, the Bureau will continue to assess whether and what further measures may be needed to improve response rates.

The Bureau's decision not to change the timing for collecting protected demographic information to after a credit decision has been made, as suggested by a commenter, is discussed in the section-by-section analysis of § 1002.107(c).

Verification. Commenters urged the Bureau to provide that financial institutions are not permitted or required to verify the ethnicity, race, or sex of a principal owner and to codify this requirement in the final rule. The Bureau agrees. Final comment 107(a)(19)-9 clarifies that a financial institution may only report an applicant's responses as to its principal owners' ethnicity, race, and sex, even if it verifies or otherwise obtains the information for other purposes.

Reduced demand for traditional credit. The Bureau appreciates some commenters' concerns that inquiries about their principal owners' ethnicity, race, and sex information might discourage small businesses from seeking credit with traditional lenders. The Bureau anticipates that while there may be some period of initial hesitation by small businesses to provide such information, small businesses will become more familiar with the requests for their demographic information over time and such requests will be considered a normal part of the process for seeking business credit. Further, as described at the end of part I above, the Bureau anticipates developing and distributing materials about the final rule directed at small businesses. The Bureau also expects that such materials, by furthering applicant understanding of the 1071 data collection, will ease the compliance burden for financial institutions in implementing the final rule.

Privacy. The Bureau received comments generally expressing concerns that small businesses' owners' demographic information could be used to identify the businesses and their owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with the data and make modification and deletion decisions to the public application-level dataset. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data

before making it public, and intends to continue engage with the public about how to mitigate privacy risk.

With respect to concerns that small business applicants may find the collection of protected demographic information to be an invasion of privacy, in amending ECOA to require the collection of an applicant's principal owners' ethnicity, race, and sex information, Congress implicitly determined that the benefits of collecting such information outweigh any invasion of privacy concerns. Nevertheless, the Bureau notes that it has included sample language in the sample data collection form in appendix E explaining the purpose of the data collection, and, as noted, it anticipates developing materials to further help small businesses understand the purposes of the rule. In addition, the final rule provides safeguards for applicants' protected demographic information by requiring that such information be kept separately from their applications and accompanying information under § 1002.111(b), through the firewall requirement in § 1002.108, and in § 1002.110(e) restricting financial institutions' re-disclosure of protected demographic data to third parties.

Burden and costs for collecting ethnicity, race, sex information. The Bureau appreciates that financial institutions will face some initial costs and burden in implementing the final rule, such as from making changes to its policies, procedures, systems, training programs, and in other areas. However, as noted by one commenter, the Bureau believes that for many financial institutions covered by the final rule, there will be manageable ongoing costs related to the data collection after an initial implementation period.

The Bureau does not believe it would be appropriate to permit financial institutions to report only aggregate data, as opposed to application-level data, as suggested by one commenter. First, the statute clearly contemplates the collection of individual loan-level information. Section 1071's information gathering requirement provides that a financial institution is required to collect and maintain information "in the case of *any* application to a financial institution . . ."

(emphasis added).[688] Further, the statute requires the financial institution to compile and maintain "a record of the information provided by any loan applicant," including loan identifying information such as the number of the application and the date on which the application was received.[689] Given this language, the Bureau believes that Congress intended that financial institutions compile and maintain application-level information and submit the information—compiled in that way—to the Bureau.

Second, the Bureau believes that it is necessary to have specific ethnicity, race, and sex data for individual principal owners to allow assessments of whether there are trends in the data, including for businesses with different amounts of ownership by individuals of certain ethnicities, races, or sex, which cannot be captured through the minority-owned, women-owned, and LGBTQI+-owned business status data points alone. As a result, the Bureau rejects a commenter's suggestion that the Bureau require the collection of only one principal owner's ethnicity, race, and sex information.

Direct reporting to the Bureau or third parties, or use of other data sources. The Bureau is not, at this time, establishing a mechanism by which small businesses might directly submit demographic information to the agency. The Bureau notes, in this respect, that the statute calls for *financial institutions* to collect these data and report them to the Bureau. In addition, the mechanisms described by the statute do not envision the Bureau ever knowing the identity of any small business submitting data, which would occur if small businesses were to file demographic data directly with the Bureau.

However, the final rule does not foreclose industry from developing mechanisms to make demographic data collection and submission more effective or efficient. For example, industry might seek to foster the development of third-party mechanisms that would let financial institutions collect and report demographic information in tokenized form so that they

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[688] ECOA section 704B(b).

[689] ECOA section 704B(e)(2).

themselves do not have access to that demographic data. To the extent that industry stakeholders are interested in the development of such mechanisms in connection with meeting their obligations under the final rule, the Bureau is willing to engage with them on these issues in order to ensure that any such developments ensure appropriate data quality and protection, do not burden or create obligations for applicants, and otherwise accord with the rule and the statute; to the extent necessary and appropriate, the Bureau would also need to adjust certain regulations and technical guidance. In considering appropriate data quality and protection, the Bureau will want to ensure that such a third-party system does not compromise privacy or other important protections or create opportunities for the sale of personal data.

Some commenters suggested that, as opposed to requiring financial institutions to collect and report demographic data, the Bureau should instead use data, for example, that is gathered by other Federal agencies or buy it from outside sources. However, Congress's intent with ECOA section 704B was to require financial institutions to collect demographic information from applicants that would then be reported to the Bureau. Gathering such information from other sources would not be aligned with this intent. Further, the Bureau believes that requiring financial institutions to collect demographic information during the application process will help to ensure comprehensive, nationwide demographic data collection about small business lending, which will in turn help enable the identification of potential discriminatory lending practices and identification of the needs and opportunities of small businesses, including women-owned, minority-owned, and LGBTQI+-owned businesses. Data that have been collected in other contexts and for other purposes, and analyzed pursuant to those agencies' methods for those other purposes, would not achieve what the Bureau believes is necessary to meet section 1071's statutory objectives. Further, some of the approaches suggested by commenters would not be feasible, such as buying data from sources outside of the Federal government, because they do not identify a small business applicant's principal owners. The Bureau also notes that it has

worked with other Federal regulators so that they can tailor data collections in this area to take advantage of data collected under this rule, thereby reducing burden on regulated entities.

Applicant and financial institution education and guidance. With respect to commenters' requests that the Bureau educate and explain the final rule and its requirements to small business applicants, the public, and financial institutions, and to provide translations of the sample data collection form into other languages, the Bureau refers readers to its discussion regarding compliance and technical assistance at the end of part I above. Likewise, the Bureau agrees with commenters that it is important to provide a disclosure to applicants to generally explain the rule and its purpose. Instruction 4 to proposed appendix G would have explained that a financial institution may inform applicants that Federal law requires it to ask for the principal owners' ethnicity, race, and sex to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. In response to comments about the importance of helping applicants to understand the reasons for the data collection,[690] under the final rule financial institutions are required to provide such information (see final comment 107(a)(19)-4); sample language effecting this provision is included on the sample data collection form at appendix E.

Proposed Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau proposed that financial institutions request principal owners' ethnicity and race using both aggregate categories as well as disaggregated subcategories.

With respect to ethnicity data collection, the Bureau proposed using the same aggregate categories (*i.e.*, Hispanic or Latino and Not Hispanic or Latino) and disaggregated subcategories as are used in Regulation C. With respect to race data collection, the Bureau proposed using the same aggregate categories as are used in Regulation C (*i.e.*, American Indian or Alaska Native;

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[690] This was reaffirmed in user testing. *See* CFPB, *User testing for sample data collection form for the small business lending final rule* at app. A (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The Bureau also proposed using the same disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category, as well as with respect to the American Indian or Alaska Native race category, including by inviting an applicant to provide the name of a principal or enrolled tribe. In addition, the Bureau proposed adding disaggregated subcategories for the Black or African American race category, which are not used when collecting data pursuant to Regulation C.

The Bureau explained that OMB has issued standards for the classification of Federal data on ethnicity and race.[691] OMB's government-wide standards provide a minimum standard for maintaining, collecting, and presenting data on ethnicity and race for all Federal reporting purposes. These standards have been developed to provide "a common language for uniformity and comparability in the collection and use of data on ethnicity and race by Federal agencies."[692] The OMB standards provide the following minimum categories for data on ethnicity and race: Two minimum ethnicity categories (Hispanic or Latino; Not Hispanic or Latino) and five minimum race categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White). The aggregate categories for ethnicity and race in Regulation C, which the Bureau proposed to use in the section 1071 final rule, conform to the OMB standards.

The Bureau also explained that in addition to the minimum data categories for ethnicity and race, the OMB's standards provide additional key principles. First, self-identification is the preferred means of obtaining information about an individual's ethnicity and race, except in instances where observer identification is more practical.[693] Second, the collection of greater detail is encouraged as long as any collection that uses more detail is organized in such a way

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[691] Off. of Mgmt. & Budget, *Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity*, 62 FR 58782, 58782-90 (Oct. 30, 1997) (OMB Federal Data Standards on Race and Ethnicity).

[692] *See id.*

[693] *See id.*

that the additional detail can be aggregated into the minimum aggregate categories for data on ethnicity and race. More detailed reporting, which can be aggregated to the minimum categories, may be used at the agencies' discretion. Lastly, Federal agencies must produce as much detailed information on ethnicity and race as possible; however, Federal agencies shall not present data on detailed categories if doing so would compromise data quality or confidentiality standards.[694]

The Bureau noted that although OMB received comments requesting the creation of a separate Arab or Middle Eastern ethnicity category prior to the adoption of the OMB Federal Data Standards on Race and Ethnicity in 1997, OMB accepted the Interagency Committee's recommendation not to include one in the 1997 minimum standards for reporting of Federal data on race and ethnicity. OMB stated that while it was adopting the Interagency Committee's recommendation, it believed additional research was needed to determine the best way to improve data on this population group.[695]

The Bureau further explained that in 2017, OMB requested comment on the Federal Interagency Working Group for Research on Race and Ethnicity's (Working Group's) proposals to update the OMB Federal Data Standards on Race and Ethnicity.[696] The Working Group proposed adding a Middle Eastern or North African classification to the Federal Data Standards on Race and Ethnicity and to issue specific guidelines for the collection of detailed data for American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, Native Hawaiian or Other Pacific Islander, and White groups.[697] The Working Group also considered whether race and ethnicity should be collected using separate questions versus a combined question. The OMB Federal Data Standards on Race and Ethnicity have not been updated, however, in the time since OMB's 2017 request for comment.

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[694] *See id.*

[695] *Id.* at 58782.

[696] 82 FR 12242 (Mar. 1, 2017).

[697] *See* OMB Federal Data Standards on Race and Ethnicity.

The Bureau stated its belief that it is also important to consider the data standards that the U.S. Census Bureau (Census Bureau) uses in the Decennial Census. The definition of Hispanic or Latino origin used in the 2010 and 2020 Census questionnaire refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.[698] The 2010 and 2020 Census disaggregated the Hispanic or Latino ethnicity into four categories (Mexican, Mexican American, or Chicano; Puerto Rican; Cuban; and Another Hispanic, Latino or Spanish origin) and included an area where respondents could provide (*i.e.*, write in) a specific Hispanic, Latino, or Spanish origin group as additional information.[699]

The Bureau explained that the 2010 and 2020 Census questionnaires listed three of OMB's five aggregate race categories (American Indian or Alaska Native; Black or African American; and White). Although the questionnaires do not list the aggregate race categories for Asian or for Native Hawaiian or Other Pacific Islander, they do list the related disaggregated subcategories for the Asian race category (*i.e.*, Asian Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, Other Asian), and for the Native Hawaiian and Other Pacific Islander race category (*i.e.*, Native Hawaiian, Chamorro,[700] Samoan, Other Pacific Islander). These questionnaires also included three areas where respondents could write in a specific race: a specific Other Asian race, a specific Other Pacific Islander race, or the name of an enrolled or principal tribe in the American Indian or Alaska Native category.[701] Additionally, the 2020 Census allowed respondents to write in a specific origin for the White category and for the Black or African American category. For respondents who did not identify with any of the five minimum OMB race categories, the Census Bureau included a sixth race category—Some Other

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[698] *See* U.S. Census Bureau, *2010 Official Questionnaire*, https://www.census.gov/history/pdf/2010questionnaire.pdf (2010 Census Official Questionnaire), and U.S. Census Bureau, *2020 Official Questionnaire*, https://www2.census.gov/programs-surveys/decennial/2020/technical-documentation/questionnaires-and-instructions/questionnaires/2020-informational-questionnaire.pdf (2020 Census Official Questionnaire).

[699] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

[700] The questionnaire for the 2010 Census included "Guamanian or Chamorro," but the questionnaire for the 2020 Census included only "Chamorro."

[701] *See* 2010 Census Official Questionnaire and 2020 Census Official Questionnaire.

Race—on the 2010 and 2020 Census questionnaires. Respondents could also select one or more race categories and write-in options.[702]

The Bureau noted that on February 28, 2017, the Census Bureau released its *2015 National Content Test: Race and Ethnicity Analysis Report*. This National Content Test provided the U.S. Census Bureau with empirical research to contribute to the planning for the content of the 2020 Census' race/ethnicity questions. The report presented findings to the Census Bureau Director and executive staff on research conducted to assess optimal design elements that could be used in question(s) on race and ethnicity. It noted that Americans view "race" and "ethnicity" differently than in decades past and that a growing number of people find the current race and ethnicity categories confusing, or they wish to see their own specific group reflected on the Census questionnaire. The National Content Test's research found that there have been a growing number of people who do not identify with any of the official OMB race categories, and that an increasing number of respondents have been racially classified as "Some Other Race." This was primarily because of reporting by Hispanics who did not identify with any of the OMB race categories, but it also noted that segments of other populations, such as Afro-Caribbean and Middle Eastern or North African populations, did not identify with any of the OMB race categories.[703] The 2015 National Content Test: Race and Ethnicity Analysis Report concluded that optimal design elements that may increase reporting, decrease item non-response, and improve data accuracy and reliability include: (1) a combined race and ethnicity question with detailed checkbox options; (2) a separate "Middle Eastern or North African" response category; and (3) instructions to "Mark all that apply" or "Select all that apply" (instead of "Mark [X] one or more boxes").[704]

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[702] *See id.*

[703] U.S. Census Bureau, *2015 National Content Test: Race and Ethnicity Analysis Report, Executive Summary*, at ix (Feb. 28, 2017), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf.

[704] *Id.* at 83-85.

The Census Bureau did not ultimately incorporate these design elements into the questionnaire for the 2020 Decennial Census, but instead continued to ask about ethnicity and race in two separate questions. While the questionnaire did not provide detailed check box options for the White race category or for the Black or African American race category, the questionnaire did add write-in options and noted examples. For White, it noted examples of German, Irish, English, Italian, Lebanese, and Egyptian. For Black or African American, it noted examples of African American, Jamaican, Haitian, Nigerian, Ethiopian, and Somali.[705] Notwithstanding the approach used by the Census Bureau for the 2020 Decennial Census, the Bureau requested comment on whether the approach and design elements set forth in the *2015 National Content Test: Race and Ethnicity Report Analysis* (whether in whole or in part) would improve data collection that otherwise furthers section 1071's purposes, improve self-identification of race and ethnicity by applicants and response rates, or impose burdens on financial institutions collecting and reporting this information.

The Bureau proposed that financial institutions must permit applicants to provide a principal owner's ethnicity and race using the aggregate categories used for HMDA data collection, which conform to the OMB standards. The Bureau believed that aligning the aggregate ethnicity and race categories for this rule's data collection with the HMDA data collection would promote consistency and could reduce potential confusion for applicants, financial institutions, and other users of the data.

The Bureau also proposed that applicants must be permitted to provide a principal owner's ethnicity and race using the disaggregated subcategories used in HMDA data collection, which also conform to one of the key principles in the OMB standards: encouraging the collection of greater detail as long as any collection that uses more detail is organized in such a way that the additional detail can be aggregated into the minimum aggregate categories for data

[705] *See* 2020 Census Official Questionnaire.

on ethnicity and race. With respect to ethnicity data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's ethnicity using the disaggregated subcategories used in HMDA data collection. For race data collection, the Bureau proposed that applicants must be permitted to provide a principal owner's race using the disaggregated subcategories for the Asian race category and the Native Hawaiian or Other Pacific Islander race category. The Bureau also proposed that applicants must be permitted to provide a principal owner's race using disaggregated subcategories for the Black or African American race category, which is not currently used in HMDA data collection. Lastly, similar to HMDA, the Bureau proposed inviting an applicant to provide the name of a principal or enrolled tribe for each principal owner with respect to the American Indian or Alaska Native race category.

The Bureau explained that it was proposing use of disaggregated subcategories for this rulemaking, in part, for general consistency with existing HMDA reporting requirements. Further, collection and reporting using disaggregated subcategories could be beneficial when attempting to identify potential discrimination or business and community development needs in particular communities. While disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred, disaggregated data on ethnicity and race may help identify potentially discriminatory lending patterns in situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau noted that additionally, as suggested in the 2015 National Content Test: Race and Ethnicity Report Analysis, the use of disaggregated subcategories may increase response rates.

The Bureau acknowledged, however, that including the disaggregated subcategories for four principal owners may make data collection more difficult in certain situations, such as for applications taken solely by telephone or for paper applications taken at retail locations. Given these concerns, the Bureau sought comment on whether an accommodation should be made for

certain application scenarios, for example by permitting financial institutions to collect ethnicity and race information using only the aggregate categories or to permit financial institutions to collect ethnicity, race, and sex information on only one principal owner in those scenarios. The Bureau also noted that FinCEN's customer due diligence rule excludes from certain of its requirements point-of-sale transactions for the purchase of retail goods or services up to a limit of $50,000.[706] The Bureau did not propose this approach given the different purposes and requirements of the customer due diligence rule (as well as FinCEN's related customer identification program rule)[707] and section 1071. Nonetheless, the Bureau sought comment on whether covered applications taken at retail locations, such as credit cards and lines of credit with a credit limit under a specified amount (such as $50,000), should be excepted from some or all of the requirement to obtain principal owners' ethnicity, race, and sex information.

The Bureau also sought comment on its proposed use of the HMDA aggregate categories, the HMDA disaggregated subcategories (including the ability to provide additional information if an applicant indicates that a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander), and the proposed addition of disaggregated subcategories for the Black or African American category. Additionally, the Bureau sought comment regarding whether it would be helpful or appropriate to provide additional clarification or to pursue a different approach regarding the ability of a principal owner to identify as Other Hispanic or Latino, Other Asian, or Other Pacific Islander or to provide additional information if a principal owner is Other Hispanic or Latino, Other Asian, or Other Pacific Islander. The Bureau also sought comment on

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[706] 31 CFR 1010.230(h)(1)(i). The customer due diligence rule's exclusion for certain point of sale transactions is based on the "very low risk posed by opening such accounts at [a] brick and mortar store." Fin. Crimes Enf't Network, U.S. Dep't of Treas., *Guidance: Frequently Asked Questions Regarding Customer Due Diligence Requirements for Financial Institutions*, at Q 29 (Apr. 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

[707] FinCEN's customer identification program rule does not contain a point of sale exclusion. While the rule permits *verification* of customer identity information within a reasonable time after an account is opened, the *collection* of required customer information must occur prior to account opening. *See* 31 CFR 1020.220(a)(2)(i)(A) and (ii). For credit card accounts, a bank may obtain identifying information about a customer from a third-party source prior to extending credit to the customer. 31 CFR 1020.220(a)(2)(i)(C).

whether any additional or different categories or subcategories should be used for section 1071 data collection, and whether the collection and reporting of ethnicity and race should be combined into a single question for purposes of section 1071 data collection and reporting. The Bureau further sought comment on whether an additional category for Middle Eastern or North African should be added and, if so, how this category should be included and defined. In addition, the Bureau sought comment on whether disaggregated subcategories should be added for the aggregate White category, and if so, what disaggregated subcategories should be added and whether the applicant should be permitted to write in or otherwise provide other disaggregated subcategories or additional information. The Bureau also sought comment on whether the approach and design elements set forth in the 2015 National Content Test: Race and Ethnicity Report Analysis would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for financial institutions collecting and reporting this information. Finally, the Bureau sought comment on whether, similar to data collection pursuant to Regulation C, financial institutions should be limited to reporting a specified number of aggregate categories and disaggregated subcategories and, if so, whether such a limitation should be described in the sample data collection form.

Proposed comments 107(a)(20)-6 and -7 would have provided guidance on collecting and reporting ethnicity and race information, respectively. The proposed comments would have explained that applicants must be permitted to provide a principal owner's ethnicity or race using aggregate categories and disaggregated subcategories and would have also listed the aggregate categories and disaggregated subcategories that applicants must be permitted to use. The proposed comments would have also explained that applicants must be permitted to select one, both, or none of the aggregate categories and as many disaggregated subcategories as the applicant chooses, even if the applicant does not select the corresponding aggregate category. The proposed comments would have stated that, if an applicant provides ethnicity or race information for a principal owner, the financial institution reports all of the aggregate categories

and disaggregated subcategories provided by the applicant, and the proposed comments would have provided examples. The proposed comments would have stated that a financial institution must also permit the applicant to refuse to provide ethnicity or race information for one or more principal owners and explain how a financial institution reports ethnicity or race information if an applicant declines to provide the information or fails to respond. Finally, the proposed comments would have explained how a financial institution reports ethnicity or race information if an applicant has fewer than four principal owners, and they would have provided examples.

Comments Received—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

The Bureau received comments from a range of commenters, including lenders, trade associations, community groups, and a business advocacy group, on its proposal to collect ethnicity and race using aggregate categories and disaggregated subcategories.

Several banks and a group of trade associations opposed the proposal to collect ethnicity and race information using disaggregated subcategories. Specifically, these commenters asserted that the disaggregated subcategories do not add value to fair lending reviews or findings in the HMDA context because there is not enough disaggregated subcategory data from which to draw fair lending conclusions, as mortgage applicants do not often use the disaggregated subcategories. Thus, they said, disaggregated subcategories should not be adopted for this data collection. The group of trade associations also stated that the Bureau's analysis of 2018 HMDA data shows that mortgage applicants largely selected one ethnicity or race field and asserted that the Bureau has not shown that small business credit applicants are likely to behave differently. A small business owner also objected to the Bureau's proposal on the grounds that applicants would not report the ethnicity and race of their principal owners accurately and, if faced with a long list of categories, would choose not to report. This commenter also asserted that the Bureau's proposal does not align with other government data collections and would hinder data analysis.

Two of those banks and the group of trade associations also objected on the grounds that collecting disaggregated data in the HMDA context has been burdensome and frustrating for applicants and lenders. The trade associations also argued that including disaggregated subcategories would impose more burden than under Regulation C because ethnicity and race data would need to be collected for up to four principal owners under the Bureau's proposal, whereas it would generally be collected for only one or two applicants for the HMDA data collection. This commenter also emphasized that for ethnicity and race data collection under Regulation C, financial institutions are required to read aloud all of the ethnicity and race disaggregated subcategories when taking a mortgage application over the phone, which the commenter asserted has been frustrating for mortgage applicants and would likely be frustrating for small business applicants as well.

The group of trade associations and a bank further argued for use of only the aggregate categories currently used in Regulation C and the OMB Federal Data Standards on Race and Ethnicity, without any new aggregate or disaggregated categories. As discussed above regarding general comments about the Bureau's proposal for collecting ethnicity, race, and sex, the Bureau also received some comments requesting that demographic information collection generally (including on race and ethnicity) for this rule should be the same, or similar to the greatest extent possible, as for Regulation C.

In contrast, many community groups and a minority business advocacy group, as well as some industry commenters, generally supported collecting ethnicity and race using aggregate categories and disaggregated subcategories as proposed by the Bureau. These commenters stated that collecting detailed, disaggregated ethnicity and race data on small business applicants' owners, and particularly for those of color, will over time provide transparency as to the different experiences of racial and ethnic subgroups in the small business lending marketplace, further fair lending enforcement, and support the objectives of section 1071. Several commenters emphasized that disaggregated data will help capture potential discrimination and allow for

targeted support. One stated that the proposal will add nuance to fair lending assessments and that aggregate racial and ethnic categories mask economic disparities and differences in social capital and experiences.

Many of these commenters highlighted that HMDA data has revealed that racial and ethnic subgroups have different experiences in the home buying market. These commenters argued that, similarly, disaggregated ethnicity and race data are necessary to allow assessments in the small business lending marketplace. Several of these commenters specifically noted that research based on 2019 HMDA data shows that Asian American and Pacific Islander communities and Hispanic/Latino subgroups fare differently in the mortgage market. One commenter noted, as an example of different experiences, that participants in its homebuying seminars have stated that language barriers often create difficulties in the home buying process. Other commenters noted the importance of disaggregated data for business lending specifically, generally citing findings in the Federal Reserve Banks' *Small Business Credit Survey: 2021 Report on Employer Firms* that firms owned by people of color were less likely to receive the full of amount financing sought than white-owned businesses.

Some commenters stated that they supported the Bureau's proposed approach of generally aligning with HMDA's aggregate categories and disaggregated subcategories for ethnicity and race and also adding new disaggregated subcategories. Two commenters affirmed that the HMDA ethnicity and race categories and subcategories are also relevant for small business lending. A lender commented that this approach will reveal different experiences in the small business lending market, but also provide familiar reporting standards. Another lender stated that aligning many of the ethnicity and race categories with those for HMDA would promote consistency and reduce confusion. One community group stated that based on the HMDA experience, it anticipates that applicants will not have difficulty understanding the information being requested regarding race as long as the sample form is clear for both lenders and applicants to follow.

Many commenters also supported the specific ethnicity and race aggregate categories and disaggregated subcategories proposed. Some called out their support for particular groups of disaggregated subcategories, for example for the Hispanic/Latino population, Asian, and Native Hawaiian or Other Pacific Islander aggregate categories. Some commenters noted that none of these communities are monoliths and different subgroups have different experiences in seeking credit. One commenter made a similar statement regarding African American and African immigrant communities in the residential mortgage context.

A community group operating in New York City suggested adding certain subgroups listed as examples in the Other Latino or Hispanic disaggregated ethnicity subcategory and in the Other Asian disaggregated race subcategory. The community group suggested adding an ethnicity subcategory for Dominican, because in New York City Dominicans make up a larger percentage of the population than Puerto Ricans, one of the proposed disaggregated ethnicity subcategories. The commenter also suggested adding Colombian, Ecuadorian, and Honduran disaggregated ethnicity subcategories. This commenter further suggested adding Bangladeshi and Pakistani disaggregated race subcategories, under the Asian aggregate race category, stating that these populations make up 6 percent and 8 percent, respectively, of the Asian population in New York City.

Many commenters expressed specific support for the proposed disaggregated Black or African American race subcategories. One commenter stated that there are distinct differences in the experiences and treatment of different subgroups and that many of these subgroups have tight-knit communities and thus it is important that this data collection captures such nuances, and another stated that disaggregation generally has proven to have value in the HMDA context.

Regarding the American Indian or Alaska Native aggregate race category, several commenters supported the Bureau's proposal to include a write-in text field for an applicant to name a principal owner's enrolled or principal tribe, though some also were concerned that there

would be insufficient information on indigenous small business owners as a result of small sample sizes, which could mask the credit needs of that community.

Some commenters supported adding an additional category for Middle Eastern or North African in the final rule, in response to the Bureau's request for comment. One commenter stated that individuals of Middle Eastern or North African descent are often left with little choice but to select White as their race, despite a long history of discrimination in the United States, and that adding this category would meet the spirit of section 1071. Several other commenters stated that a Middle Eastern or North African category should be added to capture discrimination against and barriers for applicants of Middle Eastern or North African descent. A couple of commenters suggested that North African and Middle Eastern could be addressed as its own category or as disaggregated subcategories. However, a group of trade associations argued against the proposal for a Middle Eastern or North African category, noting that OMB never finalized its proposal to include such a category in its Federal standards on race and ethnicity.

Regarding disaggregated ethnicity and race categories generally, a joint letter from community groups and business advocacy groups suggested that the Bureau provide in the final rule that the ethnicity and race categories will be maintained and updated in alignment with OMB's standards and that the specifications will be adjusted in filing instructions that the Bureau issues from time to time.

Several commenters responded to the Bureau's request for comment on whether to combine the proposed questions about ethnicity and race. These commenters did not support combining the questions. A group trade associations noted that while the Census Bureau's *2015 National Content Test: Race and Ethnicity Report Analysis* showed that many individuals that select Hispanic or Latino as their ethnicity do not make any race selections because they do not identify with the aggregate race categories, the race and ethnicity questions were ultimately not combined for 2020 Decennial Census. The commenter also reiterated that the questions are separate for HMDA data collection purposes, and stated that the same approach should be used

for this rule to maintain consistency across data collection rules and with the Census Bureau's approach, reduce burden for financial institutions, and facilitate data analyses.

One commenter urged the Bureau to allow applicants to provide an additional disaggregated subcategory in addition to those specified in the proposal beside "other" in a text field in the same manner that American Indian or Alaska Natives can identify tribal affiliation. The commenter stated this would allow applicants to write in responses such as Nicaraguan or Hmong that may provide important additional information for fair lending enforcement.

A bank asserted that for the ethnicity and race data collection under Regulation C, when applicants select a disaggregated ethnicity or race subcategory, the selection prevents the applications from being associated with the corresponding aggregate category. The commenter stated that this issue impacts how some lenders' application and origination performance with specific communities appears and urged the Bureau to fix the issue in the Regulation C data collection and ensure it is not replicated for the section 1071 data collection.

Final Rule—Collecting Ethnicity and Race Using Aggregate Categories and Disaggregated Subcategories

For the reasons set forth herein, the Bureau is finalizing its proposal to collect information about the ethnicity and race of principal owners using aggregate categories and disaggregated subcategories generally as proposed. However, the Bureau has revised the commentary related to the collection of ethnicity and race data to reduce repetition among the appendices and the commentary and to reflect other changes, as explained below.

The Bureau agrees with commenters that the disaggregated ethnicity and race subcategories will provide meaningful data that will further section 1071's purposes. Such data will be beneficial in identifying potential discrimination or business and community development needs in particular communities, including by providing insight into variations in borrowing experiences by ethnicity and race across the small business lending marketplace, even if not all applicants make ethnicity or race disaggregated subcategory selections. For example, in

the HMDA context, the Bureau has used disaggregated race data collected under Regulation C to find that some Asian American and Pacific Islanders subgroups fare better than others in the mortgage market.[708] Other data users have been able to draw conclusions and make policy recommendations to address differences and disparities in home lending among subgroups in the Hispanic or Latino community using disaggregated HMDA subcategories.[709] The Bureau believes that disaggregated ethnicity and race data in the section 1071 data collection will similarly advance section 1071's purpose in enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of businesses with owners that are members of ethnic and racial subgroups, regardless of whether those businesses meet the definition of a minority-owned small business.

With respect to the fair lending enforcement purpose of section 1071, the Bureau recognizes that disaggregated data may not be useful in analyzing potential discrimination where financial institutions do not have a sufficient number of applicants or borrowers within particular subgroups to permit reliable assessments of whether unlawful discrimination may have occurred. However, the Bureau believes there will be—as has proven to be the case in the HMDA data—situations in which the numbers are sufficient to permit such fair lending assessments. The Bureau also believes that the use of disaggregated subcategories may increase ethnicity and race response rates by small business applicants. Requiring the collection of disaggregated race and ethnicity data also follows a key principle set forth in the OMB Federal Data Standards on Race and Ethnicity to encourage applicants to self-identify their principal owners' race and ethnicity, by providing more inclusive options for applicant self-reporting.[710]

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[708] Bureau of Consumer Fin. Prot., *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf.

[709] *See* Agatha So *et al.*, Nat'l Cmty. Reinvestment Coal., *Hispanic Mortgage Lending: 2019 HMDA Analysis* (2019), https://www.ncrc.org/hispanic-mortgage-lending-2019-analysis/.

[710] *See* 62 FR 58782, 58789 (Oct. 30, 1997).

The Bureau is not, at this time, adding additional disaggregated ethnicity and race subcategories beyond those set forth in the NPRM. While one commenter suggested adding a few disaggregated ethnicity and race categories, such suggestions were based on the demographics of a specific city and it is unclear whether they would provide useful data in a nationwide data collection. The Bureau notes that if an applicant's principal owner does not clearly identify with any of the listed disaggregated ethnicity or race subcategories associated with a specific aggregate ethnicity or race category, many of the aggregate ethnicity and race categories have an associated "Other" disaggregated subcategory (*e.g.*, "Other Hispanic or Latino," "Other Asian," "Other Black or African American," and "Other Pacific Islander") that give the applicant opportunities to provide a specific subcategory not listed or otherwise provide additional ethnicity or race information.[711]

The Bureau also is not adding a separate, disaggregated subcategory for applicants to write in ethnicity or race information, as suggested by a commenter. The Bureau recognizes that some applicants may not clearly identify with the Bureau's designated ethnicity and race aggregate categories and disaggregated subcategories, despite the "Other" disaggregated ethnicity and race subcategories associated with the aggregate ethnicity and race categories in the final rule. The Bureau also notes that the 2020 Decennial Census and the Census Bureau's American Community Survey include a separate "Some Other Race" category, which provided respondents with the ability to write in additional information.[712] However, the Census Bureau's use of this race category is statutorily required and the best practice for Federal agencies is to not include a "Some Other Race" category unless required by law.[713] The Bureau believes it is

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[711] The exceptions are the "American Indian or Alaska Native" aggregate race category, which provides applicants with an opportunity to write in or provide additional information about their principal owner's enrolled or principal tribe, the "Not Hispanic or Latino" aggregate ethnicity category, and the "White" aggregate race category.

[712] *See* 2020 Census Official Questionnaire; 2022 American Community Survey Questionnaire.

[713] *See* Chief Statistician of the U.S., *Flexibilities and Best Practices for Implementing the Office of Management and Budget's 1997 Standards for Maintaining, Collecting, And Presenting Federal Data on Race and Ethnicity (Statistical Policy Directive No. 15)*, n.32 (July 2022) (citing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. 109-108, tit. II, 119 Stat. 2289, 2308-09 (2005)),

important that the race and ethnicity information be capable of being aggregated to or associated with the five OMB aggregate categories for race and the two aggregate categories for ethnicity in the OMB Federal Data Standards on Race and Ethnicity to facilitate the Bureau's and others' ability to analyze and use the collected data. As noted above, applicants will be able to use the associated "Other" disaggregated subcategories associated with many of the aggregate race and ethnicity categories to provide their principal owners' information and, as clarified by final comments 107(a)(19)-13 and -14, will also be able to make multiple selections for their principal owners' race and/or ethnicity to accurately reflect their racial and ethnic identities.

The Bureau likewise is not combining the questions about ethnicity and race at this point in time. Commenters generally did not support or did not state a position on combining the ethnicity and race questions. The Bureau notes that the 2020 Decennial Census and the 2022 American Community Survey also do not combine the questions.[714]

Some commenters expressed concern that the Bureau's proposal for the American Indian or Alaska Native aggregate race category, which does not have specifically listed disaggregated subcategories but permits applicants to write in the name of a principal owner's enrolled or principal tribe, would lead to small sample sizes and thus insufficient information to make assessments about indigenous small business owners and those communities. At this time, the Bureau is not making any changes to its approach for the American Indian or Alaska Native aggregate race category. The Bureau notes that the Census Bureau's 2020 Decennial Census and 2022 American Community Survey similarly listed American Indian or Alaska Native as an aggregate race category, do not list specific disaggregated subcategories, and ask respondents to "Print [the] name of enrolled or principal tribe(s)" along with suggested write-in options.[715] As

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https://www.whitehouse.gov/wp-content/uploads/2022/07/Flexibilities-and-Best-Practices-Under-SPD-15.pdf; *id.* at 8-9.

[714] The 2020 Decennial Census and the 2022 American Community Survey both ask separate questions for Hispanic, Latino, or Spanish origin, and for race. *See* 2020 Census Official Questionnaire; U.S. Census Bureau, *2022 American Community Survey Questionnaire*, https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2022/quest22.pdf.

[715] *See* 2020 Census Official Questionnaire; U.S. Census Bureau, 2022 American Community Survey Questionnaire.

explained in the 2015 National Content Test: Race and Ethnicity Race Report Analysis, there are hundreds of American Indian and Alaska Native tribes, villages, and groups, and checkboxes for the largest groups would only represent a small percentage of the American Indian and Alaska Native population.[716] Given this research, the Bureau believes that its approach to the American Indian or Alaska Native aggregate race category is appropriate and is thus not including a list of suggested write-in examples at this time.

The Bureau has also decided against specifically collecting data on Middle Eastern or North African populations at this point in time, whether as an aggregate ethnicity or race category, a disaggregated ethnicity or race subcategory, or through some other inquiry, due to uncertainty about how a Middle Eastern or North African category should be defined. As detailed in the NPRM, the Census Bureau and OMB have considered, over the course of years, whether to include a separate Arab or North African, or alternatively Middle Eastern or North African, classification in the Decennial Census and the Federal Data Standards on Race and Ethnicity.[717] But, despite a 2017 recommendation by a Federal interagency working group to add such a classification to the OMB Federal Data Standards on Race and Ethnicity, the standards have not been updated. And, although it was recommended in the 2015 National Content Test: Race and Ethnicity Report Analysis that a separate Middle Eastern or North African classification be adopted for the 2020 Decennial Census, no Middle Eastern or North African classification was included due to questions about whether the information should be collected as an ethnicity or race category.[718] Given the unsettled nature of how to best collect information

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[716] 2015 National Content Test: Race and Ethnicity Report Analysis, at 52 ("[W]e know from Census Bureau research that there are hundreds of very small detailed [American Indian and Alaska Native] tribes, villages, and indigenous groups for which Census Bureau data is collected and tabulated, and if we were to employ the six largest American Indian groups and Alaska Native groups as checkboxes, they would represent only about 10 percent of the entire AIAN population.").

[717] 62 FR 58782 (Oct. 30, 1997); 82 FR 12242 (Mar. 1, 2017).

[718] Hansi Lo Wang, *No Middle Eastern or North African Category on the 2020 Census, Bureau Says*, Nat'l Pub. Radio (Jan. 29, 2018), https://www.npr.org/2018/01/29/581541111/no-middle-eastern-or-north-african-category-on-2020-census-bureau-says. *See also* U.S. Census Bureau, 2015 NCT, at xiii, 84-85.

The Bureau notes that after the NPRM was published, the U.S. Department of the Treasury published an interim final rule in March 2022 related to data collection for its State Small Business Credit Initiative (SSBCI) program,

about Middle Eastern and North African populations, the Bureau is not including a separate classification for Middle Eastern or North African at this point in time. The Bureau notes, however, that OMB is currently in the process of reviewing and revising the standards for collecting data on race and ethnicity for the Federal government and may revise the standards by the summer of 2024.[719] The Bureau will be reviewing OMB's efforts and other developments that may arise in the area of ethnicity and race data collection and measurement.

The Bureau is not committing at this time to updating the rule's ethnicity and race aggregate categories and disaggregated subcategories to align with future changes to OMB Federal Data Standards on Race and Ethnicity. First, the data points the Bureau is finalizing under § 1002.107(a)(18) and (19), regarding minority-owned business status and the ethnicity and race of principal owners, are statutorily mandated. Second, the Bureau notes that the OMB Federal Data Standards on Race and Ethnicity establish only minimum standards for the collection of race and ethnicity information, which the data collection under Regulation C already expands upon.[720] Third, it is unknown what the changes to the Federal standards will be and whether the collection of information based on any revised race and ethnicity aggregate categories and/or disaggregated subcategories would further the purposes of section 1071. The Bureau, however, will track forthcoming developments as to the Federal government's standards for the collection of race and ethnicity information. Regarding updates to data point response options, see final comment 107(a)-4.

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which establishes that recipients of SSBCI funding must maintain and submit information about small business program beneficiaries' principal owners' Middle Eastern or North African ancestry, through a separate ancestry question. U.S. Dep't of Treas., *State Small Business Credit Initiative; Demographics-Related Reporting Requirements*, 87 FR 13628 (Mar. 10, 2022).

[719] Off. of Mgmt. & Budget, *Initial Proposals for Updating OMB's Race and Ethnicity Statistical Standards*, 88 FR 5375 (Jan. 27, 2023). Proposals and questions for which OMB is soliciting comment include collecting race and ethnicity information using one combined question, adding a Middle Eastern or North African minimum reporting category, requiring the collection of detailed race and ethnicity categories by default, and certain updates to terminology, among others.

[720] As explained by the Bureau in 2015, the race and ethnicity disaggregated subcategories under Regulation C go beyond the minimum categories set forth in the OMB Federal Data Standards on Race and Ethnicity by adding subpopulations used in the 2000 and 2010 Decennial Census. *See* 80 FR 66128, 66190 (Oct. 28, 2015).

As supported by some commenters, the Bureau believes it is important to collect information about principal owners that identify with subgroups within the Black or African American community, particularly as the Black or African American community in the United States diversifies. The Bureau does not believe it is necessary to use the exact same aggregate categories and disaggregated subcategories for ethnicity and race as are used for data collection under Regulation C (which would preclude the Black or African American race disaggregated subcategories), as suggested by some commenters. Certainly, the Bureau's experience with ethnicity and race data collection under HMDA informed the Bureau's considerations for its proposals and for this final rule. However, although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, Regulation C and this final rule are authorized under different statutes and for different markets. The Bureau believes that the added Black or African American race disaggregated subcategories it proposed and is finalizing will provide additional information that will further the purposes of section 1071, as explained below.

According to a Pew Research Center report, while 4.6 million, or one in ten, Black individuals in the United States were born in a different country in 2019, it is projected that by 2060 the number will increase to 9.5 million, or more than double the current level.[721] Within this changing demographic, there are socio-economic differences between Black immigrant-headed households and other immigrant households in the United States, between Black immigrant-headed households and U.S.-born Black American headed- households, and among Black immigrant-headed households by region of origin. For example, the report found that in 2019, poverty rates within the Black immigrant population vary by region, with fewer than one-in-five African-born (16 percent) and Central American- or Mexican-born Black immigrants (16 percent) living below the poverty line, and 11 percent and 12 percent of Caribbean- and

[721] Christine Tamir & Monica Anderson, Pew Rsch. Ctr., *One-in-Ten Black People Living in the U.S. Are Immigrants*, at 7 (Jan. 20, 2022), https://www.pewresearch.org/race-ethnicity/wp-content/uploads/sites/18/2022/01/RE_2022.01.20_Black-Immigrants_FINAL.pdf.

South American-born Black immigrants, respectively.[722] The Bureau is not collecting immigrant status as part of the section 1071 data collection. However, this research indicates to the Bureau that there could be important distinctions between subgroups of the Black or African American communities in the small business lending marketplace. The Bureau believes that the collection of information about small businesses whose principal owners identify among the Black or African American subgroups will allow it and others to better understand if there are distinct differences in patterns in lending to small businesses with owners in these subgroups and help fulfill the fair lending enforcement and business and community development purposes of section 1071.

Based on its experience with Regulation C, the Bureau believes that after some initial burden to implement the ethnicity and race reporting requirements, there should be minimal ongoing burden for financial institutions related to the collection and reporting of applicants' self-provided responses regarding their principal owners' aggregate category and disaggregated subcategory ethnicity and race selections. However, the Bureau acknowledges the concern raised by one commenter that, unlike in mortgage transactions where generally there are only up to two applicants, under the Bureau's proposal, ethnicity and race information could be collected for up to four principal owners. The commenter generally noted that because of this potential for an applicant to have up to four principal owners, for applications taken over the phone, it could be frustrating for applicants and financial institution employees and officers to read all of the ethnicity and race aggregate categories and disaggregated subcategories out loud, as is currently the practice under Regulation C. In consideration of this issue, the Bureau has added a comment to provide clarification for collecting ethnicity and race information orally, such as over the phone. Final comment 107(a)(19)-16 generally clarifies that when collecting ethnicity and race information orally, the financial institution is not required to read aloud every disaggregated

[722] *See id.* at 28-31.

ethnicity and race subcategory. Instead, a financial institution will be able to orally present the lists of aggregate ethnicity and race categories, followed by the disaggregated subcategories (if any) associated with the specific aggregate ethnicity or race categories selected or requested to be heard by the applicant. Comment 107(a)(19)-16 will also clarify, among other things, that after the applicant has made its selection(s) (if any), the financial institution must also ask if the applicant wishes to hear any other lists of disaggregated subcategories. The comment also provides that the financial institution may not present the applicant with the option to decline to provide ethnicity or race information without also presenting the applicant with the specified ethnicity or race aggregate categories and disaggregated subcategories. Comment 107(a)(19)-16 also generally provides that if an applicant has more than one principal owner, a financial institution will have the flexibility to ask for the principal owners' ethnicity and race information in a way that reduces repetition.

With regard to one commenter's request that the Bureau ensure that an applicant's selection of a disaggregated ethnicity or race subcategory does not prevent the application from being associated with the corresponding aggregate ethnicity or race category, the Bureau does not anticipate that the commenter's concern will be an issue for the 1071 data collection. The Bureau also notes that the commenter's issue is not present for reporting under Regulation C, as stated by the commenter. When reporting an applicant's disaggregated ethnicity or race subcategory selections under Regulation C, the aggregate ethnicity or race category is disclosed in the derived aggregate ethnicity or race field in the publicly released data. To the extent the commenter is referring to a concern about how an applicant may select a disaggregated ethnicity or race subcategory, without also selecting the associated aggregate category, the Bureau believes that allowing applicants to make such a selection and requiring a financial institution to report that selection as it was made, and recognizes that individuals may have varying racial and ethnic identities.

To further this goal, final comment 107(a)(19)-1 states that financial institutions report responses as provided by applicants. Generally, this is the case even if they contain obvious discrepancies and inaccuracies.[723] Upon further review, however, the Bureau has revised the commentary for final § 1002.107(a)(19) to clarify that if an applicant provides additional ethnicity or race information in a write-in field on a paper or electronic data collection form but does not select (*e.g.*, by a check mark on a paper form) the corresponding "Other" disaggregated subcategory (*e.g.*, "Other Hispanic or Latino," "Other Asian," "Other Black or African American," and "Other Pacific Islander"), the financial institution is permitted, but not required, to report the corresponding "Other" ethnicity or race disaggregated subcategory as well. Similarly, if an applicant provides the name of an enrolled or principal tribe but does not also indicate that the principal owner is American Indian or Alaska Native on a paper or electronic data collection form, the financial institution is permitted, but not required, to report American Indian or Alaska Native as well. This change aligns with the similar instruction regarding such situations in Regulation C.[724]

The Bureau has also made changes to the commentary specifically regarding the collection of ethnicity and race information to incorporate unique content from the instructions for collecting ethnicity and race information in proposed appendix G, which the Bureau is removing from the final rule, as explained earlier in this section-by-section analysis.[725] These changes include updated numbering, added references to the sample data collection form at final appendix E, and further clarification regarding applicability of the instructions when ethnicity and race information is requested on a paper or electronic data collection form, versus orally

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[723] The Bureau notes that comment 107(a)(19)-8 provides clarification that in the specific situation where an applicant both provides a substantive response to a request for a given principal owner's ethnicity, race, or sex (by identifying the principal owner's race, ethnicity, or sex) and also indicates that it does not wish to provide the information (*e.g.*, by selecting an option that states "I do not wish to provide this information" or similar), the financial institution reports the substantive response provided by the applicant (rather than reporting that the applicant responded that it did not wish to provide the information).

[724] *See, e.g.*, 12 CFR part 1002, appendix B, instruction 9.ii.

[725] These comments were proposed comments 107(a)(20)-6 and 107(a)(20)-7. These proposed comments generally correspond with final comments 107(a)(19)-13 and 107(a)(20)-14.

(*e.g.*, telephone applications). The Bureau has also removed proposed clarification in each of the ethnicity and race-related comments regarding ethnicity and race information that an applicant has specifically indicated it is declining to provide, which it did not provide, or which is not applicable, including because the applicant has fewer than four principal owners.[726] The Bureau has either deleted such content where duplicative of similar content in final comment 107(a)(19)-1 ("General") or moved it to new, generally applicable comments at final comments 107(a)(19)-6 ("Ethnicity, race, or sex of principal owners not provided by applicant"), 107(a)(19)-7 ("Applicant declines to provide information about a principal owner's ethnicity, race, or sex"), and 107(a)(19)-10 ("Reporting for fewer than four principal owners").

Proposed Rule—Collecting Sex

Proposed comment 107(a)(20)-8 would have clarified that a financial institution is required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, the applicant prefers to self-describe their sex (with the ability of the applicant to write in or otherwise provide additional information), and also would have permitted the applicant to refuse to provide the information. The sex categories would have also been on the sample data collection form proposed as appendix E, in response to a query about the principal owner's "Sex," with a direction to "Check one or more." Instruction 6 of proposed appendix G would have similarly required financial institutions to permit applicants to use the sex categories as listed on proposed appendix E as responses for a principal owner's sex.

In the NPRM, the Bureau stated that it was generally proposing that financial institutions use the sex categories from Regulation C when requesting that applicants provide the sex information of their principal owners, but that it was also proposing the self-describe response option. The Bureau explained that Federal, State, and local government agencies have been moving to providing additional options for designating sex. At the Federal level, the Bureau

[726] The clarification was originally at proposed comments 107(a)(20)-6.iv and -7.iv.

noted that, for example, the Department of State had announced that it was planning to offer the option of a new gender marker for non-binary, intersex, and gender non-conforming persons for passports and Consular Reports of Birth Abroad as an alternative to male or female.[727] The Bureau also noted that the Food and Drug Administration includes the gender options of female, male, intersex, transgender, and "prefer not to disclose" on certain patient forms.[728] The Bureau also discussed how a number of States and the District of Columbia, as well as some local governments, offer an alternative sex or gender designation to male and female (*e.g.*, "X") on government-issued documents and forms such as drivers' licenses and identification cards, and in some cases birth certificates.[729]

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[727] *See* U.S. Dep't of State, *Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad* (June 30, 2021), https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad/. The Department of State subsequently made this option available in April 2022. *See* U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/.

[728] *See* U.S. Food & Drug Admin., *MedWatch forms FDA 3500 and 3500A* (Sept. 12, 2018) (approved under OMB No. 0910-0291), https://www.fda.gov/media/76299/download and https://www.fda.gov/media/69876/download.

[729] *See, e.g.*, Cal. S.B. 179, *Gender identity: female, male or nonbinary* (Oct. 16, 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179; State of California Dep't of Motor Vehicles, *Driver's License or ID Card Updates*, https://www.dmv.ca.gov/portal/driver-licenses-identification-cards/updating-information-on-your-driver-license-or-identification-dl-id-card/ (last visited Mar. 20, 2023); Colo. Dep't of Revenue, *Change of Sex Designation*, https://drive.google.com/file/d/1PeYZd7U43ar6Flg8lFAT1Etg1EPdLVUy/view; State of Connecticut Dep't of Motor Vehicles, *Gender Designation on a License or Identification Card*, https://portal.ct.gov/-/media/DMV/20/29/B-385.pdf; District of Columbia Dep't of Motor Vehicles, *Procedure For Establishing or Changing Gender Designation on a Driver License or Identification Card* (June 13, 2017), https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DC%20DMV%20Form%20Gender%20Self-Designation%20English.pdf, *DC Driver License or Identification Card Application* (Jan. 2019), https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DMV%20BOE%20Application_2-25-19.pdf; Maine Bureau of Motor Vehicles, *Gender Designation Form* (Nov. 4, 2019), https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf; State of Nevada Dep't of Motor Vehicles, *Name Changes*, https://dmvnv.com/namechange.htm; State of New Jersey Dep't of Health, Off. of Vital Statistics and Registry, *Request Form and Attestation (REG-L2) to Amend Sex Designation to Reflect Gender Identity on a Birth Certificate—Adult* (Feb. 2019), https://www.nj.gov/health/forms/reg-l2_1.pdf; 2019 N.J. Sess. Law Serv. ch. 271; New Mexico Motor Vehicle Div., *Request for Sex Designation Change*, http://realfile.tax.newmexico.gov/mvd10237.pdf; New Mexico Dep't of Health, *Request to Change Gender Designation on a Birth Certificate* (Oct. 2019), https://www.nmhealth.org/publication/view/form/5429/; Virginia Dep't of Motor Vehicles, *Driver's License and Identification Card Application* (July 1, 2021), https://www.dmv.virginia.gov/webdoc/pdf/dl1p.pdf; Washington State Dep't of Licensing, *Change of Gender Designation* (Nov. 2019), https://www.dol.wa.gov/forms/520043.pdf; N.Y. City Dep't of Homeless Servs., Off. of Policy, Procedures and Training, *Transgender, Non-binary, and Intersex Clients* (July 15, 2019), https://www1.nyc.gov/assets/dhs/downloads/pdf/dhs_policy_on_serving_transgender_non_binary_and_intersex_clients.pdf.

The Bureau further explained that the Supreme Court's 2020 opinion in *Bostock v. Clayton County* had concluded that sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, and that these forms of discrimination necessarily involve consideration of sex.[730] The Supreme Court reached this conclusion in the context of title VII of the Civil Rights Act of 1964, as amended,[731] which prohibits sex discrimination in employment.[732] Following the issuance of the Supreme Court's opinion, the Bureau issued an interpretive rule clarifying that ECOA's and Regulation B's prohibition on discrimination based on sex protects against discrimination based on sexual orientation, gender identity, actual or perceived nonconformity with sex-based or gender-based stereotypes, and the sex of people associated with the applicant.[733] The Bureau noted that other Federal agencies have similarly clarified that other statutes that protect against discrimination based on sex protect against discrimination based on sexual orientation and gender identity.[734]

The Bureau additionally explained that some other Federal agencies had also begun to re-consider how they collect information on sex by including questions about sexual orientation and gender identity as part of questions about sex. The Bureau cited the example of the Census Bureau's Household Pulse Survey,[735] which asks questions about sex assigned at birth, current

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[730] *See Bostock*, 140 S. Ct. 1731.

[731] 42 U.S.C. 2000e *et seq.*

[732] *Bostock*, 140 S. Ct. 1731.

[733] 86 FR 14363 (Mar. 16, 2021). *See also* Letter from CFPB to Serv. & Advocacy for GLBT Elders (SAGE) (Aug. 30, 2016), https://files.consumerfinance.gov/f/documents/cfpb_sage-response-letter_2021-02.pdf.

[734] *See, e.g.*, 86 FR 32637 (June 22, 2021) (Department of Education interpreting title IX of the Education Amendments of 1972); 86 FR 27984 (May 25, 2021) (Department of Health and Human Services interpreting section 1557 of the Affordable Care Act); Memorandum from Jeanine M. Worden, Acting Assistant Secretary for Fair Housing and Equal Opportunity, *Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act* (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/PA/documents/HUD_Memo_EO13988.pdf (Department of Housing and Urban Development interpreting the Fair Housing Act).

[735] U.S. Census Bureau, *Phase 3.2 Household Pulse Survey* (undated), https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3.2_Household_Pulse_Survey_FINAL_ENGLISH.pdf. As of the date of this document, the Household Pulse Survey is in Phase 3.7, which started on December 9, 2022. *See* U.S. Census Bureau, *Household Pulse Survey Phase 3.7* (Dec. 9, 2022, updated Dec. 14, 2022), https://www.census.gov/newsroom/press-releases/2022/household-pulse-phase-3-7.html. The survey questionnaire used for Phase 3.7 includes the same three questions noted by the Bureau in the NPRM. *See* U.S. Census Bureau, *Phase 3.7 Household Pulse Survey* (undated), https://www2.census.gov/programs-surveys/demo/technical-documentation/hhp/Phase_3-7_Household_Pulse_Survey_ENGLISH.pdf.

gender identity, and sexual orientation.[736] The Bureau also noted that other Federal agencies and initiatives have encouraged sexual orientation and gender identity data collection in health care settings.[737]

The Bureau explained that in light of feedback it received during the SBREFA process, among other matters, the Bureau was proposing to add the option for "I prefer to self-describe" (with the ability of the applicant to write in or otherwise provide additional information) for the principal owner's sex in addition to the options currently used on the HMDA sample data collection form.

Proposed comment 107(a)(20)-8 would have explained that a financial institution would have been required to permit an applicant to provide a principal owner's sex using one or more of the following categories: Male, Female, and/or that the principal owner prefers to self-describe their sex. It would have further explained that, if an applicant indicated that a principal owner preferred to self-describe their sex, the financial institution would have been required to permit the applicant to provide additional information about the principal owner's sex. The financial institution would have been required to report to the Bureau the additional information provided by the applicant as free-form text.

Proposed comment 107(a)(20)-8 would have stated that a financial institution would be required to permit an applicant to select as many categories as the applicant chooses and that the financial institution would report the category or categories selected by the applicant, including any additional information provided by the applicant, or would report that the applicant refused

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[736] Specifically, the Household Pulse Survey includes the following three questions: (1) What sex were you assigned at birth, on your original birth certificate? (A respondent could provide a response of male or female.); (2) Do you currently describe yourself as male, female or transgender? (A respondent also could provide a response of "none of these."); (3) Which of the following best represents how you think of yourself? (A respondent may select from the following responses: (a) Gay or lesbian; (b) Straight, that is not gay or lesbian; (c) Bisexual; (d) Something else; or (e) I don't know.

[737] *See, e.g.*, Off. of Disease Prevention & Health Promotion, *Healthy People* (2020), https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health; Off. of the Nat'l Coordinator of Health Info. Tech., *2021 Interoperability Standards Advisory* (2021), https://www.healthit.gov/isa/sites/isa/files/inline-files/2021-ISA-Reference-Edition.pdf; Ctrs. for Disease Control & Prevention, *Collecting Sexual Orientation and Gender Identity Information* (Apr. 1, 2020), https://www.cdc.gov/hiv/clinicians/transforming-health/health-care-providers/collecting-sexual-orientation.html.

to provide the information or failed to respond. It would have clarified that a financial institution would not have been permitted to report sex based on visual observation, surname, or any basis other than the applicant-provided information. Finally, proposed comment 107(a)(20)-8 would have explained how a financial institution would report sex if an applicant had fewer than four principal owners, would have provided an example, and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting a principal owner's sex.

The Bureau sought comment on its proposed approach to requesting information about a principal owner's sex, including the opportunity for self-identification (by allowing the applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether the sample data collection form should list examples from which the applicant could choose. The Bureau also sought comment on whether, alternatively, sex should be collected solely via the "I prefer to self-describe" option (with the ability of an applicant to write in or otherwise provide additional information). The Bureau also sought comment on whether applicants should be restricted from designating more than one category for a principal owner's sex.

The Bureau also sought comment on 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. The Bureau also sought comment on whether it should adopt a data point to collect an applicant's lesbian, gay, bisexual, transgender, or queer plus (LGBTQ+)-owned business status, similar to the way it proposed to collect minority-owned business status and women-owned business status under proposed § 1002.107(a)(18) and (19).[738] The Bureau also sought comment on whether including such

[738] For a discussion of the comments received by the Bureau with regard to its request for comment on whether to include a data point to collect information about applicants' LGBTQ+-owned business status, the Bureau refers readers to the section-by-section analyses of §§ 1002.102(k) (definition of LGBTQI+ individual), 1002.102(*l*) (definition of LGBTQI+-owned business), and 1002.107(a)(18) (minority-owned, women-owned, and/or LGBTQI+-owned business status).

questions would improve data collection or otherwise further section 1071's purposes, as well as whether it would pose any particular burdens or challenges for industry.

Finally, the Bureau also requested information on Federal, State, and local government initiatives, as well as private sector initiatives, involving questions regarding sexual orientation and gender identity in demographic information.

Comments Received—Collecting Sex

The Bureau received comments from community groups, banks, trade associations, and individuals on its proposal for collecting information about principal owners' sex. Commenters addressed both general issues as well as specific aspects of the proposal, including whether to collect sexual orientation and gender identity data.

General comments. A couple of commenters opposed collecting information about principal owners' sex. An individual commenter stated that it does not make sense to collect such information because society's view of gender is still evolving. A lender suggested removing the sex of principal owners (along with several other data points) to reduce the amount of detail in the rule.

One industry commenter supported the collection of sex data as proposed; others supported the Bureau's proposal but suggested that the Bureau use the term "gender" instead of "sex" to be consistent with modern usage. One suggested that the Bureau also include sex category options for transgender and nonbinary.

Another commenter said that sharing information about principal owners' gender identity and sexual orientation should be voluntary for applicants, noting that individuals that are a part of the lesbian, gay, bisexual, transgender, queer, intersex, and asexual (LGBTQIA) community are concerned about harassment and should be protected.

Collection of sexual orientation and gender identity information. Most of the comments received by the Bureau in response to its proposal for collecting information about a principal

owner's sex were in the context of whether the Bureau should also collect information about principal owners' sexual orientation and gender identity.

Several banks, trade associations, and individual commenters opposed adding inquiries about principal owners' sexual orientation and gender identity to the final rule. A few stated that bank employees would feel uncomfortable requesting this information; that applicants would refuse to provide the information or would be offended by the questions; or that separate questions for sex, sexual orientation, and gender identity would be invasive.

A few of these commenters stated that requiring financial institutions to ask separate questions for sex, sexual orientation, and gender identity could potentially further segregate and stigmatize LGBTQ individuals and their businesses, when members of that community already face bias and discrimination. These commenters also raised concerns about the security of the collected information, noting that storing it with financial institutions and in a nationwide database exposes the information to not only a number of persons with authorized access but also potentially to hackers. These commenters stated that although there is some protection from employment discrimination under Federal law due to *Bostock*, there are States where discrimination against LGBTQ individuals in other forms is legal and inferences about one's sexuality could have serious negative impacts. The commenters also expressed concern that the information could be used for other purposes, with one commenter additionally expressing a concern that such previously collected data could be used for unintended purposes. Another commenter stated that the information should be requested only if information is also provided to applicants to allow them to make informed decisions about providing the information, which includes a warning that discrimination based on sexual orientation may be allowed in certain States. Some commenters also opposed collecting information on principal owners' gender identity and sexual orientation, on the grounds that such information is not needed by financial institutions to make loans and it should have no bearing on an applicant's ability to qualify for a loan.

Several other industry commenters expressed concern that adding more inquiries to a demographic data collection form would add complexity to the collection process and increase the burden on financial institutions. One urged the Bureau to not include inquiries about such personal information in the business lending process without more stakeholder input as to the benefits and burdens of collecting the data and before publishing such sensitive information. These commenters also suggested that the Bureau give financial institutions the option of collecting the information.

Some commenters suggested that the Bureau should include only "Male" and "Female" categories as responses to a request for a principal owner's sex information. One bank opposed the inclusion of options for gender choices and free-form text, stating that there are many possible gender categories and including those categories or a write-in field could dilute the data and lead to inconclusive findings. Several lenders also specifically urged use of only "Male" and "Female" categories as answer options in the final rule, for alignment with sex categories used to collect HMDA data, on the grounds that it would avoid confusion among financial institutions and applicants, promote efficient implementation and reporting, reduce administrative complexity, and facilitate compliance. One bank expressed concern about use of the proposed self-describe sex response option for applications reported under both HMDA and section 1071.

In contrast, a range of commenters, including many community groups, research and advocacy groups, community-oriented lenders, and individual commenters, urged the Bureau to require the collection of more detailed and accurate information about gender identity and sexual orientation than would be collected under the Bureau's proposal. These commenters generally stated that more detailed information is necessary to account for small businesses owned by people with intersectional identities and orientations, to see if they experience discrimination, enforce fair lending laws, and to allow policymakers and the public to have a better understanding of and address gaps and community needs. Several commenters asserted that to the final rule should reflect that gender is not binary and be more inclusive. Others argued that

collecting principal owners' gender identity information will enhance the Bureau's and the public's ability to enforce ECOA for transgender individuals and gender minorities and collecting their sexual orientation information will likewise facilitate the same as to lesbians, gays, bisexuals, and other sexual minorities, consistent with the purposes of section 1071. Another commenter stated that collecting information about gender identity and sexual orientation would reduce the burden of implementing future legislation requiring such collection.[739] Another commenter said that collecting data on gender identity and sexual orientation would allow lenders, especially CDFIs, to be more accountable to their mission of economic justice and financial inclusion. Some commenters urged the Bureau to follow best practices and directed the Bureau to resources made available and research conducted by the Williams Institute at the University of California Los Angeles School of Law.

A number of these commenters urged the Bureau to not conflate lines of inquiry for gender identity and sexual orientation, with some specifically suggesting separate sets of questions, either in addition to or in place of, the inquiry about principal owners' sex as proposed by the Bureau.[740]

One commenter stated that respondents are unlikely to consider sexual orientation and gender identity to be sensitive and would likely provide their information, citing a study as to the collection of such information in health centers and another relating to attitudes of sexual minorities responding to a 2020 survey administered by the Census Bureau. Commenters also noted that other Federal surveys ask questions about gender identity and sexual orientation, including the Census Bureau and the Centers for Disease Control and Prevention, and that questions to identify transgender respondents are included on State and investigator-led surveys.

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[739] The commenter cited the LGBTQ Business Equal Credit Enforcement and Investment Act (H.R. 1443, 117th Cong. (2021)), which sought to amend ECOA section 704B to require the collection of an applicant's principal owners' sexual orientation and gender identity, in addition to information about sex.

[740] For example, some commenters suggested separate categories for gender (Cis woman, Cis man, Trans woman, Trans man, Non-binary or gender non-conforming, and Other (with a write-in text field)) and sexual orientation (straight/heterosexual, bisexual, and queer, and other (with a write-in text field)).

One commenter asserted that the proposal collects less information than other Federal agencies, citing the example of the Census Bureau.

Commenters also noted that the Federal government has long considered what best practices should apply for the measurement of sexual orientation and gender identity information, such as through the Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys, and by commissioning a study looking at the measurement of sex, gender identity, and sexual orientation through the National Academies of Sciences, Engineering, and Medicine (the National Academies).[741]

Legal authority. Several research and advocacy organizations argued that the Bureau has the legal authority to collect information about the gender identity and sexual orientation of principal owners. Generally, these commenters stated that ECOA and section 1071 provide the Bureau with a broad grant of authority to issue regulations requiring the collection of gender identity and sexual orientation data. The commenters also highlighted that unlawful discrimination based on "sex" under ECOA includes discrimination based on sexual orientation and gender identity, consistent with the U.S. Supreme Court's decision in *Bostock*. As a result, they said, collecting sexual orientation and gender identity data would facilitate the purposes of section 1071 by enhancing the agency's ability to understand small business lending discrimination based on sexual orientation and gender identity, enforce fair lending laws, and identify business and community development needs and opportunities of small businesses.

However, several industry commenters argued that the collection of sexual orientation and gender identity information is not clearly required. One stated that there is no indication in the statute that Congress intended the term "sex" as used in section 1071 to encompass sexual orientation and/or gender identity. Another emphasized that the statute focuses on the collection

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[741] Since the comment period for the NPRM closed, the National Academies published its report on the study. *See* Nat'l Acad. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* (2022), https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.

and reporting of data about the defined term "women-owned businesses," and asserted it is thus not apparent that the section 1071 data collection is meant to include such data. Another commenter argued that neither Congress nor the Supreme Court in *Bostock* has taken specific action to change the scope of the prohibition against sex discrimination in ECOA to include discrimination on the bases of sexual orientation and gender identity.

Need for information on gender identity and sexual orientation. Some community groups and research and advocacy organizations generally stated that data are needed to understand LGBTQI+ individuals' and business owners' experiences in accessing small business credit. Some emphasized that available Federal small business or fair lending data do not currently include sexual orientation and gender identity information. One commenter noted that the Federal data that exist on LGBTQ individuals' access to credit are generally limited to the population of cohabitating same-sex couples because such data are often collected through a marital status question on Census Bureau surveys.

Nevertheless, these commenters stated that available research suggests that sexual and gender minorities encounter discrimination when attempting to access credit. The commenters cited research, based on the 2019 Federal Reserve Board Survey of Household Economic Decisionmaking, finding that LGBT individuals (and particularly LGBT persons of color and depending on gender) are more likely to have their applications for credit rejected and that they are more likely to be approved for less credit than they wanted.[742] The commenters stated that studies based on HMDA data have also found that same-sex couples are denied home loans more often and that the loans they do receive have higher interest rates and fees than different-sex couples of similar financial and credit quality. Similarly, loans made in neighborhoods with a higher density of LGBTQI+ individuals generally have higher interest rates and fees than

[742] Spencer Watson *et al*., Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (2021), https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf.

neighborhoods with a lower density.[743] One commenter stated that the analysis likely understates these disparities due to HMDA data limitations.[744] A research and policy organization focusing on gender identity and sexual orientation issues also cited reports and analyses highlighting disparities in home ownership between LGBT adults and non-LGBT adults, same-sex couples and different-sex couples, and among sexual minorities versus heterosexual individuals and also suggesting that home ownership among transgender adults is particularly low.[745] This commenter also stated that such research noting disparities among LGBTQI+ persons based upon race, sex, and sexual orientation suggests that the data collected under section 1071 should allow identification of individuals who may have intersectional identities.

Commenters also noted that LGBTQI+ individuals and businesses are key parts of the population and economy in this country, yet face discrimination and disparities in a number of areas. They stated that there are an estimated 11 million LGBT adults, which make up around 4.5 percent of the total U.S. adult population. They stated that high numbers of LGBTQ adults have self-reported experiences with physical and verbal abuse and violence, job loss, and workplace harassment and discrimination. They also noted that prior to the COVID-19 pandemic, LGBTQ individuals were more likely to report having experienced economic hardship, from unemployment, homelessness, and in other areas. The commenters also

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[743] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), https://ncrc.org/same-sex-couples-and-mortgage-lending/; Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 Procs. of the Nat'l Acad. of Sci. (PNAS) PROCs. NAT'L ACAD. SCI. 9293 (Mar. 16, 2019), https://doi.org/10.1073/pnas.1903592116.

[744] *See* Jason Richardson & Karen Kali, Nat'l Cmty. Reinvestment Coal., *Same-Sex Couples and Mortgage Lending* (June 22, 2020), https://ncrc.org/same-sex-couples-and-mortgage-lending/.

[745] Studies cited by the commenters include, for example: Adam P. Romero, Shoshana K. Goldberg, & Luis A. Vasquez, Williams Inst., *LGBT People and Housing Affordability, Discrimination, and Homelessness* (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf; Kerith Conron, Williams Inst., *Financial Services and the LGBTQ+ Community: A Review of Discrimination in Lending and Housing, Testimony Before the Subcommittee on Oversight and Investigations* (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf; Freddie Mac, *The LGBT Community: Buying and Renting Homes* (2018), http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf; Kerith J. Conron, Shoshana K. Goldberg, & Carolyn T. Halpern, *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 J. Epidemiology & Cmty. Health 1016 (Nov. 2018), https://pubmed.ncbi.nlm.nih.gov/30190439.

emphasized that studies show that during the pandemic, LGBTQ adults, and particularly LGBTQ people of color and gender minorities, have disproportionately experienced the negative financial effects of the COVID-19 pandemic, including food insecurity, job loss, and housing insecurity.[746] One commenter also highlighted that research shows that transgender individuals are disadvantaged as compared to their cisgendered counterparts across a number of socio-economic factors, such as education levels and percentages living at or below the poverty level, among others.[747]

One commenter cited a study estimating that about 7.7 million LGBT adults live in States without explicit statutory protections against discrimination on the basis of sexual orientation and gender identity in credit.[748] This commenter also noted research finding that while 30 States have laws analogous to ECOA, only about half explicitly prohibit discrimination on the basis of sexual orientation or gender identity, leaving a significant number of LGBT adults in the United States without protection from credit discrimination under State law.[749] Further, this commenter stated that LGBTQ businesses may generally have a particular need for credit, because they

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[746] *See* Thom File & Joey Marshall, U.S. Census Bureau, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents* (Aug. 11, 2021), https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html; Brad Sears, Kerith J. Conron, & Andrew R. Flores, Williams Inst., *The Impact of the Fall 2020 COVID-19 Surge on LGBT Adults in the US* (Feb. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf; Christy Mallory, Brad Sears, & Andrew R. Flores, Williams Inst., *COVID-19 and LGBT Adults Ages 45 and Older in the US* (May 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf; Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID-19 Pandemic* (Dec. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf; Movement Advancement Project, *The Delta Variant & the Disproportionate Impacts of COVID-19 on LGBTQ Households in the U.S., Results from an August/September 2021 National Poll* (Nov. 2021), https://www.lgbtmap.org/file/2021-report-delta-impact-v2.pdf.

[747] *See* Kerith J. Conron & Kathryn K. O'Neill, Williams Inst., *Food Insufficiency Among Transgender Adults During the COVID-19 Pandemic* (Dec. 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf.

[748] Kerith J. Conron & Shoshana K. Goldberg, Williams Inst., *LGBT People in the US Not Protected by State Non-Discrimination Statutes* (Apr. 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf.

[749] Christy Mallory, Luis A. Vasquez, & Celia Meredith, Williams Inst., *Legal Protections for LGBT People After* Bostock v. Clayton County (Aug. 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf.

often lack the family support other small business entrepreneurs may rely upon to begin their businesses.

Suggestions for collecting sexual orientation and gender identity information. A number of commenters suggested specific modifications to the Bureau's proposal, generally by either adding response categories to the proposed (single) inquiry about a principal owner's sex; by recommending two separate inquiries for the identification of a principal owner's gender (as opposed to sex) and sexual orientation; or by suggesting separate inquiries as to each of a principal owner's sex, gender identity, and sexual orientation.

Generally, commenters who suggested additional response categories suggested adding such options in the context of a single inquiry for information about a principal owner's sex. Some commenters suggesting adding an additional category, such as "Other," to allow the Bureau to analyze whether nonbinary individuals face discrimination from lenders and urged the Bureau to avoid a data collection that forces applicants to provide their principal owners' information on a strict binary sex/gender basis. Several industry commenters suggested the Bureau remove the self-describe option with a write-in text field with a third category, such as "non-binary." These commenters expressed concern that the write-in text field may create data integrity problems or add complexity to reporting standards.

Other commenters suggested specific sex categories for the Bureau's consideration. A group of trade associations suggested adding sex categories for transgender and nonbinary. A community group suggested adding a "non-binary" sex category and any others according to best practices, in order to bring transparency as to the treatment of that population. Another suggested adding "Non-binary," "Transgender Male," "Transgender Female," stating that these categories are widely accepted by the LGBTQ community, will provide more data, and will be more inclusive. This commenter also supported allowing applicants to select one or more options. A CDFI lender recommended that the Bureau include a list of examples that an applicant could refer to when self-describing, like intersex, non-binary, or transgender. This commenter stated

that providing examples for the self-describe option would streamline the data collection and analysis.

A bank suggested that instead of requesting information from applicants about their principal owners' sex, that the Bureau identify a principal owners' information based on what is listed on the principal owner's driver's license. The bank noted that some states, like New York, allow residents who identify as nonbinary or intersex to use an "X" marker on their State driver's licenses and stated that beneficial owners' driver's licenses must be provided as a result of FinCEN's customer due diligence rule when an account is opened. The bank acknowledged that different states may not allow the use of an "X" marker and that some principal owners may not identify with the gender marker on their driver's license but suggested that aligning the data collection with this supporting documentation would remove the potential for error and regulatory scrutiny.

Some commenters urged the Bureau to revise its proposal to include two sets of inquiries, one addressing gender identity and the other sexual orientation, each with multiple categories from which an applicant could select. One community group suggested two separate inquiries are necessary, to accurately measure disparities and discrimination. The community group suggested that for the inquiry about gender identity, response options could include "Male," "Female," "Transgender," and "Do not identify as female, male, or transgender." For the inquiry about sexual orientation, the community group stated response options could include "Straight," "Gay or lesbian," "Bisexual," and "Transsexual, or gender non-conforming." This commenter also suggested the Bureau consult experts on these issues. Some other community groups suggested that, to reflect current language around gender-identity and expression, categories for gender should include "Cis woman," "Cis man," "Trans woman," "Trans man," "Non-binary or gender non-conforming," and "Other" (with a write-in text field). For sexual orientation, the commenters suggested "Straight/heterosexual," "Bisexual," "Queer," and "Other" (with a write-in text field). One commenter noted that the answer options for each inquiry should include those

to allow the applicant to choose not to state its response and an "Other" option (with a write-in text field).

Several research and policy organizations focusing on gender identity and sexual orientation issues generally stated that because sex, sexual orientation, and gender identity are related but intellectually distinct concepts, the Bureau should collect such information through three separate inquiries addressing each concept instead of through one question asking about a principal owner's sex. A community group stated that the Bureau's proposal does not sufficiently encompass gender, gender identity, and sexual orientation to address fair lending concerns.

Research and policy organizations also suggested the Bureau take an approach similar to that used in the Census Bureau's Household Pulse Survey, which they characterized as taking a "two-step" approach to asking about a respondent's sex, with one question about the respondent's sex assigned at birth and a second question about their current gender. They also recommended the Household Pulse Survey approach in asking a separate question about sexual orientation, which the commenters noted aligns with a recommendation from a 2009 Sexual Minority Assessment Research Team report[750] on best practices for asking questions about sexual orientation on surveys. One also urged the Bureau to examine a two-step approach to sex for the final rule, noting that it was based on research and recommended by a panel of experts known as the Gender Identity in U.S. Surveillance group, through the Williams Institute at the University of California Los Angeles School of Law, as one that is likely to have high sensitivity and specificity in distinguishing transgender and gender minority respondents from cisgender respondents.[751] The commenter also recommended that the Bureau consider if any refinements

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[750] Sexual Minority Assessment Rsch. Team (SMART), Williams Inst., *Best Practices for Asking Questions About Sexual Orientation on Surveys* (2009), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf.

[751] The GenIUSS Grp., Williams Inst., *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys* (Sept. 2014), https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/.

are necessary in the context of section 1071, conduct user testing, and also coordinate in the future with other Federal agencies to improve its measurements of principal owners' sex.

For the question about sexual orientation, research and policy organizations recommended using the same or similar questions as presented in the Census Bureau's Household Pulse Survey and the 2009 Sexual Minority Assessment Research Team report. A community group also suggested that the Bureau adopt the Census Bureau's approach with the Household Pulse Survey, but stated that more response categories may be necessary to better capture the LGBTQIA+ community.

Selection of multiple responses. The Bureau received several responses to the Bureau's question about whether applicants should be restricted from designating more than one category for a principal owner's sex. Two commenters supported the Bureau's proposal to allow an applicant to select multiple sex categories, stating that limiting applicants to one answer option may be viewed as marginalizing the principal owner's personal characteristics for individuals whose gender is fluid. Another suggested allowing the selection of just one response category, which it said would streamline data collection. Two research and policy organizations suggested that the Bureau limit applicants from selecting more than one response to the inquiry about sex assigned at birth because medical records in the United States generally allow only male or female sex assignments. They also suggested that the Bureau allow just one selection in response to a question about sexual orientation. But for gender identity, the applicant suggested allowing applicants to select multiple response options.

Self-describe response option. Several commenters supported the Bureau's proposed "I prefer to self-describe" option (with the ability to write in or otherwise provide additional information). A business advocacy group stated that the information collected from the option will bring attention to inequitable lending practices based on gender identity. As noted above, one commenter supported the proposed answer option, but suggested that the Bureau include a list of examples. The commenter opposed, however, the use of the option as the only way to

collect information about principal owners' sex. Another commenter supported having the "I prefer to self-describe" option as the only way used to collect sex information, stating that this approach would promote diversity and acceptance and that the Bureau's proposal may make applicants feel uncomfortable expressing their true gender identity.

However, several industry and research and policy organization commenters opposed the proposed "I prefer to self-describe" option. One commenter said it would be confusing for applicants and bank employees, and recommended having the Bureau's data collection for principal owners' sex match that under Regulation C. Other commenters generally cited data quality concerns related to potential write-in field responses. Two such commenters noted that in the HMDA free-form ethnicity and race data, they commonly see responses that would fit into an existing category and expressed concern that similar issues would arise under the Bureau's proposal. Two industry commenters also noted that the write-in field could diminish the accuracy and utility of collected data, because fewer responses would be reported for other listed categories. One industry commenter also noted that a write-in field may add complexity to reporting standards. Another stated that the Bureau may encounter varying spellings and misspellings, which would create reporting burdens and diminish the accuracy of the information received by the Bureau.

A research and policy organization stated that because the Bureau will not be including write-in responses in what is released to or analyzed for the public, write-in responses allowing applicants to self-describe their principal owners' sex, sexual orientation, or gender identity would prevent respondents from being included in the data for analysis. The commenter suggested that the Bureau assess the performance of questions as to gender identity and sexual orientation first and then make revisions as needed. The commenter also stated that it also did not recommend including the proposed "I prefer to self-describe" option as a way to capture individuals with intersex traits, and noted that it is not generally recommended that researchers capture information on intersex status through a question on sex.

Other research and policy organizations stated a concern that free-form text responses would require substantial effort by the Bureau and others to distinguish transgender individuals and gender minorities from respondents using the "I prefer to self-describe" option, even though female or male responses would have been appropriate. This commenter noted that analysis of free-form text fields can be time-intensive and responses challenging to categorize, leading to discarded data, reduced sample sizes, lessened statistical power, and potentially errors in classification. The commenter also noted that although a write-in response for gender identity to capture the many gender identities and communities that exist may work in some circumstances, it does not recommend it for a data collection of the anticipated size and complexity of the effort under section 1071. With regard to sexual orientation, the commenter noted that most people with same-sex attraction are likely to choose the terms gay, lesbian, or bisexual if they are the only terms provided, and thus a self-describe option would just reduce the number of identifiably lesbian, gay, and bisexual principal owners in the section 1071 data collection and reduce the usefulness of the data.

Intersex status. Research and policy organizations suggested that the Bureau add a specific inquiry regarding variations of sex characteristics in the final rule or in the future, to identify intersex business owners and their experiences. They emphasized that people with variations in sex characteristics may comprise as much as 1.7 percent of the population. And, although little population-based data exists, according to the commenter, intersex people face documented social and health disparities. This in turn, they said, could affect their economic opportunities. Moreover, according to the commenter, the increased visibility of intersex individuals could also make small business owners with intersex traits more vulnerable to discrimination. They also stated that the Department of Justice's Title IX Legal Manual rationale—finding that title IX's prohibition on sex discrimination includes discrimination based on sex characteristics, including intersex traits—should also apply to ECOA. They noted that a consensus study from the National Academies had recommended that the Federal government

develop and evaluate measures to identify intersex populations and recommended that the Bureau review another pending National Academies study with recommendations on this area.[752]

Final Rule—Collecting Sex

For the reasons set forth herein, the Bureau has revised its proposal regarding the collection of information about the sex of the principal owners of a small business applicant. Under final comment 107(a)(19)-15, if collecting the information using a paper or electronic form, the financial institution must make the request using the term "sex/gender" and must permit applicants to respond by using free-form text. If collecting the information orally, the financial institution must inform the applicant of the opportunity to provide each principal owner's sex/gender and record the response. As with other protected demographic information, the applicant can refuse to provide the requested information. Unlike the Bureau's proposal, the final rule does not use specific sex categories, such as "Male" and "Female," for a principal owner's sex/gender. The Bureau has made conforming changes, removed duplicative content, and updated cross-references, in comment 107(a)(19)-15 and other comments that relate to collection of principal owners' sex.

As an initial matter, the Bureau believes that collecting information about a principal owner's sex, gender identity, and sexual orientation is within section 1071's mandate. Following the Supreme Court's holding in *Bostock*, even though the term "sex" is not defined in ECOA or in Regulation B, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of "sex" to include discrimination based on sexual orientation and gender identity.[753] As stated by the Court, sex discrimination encompasses sexual orientation discrimination and gender identity discrimination, as those forms of discrimination necessarily

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[752] *See* Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), https://nap.nationalacademies.org/catalog/25877/understanding-the-well-being-of-lgbtqi-populations. The National Academies has issued the report anticipated by the commenter. *See* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health* (2022), https://www.ncbi.nlm.nih.gov/books/NBK578625/pdf/Bookshelf_NBK578625.pdf.

[753] *Bostock*, 140 S. Ct. 1731; 86 FR 14363 (Mar. 16, 2021).

involve consideration of sex.[754] Because section 1071 is an enumerated provision of ECOA and the final rule is part of Regulation B, this interpretation as to what is included within the scope of the term "sex" necessarily applies to the collection of information about a principal owner's "sex" under section 1071 as well.

The Bureau believes further that available research, including that cited by commenters and discussed above, showing disparities in access to credit across gender identity and sexual orientation supports the importance of collecting gender identity and sexual orientation small business lending data.[755]

There was no clear consensus among commenters as to how information about the sex of small businesses' principal owners should be collected. As described above, the Bureau received a diverse array of comments recommending a range of response options to the proposed inquiry about a principal owner's sex and suggesting questions in addition to, or instead of, the Bureau's proposed query about a principal owner's sex. The Bureau notes that at the Federal level, there is wide variance in data collection approaches, question phrasing, and answer options, and that the Federal government's approach is in flux.[756] For example, on January 11, 2023, shortly before

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[754] *See Bostock*, 140 S. Ct. 1731.

[755] *See, e.g.*, Ctr. for LGBTQ Econ. Advancement & Rsch., *The Economic Well-Being of LGBT Adults in the U.S. in 2019* (June 2021), https://lgbtq-economics.org/research/lgbt-adults-2019/ (LGBT adults more likely than non-LGBT adults to report being turned down by lenders and to be offered credit at rates higher than desired); Hua Sun & Lei Gao, *Lending practices to same-sex borrowers*, Proceedings of the Nat'l Acad. Sci. of the U.S. of Am. (May 2019), https://doi.org/10.1073/pnas.1903592116 (finding same-sex couples more likely to be denied a mortgage than different-sex couples); J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. Chi. L. Rev. 1 (2019), https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination (finding that same-sex male home loan co-applicants were less likely to have their loan applications accepted compared to white, different-sex co-applicant pairs; male same-sex pairs with Black applicants had significantly worse acceptance outcomes).

[756] *See* 86 FR 56356, 56482 (Oct. 8, 2021) (discussing approach used by the Census Bureau's Household Pulse Survey, asking separate questions for sex assigned at birth, current gender identity, and sexual orientation); *id.* at 56482 n.686 (discussing other Federal agency approaches in health care settings). *See also* 31 CFR 35.28(h), (i) (in annual reports by participants in the U.S. Treasury's State Small Business Credit Initiative (SSBCI) program, requiring information about program beneficiaries' principal owner's gender (using categories: female; male; nonbinary; prefer to self-describe, with an option to write in information; prefer not to respond; or that the business did not answer) and sexual orientation (using categories: gay or lesbian; bisexual; straight, that is, not gay, lesbian, or bisexual; something else; prefer not to respond; or that the business did not answer); 2020 Census Official Questionnaire (inquiring as to each person's sex (*e.g.*, "What is Person 1's sex? Mark (x) ONE box."), with answer options: "Male" and "Female" and asking about the relationships with other household members (*e.g.*, "How is this person related to Person 1? Mark (X) ONE box."), with answer options including, *inter alia*, "opposite-sex husband/wife/spouse", "opposite-sex unmarried partner, "same-sex husband/wife/spouse", and "same-sex unmarried

this rule was issued, OMB released new recommendations for agencies on the best practices for the collection of sexual orientation, gender identity, and sex characteristics data on Federal statistical surveys, including strategies to preserve data privacy and safety.[757] The Bureau also notes the consensus study from the National Academies cited by a commenter that indicates that the terms used to describe individuals who identify as or exhibit attractions and behaviors that do not align with heterosexual or traditional male-female binary gender norms are evolving.[758]

As a result of these factors, the Bureau believes that an approach that allows principal owners to designate their sex/gender with the ability to write-in or provide additional information (such as in a free-form field on a paper or electronic form) will encourage applicant self-identification using terminology that may change over time. To increase applicants' autonomy to provide responses they feel best characterize their principal owners, the final rule does not include additional sex category responses suggested by commenters nor does it require a financial institution to provide a list of example responses when requesting that an applicant provide its principal owners' sex. This approach mitigates the concern of some commenters that a list of disaggregated categories would be difficult for some lender staff to ask and for some applicants to be asked.

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partner"); Soc. Sec. Admin., *How do I change the sex identification on my Social Security record?* (KA-01453) (last updated Oct. 25, 2022), https://faq.ssa.gov/en-us/Topic/article/KA-01453 (individuals can provide sex identification evidence that is binary or non-binary, but stating that SSA record systems currently require a sex designation of female or male); U.S. Dep't of State, *X Gender Marker Available on U.S. Passports Starting April 11, 2022* (Mar. 31, 2022), https://www.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/; U.S. Equal Emp. Opportunity Comm'n, *EEOC Adds X Gender Marker to Voluntary Questions During Charge Intake Process* (June 27, 2022), https://www.eeoc.gov/newsroom/eeoc-adds-x-gender-marker-voluntary-questions-during-charge-intake-process; Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; Domestic Victims of Human Trafficking Program Data (OMB #0970–0542)*, 87 FR 45107 (July 27, 2022) (proposing changes to collection of participant demographics for Domestic Victims of Human Trafficking Services and Outreach Program grant programs); Admin. for Children & Fams., U.S. Dep't of Health & Hum. Servs., *Proposed Information Collection Activity; SOAR (Stop, Observe, Ask, Respond) to Health and Wellness Training (SOAR) Demonstration Grant Program Data (New Collection)*, 87 FR 52386 (Aug. 25, 2022) (indicating that data to be collected with regard to the SOAR program will include client sex, gender identity, sexual orientation.)

[757] Off. of Mgmt. & Budget, Off. of the Chief Statistician of the U.S., *Recommendations on the Best Practices for the Collection of Sexual Orientation and Gender Identity Data on Federal Statistical Surveys* (Jan. 11, 2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/SOGI-Best-Practices.pdf.

[758] Nat'l Acads. of Scis., Eng'g, & Med., *Understanding the Well-Being of LGBTQI+ Populations* 1-2. *See also* Nat'l Acads. of Scis., Eng'g, & Med., *Measuring Sex, Gender Identity, and Sexual Orientation* 1-4 to 1-5 (discussing terms and identities associated with the concepts of gender, sex, and sexual orientation).

In partial response to the several commenters who urged that the Bureau use the term "gender" instead of "sex," the Bureau is requiring financial institutions to use the term "sex/gender" when requesting information about principal owners' sex. As explained above, the Bureau interprets ECOA's and Regulation B's prohibitions against discrimination on the basis of "sex" to also include, *inter alia*, discrimination based on gender identity; this interpretation as to what is included within the scope of the term "sex" necessarily also applies to the collection of information about a principal owner's "sex" under section 1071.[759] the Bureau believes that requiring financial institutions to ask for information about "sex/gender" will provide principal owners with the flexibility and autonomy to use terms that they prefer.

Although some commenters requested that the Bureau require the collection of principal owners' sexual orientation information and intersex status in addition to the collection of information about their gender identity, the final rule does not include these specific inquiries. The Bureau believes that such specific inquiries about individuals would likely be perceived as more invasive than a general request as to "sex/gender" and, as explained above, the overall LGBTQI+-ownership status of the business. Accordingly, the Bureau is concerned that questions to this effect could impact the overall willingness of applicants to provide demographic information, as noted by some commenters.

Some commenters expressed concerns that collecting data via write-in text fields may lead to data analysis issues. The Bureau anticipates that its review of responses to the sex/gender inquiry will result in data that could be used by the Bureau and other regulators and, once grouped into categories, publicly released subject to any necessary modifications or deletions for privacy purposes.

The Bureau believes that principal owners' sex/gender and applicants' LGBTQI+-owned business status data points together strike a balance that respects for small business owners'

[759] 86 FR 14363 (Mar. 16, 2021).

autonomy in self-identification, while also providing the Bureau and the public with information needed to further section 1071's statutory purposes.

The Bureau recognizes that the way financial institutions will collect data about sex under the final rule differs from the collection of information about the sex of home mortgage applicants under Regulation C/HMDA.[760] Although the collection of ethnicity, race, and sex data in both contexts serves related fair lending purposes, the two regulations have different legal authorities, cover different markets, and were developed at different times. The Bureau has specifically tailored the collection of sex data under this final rule implementing section 1071 for the small business lending context, in consideration of the comments received and of continuing developments in Federal government's approach to collecting information about sex, gender identity, and sexual orientation.

The Bureau has also considered commenters' statements that small business applicants may feel uncomfortable and have privacy concerns about providing sensitive information to lenders related to the sex of their principal owners. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with this data and on that basis, make appropriate pre-publication modification and deletion decisions. The Bureau takes the privacy of such information seriously and intends to make appropriate modifications and deletions.

Commenters also included suggestions for whether to allow applicants to select only one or multiple response categories in response to questions related to a principal owner's sex. As explained above, the Bureau has decided to include only a self-describe response option in response to the question about a principal owner's sex/gender at this time, rendering these comments moot.

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[760] As the Bureau is exempting HMDA-reportable transactions from the data collection requirements of the final rule, in § 1002.104(b)(2), strict consistency between reporting categories is unnecessary.

One commenter stated that providing information about a principal owner's sexual orientation and gender identity should be optional for the applicant. The Bureau agrees, and applicants have a right to refuse to provide responses to questions about protected demographic information. As explained in final comment 107(a)(19)-1, financial institutions must permit an applicant to refuse to answer the financial institution's inquiry and must inform the applicant that it is not required to provide the information.

With regard to some commenters' suggestion that questions about a principal owner's gender identity and sexual orientation should be optional for financial institutions, the Bureau is not requiring separate questions for sex, gender identity, and sexual orientation for the reasons above. Thus, these commenters' suggestion is moot.

The Bureau does not believe it would be appropriate, however, to remove the requirement to collect principal owners' sex, suggested by some commenters. As discussed above, the collection of information about sex is required under section 1071.

The Bureau is not requiring financial institutions to report what sex or gender is indicated on a principal owner's State driver's license, as requested by one commenter. As the commenter acknowledged, State requirements differ as to what residents may select as to their sex and/or gender on their State government-issued identification and the available selections may not be adequate as to a principal owner's self-identified sex and/or gender. As noted above, the Bureau believes that the collection of principal owners' sex information under this rule should be based solely on an applicant's self-identification. However, as the commenter also pointed out, some governmental authorities allow individuals to indicate their sex as "X" in government-issued documents. Nothing in this rule would interfere with a principal owner choosing to designate their sex in that way in the self-describe response option.

With regard to one commenter's statement that the Bureau should not allow the use of previously collected information due to concern about misuse of such data, the final rule

specifies how previously collected information may be used, as discussed further in the section-by-section analyses of §§ 1002.107(d) and 1002.110(e) below.

Regarding a commenter's suggestion that the Bureau should consult further with stakeholders before finalizing any publication of information about sexual orientation and gender identity of principal owners, the Bureau intends to engage further with stakeholders before publishing data, as discussed in part VIII below.

Proposed Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau proposed that financial institutions be required to collect and report at least one principal owner's ethnicity and race based on visual observation and/or surname in certain circumstances. This would have been required if the financial institution met in person with one or more of the applicant's principal owners and the applicant did not provide ethnicity, race, or sex information for at least one principal owner in response to the financial institution's inquiry pursuant to proposed § 1002.107(a)(20).

The Bureau noted that demographic response rates in the SBA's Paycheck Protection Program data are much lower when compared to ethnicity, race, and sex response rates in HMDA data.[761] The Bureau reasoned that without a visual observation and/or surname collection requirement, meaningful analysis of principal owner ethnicity and race data could be difficult, significantly undermining section 1071's purposes. Historically, one challenge under HMDA has been the reluctance of some applicants to voluntarily provide requested demographic information, such as ethnicity and race. The Bureau explained that the requirement in Regulation C to collect race, sex, and ethnicity on the basis of visual observation or surname is

[761] Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021*, *Version 11*, at 9 (effective Apr. 5, 2021), https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf. Paycheck Protection Program data were taken from 2021 loans for which the collection form for principal owner demographics was included in the application itself and, for most of that time, was featured on the first page of the application.

an important tool to address that challenge, and that it believes that the requirement has resulted in more robust response rates in the HMDA data.

Accordingly, the Bureau proposed that financial institutions collect at least one principal owner's ethnicity and race (but not sex) on the basis of visual observation and/or surname in the circumstances described above. Under the Bureau's proposal, a financial institution would not have been required to collect ethnicity and race via visual observation and/or surname if the applicant provided *any* demographic information regarding *any* principal owner. For applicants with multiple principal owners, the financial institution may not be able to determine whether the applicant had provided the demographic information of the principal owner who met in person with the financial institution or for another principal owner. The Bureau sought comment on this proposed approach. The Bureau also sought comment on whether a financial institution should be required to collect a principal owner's ethnicity and/or race via visual observation and/or surname if the applicant has only one principal owner, the applicant does not provide all of the principal owner's requested demographic information, and the financial institution meets in person with the principal owner. The Bureau noted that in this situation, the financial institution would be able to "match" any demographic information that the applicant provides with the correct principal owner because there is only one principal owner.

Proposed comment 107(a)(20)-9 would have explained that a financial institution would be required to report ethnicity and race based on visual observation and/or surname in certain circumstances. It would have further explained that a financial institution would not be required to report based on visual observation and/or surname if the principal owner only meets in person with a third party through whom the applicant is submitting an application to the financial institution.

Proposed comment 107(a)(20)-10 would have clarified that a financial institution meets with a principal owner in person if an employee or officer of the financial institution or one of its affiliates has a meeting or discussion with the applicant's principal owner about an application

and can visually observe the principal owner. The proposed comment would have also provided examples of situations where the financial institution meets in person with a principal owner and where it does not. The Bureau requested comment on this approach and whether there should be additional or different examples.

Proposed comment 107(a)(20)-11 would have clarified that a financial institution uses only aggregate categories when reporting ethnicity and race based on visual observation and/or surname and would have directed financial institutions to proposed appendix G for additional information on collecting and reporting ethnicity and race based on visual observation and/or surname. The Bureau requested comment on whether to permit, but not require, financial institutions to use the disaggregated subcategories as well when reporting ethnicity and race based on visual observation and/or surname.

In addition to the specific matters identified above, the Bureau sought comment on its proposed approach to this data point, the proposed methods of collecting and reporting the data, and on whether additional clarification regarding any aspect of this data point is needed.

Comments Received—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

General comments. The Bureau received comments from many banks, trade associations, community groups, members of Congress, small business owners, service providers, and others on its proposal that financial institutions be required to collect at least one principal owner's ethnicity and race on the basis of visual observation and/or surname under certain circumstances. A community group, a joint letter from community and business advocacy groups, and a CDFI lender supported the proposed requirement, emphasizing that demographic data collection via visual observation and surname analysis has been required by Regulation C for many years. The community group also commented that ethnicity and race information, including information collected via visual observation and/or surname as proposed, will allow data users to assess how the experiences of small businesses differ by approximate amount of minority ownership in the

business, particularly when combined with information about an applicant's number of principal owners under proposed § 1002.107(a)(21).

Many commenters objected to the proposed requirement. A number of industry commenters stated that the Bureau should require only the reporting of applicant-provided data. A number of agricultural lenders, a trade association, a service provider, a community group, and a business advocacy group stated that while they support the collection of demographic information and the need for robust data, they do not support the proposed requirement. A few industry commenters said that the Bureau should only require best efforts to collect demographic information.

Use of visual observation and surname to collect sex. A number of commenters, including banks, trade associations, community groups, and LGBTQI+ advocacy groups, supported the Bureau's proposal to not require the use of visual observation and/or surname to report a principal owner's sex. Several LGBTQI+ advocacy groups commented that visual observation of the gender expression of principal owners would inevitably rely upon sex stereotypes and lead to inaccurate determinations of sex, gender identity, or sexual orientation. A community group similarly stated that it would not be possible in some cases to use visual observation to accurately identify gender. Several industry commenters stated that requiring financial institutions to determine the sex of principal owners would make employees uncomfortable and potentially offend applicants who had declined to provide this information.

In contrast, some banks requested that the visual observation and surname requirement for this rule be aligned with Regulation C and thus apply to data on sex as well as for ethnicity and race. These commenters said that alignment with Regulation C would reduce reporting errors and financial institutions' compliance burden because financial institutions would not need to use additional resources to understand and implement different data collection requirements.

Data accuracy and related concerns. Many commenters, including a range of lenders, trade associations, community groups, several members of Congress, business advocacy groups,

and others, were concerned that the proposed requirement would yield unreliable ethnicity and race data.

Some commenters argued that such a requirement would introduce error, bias, and subjectivity into the data collection process, leading to inaccurate or distorted data. Several said that such purported bias should not be part of the underwriting process or that section 1071 was intended to combat this type of bias. One commenter said that banks do not consider the ethnicity, race, or gender of small business applicants and argued that they should not be required to guess such information. Other commenters asserted that inaccuracies in the collected data would not support rigorous analysis, would not serve the purposes of section 1071, and would be inconsistent with congressional intent to collect reliable data on small business credit. Several other commenters similarly stated that data collected via visual observation or surname would impair analyses, conclusions, and policies based on such data.

Several commenters asserted that data collected pursuant to the proposed requirement would be inaccurate because the process would be based on or encourage the use of racial stereotypes or assumptions. Several other commenters asserted that ethnicity and race determinations made by visual observation have been prone to error or unreliable, with some citing materials on own-race bias, other-race effect, and similar issues. Some commenters predicted that the proposed requirement may cause some lenders to rely on surname alone to avoid determining ethnicity and race based on visual observation. Others said that the proposed requirement should not be finalized because it could risk perpetuating discrimination and insert racial stereotyping into application processes, posing risks to applicants and financial institutions alike. A community group stated that the proposed data collection method raises fair lending concerns. With respect to reporting ethnicity and race based on surname, several commenters asserted that surname analysis was unreliable and obsolete.

Commenters also identified specific circumstances that they said could lead to inaccurate ethnicity and race determinations based on visual observation and surname. Some commenters

argued that the provision does not account for situations such as adoption, surname changes, and multi-ethnic or multi-racial identities. Other commenters alleged that visual observation and surname analysis would likely be inaccurate or unreliable as a result of increasing demographic diversity. Several asserted that racial and ethnic identities are personal, influenced by a number of different factors, and should be confirmed only by the applicant. Another commenter likewise stated that the Bureau should only require lenders to report based on applicant-provided data to promote accuracy and inclusivity. Several commenters noted that a principal owner's ethnicity and race could be reported differently by different lenders under the proposed requirement.

Some commenters said that loan officers and bank employees lack the expertise or training to make ethnicity and race determinations, and that the proposed requirement would lead to guessing. Another commenter said the proposed requirement would create training and other employment hurdles without producing meaningful information.

Several commenters noted that the proposed requirement would result in inaccurate data when the person filling out the application is not a principal owner of the business, but rather an employee. Commenters also asserted that data would be misleading when the ethnicity and race of the principal owner meeting with the bank is not representative of the other principal owners of the business. One commenter asserted that the proposed requirement could subject lenders to liability because they do not always interact with principal owners.

Some commenters opposed the proposed requirement on the grounds that data collected using this method would be, they said, generally unrepresentative of small business applicants. They predicted low response rates to inquiries about ethnicity and race for this rule, based on the experience of the Paycheck Protection Program, and argued that ethnicity and race data would be based on visual observation and surname analysis for a disproportionate number of applications, which these commenters posited would result in inaccurate data. Several commenters stated that, as a result, inaccuracies attributable to the use of visual observation and surname analysis would be magnified, making the data collected unrepresentative of the applicant population and not

useful for any analyses. Others commented that ethnicity and race data reported based on visual observation or surname would be both inaccurate and unrepresentative because of the increased use of digital application processes with no visual component. A trade association anticipated low applicant response rates to the demographic questions based on its members' experience that customers express anger or are reluctant to provide ownership information as required by FinCEN's customer due diligence rule. This commenter expected that applicants would not want to provide demographic information due to concerns that it would be used in the credit process, despite any assurances to the contrary on the sample data collection form.

Customer relationships. Many commenters asserted that the proposed requirement would impair customer relationships, citing small business lending as more relationship-dependent than other forms of credit. A number of commenters stated that it would make bank employees and applicants uncomfortable, with some suggesting specifically that this could occur when in-person applicants witness employees filling out demographic information that the applicants declined to provide. A number of commenters likewise said it would negatively impact customer relationships. One argued that because banks are more likely to have ongoing interactions with a small business owner than someone seeking a mortgage, offense taken from visual observation or surname analysis would be more detrimental.

Several agricultural lenders expressed concern that the disclosure on the proposed sample data collection form informing applicants about the obligation of lenders to report ethnicity and race information through visual observation and/or surname analysis would be negatively received by applicants, stating that applicants might perceive the notice as an indication that the lender intends to or must contradict the applicant's wishes. A trade association suggested that applicants would feel uncomfortable providing their demographic information if they receive notice that such information would not be subject to a firewall, which would lead to a greater use of visual observation and surname analyses.

Right to refuse. A range of commenters opposed the proposal on the grounds that applicants have a right to decline to provide demographic information. One commenter said that the proposed requirement would further damage the public's confidence in financial institutions and heighten privacy concerns, because it would contradict an applicant's decision to not provide the requested information. Several cited the high percentage of Paycheck Protection Program loan applicants that did not report demographic data as showing applicant concerns about privacy and the importance of voluntary reporting.

Some commenters stated that the proposal is inconsistent with, or that it inappropriately circumvents, section 1071's provision that an applicant may refuse to provide protected demographic information and urged the Bureau to respect that right. One commenter said that section 1071 is structured to require financial institutions to make inquiries for their customers' information and to allow applicants to refuse to provide such information; given this framework, the commenter questioned whether requiring collection would be permissible under the statute when an applicant has already refused to provide the information. One commenter said that applicants may not understand that if they decline to answer demographic inquiries that lenders will determine and report their ethnicity and race anyway. Several commenters highlighted that HMDA, in contrast to section 1071, does not provide a comparable right of refusal.

Burden and cost. A few commenters objected to the proposed requirement on the grounds that it would impose significant costs on some lenders. One commenter identified costs to create and maintain policies and procedures, apply these consistently, conduct ongoing training, and audit compliance, while another said the proposal would require substantial changes to its loan processes, systems, and compliance protocols to implement. A commenter said that reliance on proxying, inference, or visual observation would impose a number of cost and compliance concerns. Several commenters asserted that lenders may face substantial costs to train employees to make determinations; one said this training could be complex for front-line employees who are currently taught that ECOA and other laws prohibit the collection of ethnicity and race

information. A CDFI lender stated that the proposed requirement would impose less burden on larger banks and online lenders, either because they will have a higher number of online loan applications or because they already report demographic information on the basis of visual observation and surname under HMDA.

Response rates. Several commenters disputed that the higher responses rates in HMDA data, compared with lower response rates in Paycheck Protection Program data, could be attributed to HMDA's visual observation and surname requirement, and also disputed that this proposed requirement could improve response rates for financial institutions complying with the small business lending rule. Some suggested that the Bureau's concern with low response rates based on the Paycheck Protection Program experience is misplaced, arguing that those response rates were attributable to the program's emergency nature, and the rush by all parties to submit and process applications. Commenters also noted that Paycheck Protection Program may not inform the likely response rates under this rule because that program covered a wider range of businesses than the Bureau's proposal.

Purported conflicts with ECOA and Regulation B. Some commenters raised concerns about conflicts between the proposed requirement and subpart A of Regulation B and ECOA. One commenter stated that the proposed requirement is prohibited by 12 CFR 202.5, which provides that a creditor may not inquire about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction. Several commenters said that the proposed requirement would require bank employees to consider factors that ECOA prohibits creditors from considering. Commenters also generally stated that the proposed requirement conflicts with the fair lending training provided to bank employees and will insert race as a factor in the credit application process.

Several commenters said that a visual observation and surname requirement would not align with, or would violate, the statutory firewall requirement, noting that the lenders would have to determine a borrower's ethnicity and race but then have to "forget" and isolate the

information when making credit decisions. One requested that information collected via visual observation and/or surname not be subject to the firewall provision because of the difficulty in maintaining the firewall requirements for data collected this way.

In-person meetings. A number of commenters raised concerns that the proposed requirement would damage the relationships that community banks, traditional banks, or small- to mid-sized banks have with their customers. One asserted that in-person interactions are important for community lenders, such as CDFI banks, to understand customers, to make customers feel comfortable, and to identify products and services responsive to the needs of lower income and other underserved communities. Others emphasized that such lenders value and rely on repeated, in-person interactions with customers, saying that the proposed requirement would disproportionately affect them, but would favor large banks and online lenders that did not see applicants and thus would not have to employ the visual observation or surname analysis. One commenter suggested that all lenders should be subject to the proposed requirement, because online lenders can still conduct surname analyses. Another said that the proposed requirement would disproportionately subject CDFI lenders to the risks of reporting inaccurate data, including reputational damage, and greater operational and compliance burden. A commenter urged that the Bureau exempt community banks from the proposed requirement.

In contrast, some commenters suggested that the proposed requirement would not generate much data as a result of a shift away from in-person interactions, thus limiting or negating its value. One such commenter predicted that much small business lending will likely be through credit cards, which it said would not provide an opportunity to implement the requirement, and as a result data collected via visual observation and surname would be associated with certain loan types that may be received by higher revenue applicants.

Some commenters suggested that lenders, their employees, and applicants would try to avoid visual observation and surname analysis. Several said that the proposed requirement would discourage loan officers and applicants from meeting in person or by video call. Others stated

that some banks may shift applications online, impairing the personal interaction some banks have with their communities. One commenter predicted that the proposed requirement would discourage small business applicants from seeking credit.

Another commenter argued that the proposed requirement is unnecessary because financial institutions do not always meet with the principal owners of a business. Several commenters said that ethnicity and race determinations from visual observation and surname analysis may not be representative of the applicant population, would be inconsistent, and would not be comparable to other data.

One commenter said that the requirement would be difficult to apply because a financial institution may not know if the principal owner's demographic information had already been collected to assess if the visual observation and surname requirement applies, such as in the context of a brief interaction that is later determined to be an in-person meeting that would trigger the proposed requirement. Others asked for clarity on whether the proposed requirement would be triggered if any bank employee met in person with a principal owner, even if not involved with the credit application (for example when signing closing documents). Another commenter stated that financial institutions should not be required to determine if an individual is a principal owner, a necessary condition to collect data on a principal owner's ethnicity and race via visual observation and surname analysis, if the small business applicant chooses not to disclose its ownership structure.

Litigation and compliance risk. Some commenters were concerned that the proposed requirement would subject financial institutions and their employees to enforcement actions or litigation if they erred in determining a principal owner's ethnicity or race. Several stated that despite good faith efforts, such errors could subject lenders to examiner scrutiny, litigation, negative media, and erroneous discrimination claims by third parties, or subject them to customer complaints. One commenter stated that regulators could use financial institutions' best-guess, but erroneous determinations to pursue disparate impact cases, or customers could bring

discrimination cases, if they are able to reverse engineer the inadvertently incorrect ethnicity or race determinations made by financial institutions. A community group suggested that financial institutions would avoid reporting ethnicity or race at all to avoid litigation risk.

Several business advocacy groups suggested that certain lenders may use this provision to fabricate ethnicity and race data in order to make their lending practices appear more equitable, accessible, and unbiased.

Implementation and other comments. A number of commenters offered specific suggestions regarding particular aspects of the proposal, notwithstanding other objections they may have raised regarding whether it should be finalized at all. Several urged the Bureau to provide guidance materials and sample disclosures, and to engage in education efforts to encourage applicants to self-report their demographic information, with some suggesting these options in place of the proposed provision. Some said the Bureau should develop guidance that lenders could use to avoid questions of interpretation and to learn about resources they can use to make ethnicity and race determinations on the basis of a principal owner's surname. Several suggested that the Bureau provide a uniform surname classification standard.

One commenter requested an exemption from the proposed requirement (and the collection of ethnicity and race generally) for retail credit, on the grounds that many applicants will decline to provide demographic information about their principal owners given the sensitivity of the information. Other commenters stated that automobile and truck dealers had expressed concerns about the proposed requirement and did not think it would be possible to report detailed demographic information based on visual observation. Another commenter recommended that the Bureau exempt sole proprietors from the proposed requirement, noting that sole proprietor transactions are unique and may not provide meaningful data on the commercial credit market served by small, non-bank lenders.

Several commenters opposed the proposed requirement, arguing that the use of visual observation and surname is outdated. Two commenters stated that these methods employed in

Regulation C were implemented many years ago, and that the Bureau should follow more current government agency practices, citing a 2021 policy memo from USDA[762] rescinding the use of visual observation to determine ethnicity or race for certain Federal food programs. One commenter stated that, as with participants in the USDA programs, some small business owners may not want their ethnicity or race determined by others, may perceive discriminatory treatment, and may avoid applying for credit.

One commenter stated that the scope of the proposed requirement was unclear, noting that the NPRM preamble and proposed commentary provided that a financial institution would have to identify at least one principal owner by visual observation or surname if the applicant does not provide the ethnicity and race of at least one principal owner, even though institutions are obligated to collect the ethnicity, race, and sex of each of the small business applicant's principal owners. Several commenters requested that financial institutions should only be required to collect aggregate ethnicity and race categories.

One commenter suggested the use of an automated proxy analysis of surnames as an alternative to the proposed requirement. Another said that the Bureau could determine ethnicity and race with the data reported by lenders based on surname analysis.

Several commenters urged that, if the proposed requirement is finalized, demographic data should note when they are collected via visual observation or surname.

Final Rule—Collecting Ethnicity and Race via Visual Observation or Surname in Certain Circumstances

The Bureau is not finalizing its proposed visual observation and/or surname analysis requirement for the reasons set forth below. Final § 1002.107(a)(19) (proposed as § 1002.107(a)(20)) no longer includes references to the reporting of ethnicity and race based on visual observation and surname. The Bureau is likewise not adopting proposed comment

[762] U.S. Dep't of Agric., *Collection of Race and Ethnicity Data by Visual Observation and Identification in the Child and Adult Care Food Program and Summer Food Service Program—Policy Recission* (May 17, 2021), https://www.fns.usda.gov/cn/Race-and-Ethnicity-Data-Policy-Rescission.

107(a)(20)-9, regarding reporting based on visual observation and/or surname; proposed comment 107(a)(20)-10, regarding meeting in person with a principal owner; and proposed comment 107(a)(20)-11, regarding the use of aggregate categories when reporting using visual observation or surname. The Bureau has also removed other references to the collection of ethnicity and race data via visual observation and/or surname from other locations in the final rule.

In making this decision, the Bureau carefully considered the numerous comments it received, the statute, the history of the use of visual observation and surname analysis under HMDA, and the recent history of the collection of demographic information related to the Paycheck Protection Program. The Bureau believes, based on its expertise and the longstanding use of visual observation and surname analysis in HMDA, that collection of demographic information via visual observation or surname analysis has the capacity to improve response rates for demographic information—without particular risk to data accuracy,[763] introduction of bias or racial stereotyping into the underwriting process,[764] increased litigation/compliance risk, or violations of existing ECOA/Regulation B,[765] as suggested by some commenters. The Paycheck Protection Program experience also suggests that there may be benefits in such a requirement.

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[763] While some commenters suggested that data inaccuracies from visual observation and surname analysis would have limited the usefulness, integrity, reliability, or quality of the collected data and conclusions or policies based upon the data, the Bureau has not found this to be the case in HMDA and would not expect it to be so here either. A loan officer reporting their perception of an applicant's ethnicity and race could not do so "incorrectly" (other than by intentionally mis-reporting their perception); in fact, a loan officer's perception of an applicant's protected demographic information may be more important for fair lending analyses than how the applicant self-identifies.

[764] Collecting lenders' perceptions of the ethnicity and race of applicants, whether or not such perceptions are what the applicant would consider "accurate," could have enabled an analysis of potential bias by lenders. But the mere recordation of those perceptions is unlikely to create bias on the basis of those perceptions.

[765] Inquiring about an applicant's ethnicity and race (or collecting such information via visual observation or surname, if the Bureau were finalizing that aspect of the proposal) will not, in fact, violate Regulation B's prohibition on inquiring about certain protected characteristics of an applicant in connection with a credit transaction, nor is doing so under HMDA/Regulation C a violation. Regulation B implements ECOA, of which section 1071 is a part. Section 1002.5 of Regulation B, and its amendments under this final rule, make clear that the collection of ethnicity and race pursuant to this rule would not violate Regulation B.

Nonetheless, the Bureau believes that a requirement to collect principal owners' ethnicity and race via visual observation or surname could pose particular challenges for small business lending that are not present in mortgage lending. For example, applicants and co-applicants are clearly identified as such in mortgage applications—making it obvious whose demographic information has, or has not, been self-reported. In contrast, this final rule—as mandated by section 1071—requires a record of the applicant's responses to a request for protected demographic information to be kept separate from the application, and prohibits inclusion of personally identifiable information in records compiled and maintained pursuant to this rule. This could make tracking whose information has, or has not, been self-reported by the applicant particularly challenging. As commenters pointed out, a financial institution might be interacting with a representative of a small business who is not a principal owner, or the institution may not know—particularly early in the application process—if a particular person is a principal owner.

In addition, the Bureau is mindful, consistent with the comments it received, that much of the lending to small businesses in smaller communities and in underserved and rural areas occurs through relationship banking that involves more frequent and more personal contact with applicants. The Bureau is also mindful of concerns raised by lenders that rely on in-person engagement that their customer relationships may be negatively impacted by customer discomfort with a visual observation and surname data collection requirement, particularly during initial implementation of this final rule. The Bureau also acknowledges the concerns expressed by commenters that bank employees may feel uncomfortable making ethnicity and race determinations on the basis of visual observation or surname. On the other hand, the Bureau acknowledges comments that the prevalence of online lending processes and use of credit cards in small business lending could mean few opportunities for in-person or video-enabled meetings and thus for the collection of ethnicity and race via visual observation or surname.

The Bureau's decision not require financial institutions to collect principal owners' ethnicity and race information via visual observation or surname at this time renders moot the

comments about implementation of such a requirement, as well as those suggesting alternatives to the proposal.

The Bureau intends to actively monitor financial institutions' response rates to inquiries regarding demographic data to ensure that applicants are not being discouraged in any way from providing their demographic data pursuant to this final rule and to determine whether any future adjustments to the rule may be warranted.

107(a)(20) Number of Principal Owners

Proposed Rule

Proposed § 1002.107(a)(21) would have required financial institutions to collect and report the number of the applicant's principal owners. Proposed comment 107(a)(21)-1 would have explained that a financial institution would be able to collect an applicant's number of principal owners by requesting the number of principal owners from the applicant or by determining the number of principal owners from information provided by the applicant or that the financial institution otherwise obtains. If the financial institution asks the applicant to provide the number of its principal owners, proposed comment 107(a)(21)-1 explained that the financial institution would have been required to provide the definition of principal owner set forth in proposed § 1002.102(o). The proposed comment also clarified that, if permitted pursuant to proposed § 1002.107(c)(2), a financial institution could report an applicant's number of principal owners based on previously collected data.

Proposed comment 107(a)(21)-2 would have clarified the relationship between the proposed requirement to collect and report the number of principal owners in proposed § 1002.107(a)(21) with the proposed requirement to report verified information in proposed § 1002.107(b). The proposed comment would have stated that the financial institution may rely on an applicant's statements in collecting and reporting the number of the applicant's principal owners. The financial institution would not have been required to verify the number of principal owners provided by the applicant, but if the financial institution did verify the number of

principal owners, then the financial institution would report the verified number of principal owners.

Proposed comment 107(a)(21)-3 would have stated that pursuant to proposed § 1002.107(c)(1), a financial institution would be required to maintain procedures reasonably designed to collect applicant-provided information, which includes the applicant's number of principal owners. However, the proposed comment would have explained that if a financial institution is nonetheless unable to collect or determine the number of principal owners of the applicant, the financial institution would report that the number of principal owners is "not provided by applicant and otherwise undetermined."

In addition to seeking comment on its proposed approach to the collection and reporting of the number of principal owners generally, the Bureau also sought comment on whether to instead, or additionally, require collection and reporting of similar information about owners (rather than principal owners). The Bureau raised, as an example, whether financial institutions should be required to collect and report the number of owners that an applicant has that are not natural persons.

Comments Received

The Bureau received comments on this aspect of the proposal from a number of lenders, trade associations, and community groups. Two lenders and a community group supported the Bureau's proposal for collecting and reporting the number of an applicant's principal owners. The community group stated that the information would help determine whether experiences in the small business lending marketplace are different if an owner is a woman or minority, even if a small business does not meet the criteria for a minority-owned or women-owned business. Further, knowing the number of a business's principal owners would help data users identify businesses with varying percentages of ownership by women or minorities above or below the 50 percent threshold for minority-owned or women-owned businesses. One lender stated that the number of principal owners data point, along with others proposed by the Bureau, would provide

insight on the quality of capital being accessed by small businesses, assist in showing how financial institutions compare across different metrics, and help determine if an institution is engaged in equitable lending. This commenter also stated that in its experience, there are a number of small business lending programs and funding opportunities that require similar data. Thus, this commenter stated its expectation that the reporting requirements in the Bureau's final rule would satisfy requirements across a number of such programs and reduce administrative burden. Specifically, the commenter noted that it had gathered similar data on owners for Paycheck Protection Program loans it originated.

A number of lenders and trade associations opposed the Bureau's proposal to collect information about the number of an applicant's principal owners. Two such commenters stated that the information does not serve the purposes of section 1071, unless it is to allow second guessing of applicant-provided responses as to their minority-owned or women-owned status or the Bureau intends to require the collection of ethnicity, race, and sex data for all of an applicant's principal owners. One bank stated that the proposed number of principal owners data point would not offer any insight into lending patterns, as it is not considered in the underwriting process. Another bank argued that the data point is not necessary because there is no evidence that lenders use an applicant's number of principal owners as a basis for discrimination. One bank questioned the benefit of collecting such information, stating that a business's ownership and principals may change on a day-to-day basis. Another commenter stated that the information collected may inadequately or erroneously describe an applicant's ownership structure, particularly where the legal structure of the applicant's ownership may make such determinations difficult. Several commenters also stated that the data point is unnecessary, because similar information is already collected in other contexts (such as under FinCEN's customer due diligence rule) and regulators already examine banks for fair lending compliance.

Several commenters cited costs and burden as the basis for their objections. Two banks stated that it would be expensive to collect the information, with one also noting that the costs

would be passed down to customers and communities. Another bank stated that because it does not collect information about the number of an applicant's principal owners currently, the proposed requirement would entail changes to its operating procedures and suggested that the Bureau could obtain this information from the Internal Revenue Service instead. With regard to indirect vehicle financing transactions, a trade association stated that information about the number of principal owners is not part of the data transmitted between dealers and finance companies and is not used for business purposes, thus technical and process changes would be needed to collect and report the data.

A few industry commenters objected to the collection and reporting of the number of an applicant's principal owners on the basis of privacy, stating that the data point could be used to identify applicants. One said that this concern was particularly relevant for small communities with limited numbers of small businesses. Two others urged the Bureau to not publish the data point publicly to protect applicants' privacy.

An agricultural lender said it was unclear how financial institutions should report the number of principal owners for family farmers. This lender emphasized that the ownership of many family farm businesses is complex and may involve multiple business entities for risk management purposes, with separate entities for different farm operations. The commenter provided as an example a situation where a person owns only one farm parcel but works several farm parcels that are owned by a parent through multiple business entities and trusts.

Some industry commenters objected to this proposed data point as part of their general objection to the Bureau's data points proposed pursuant to ECOA section 704B(e)(2)(H). These commenters generally argued that such data points, including the number of an applicant's principal owners, do not add value or advance the purposes of achieving fair lending or of ECOA; are not used or collected for underwriting or financial analysis; go beyond what other laws require financial institutions to collect; add unnecessary complexity and detail to the rule;

and would add to the burden and costs for implementing the rule, especially for small covered financial institutions.

Two industry commenters objected to the data point on the grounds that in the absence of other information about an applicant's ownership, such as the number of owners or percentages of ownership, the information could lead to incorrect assumptions about the ownership structure of a small business applicant. For example, the commenters noted that if demographic data are reported for one individual, it could lead to a conclusion that the applicant has only one principal owner, when the applicant has several owners, but only one with more than a 25 percent ownership share.

Two commenters urged the Bureau to provide a regulatory safe harbor for reporting information about an applicant's number of principal owners, as part of a global safe harbor for all applicant provided data, or a safe harbor similar to that in proposed § 1002.112(c).

Several community groups suggested additional data points related to ownership. One such commenter suggested that the Bureau require financial institutions collect and report the percentage amount of a principal owner's ownership. This information, argued the commenter, would enable the Bureau to refine its data and reveal specific disparities in lending by ownership composition. Another commenter suggested that the Bureau require financial institutions to ask applicants for the number of individuals who own less than 25 percent of the applicant, to provide more insight on the distribution of small businesses and their experiences. One other commenter instead suggested that the Bureau add additional data points to measure the percentage of ownership by women and by people of color, to further enable evaluations of access to credit based on the proportion of ownership and control by such individuals.

A joint letter from community and business advocacy groups requested that the Bureau clarify proposed comment 107(a)(21)-3, which stated that if a financial institution is unable to collect or "otherwise determine" an applicant's number of principal owners, the financial institution should report it as unknown. The community groups asked the Bureau to clarify the

meaning of the phrase "otherwise determine," and specifically whether financial institutions may limit its investigation to documents obtained from the applicant in the normal course of an application, or if they have an obligation to conduct a due diligence investigation of corporate records.

Final Rule

For the reasons set forth herein, the Bureau is finalizing the requirement for financial institutions to collect and report the number of an applicant's principal owners, renumbered as § 1002.107(a)(20), and its associated commentary. In consideration of the comments received, the Bureau is doing so pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data under section 1071 and under ECOA section 704B(e)(2)(H), which authorizes the Bureau to require financial institutions to compile and maintain "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]."

The Bureau believes that the information will provide important context for other information collected and reported under the rule and thus serve the purposes of section 1071. The Bureau acknowledges that, as argued by commenters, the number of an applicant's principal owners may not be information considered by financial institutions in the underwriting process or, by itself, serve as the basis of discrimination. However, as noted by other commenters, information about the number of small businesses' principal owners will help data users, including the Bureau, understand how small business applicants' experiences in the lending marketplace differ on the basis of the demographic composition of their ownership and identify business and community development needs and opportunities. Thus, even if an applicant is not a women-owned, minority-owned, or LGBTQI+-owned business under § 1002.107(a)(18), through the number of principal owners data point, data users will still have some insight into what proportion of the small business's ownership has the demographic characteristics provided by the applicant.

The Bureau acknowledges some commenters' concerns that the number of principal owners data point would not provide a comprehensive picture of an applicant's ownership structure. Final § 1002.102(o) defines a principal owner as an individual who directly owns 25 percent or more of the equity interests of a business. As a result, the requirement to collect information about the number of an applicant's principal owners will not account for individuals with either indirect ownership or less than 25 percent ownership in the business. However, the Bureau believes that this supports, rather than counsels against, inclusion of this data point in the final rule.

The Bureau also is not adding other data points related to ownership to the final rule. The Bureau considered the general likelihood that an individual responding for the applicant would know the information being requested in formulating its proposal. The Bureau believes that applicants are likely to know the number of its principal owners and will be willing to provide that information. Overall, the Bureau believes that the number of principal owners data point, particularly in combination with information about an applicant's business statuses under § 1002.107(a)(18), strikes a balance so that the Bureau is likely to receive useful data that will allow it and others to develop a nuanced understanding of small business lending practices generally, even if it does not present a complete picture of each applicant's ownership structure.

The Bureau does not believe that the fact that some applicants have complicated ownership structures necessitates removal of this data point from the final rule. Although some small business applicants, such as family farmers, may have ownership structures where there are many owners and/or where ownership is through various business entities, the rule's definition for principal owner means that applicants would be required to identify only individuals, and not entities or trusts, with direct ownership in the business and would not need to trace ownership through multiple business entities or provide information about individuals with small equity shares in the business. Under comment 107(a)(20)-1, this definition would be provided to an applicant in conjunction with the request for the number of its principal owners.

The Bureau believes that the straightforward definition in § 1002.102(o) will assist applicants in providing this information.

Further, the Bureau believes the information about the number of an applicant's principal owners will be useful and facilitate the purposes of section 1071, even if a specific applicant's ownership changes over time. Under the Bureau's proposal, as with the final rule, applicants are asked for information in relation to individual, covered applications to allow data users, in the aggregate, to ascertain lending patterns at the institution or community levels. The data meets the final rule's purposes if it is accurate at the time the data are collected. Identifying changes in ownership over time will also further the business and community development and fair lending purposes of section 1071.

Some commenters suggested that the number of principal owners data point should not be required under the final rule because similar information is collected in other contexts. However, the definition of principal owner under § 1002.102(o) has been specifically tailored by the Bureau to meet the purposes of section 1071. Information about differently defined owners under different regulatory regimes, reported to other regulatory authorities, does not facilitate section 1071's purposes of fair lending enforcement and identification of business and community development needs and opportunities, nor could such data be matched to a particular covered application reported under section 1071.

With respect to commenters' arguments that the additional burden and costs that would result from the number of principal owners data point warrant its removal from the final rule, the Bureau notes first that commenters did not identify any specific costs or burdens with reporting the number of principal owners data point in particular, as much as concern about the costs and burden of reporting data points adopted pursuant to the Bureau's statutory authority in ECOA section 704B(e)(2)(H) generally. The Bureau acknowledges that financial institutions will experience some initial expenses and burden in implementing new regulatory data collection requirements. However, the Bureau understands that financial institutions already collect and

maintain information about the ownership of certain businesses under FinCEN's customer due diligence rule. The Bureau does not believe that there will be significant costs and burden associated with collecting and reporting information about applicants' principal owners specifically, as opposed to generally as part of a new data collection regime. The Bureau considers the data points it is adopting pursuant to section 704B(e)(2)(H)—including the number of an applicant's principal owners and the corresponding costs and burden to implement their collection—necessary to facilitate the purposes of section 1071.

The Bureau does not believe that a specific safe harbor is necessary for reporting the number of an applicant's principal owners, as urged by commenters. As provided in final comment 107(a)(20)-2 (proposed as comment 107(a)(21)-2), a financial institution is entitled to rely on the statements provided by the applicant in collecting and reporting the information provided by the applicant. As a result, any such good faith reporting by a financial institution of the number of an applicant's principal owners that the financial institution has no reason to believe is inaccurate will not be a violation of the regulation's requirements.

In response to commenters' concerns that information about an applicant's number of principal owners may be used to identify applicants, the Bureau will review the data received to complete the full privacy analysis to determine the privacy risks associated with the publication of the application-level data as discussed in part VIII, below. The Bureau takes the privacy of such information seriously and will be making appropriate modifications and deletions to any data before making it public.

With respect to commenters' request that the Bureau clarify financial institutions' obligation to determine the number of an applicant's principal owners, the Bureau believes that the proposed commentary is sufficiently clear and does not need to be revised. The Bureau's intent in proposed comment 107(a)(21)-3 that a financial institution report that the number of principal owners is "not provided by the applicant and is otherwise undetermined" was to refer to the possibility that a financial institution may not know the number of the applicant's principal

owners if, despite maintaining reasonably designed procedures to obtain the information, the applicant does not provide the information and the financial institution does not otherwise verify such information. The Bureau has also revised comment 107(b)-1 to clarify what information may be used to verify information. Given these other statements in the commentary, the Bureau does not believe that further clarification of financial institutions' obligation to determine the number of an applicant's principal owners is necessary.

As explained in the section-by-section analysis of § 1002.102(o), the Bureau has changed the definition of principal owner to use the term "individual" instead of "natural person" for comprehensibility reasons. Accordingly, the commentary for final § 1002.107(a)(20) has likewise been updated to refer to individuals and not natural persons.

To streamline the commentary, the Bureau has revised comment 107(a)(20)-1 (proposed as 107(a)(21)-1) to remove the first sentence as to requesting the number of an applicant's principal owners from the applicant or determining such information from other information, as duplicative of content in comment 107(b)-1, which applies to the number of principal owners data point. For similar reasons, it has removed the last sentences of comments 107(a)(20)-1 and -2, regarding the use of previously collected data and about verification, as straightforward applications of final § 1002.107(d) and (b), respectively, that would not provide any new content. Otherwise, the Bureau is substantially finalizing the commentary for § 1002.107(a)(20) with changes to reflect updated numbering for the data point and also updating and adding cross-references to other parts of the final rule.

107(b) Reliance on and Verification of Applicant-Provided Data

Proposed Rule

ECOA section 704B(e)(1) provides that "[e]ach financial institution shall compile and maintain, in accordance with regulations of the Bureau, a record of the information provided by

any loan applicant pursuant to a request under [section 704B(b)]."[766] Section 1071 does not impose any requirement for a financial institution to verify the information provided by an applicant.

During the SBREFA process, a number of small entity representatives urged the Bureau to require collection and reporting of a number of data points based only on information as provided by the applicant.[767] No small entity representatives stated that they thought verification should be generally required. The industry stakeholders who commented on this issue asked that the Bureau not require verification of applicant-provided information. The Bureau did not receive any comments on this issue from community group stakeholders during the SBREFA process.

The Bureau proposed in § 1002.107(b) that unless otherwise provided in subpart B, the financial institution would be able to rely on statements of the applicant when compiling data unless it verified the information provided, in which case it would be required to collect and report the verified information. The Bureau believed that requiring verification of collected data would greatly increase the operational burden of the rule. Proposed comment 107(b)-1 would have explained that a financial institution could rely on statements made by an applicant (whether made in writing or orally) or information provided by an applicant when compiling and reporting applicant-provided data; the financial institution would not be required to verify those statements. Proposed comment 107(b)-1 would have further explained, however, that if the financial institution did verify applicant statements for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution would report the verified information. The comment would have gone on to explain that, depending on the circumstances and the financial institution's procedures, certain applicant-provided data could be collected without a specific request from the applicant. For example, gross annual

[766] ECOA section 704B(e)(1).

[767] SBREFA Panel Report at 26.

revenue could have been collected from tax return documents. In addition, the proposed comment would have made clear that applicant-provided data are the data that are or could be provided by the applicant, including those in proposed § 1002.107(a)(5) through (7), and (13) through (21).

The Bureau sought comment on its proposed approach to verification of the 1071 data points, including the specific guidance that would have been presented in comment 107(b)-1. The Bureau also sought comment on whether financial institutions should be required to indicate whether particular data points being reported have been verified or not.

Comments Received

The Bureau received comments on this aspect of the proposal from numerous lenders, trade associations, community groups, and a business advocacy group. Several lenders and trade associations supported the proposed provision, agreeing with the Bureau that requiring verification of collected data would greatly increase the operational burden of the rule. These commenters did not object to reporting verified information when a financial institution verifies applicant statements for its own business purposes. Several of these commenters did, however, object to the possible inclusion of a provision requiring financial institutions to flag whether or not they had verified reported data, a question that the NPRM had sought comment on. Although these commenters did not discuss reasons for objecting to the verification flag, the context suggests that they were concerned about the operational difficulty of carrying out such a provision.

Several banks and trade associations supported the ability to rely on unverified applicant-provided data, but objected to the requirement to report verified information when the financial institution verifies applicant statements for its own business purposes. Some of these commenters pointed out that verification may happen after the initial application, different lenders have different methods of verification, and updating the information for reporting would be operationally difficult. One of these commenters stated that the verification may be carried

out by different staff using different platforms, and section 1071 does not mention verification. Other commenters suggested that the term "verification" was not sufficiently clear, and sometimes a financial institution would collect documents such as tax forms that contain information that conflicts with applicant statements, for example a different NAICS number, even though the financial institution is not "verifying" that data point. Other commenters expressed concern about how reporting information verified later would affect use of the "firewall." A group of trade associations stated that collecting the verified information would provide little benefit and the already difficult implementation of the rule would be made even more onerous by this provision. In addition, one commenter stated that the verification provision was similar to HMDA, which they considered to be very onerous.

A community group and a women's business advocacy group suggested that the final rule should require additional verification. The community group stated that verification of a few key data points that are generally verified by lenders now, such as gross annual revenue, or that can be easily checked, such as the NAICS code, should be required. A business association urged the Bureau to look into ways to verify that the correct information is offered and reports are accurate.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(b) with additional language making clear that a financial institution may rely on information from appropriate third-party sources as well as the applicant, and other edits for clarity. Final § 1002.107(b) provides that unless otherwise provided in subpart B, the financial institution may rely on information from the applicant, or appropriate third-party sources, when compiling data. Section 1002.107(b) further states that if the financial institution verifies applicant-provided data, however, it shall report the verified information.

The Bureau is also finalizing associated comment 107(b)-1 with phrasing edits similar to those in the regulation text, and revised and additional cross-references to facilitate compliance.

Final 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 applicant-provided data; the financial institution is not required to verify those statements or that information. Comment 107(b)-1 further explains, however, that if the financial institution does verify applicant statements or information for its own business purposes, such as statements relating to gross annual revenue or time in business, the financial institution reports the verified information. The comment also makes clear that when collecting certain applicant-provided data, depending on the circumstances and the financial institution's procedures, a financial institution may collect and rely on information from appropriate third-party sources without requesting it from the applicant. The comment then provides further guidance on collection and verification of applicant-provided data, including a list of applicant-provided data points. In order to facilitate compliance, final comment 107(b)-1 also adds references to two comments that explain restrictions regarding verification of certain data points.

The Bureau believes that requiring verification of applicant-provided data points would greatly increase the operational burden of the rule, and that relying on applicant-provided data, whether directly from the applicant or through appropriate third-party sources, will ensure sufficient accuracy to carry out the purposes of section 1071. As explained above, section 1071 does not speak to verification; rather it refers only to compiling and maintaining a record of certain information provided by an applicant. However, the Bureau believes that requiring financial institutions to collect and report (for this final rule) information that they have already verified will only add slight operational difficulty, and will enhance the accuracy and usefulness of the data, thereby furthering the purposes of section 1071. The Bureau is implementing this requirement pursuant to its authority under ECOA section 704B(g)(1) to prescribe rules in order to carry out, enforce, and compile data pursuant to section 1071, and as an interpretation of the statutory phrase "compile and maintain" in ECOA section 704B(e)(1). In the Bureau's view, the fact that the statute does not use the specific word "verification" is not relevant to this issue

because the verification that the financial institution chooses to carry out is a standard part of compiling and maintaining the information provided by the applicant. The Bureau also believes that this requirement will improve the quality and usefulness of the resulting dataset, thereby furthering the purposes of section 1071.

In regard to the possibility of the final rule requiring financial institutions to report whether or not certain data points have been verified, the Bureau notes that no commenters expressed support for this idea, while several opposed it. The Bureau believes that such a requirement would impose considerable operational difficulty, and it is not clear that any uses of this information would justify the increased burden. Consequently, the final rule does not include this provision.

As discussed above, several commenters suggested that verification might occur at different times on different platforms and be carried out by different personnel. Although credit processing is complex, the Bureau anticipates that financial institutions will report data using the applicant's whole credit file in order to provide accurate information, as is done with HMDA. Although implementing the final rule so that verified information can be reported will add operational difficulty, such difficulty should be greatly reduced once the rule is implemented and the gathering of data is standardized within the financial institution. In addition, the fact that different financial institutions have different processes should not cause a problem because each financial institution can implement the rule to coordinate with its own processes. As explained above, the Bureau believes that requiring reporting of the verified information when the financial institution verifies for its own purposes will benefit data users in carrying out the purposes of section 1071 by enhancing the quality of the data reported.

Several commenters were concerned about how the term "verification" would be interpreted in relation to unused information in the credit file that might conflict with applicant-provided data. The Bureau interprets the word "verification" to mean the intentional act of determining the accuracy of information provided, in this case for the purpose of processing and

underwriting the credit applied for, and potentially changing that information to reflect the determination. Loan file information that may or may not be more accurate than applicant-provided data and is not part of a financial institution's verification of the file's applicant-provided data or used by the institution in processing or underwriting the loan need not be reported. For example, a financial institution that uses a tax form to verify gross annual revenue, but does not consider or use the NAICS information on the tax form, may continue to rely on the applicant-provided NAICS information. However, if a financial institution believes the tax form information to be more accurate and chooses to report it instead of the applicant-provided data, it may do so.

The Bureau does not believe that requiring the reporting of data that is later verified will interfere with the final rule's firewall provision, which exists to protect against disclosure of protected demographic information for which verification is not allowed. For further discussion of the firewall provision see the section-by-section analysis of § 1002.108 below.

The Bureau does not believe it would be appropriate, as suggested by some commenters, require financial institutions to verify applicant-provided data when they do not already do so for their own business purposes. As stated by several commenters and explained above, requiring verification merely for the purpose of data collection would impose significant operational difficulty and expense on reporters.

107(c) Time and Manner of Collection

Proposed Rule

Although the definition of "application" triggers a financial institution's *duty* to collect 1071 data, the application definition does not necessarily govern *when* that data must be collected. The language and structure of section 1071—which applies to "applications" from

"applicants"—indicates that the data must be collected sometime during the application process, but does not provide further detail.[768]

Proposed § 1002.107(c)(1) would have required a covered financial institution to maintain procedures to collect applicant-provided data under proposed § 1002.107(a) at a time and in a manner that is reasonably designed to obtain a response. The Bureau believed there would be benefits to providing a flexible approach concerning when applicant-provided data must be collected during the application process. Given the variety of application processes in the small business lending space, the Bureau believed that requiring data collection to occur within a narrow window could affect data quality and disrupt financial institution practices. On the other hand, the Bureau believed that safeguards would be necessary to ensure that financial institutions are not evading or delaying their obligation to collect data in a manner that detrimentally affects response rates.

Proposed comments 107(c)(1)-1 and -2 would have clarified the meaning of financial institution "procedures" and would have emphasized a financial institution's latitude to establish procedures concerning the time and manner that it collects applicant-provided data, provided that those procedures are reasonably designed to collect the applicant-provided data in proposed § 1002.107(a). Proposed comment 107(c)(1)-3 would have clarified what constitutes "applicant-provided data" in proposed § 1002.107(c)(1).

Proposed comment 107(c)(1)-4 would have provided additional guidance on financial institutions' procedures that are reasonably designed to obtain a response. Proposed comment 107(c)(1)-4 would have provided that a financial institution shall assess on a periodic basis whether its procedures are reasonably designed. Proposed comment 107(c)(1)-4 would have explained that one way a financial institution may be able to assess whether its procedures are reasonably designed would be, once 1071 data are made publicly available, to compare its

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[768] *See, e.g.*, ECOA section 704B(b) ("[I]n the case of any *application* to a financial institution . . . .") and 704B(c) ("Any *applicant* . . . may refuse to provide any information requested . . . .") (emphases added)).

response rate with similarly situated financial institutions (for example, those that offer similar products, use a similar lending model, or are of a similar size).

Proposed comments 107(c)(1)-5 and -6 would have provided examples of procedures that generally are and are not reasonably designed to obtain a response. Proposed comment 107(c)(1)-5 would have provided that, although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application; the earlier a financial institution seeks to collect applicant-provided information, the more likely the timing of collection is reasonably designed to obtain an applicant response. Conversely, proposed comment 107(c)(1)-6 would have provided that, as a general matter, a procedure is not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application. Proposed comment 107(c)(1)-6 would have provided that depending on the particular facts, however, these procedures may be reasonably designed to obtain a response; for example, if the financial institution has evidence or a reason to believe that under its procedures the response rate would be similar to or better than other alternatives.

Proposed comment 107(c)(1)-7 would have explained that a financial institution reports updated applicant-provided data if it obtains more current data during the application process. Proposed comment 107(c)(1)-8 would have provided guidance in the event a financial institution changes its determination regarding an applicant's status as a small business.

The Bureau sought comment on proposed § 1002.107(c)(1) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(1) from a number of lenders, trade associations, and community groups. Commenters expressed a range of views.

General comments related to proposed § 1002.107(c)(1). A number of commenters, mainly from industry, supported the flexibility provided in proposed § 1002.107(c)(1), including

provisions that would have allowed financial institutions leeway to establish data collection procedures that best fit within their processes and business models. A CDFI lender emphasized that lenders have varying intake processes. Similarly, a trade association noted that while it anticipates most CDFIs will collect 1071 data as early in the application process as possible, including at the time an application is triggered, lenders should have flexibility to respond to market concerns. Trade associations representing automobile dealers urged the need for flexibility, for example, to accommodate the different methods by which data is collected (online and in-person) and the different parties involved in a credit transaction. A CDFI lender argued that the application and timeline often depends on the applicant themselves, further supporting the need for flexibility. A number of commenters argued for flexible collection, pointing out that small business lending, unlike mortgage lending, does not involve highly regimented application procedures. Trade associations representing automobile dealers further argued that flexibility would facilitate compliance without diminishing the information reported.

Commenters representing community banks similarly stressed the need for flexibility. A trade association asked the Bureau to provide community banks with flexibility in how and when to collect 1071 data during the lending process and latitude to determine what are reasonable collection practices. The commenter emphasized the iterative nature of small business lending, noting that the application process can span weeks or months to complete. The commenter urged the Bureau to avoid designating a prescriptive point in time when sufficient data has been gathered to trigger reporting. They further stated that community banks are good at satisfying regulatory requirements, do not need to be second-guessed in how or when they accomplish data collection, and that the Bureau should not be concerned about community banks' ability to maintain data quality and completeness. Even with the proposed flexibility, a community bank generally opposed proposed § 1002.107(c)(1), stating that the requirements are similar to HMDA, which are very onerous and unduly burdensome on small and mid-size institutions.

Comments related to the reasonably designed standard. As described above, proposed comments 107(c)(1)-4 through -6 would have provided additional guidance and examples of reasonably designed procedures. The Bureau received numerous comments concerning proposed comments 107(c)(1)-4 through -6 from a range of stakeholders.

The Bureau received a number of comments on its general approach in proposed comments 107(c)(1)-4 through -6 to provide examples of procedures that are and are not reasonably designed to obtain a response. A CDFI lender and a trade association representing CDFIs supported the proposed commentary and the description of "reasonably designed" procedures for collecting applicant-provided data. The trade association noted that the examples were helpful to identify what lenders should avoid and agreed that it is important to have safeguards to ensure the data are collected in a manner reasonably designed to obtain a response.

In contrast, other commenters argued that proposed § 1002.107(c)(1) and associated commentary are ambiguous or incomplete and urged the Bureau to provide further guidance. A trade association representing online small business lenders expressed concern that financial institutions would have increased compliance costs to avoid unintentional non-compliance. For example, financial institutions may believe they are required to compare response rates at different parts of the loan application cycle, compare results similar to an A/B testing scheme, or otherwise consistently seek to ascertain the best ways to obtain 1071 applicant-provided data. The commenter suggested the Bureau provide additional guidance so that financial institutions can ensure they meet the reasonableness standard. Another commenter similarly requested that the Bureau provide more guidance on the reasonableness standard, and in particular clarify that financial institutions have flexibility to design self-assessment methods best suited to their products, processes, and business models.

Among the proposed examples of reasonably designed procedures, the Bureau received the most comments related to the timing of collection. The comments spanned a range of positions, with some commenters advocating for a more restricted time period for collection of

applicant-provided data while other commenters sought a more flexible approach. For example, some community groups argued that financial institutions should be required to collect applicant-provided data at the time of a covered application. One of these commenters said that requiring collection at the time of application would increase the likelihood of successfully receiving the requested information, and that the benefits of early collection outweigh the costs. Another commenter similarly asserted that collection at the time of a covered application would maximize responses and urged the Bureau to make it a requirement, rather than merely a suggestion, as set forth in the proposal. A credit union also said that if a customer does not provide 1071 data with an application, it will be challenging for a financial institution to accurately collect and report the required data.

In contrast, a number of industry commenters took issue with proposed comment 107(c)(1)-6, which would have provided that collection of applicant-provided data simultaneous with or after notifying an applicant of action taken is generally not reasonably designed to obtain a response. Many of these commenters argued that financial institutions should have flexibility to collect applicant-provided data after decisioning an application. A few commenters went further, arguing that collection should be permitted or required to occur after finalizing credit documents, after a credit decision is made, or during closing. One commenter stated that although the proposed rule asserts to provide flexibility for financial institutions, proposed comments 107(c)(1)-5.i and -6.i (identifying procedures concerning the timing of collection of applicant-provided data that generally would and would not be reasonably designed to obtain a response) claw back that flexibility by expressing a clear preference that would discourage financial institutions from collecting 1071 data at any time except early in the application process. The commenter suggested the Bureau instead clarify that a financial institution has flexibility to sequence collection at a time it determines is reasonable for its business and products, subject to the self-assessment process articulated in proposed 107(c)(1)-4.

Commenters advanced several arguments for why financial institutions should be permitted to collect applicant-provided data after a credit decision is made on a covered application. First, a couple of commenters stated that it would minimize friction during the application process; they asserted that mandating 1071 data collection while the application is pending would frustrate the application process, create additional obstacles, and increase the likelihood of abandoned applications. Several technology providers and a trade association representing technology providers said that the application process is already lengthy enough given existing legal and underwriting requirements. The commenters further stated that the streamlined and user-friendly application experience that technology companies have sought to establish would be further frustrated if 1071 data is required to be collected early in the application process. Some of the commenters argued that sequencing of 1071 data collection involves a tradeoff between getting small businesses to respond to 1071 data requests and getting small businesses to apply for credit at all. Another trade association similarly emphasized the need for flexibility, particularly for fast-paced processes that render a decision in minutes.

Several of the commenters argued that collection of applicant-provided data early in the process could cause an applicant to believe that such information would be considered as part of the credit decision, therefore potentially discouraging an applicant from applying for credit. A group of technology providers stated that collection of demographic information before a credit decision is made may invite the perception of bias in the application process, especially if an applicant is later denied credit. The commenters cited a Federal Reserve Banks survey, which they stated showed that minority-owned businesses were more likely than white-owned businesses to report that they did not apply for financing because they either believed they would be turned down or found the application process too difficult or confusing.[769] The commenters argued that requiring collection of applicant-provided data before a credit decision is made

[769] Citing Fed. Rsrv. Bank of Atlanta *et al.*, *Small Business Credit Survey: 2021 Report on Firms Owned by People of Color*, at 25 (Apr. 15, 2021), https://www.fedsmallbusiness.org/survey/2021/2021-report-on-firms-owned-by-people-of-color.

would exacerbate identified concerns of discouragement and undermine the purposes of section 1071. Similarly, a couple commenters expressed concerns about discouragement if demographic information is collected early in the application process. Two CDFI lenders stated that they had received feedback from applicants that providing demographic data early in the application process felt intrusive and raised concerns for the applicant that their responses would negatively affect their application. As a result, one said that it had moved collection of demographic information from the loan application stage to the loan closing stage.

A couple of commenters challenged the Bureau's assertion that applicants will be less likely to respond to requests for the action taken. One commenter noted that the proposed rule improperly places the burden on the financial institution that wants to collect 1071 data after action is taken on an application to show that response rates would be similar to or better than alternative collection methods. Another asserted that Paycheck Protection Program data demonstrate that applicants are less likely to answer a question about their race on a credit application. A trade association representing equipment and leasing finance companies similarly asserted that post-decision collection would improve response rates.

Commenters advanced several other arguments for why applicant-provided collection should be permitted or required to occur after decisioning an application. A trade association representing equipment and leasing finance companies predicted that collecting applicant-provided data with the credit application would lead applicants to provide little information given the speed of the transaction, which is often completed in minutes. The commenter also asserted that the person initially completing the application is often not the business owner or familiar with the owner, and so would lack the requisite knowledge to provide certain 1071-required information. If, on the other hand, the financial institution can follow-up electronically or through other means with the business, the commenter asserted that the request could be directed to the person in the best position to provide the information. The commenter further stated that collecting 1071 data during the application stage would be particularly problematic

for vendor finance transactions because the vendor collecting application information has no regulatory requirement to do so, and so would unlikely take the time to gather the required information. Another commenter asserted that post-decision collection would also ensure that underwriters would not have access to an applicant's responses related to ethnicity, race, and sex. The commenter asserted that financial institutions could ensure data is collected by making it part of the closing procedures for approved loans and as part of remediation efforts for non-approved loans.

In addition to seeking comment related to the timing of collection, the Bureau sought comment on proposed § 1002.107(c)(1) and associated proposed commentary generally, including on the other examples in proposed comments 107(c)(1)-5 and -6 of procedures that generally would and would not be reasonably designed to obtain a response. The Bureau further asked commenters whether it would be useful to provide additional examples. In response, commenters raised a number of issues related to the commentary on reasonably designed procedures in proposed comments 107(c)(1)-4 through -6.

Several commenters weighed in on the provision in proposed comment 107(c)(1)-4 that financial institutions shall "reassess on a periodic basis" whether its procedures are reasonably designed to obtain a response. One commenter stated that it would be appropriate for financial institutions to conduct periodic reassessments of their collection procedures, but urged that procedures should not need to be reexamined more frequently than once every three years. The commenter suggested an additional safeguard would be to encourage consistent collection across individual institutions and small business lending sectors. Another commenter urged the Bureau to provide greater clarity on how frequent "periodic" testing must occur so that financial institutions can allocate resources accordingly, and encouraged the Bureau to take into account different products and resources among financial institutions. A business advocacy group urged the Bureau not to treat an applicant's decision to not to provide 1071 data as evidence that a lender lacks reasonably designed procedures.

A couple of commenters provided feedback on the use of response rates. A community group and a minority business advocacy group asked the Bureau to reconsider guidance in proposed comment 107(c)(1)-4 that a financial institution may assess the reasonableness of its procedures by, for example, comparing its response rate with similarly situated financial institutions. The commenters argued that peers may also not be making a reasonable effort to collect the data, and that it would be better to have a concrete metric, for example, based on other data collection efforts with good response rates.

A handful of commenters asked the Bureau to take other actions related to proposed § 1002.107(c)(1), including to provide additional clarifications and guidance. First, a trade association asked the Bureau to clarify that lenders need only request 1071-required data once. Next, a group of trade associations asked for clarification on proposed comment 107(c)(1)-7, which would have provided that a financial institution reports updated applicant-provided data if it obtains more current data during the application process. The commenter said that the requirement to "update" information is ambiguous, and inquired whether a financial institution would be required to update information if an applicant supplies updated data without a request from the financial institution. The commenter also asserted that it was unclear how proposed comment 107(c)(1)-7 relates to proposed § 1002.107(b) related to the reporting of verified information where obtained. A network of financial institutions specializing in agricultural lending stated that certain lenders use the information included in scoring models to determine whether the applicant business is a "small business," and so would not be able to identify applications involving a small business for which demographic information must be collected, until after a credit decision is made. The commenter argued that because ECOA and the Fair Credit Reporting Act require a timely decision be made and communicated, it would be a direct conflict of the regulations to delay communicating a credit decision to a customer solely to acquire data for demographic reporting purposes.

Several commenters asked the Bureau to provide additional guidance on the manner in which applicant-provided data can be collected, including disclosures and sample forms for collection. A CDFI lender asked the Bureau to share best practices on disclosures or assurances a lender can provide applicants when collecting demographic information to allay concerns about how the data will be used. A community bank and a community group urged the Bureau to provide a data collection form for financial institutions to use when collecting 1071 data from applicants. The community bank asserted that use of a data collection form would increase borrower response rates, as demonstrated by Paycheck Protection Program statistics. The commenter also argued that absent a uniform CFPB-issued form, collection will be flawed and the data useless. A community group stated that the Bureau may want to create a sample application form with all required data elements in order to facilitate data collection. Finally, a bank and a trade association urged the Bureau to expressly permit covered financial institutions to collect required data from applicants through a variety of means, including on an application form, on supplemental documents or forms, or on the proposed sample data collection form. The commenters stated that certain applicant-provided data points, such as number of workers, time in business, and NAICS code, are not on the sample data collection form. The commenters stated that except for data points required to be collected on the sample data collection form and kept separate, financial institutions should be permitted to collect the other data points through various means or forms.

Comments requesting special treatment for particular transactions or financial institutions. Several commenters urged the Bureau exempt particular types of transactions or lenders from coverage under the rule, primarily due to concerns about the specific characteristics of these application processes and the particular difficulty of collecting demographic information in light of these characteristics.[770] As discussed in the NPRM, the proposed rule would not have

[770] See also the section-by-section analysis of § 1002.104 (covered credit transactions) concerning additional comments related to private-label credit and insurance premium finance transactions, and the section-by-section analysis of § 1002.105(covered financial institutions and exempt institutions) concerning indirect lending.

made any exceptions concerning the time and manner of collecting 1071 data for point of sale transactions.[771] In response to the Bureau's request for comment on point of sale transactions, two trade association commenters and a community group stated that such transactions should be provided special treatment or exceptions. The two trade associations, one representing industry and another representing retailers, opposed rule coverage for private label applications, focusing particularly on point of sale transactions. One stated that credit applications are taken at the point of sale or at a customer service desk using interview-style or interactive processes. The commenters asserted that customers would feel uncomfortable answering questions related to their race, sex, and ethnicity in such a public place, without the necessary privacy accommodations. They also argued that collecting applicant-provided data would significantly lengthen the application process, frustrating retailers' focus on speed, efficiency, and limiting time spent in the checkout line. The commenters further asserted that requiring 1071 data collection at the point of sale would impede the availability of commercial credit applications in-store, both because businesses would not want to apply for credit and because retailers would no longer offer in-store private label credit. One also argued that point of sale transaction data would be of reduced data quality: the data may be collected from persons who are not the principal owners of a business and may therefor lack the relevant knowledge, the environment is not conducive to collecting detailed information, and the data would reflect the retailer's, rather than a financial institution's, clientele. The commenter also said that retail staff are unable to manage sensitive demographic information and that retailers will not appreciate allegations of discrimination if an application is left pending or denied. A few commenters suggested that if the Bureau were to include private label or co-branded transactions (which often occur as point of sale transactions) in the final rule, it should exempt transactions under $50,000 to mitigate the impact of inclusion and provide consistency with FinCEN's customer due diligence rule.

[771] 86 FR 56356, 56487-88 (Oct. 8, 2021).

Similarly, a trade association stated that if point of sale transactions are included, credit lines below $50,000 should be excepted from the requirement to obtain demographic information.

In contrast, a community group urged the Bureau not to provide special treatment for point of sale transactions, arguing that point of sale transactions should follow a similar procedure as other covered transactions. The commenter voiced agreement for the Bureau's suggestion in the proposed rule that retail stores can use the sample data collection form (printed or online) for point of sale transactions.

Next, a trade association representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance lenders, asserting that such lenders cannot collect 1071 data until after funding. Comments regarding insurance premium finance are discussed in the section-by-section analysis of § 1002.104(b)(3).

Finally, one trade association argued for the exemption of captive vehicle finance lenders, based in part on concerns about the collection of small business lending data. The commenter argued that because indirect lenders do not interact with the applicant, they cannot gather certain data required by section 1071, and therefore the motor vehicle dealer would be the only party capable of requesting the applicant's protected demographic information. However, the commenter asserted, the dealer is outside the CFPB's authority and is currently prohibited by ECOA from gathering this information. The commenter stated that the proposal would put pressure on dealers to collect otherwise protected information. The commenter further noted that the employee acquiring the vehicle may not be familiar with the requested data, such as total revenue or ownership structure. In addition, the commenter voiced concerns about purportedly having to collect data at each stage of the process, potentially by multiple covered financial institutions. The commenter argued that requiring collection of 1071 data (such as ethnicity, race, and sex information) at multiple points in the process would be unnecessary, costly, and duplicative, and could expose financial institutions to liability.

Final Rule—Overview of final § 1002.107(c)

For the reasons set forth below, the Bureau is finalizing § 1002.107(c)(1) to require a covered financial institution to not discourage an applicant from responding to requests for applicant-provided data under final § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. The Bureau is adopting new § 1002.107(c)(2) to identify certain minimum components when collecting data directly from the applicant that must be included within a financial institution's procedures to ensure they are reasonably designed to obtain a response. The Bureau is also adopting new § 1002.107(c)(3) to provide the additional safeguard that a covered financial institution must maintain procedures to identify and respond to indicia that it may be discouraging applicants from responding to requests for applicant-provided data, including low response rates for applicant-provided data. Finally, new § 1002.107(c)(4) provides that low response rates for applicant-provided data may indicate that a financial institution is discouraging applicants from responding to requests for applicant-provided data or otherwise failing to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. The Bureau is finalizing § 1002.107(c) pursuant to its authority in ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. For the reasons discussed below, final § 1002.107(c) is necessary to collect 1071 data from applicants and prevent financial institutions from discouraging or influencing an applicant's response.

Final § 1002.107(c) seeks to provide a balance between flexibility and ensuring data collection occurs without discouragement and otherwise in a time and manner likely to generate a robust response. On the one hand, the Bureau believes there are benefits to preserving some flexibility concerning the time and manner in which applicant-provided data are collected. As noted by a number of commenters, there are benefits to providing a flexible approach given the variety of application processes in the small business lending space. The Bureau believes that

financial institutions may need latitude to adjust data collection practices to fit within their own processes and business models; requiring data collection at a single point in time, or only through a particular method, may affect data quality and disrupt financial institutions' practices.

On the other hand, the Bureau believes that collection of applicant-provided data is essential to fulfilling the purposes of section 1071. The Bureau therefore believes that substantial safeguards are necessary to ensure that financial institutions do not discourage applicants from responding to requests for applicant-provided data or otherwise evade or delay their obligation to collect 1071 data in a manner that detrimentally affects response rates.

The Bureau is also implementing revisions to final § 1002.107(c) to provide additional clarity to covered financial institutions concerning the reasonably designed standard and minimum requirements. These changes are responsive to feedback from commenters that proposed 1002.107(c)(1) and associated commentary would have been ambiguous and potentially inconsistent, and requesting further clarity and guidance. The revisions to final § 1002.107(c) and responses to commenter feedback are discussed in depth below.

Final Rule—§ 1002.107(c)(1) In General

Final § 1002.107(c)(1) requires a covered financial institution to not discourage applicants from responding to requests for applicant-provided data under § 1002.107(a) and to otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response. As discussed above, the Bureau believes this general standard provides flexibility to accommodate various small business lending models while also imposing a general duty to maintain procedures concerning the collection of applicant-provided data that are reasonably designed to obtain a response, including not discouraging applicant responses. In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data, and procedures cannot be reasonably designed if they permit financial institutions to engage in conduct that discourages applicants from responding to requests for applicant-provided data. While the Bureau believes that reasonably

designed procedures to collect applicant-provided data inherently must not discourage applicants from responding, in response to comments seeking additional clarity on the Bureau's understanding of reasonably designed procedures, the Bureau is now clearly articulating the prohibition against discouragement.

Comments 107(c)(1)-1 and -3 are finalized with minor revisions for clarity and consistency. Final comment 107(c)(1)-2 is revised to affirm a financial institution's flexibility to establish procedures concerning the time and manner that it collects applicant-provided data, provided that its procedures otherwise meet the requirements of final § 1002.107(c).

New comment 107(c)(1)-4 (part of which was proposed as part of comment 107(c)(1)-3) clarifies that applicant-provided data can be obtained without a direct request to the applicant and can be based on other information provided by the applicant or through appropriate third-party sources.

The Bureau is revising comment 107(c)(1)-5 (proposed as comment 107(c)(1)-7) to clarify that a financial institution reports updated data if it obtains more current data from the applicant during the application process. In response to a commenter's request for additional guidance on whether a financial institution must update data if the applicant provides the information without a request from the financial institution, the Bureau notes that final comment 107(c)(1)-5 requires a financial institution to report data updated by the applicant regardless of whether the financial institution solicits the information. The commenter also asked how proposed comment 107(c)(1)-7 differs from proposed § 1002.107(b), which would have permitted a financial institution to rely on statements of the applicant when compiling data, unless verified information was available. Both final comment 107(c)(1)-5 and final § 1002.107(b) require reporting of updated information where available; the former is focused on data provided by the applicant, while the latter is focused on data verified by the financial institution. Thus, no matter the source, a financial institution should report updated data where available. To the extent a financial institution receives updates from the applicant on data the

financial institution has already verified, final comment 107(c)(1)-5 is revised to clarify that a financial institution reports the information it believes to be more accurate, in its discretion.

Final Rule—§ 1002.107(c)(2) Applicant-provided Data Collected Directly From the Applicant

The Bureau is adopting new § 1002.107(c)(2), which provides that for data collected directly from the applicant, procedures that are reasonably designed to obtain a response must include four specific components, which are further described below. The Bureau is adopting new § 1002.107(c)(2) to provide financial institutions additional clarity on minimum criteria the Bureau believes are necessary for a financial institution's procedures to be "reasonably designed" to obtain a response. Although proposed comments 107(c)(1)-4 through -6 would have provided examples of procedures that generally were and were not reasonably designed, as discussed above, the Bureau received feedback that proposed § 1002.107(c)(1) and associated comments would have been ambiguous, been incomplete, or increased compliance burdens on financial institutions seeking to avoid unintentional non-compliance. The Bureau also believes that greater clarity will increase compliance and help ensure financial institutions put such safeguards into place.

New comment 107(c)(2)-1 provides general guidance on what are reasonably designed procedures and the minimum criteria required under final § 1002.107(c)(2). Comment 107(c)(2)-1 clarifies that whether a financial institution's procedures are reasonably designed is a fact-based determination that may depend on a number of factors, and that procedures that are reasonably designed to obtain a response may therefore require additional provisions beyond the minimum criteria set forth in § 1002.107(c)(2). In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data.

The specific components that must be included within a financial institution's procedures pursuant to final § 1002.107(c)(2) are each discussed in turn below.

Provisions primarily related to the timing of collection. The Bureau is adopting new § 1002.107(c)(2)(i), which requires covered financial institutions to maintain procedures that

provide for the initial request for applicant-provided data to occur prior to notifying an applicant of final action taken on a covered application. The Bureau believes this requirement strikes the right balance between providing financial institutions some flexibility to time the initial collection of applicant-provided data at a point that works for their business models, while also putting in place a guardrail to ensure that applicant-provided data is not collected so late in the process that it jeopardizes the likelihood of receiving a response from an applicant. Unlike proposed § 1002.107(c)(1), which did not set forth any concrete timing deadlines for the collection of applicant-provided data, final § 1002.107(c)(2)(i) requires financial institutions to initially seek to collect applicant-provided data, at the latest, before notifying the applicant of final action taken on a covered application. The Bureau is adopting this revision for several reasons, described below.

Foremost among them, the Bureau believes that initial attempts to collect applicant-provided data after notifying an applicant of action taken on an application—particularly if the action taken is a denial—are likely to result in higher rates of missing data. This view is unchanged from the Bureau's initial position at the NPRM stage, which similarly encouraged collection early in the process and before notifying the applicant of action taken on the application.[772] Not only will late collections miss withdrawn or incomplete applications—information about which is essential to the purposes of section 1071—but it will also likely jeopardize the probability of responses from declined applicants. Unlike originated applications, which have continuous touch points between an applicant and a lender, the Bureau believes it is highly unlikely that an applicant will continue to engage in any information gathering process after being denied a request for credit. Significantly, no commenter provided a viable solution for ensuring collection of 1071 data after an application is denied.

[772] As discussed above, proposed comment 107(c)(1)-5 would have provided that although a fact-based determination, a procedure reasonably designed to obtain a response is one in which a financial institution requests applicant-provided data at the time of a covered application. Conversely, proposed comment 107(c)(1)-6 would have provided that a procedure is generally not reasonably designed to obtain a response if a financial institution requests applicant-provided data simultaneous with or after notifying an applicant of action taken on the covered application.

Next, final § 1002.107(c)(2)(i) provides a bright line point in the application process before which financial institutions must initially seek to collect applicant-provided data, therefore responding to certain commenter feedback that the proposed standard would be ambiguous. As noted by one commenter, although the proposal asserted to provide flexibility for financial institutions to collect applicant-provided data at any point during the application process, so long as the procedures are reasonably designed, the proposed commentary clawed back that flexibility by expressing a clear preference for collection before notifying an applicant of the outcome of its application. The Bureau agrees this fluid framing may cause confusion, and believes providing a defined time frame early enough in the process when applicant-provided data must be collected will assist financial institutions with compliance.

Finally, other changes in the final rule counsel in favor of adopting a more concrete timing standard for the collection of applicant-provided data. Unlike the proposal, which would have included a requirement in certain circumstances for financial institutions to collect information about an applicant's ethnicity and race based on visual observation and/or surname analysis if the applicant did not itself provide such information, as discussed in the section-by-section analysis of § 1002.107(a)(19) above, the final rule does not include such a requirement. As a result, financial institutions might be less motivated to obtain demographic information early enough in the process, when the applicant is still actively engaged and more likely to respond to data requests.

As described above, some commenters urged the Bureau to tighten the timing requirement to require collection in a narrow timeframe, while others asked the Bureau to expand the timing requirement to widely permit collection even after notifying an applicant of action taken on a covered application. The Bureau is not adopting either approach. Although the Bureau agrees with commenters who argued that collection at the time of a covered application will likely increase applicant responses rates in most instances, given the fluid and heterogenous

nature of small business lending, the Bureau believes designating a narrow time-frame may be overly restrictive.

On the other hand, the Bureau is also not permitting financial institutions to attempt the initial collection of applicant-provided data after notifying an applicant of action taken on an application. Industry commenters' principal argument was that collection of sensitive applicant-provided data before decisioning an application could lead to discouragement: applicants may be concerned that the information will be used against them in the credit decision and thus will either not provide the information or not proceed with the credit transaction altogether. Industry commenters also raised the concern that financial institutions could be accused of bias if an applicant is ultimately denied credit after providing protected demographic information.

The Bureau does not believe that early collection will discourage applicants from disclosing certain demographic information and does not believe this concern expressed by commenters outweighs the benefits of early data collection. Initially, concerns of discouragement may be mitigated by the mandatory disclosure language set forth in final comments 107(a)(18)-3 and 107(a)(19)-3, and included on the sample data collection form in appendix E, which explains to applicants the reason the information is being collected and that the information cannot be used to discriminate against the applicant. If, however, an applicant remains concerned about providing applicant demographic information, the applicant can always choose to not provide any requested information (*e.g.*, by selecting "I do not wish to provide this information" or similar for any of the demographic information inquiries). As set forth in final comments 107(a)(18)-1 and 107(a)(19)-1, a financial institution must permit an applicant to refuse or decline to answer inquiries regarding the applicant's protected demographic information and must inform the applicant that the applicant is not required to provide the information. These protections ensure that any applicant who does not feel comfortable providing a response to the demographic inquiries, is not required to do so.

Similarly, the Bureau does not believe that requiring an initial collection attempt before notifying an applicant of action taken will result in fewer applicants voluntarily providing certain demographic information. The Bureau notes that financial institutions regularly collect, at the time of application, demographic information required by Regulation C without issue. Although certain commenters cited to the Paycheck Protection Program as evidence that the collection of demographic information at the time of application results in low response rates, the demographic response rates for Regulation C are significantly higher than for the Paycheck Protection Program, with only 14.3 and 14.7 percent of HMDA respondents not providing a response for race and ethnicity, respectively.[773] Thus, the lower response rate for Paycheck Protection Program applicants is likely due to independent factors. Moreover, to the extent that a financial institution believes that applicants may be reluctant to provide demographic data before an application is decisioned, new § 1002.107(c)(2)(i) only requires a financial institution to make an *initial* collection attempt before notifying an applicant of action taken; nothing prevents a financial institution from making *another* attempt to collect data required by this rule after the application is decisioned.

Ultimately, any applicant reluctance to provide demographic (or other applicant-provided data) pre-decision is not outweighed by the commonsense conclusion that applicants will be unwilling and unmotivated to provide information after being denied a request for credit. After a denial, an applicant will have no independent reason to continue discussions with the lender, much less respond to new requests for information. In this respect, 1071 data collection is distinct from current collection efforts by CDFIs that generally seek to collect demographic information for originated loans, but not denied loans. While CDFI commenters' practice of

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[773] *See* 86 FR 56356, 56483 (Oct. 8, 2021) (noting that demographic response rates in the SBA's Paycheck Protection Program data are "much lower when compared to ethnicity, race, and sex response rates in HMDA data. For instance, roughly 71 percent of respondents in the [Paycheck Protection Program] data did not provide a response for race, compared to only 14.7 percent in the HMDA data. Roughly 66 percent of respondents in the [Paycheck Protection Program] data did not provide a response for ethnicity, compared to only 14.3 percent in the HMDA data.") (citing Small Bus. Admin., *Paycheck Protection Program Weekly Reports 2021, Version 11*, at 9 (effective Apr. 5, 2021), https://www.sba.gov/sites/default/files/2021-04/PPP_Report_Public_210404-508.pdf.

collecting demographic data at loan closing may make sense for other regulatory regimes, it would not be effective at capturing data on denied, incomplete, or withdrawn applications.[774] Although some commenters asserted that response rates would be better if demographic information is collected post-decision, significantly, none of the commenters were able to provide persuasive evidence in support of their assertion, to rebut the belief that applicants are unlikely to respond to information requests once they are no longer involved in the application process, or to offer a workable solution to ensure robust data collection post-decision. While one commenter suggested that financial institutions could collect applicant-provided data "as part of remediation efforts for non-approved loans," the commenter provided no specifics as to what this would entail, or how or why it would be effective.

Next, commenters stated that permitting post-decision collection would minimize friction in the application process. These commenters argued that streamlining the application process is of paramount importance to their business, and any additional delay could frustrate the application process and lead to abandoned applications. The Bureau agrees that new § 1002.107(c)(2)(i) may require financial institutions to take some minimal additional steps during the information gathering stage of the application process, but believes that these additional minimal steps are necessary to fulfill the purposes of section 1071 and should not impact meaningfully the rate of abandoned applications. Moreover, as discussed in the section-by-section analysis of § 1002.107(d), the Bureau has provided flexibilities for financial institutions to reuse some applicant-provided data under certain circumstances, which may alleviate the need for repeated collections. In response to an industry commenter's argument that applicants are unlikely to respond to 1071 data requests given the speed of certain application processes, the Bureau notes that the applicant is less likely to respond if the data is requested post-decision when the applicant is no longer engaged in the process at all. Given the relatively

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[774] *See, e.g.*, 12 CFR 1805.803 (identifying data collection and reporting requirements for the CDFI program, which provides that a financial institution recipient shall "compile data on gender, race, ethnicity, national original, or other information on *individuals that utilize its products and services* . . . .") (emphasis added).

limited time it would take to collect 1071 data, the Bureau also rejects commenters' assertion that requesting 1071 data will negatively impact whether a small business applies for credit at all. No commenter provided persuasive evidence that applicants will avoid seeking credit because of data collection under this rule.

Commenters raised a handful of additional arguments. In response to a commenter's argument that the person initially completing the application may not be the business owner or have the requisite knowledge, the Bureau notes that new comment 107(c)(2)-2.v permits a financial institution to follow-up with additional attempts to collect the information through different means or at another time. Moreover, given that approximately 82 percent of small businesses are non-employer firms,[775] the Bureau believes in most instances the individual completing the form will have the relevant information.

Next, in response to a comment that post-decision collection would ensure underwriters do not have access to protected demographic information, the Bureau agrees, but does not believe that such considerations trump the importance of ensuring data are collected in the first place. Indeed, the fact that ECOA section 704B(d)(2) contemplates that underwriters and other employees involved in making a credit determination may have access to applicant-provided data demonstrates that Congress envisioned that financial institutions may collect 1071 data before decisioning an application. In any event, concerns about access to demographic information are adequately addressed by the firewall provision in final § 1002.108, as well as the general prohibition from discriminating on a prohibited basis in any aspect of a credit transaction in existing ECOA and Regulation B.

Finally, one commenter indirectly took issue with the requirement to collect applicant-provided data in advance of notifying an applicant of action taken by noting that certain lenders would use decision scoring models to also determine whether the applicant is a "small business,"

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[775] White Paper at 8; *see also* U.S. Small Bus. Admin., Off. of Advocacy, *2022 Small Business Profile*, at 2 (2022), https://cdn.advocacy.sba.gov/wp-content/uploads/2022/08/30121338/Small-Business-Economic-Profile-US.pdf (identifying 33,185,550 small businesses, of which 27,104,006 have no employees).

such that demographic information could only be collected after a decision is made on the application. Initially, the Bureau notes that nothing prevents a financial institution from inquiring whether the applicant is a "small business," and if so, seeking applicant-provided data before decisioning the covered application. Indeed, as discussed in final comment 107(c)(2)-2.i, the earlier in the application process the financial institution initially seeks to collect applicant-provided data, the more likely the timing of collection is reasonably designed to obtain a response. The Bureau also does not agree that delaying communicating a credit decision to an applicant in order to acquire demographic or other applicant-provided data would violate ECOA and the Fair Credit Reporting Act. The Bureau does not believe there is a conflict between the laws; any delay would be minimal, would not affect the timeframes under existing Regulation B to provide required notices when decisioning a credit application,[776] and could be avoided by collecting applicant-provided data in advance, as discussed above.[777]

For the reasons discussed above, including that collection occurring post-final action would undermine the purposes of section 1071, the Bureau is requiring financial institutions to maintain procedures to collect applicant-provided data before notifying the applicant of final action on the application.[778] The Bureau is also adopting new comment 107(c)(2)-2.i, which provides additional guidance concerning when financial institutions must initially seek to collect 1071 applicant-provided data. New comment 107(c)(2)-2.i clarifies that § 1002.107(c)(2) requires that under no circumstances may the initial request for applicant-provided data occur

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[776] Existing Regulation B § 1002.19(a)(1) requires a creditor to notify an applicant of action taken within 30 days after receiving a completed application.

[777] *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" (citation omitted)).

[778] Although final § 1002.107(c)(2)(i) requires collection before *notifying* an applicant of final action on an application, the Bureau anticipates that in the vast majority of cases financial institutions will also collect applicant-provided data before *decisioning* an application. The Bureau is requiring collection based on when an applicant is notified of final action on the application, however, given the concerns noted above (particularly related to the applicant's willingness to stay engaged) and because a financial institution may have an easier time controlling when an applicant is notified, versus when an application is decisioned.

simultaneous with or after notifying an applicant of final action taken on a covered application.[779]

Although new § 1002.107(c)(2)(i) requires a financial institution to make an initial collection attempt prior to notifying an applicant of action taken, new comment 107(c)(2)-2.v clarifies that a financial institution has latitude to make additional requests for applicant-provided data, including after notifying the applicant of action taken. In response to a trade association's request that the Bureau clarify how many times a financial institution must request 1071 data, new comment 107(c)(2)-2.v clarifies that a financial institution is permitted, but not required, to make more than one attempt to obtain applicant-provided data if the applicant does not respond to an initial request. For example, a financial institution may decide to make multiple requests if it is concerned that applicants may not be as forthcoming early in the process, if it has multiple opportunities to request 1071 data that work well within its business processes, or as another method to encourage greater applicant response.

Provisions primarily related to the manner of collection. New § 1002.107(c)(2)(ii) through (iv) sets forth provisions that financial institutions must incorporate into their procedures for collecting applicant-provided data directly from the applicant to ensure that such procedures are reasonably designed to obtain a response and do not discourage a response. New § 1002.107(c)(2)(ii) requires financial institutions to maintain procedures that provide the request for applicant-provided data is prominently displayed or presented. New comment 107(c)(2)-2.ii provides further guidance on the requirement, clarifying that a financial institution must ensure an applicant actually sees, hears, or is otherwise presented with the request for applicant-provided data, and that if the request is obscured or likely to be overlooked or missed by the applicant, it is not reasonably designed. For example, a financial institution seeking to collect

[779] Nor may a financial institution seek to evade § 1002.107(c)(2)(i) by initially seeking to collect applicant-provided data after it has signaled to the applicant that its application has been decisioned and the likely outcome, even if the financial institution has not yet formally notified the applicant of action taken on the covered application. Such conduct would not constitute procedures reasonably designed to obtain a response, as required pursuant to § 1002.107(c)(1).

1071 data in connection with a digital application likely does not have reasonably designed procedures if it uses a bypassable hyperlink for 1071 data collection while other data are requested through click-through screens.

New § 1002.107(c)(2)(iii) requires that the financial institution's procedures must not have the effect of discouraging applicants from responding to a request for applicant-provided data. New comment 107(c)(2)-2.iii clarifies that a covered financial institution that collects applicant-provided data in a time or manner that directly or indirectly discourages or obstructs an applicant from responding or providing a particular response violates the rule. The comment also provides further guidance on procedures that may avoid the effect of discouraging a response. For example, comment 107(c)(2)-2.iii.B explains a covered financial institution avoids discouraging a response by requiring an applicant to provide a response in order to proceed with a covered application, including, as applicable, a response of "I do not wish to provide this information" or similar. While optional, requiring an applicant to provide a response, particularly for the collection of demographic applicant information, may be one of the most effective methods a financial institution can use to maximize collection of such data.

The Bureau notes that other aspects of this final rule are similarly directed at ensuring applicants are not discouraged from providing a response. For example, in response to a commenter's request that the Bureau provide potential disclosure language and sample collection forms financial institutions can use with applicants to allay concerns about how data will be used, the Bureau notes that the final rule provides for such required disclosure language and a sample disclosure form. For instance, final comments 107(a)(18)-4 and 107(a)(19)-4, concerning collection of applicant demographic information, require financial institutions to inform the applicant both that a financial institution cannot discriminate on the basis of the applicant's responses to data collected pursuant to § 1002.107(a)(18) and (19) and that Federal law requires them to ask for an applicant's demographic information to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are

being fulfilled. The Bureau believes such explanations, which are included in the sample data collection form in appendix E, are important to inform applicants why the request is being made and to assure them that financial institutions may not use the information collected for a discriminatory purpose.[780]

Finally, new § 1002.107(c)(2)(iv) requires that the financial institution's procedures include provisions that ensure applicants can easily respond to a request for applicant-provided data. New comment 107(c)(2)-2.iv provides additional guidance and examples of procedures that would and would not make it easy for an applicant to provide a response. The comment further clarifies that a financial institution complies with § 1002.107(c)(2)(iv) if it requests the applicant to respond to inquiries made pursuant to § 1002.107(a)(18) and (19) through a reasonable method intended to keep the applicant's responses discrete and protected from view. For example, if an applicant is completing a paper application form, a financial institution may request that the applicant return a paper data collection form requesting demographic data in a sealed envelope provided by the financial institution.

In response to a commenter's suggestion that the Bureau permit financial institutions to collect applicant-provided data through a variety of means, the Bureau notes that nothing requires a financial institution to request applicant-provided data in a single format or manner, and indeed new comment 107(c)(2)-2.iv expressly contemplates that a financial institution may use multiple methods to collect applicant-provided data.

Final Rule—§ 1002.107(c)(3) Procedures to Monitor Compliance

The Bureau is adopting new § 1002.107(c)(3) to require that a covered financial institution maintain procedures designed to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data. The Bureau is

[780] In response to a community group's suggestion that the Bureau create a sample form with all required data elements, the Bureau notes that, except for collection of certain demographic information, many financial institutions already collect some or all of the data required by this final rule, or may opt do so in a myriad of ways. See the section-by-section analysis of appendix E for further discussion of why the Bureau is not adopting sample or model forms for the collection of other types of data required by this rule.

adopting new § 1002.107(c)(3) in order to provide greater clarity and safeguards on the type of infrastructure financial institutions are expected to have in place in order to ensure compliance with final § 1002.107(c)(1) and (2). Although the Bureau anticipates that the particular components of a financial institution's procedures will vary from institution to institution, to provide regulatory clarity, new comment 107(c)(3)-1 provides a list of procedures the Bureau generally expects financial institutions will maintain in order to identify and respond to indicia of potential discouragement.[781]

In response to commenters' request for additional guidance on proposed comment 107(c)(1)-4, which would have required financial institutions to reassess on a periodic basis, based on available data, whether its procedures are reasonably designed to obtain a response, the Bureau notes that new § 1002.107(c)(3) and comment 107(c)(3)-1 clarify the type of monitoring expected of financial institutions. In response to a commenter's question about whether a financial institution is permitted or required to engage in testing beyond peer analysis, such as A/B testing or other methods, the Bureau notes that nothing in the final rule requires a financial institution to do so. While a financial institution is certainly free to experiment with different procedures to see which are most effective for its business model, a financial institution may typically comply with final § 1002.107(c) by following the minimum factors and guidelines set forth in final § 1002.107(c)(1) through (3) and associated commentary. In response to a commenter's request for further guidance on what constitutes "periodic" peer testing, the Bureau notes initially that the term "periodic" does not appear in new § 1002.107(c)(3) or its associated commentary. The Bureau does anticipate, however, regular monitoring under new § 1002.107(c)(3) in order to identify and respond to indicia of potential discouragement. There is no designated number or time frame for how often that monitoring must occur; rather, the precise

[781] The Bureau acknowledges that financial institutions may not have all the necessary data to conduct a robust peer analysis of response rates until after 1071 data collection has been in effect for some period of time, and that the availability and robustness of a peer analysis will also depend on the extent to which 1071 data are made publicly available. In the meantime, the Bureau still expects financial institutions to monitor response rates internally and in comparison to public data, as available.

cadence and scope will vary depending on the financial institution's procedures for collecting applicant-provided data, its business model, and other relevant factors.

Final Rule—§ 1002.107(c)(4) Low Response Rates

The Bureau is adopting new § 1002.107(c)(4) to provide that a low response rate for applicant-provided data may indicate discouragement or other failure by a covered financial institution to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response. Similar to proposed comment 107(c)(1)-4, which would have provided that a financial institution may compare its response rate to peer institutions as a method to assess whether its procedures are reasonably designed, final § 1002.107(c)(4) identifies the importance of response rates as a method to assess whether a financial institution has reasonably designed procedures. The Bureau anticipates that in many instances, a low response rate may indicate a failure to comply with final § 1002.107(c)(1) and (2). The Bureau is adopting § 1002.107(c)(4) in order to provide covered financial institutions clarity on the type of information that may be used to assess a financial institution's procedures.

The Bureau is adopting new comment 107(c)(4)-1 to provide further guidance on how to assess response rates. The comment clarifies that "response rate" generally refers to whether the financial institution has obtained some type of response to requests for applicant-provided data (including, as applicable, a response from the applicant of "I do not wish to provide this information" or similar). However, significant irregularities in a particular response (for example, very high rates of "I do not wish to provide this information" or similar) may also indicate that a financial institution does not have reasonably designed procedures. In particular, significant irregularities may indicate the financial institution is somehow steering, improperly interfering with, or otherwise discouraging or obstructing an applicants' preferred response. New comment 107(c)(4)-1 further clarifies that response rates may be measured, as appropriate, as compared to financial institutions of a similar size, type, and/or geographic reach, or other factors, as appropriate.

In response to commenters' concern that peer comparisons may not be an effective method to assess the reasonableness of a financial institution's procedures if all peers are not making reasonable efforts, the Bureau agrees that peer comparisons alone are not determinative. Comparing a financial institution's response rates to its peers is just one possible indicator of whether a financial institution has procedures reasonably designed to obtain a response. Even if a financial institution maintains a response rate commensurate with its peers, if all peers have low response rates overall or maintain procedures not reasonably designed to obtain a response, the financial institution may still violate § 1002.107(c). The Bureau does not believe it would be appropriate at this time, however, to set a specific percentage or metric for response rates, as suggested by some commenters, as the appropriate response rate may depend on a number of factors, differ from institution to institution, and change over time, for example, as financial institutions refine their collection methods.

Requests for special treatment for particular types of transactions or types of financial institutions

The Bureau is not adopting exceptions concerning the time and manner of collection of demographic information for particular types of transactions or by particular financial institutions, as requested by some commenters. For the reasons described below, the Bureau believes the same time and manner rules should apply across all covered credit transactions and all covered financial institutions.

Initially, the Bureau believes that point of sale transactions should follow the same rules as all covered credit transaction types, and thus does not believe that an exemption for such transactions, as suggested by some commenters, would be appropriate. The Bureau understands that many (though not all) point of sale applications, particularly those for smaller credit amounts or to purchase particular goods in a store, are submitted on-site at the point of sale and decisioned in real time. Many of the commenters' arguments for exclusion of point of sale transactions were identical to the arguments set forth by commenters above for why financial

institutions should be permitted to collect 1071 data after decisioning an application, including arguments based on the speed and fast-paced nature of the application process, that applicants would be discouraged from responding or proceeding with the transaction, and that the person completing the application may lack the requisite knowledge. For the same reasons discussed above, the Bureau likewise does not believe that an exemption would be appropriate for point of sale transactions.

In response to commenters' concerns that applicants will not feel comfortable answering questions related to their ethnicity, race, and sex in a public place, the Bureau believes that financial institutions can develop procedures to accommodate collection in this setting, including by using the sample collection form developed by the Bureau (in paper or electronic format) or creating more private locations for the collection of data in-store. The Bureau also does not believe that specialized knowledge is necessary to collect these data, and believes that retailers and their employees can collect and maintain data with the necessary precautions to safeguard applicant information, as they do with other sensitive data provided in connection with a credit application. As to a commenter's argument that retailers will have limited motivation to collect small business lending data, the Bureau notes that a financial institution that retains a third party to offer its financial products has significant control and responsibility over how its products are offered, including the power and responsibility to require third-party partners to seek to collect required data and otherwise comply with applicable law. In response to a commenter's argument that data collected on point of sale transactions will reflect the retailer's, rather than the financial institution's, footprint, the Bureau notes that a financial institution chooses its retail partners. Finally, although some commenters asserted that the collection of 1071 data will deter applicants from seeking credit or retailers from providing in-store private label credit, they provided no evidence to support this claim.

Several commenters requested that if the Bureau includes point of sale or similar transactions in the final rule, the Bureau should nonetheless exempt such transactions under

$50,000 or except such transactions from the requirement to obtain demographic data. These commenters stated that such an exemption would be consistent with FinCEN's customer due diligence rule, which excludes from certain of its requirements point of sale transactions to provide credit products solely for the purchase of retail goods/services up to a limit of $50,000. The Bureau is not adopting such an approach here, given the different purposes and requirements of the customer due diligence rule and section 1071. The purpose of FinCEN's rule is to improve financial transparency and prevent criminals and terrorists from misusing companies to disguise their illicit activities and launder their ill-gotten gains.[782] The customer due diligence rule's exclusion for certain point of sale transactions is based on the "very low risk posed by opening such accounts at [a] brick and mortar store."[783] While the customer due diligence rule focuses on accounts (including certain originated loans), obtaining data on denials is essential to section 1071's purposes. Moreover, unlike FinCEN's rule, which requires covered financial institutions to collect certain essential information, section 1071 only requires that financial institutions seek to collect applicants' protected demographic information, and permits applicants to refuse to provide that information. Given these key differences, the Bureau is not adopting an exclusion for point of sale applications below $50,000. See also the section-by-section analysis of § 1002.104, which discusses requests for minimum transaction amount thresholds.

Next, trade associations representing insurance premium finance lenders and insurance agents and brokers similarly argued that the Bureau's rule should not apply to insurance premium finance lenders, in part because such lenders cannot collect 1071 data until after funding. New § 1002.104(b)(3) excludes insurance premium financing, therefore resolving these commenters' concerns.

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[782] *See* Fin. Crimes Enf't Network, *Information on Complying with the Customer Due Diligence (CDD) Final Rule,* https://www.fincen.gov/resources/statutes-and-regulations/cdd-final-rule (last visited Mar. 20, 2023).

[783] Fin. Crimes Enf't Network, *Guidance,* at Q 29 (Apr. 3, 2018), https://www.fincen.gov/sites/default/files/2018-04/FinCEN_Guidance_CDD_FAQ_FINAL_508_2.pdf.

Finally, the Bureau does not believe it would be appropriate to categorically exclude captive vehicle finance lenders should be excluded from coverage. The commenter's request was primarily based on the argument that dealers—who primarily interact with applicants—are currently prohibited by ECOA from gathering certain protected demographic information. As further discussed in the section-by-section analysis of § 1002.109(a)(3), Regulation B issued by the Board of Governors of the Federal Reserve System (12 CFR part 202) and applicable to dealers provides in comment 5(a)(2)-3 that "[p]ersons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to [HMDA] or another Federal or State statute or regulation requiring data collection." In response to the commenter's concern that dealers may not be familiar with all required data under section 1071, such as gross annual revenue or ownership structure information, the Bureau first notes that dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting 1071 data on behalf of other reporting financial institutions. Second, even in situations where the dealer is acting as a mere conduit, and thus may be collecting information on behalf of another financial institution, the Bureau expects that the dealer can request 1071 data from the applicant, just like a covered financial institution would do. Finally, the commenter's concerns that data must be collected at each stage of the process, potentially by multiple covered financial institutions, may be misplaced; nothing in the proposed or final rule would require a financial institution (or a third party collecting data on its behalf) to collect data multiple times in connection with a single covered application.

107(d) Previously Collected Data

Proposed Rule

Proposed § 1002.107(c)(2) would have permitted, but not required, a financial institution to reuse previously collected data to satisfy proposed § 1002.107(a)(13) through (21) if the data

were collected within the same calendar year as the current covered application and the financial institution had no reason to believe the data are inaccurate. The Bureau believed that, absent a reason to suspect otherwise, recently collected 1071 data are likely to be reliable.

Proposed comments 107(c)(2)-1 through -7 would have provided additional guidance and examples of when certain data can be reused by a financial institution, including what data can be reused, when information is considered collected in the same year, when a financial institution may have reason to believe data are inaccurate, and when a financial institution may reuse data regarding minority-owned business status, women-owned business status, and data on the principal owners' ethnicity, race, and sex.

The Bureau sought comment on § 1002.107(c)(2) and associated commentary.

Comments Received

The Bureau received comment on proposed § 1002.107(c)(2) from a range of lenders, trade associations, and community groups. A few commenters noted that it is commonplace for lenders to receive multiple applications from a borrower. For example, a community bank stated that it is typical for borrowers to submit numerous loan requests during the year, and expressed concern about what it referred to as "repetitive completion" of data points. A trade association similarly noted that financial institutions often have customers with multiple facilities, which may have been obtained all at once or over time.

Some commenters generally supported a provision that would allow financial institution to reuse certain data for some period of time. A community group supported allowing lenders to use previously collected data if an application is continued at a later date. However, the commenter urged against permitting reuse beyond a year, noting that the characteristics of the small business may change (such as revenue size).

In response to the Bureau's request for comment on the issue, a number of commenters urged the Bureau to adjust the time frame for reuse. A CDFI lender urged that, at a minimum, the Bureau update the time frame to "within 12 months," rather than the same calendar year, noting

that there is no reason to believe data are inaccurate for applications submitted close in time, but that fall between two calendar years. A trade association urged the Bureau to permit reuse for "the same or prior calendar year." The commenter argued that permitting reuse of data would reduce applicant burden and that it would be unnecessarily restrictive to require financial institutions to collect anew previously obtained data that is still likely to be accurate. The commenter further noted that a financial institution can repopulate previously provided data, and the applicant can certify that the data are still accurate or update the data. A community bank argued that a one-year period was too short considering that its agricultural clients often annually reapply for draw down lines of credit (used to purchase crop inputs for the year), during which period a borrower's small business and principal owner status are unlikely to change.

A couple of community banks and group of trade associations urged the Bureau to permit reuse for a 24-month or two-year period. One of the banks stated that it is common for businesses to obtain a new product from a financial institution in the first three years, rather than the first year alone. Another trade association argued for a three-year reuse period. The commenter also argued that reuse should be permitted for any data the financial institution does not normally gather in connection with credit applications, such as data regarding minority-owned business status, women-owned business status, and data on the principal owners' ethnicity, race, and sex, as well as gross annual revenue information if not typically collected. A community bank argued that if there are no changes to the data, a financial institution should be permitted to reuse data indefinitely. Finally, a community bank asserted that prior collected data should be reusable for the same amount of time across all data points, unless there is a reason to believe they are inaccurate. However, the commenter continued, reuse of gross annual revenue data should be updated every fiscal year and gender should be updated every year given that gender identity may change. The commenter asserted that ethnicity and race information about the principal owner(s) should not change absent a change in principal owner(s).

In contrast, a community groups, community-oriented lenders, and business advocacy groups, as well as an individual commenter opposed reuse of prior collected data in certain circumstances. The joint letter and the minority business advocacy group specifically opposed reuse of information about a principal owner's ethnicity, race, and sex information if the business previously responded "I do not wish to provide this information." The commenters asserted that opinions may shift, which may make a person more likely to provide the requested information. The commenters further noted that it is not a big burden on financial institutions to attempt to gather the information again and doing so goes to the purposes of section 1071. An individual commenter argued that the proposed reuse of previously collected data about an applicant's sex, sexual orientation and gender identification would have a negative impact on members of the LGBTQ community. The commenter was concerned that information collected for one purpose would be used for a non-intended purpose, such as to classify and segregate LGBTQ members applying for a small business loan. The commenter stated that by collecting data on an applicant's sex, sexual orientation, and gender identification, LGBTQ members are at risk that their data may be used for unintended purposes outside 1071 data collection.

In response to the Bureau's request for comment on whether financial institutions should be required to notify applicants that information they provide may be reused for subsequent applications, one community bank suggested the Bureau add a disclosure on the sample data collection form noting that the information may be reused, and if the information has changed, to inform the applicant's lender.

A community bank asked how the reuse provision could be implemented in light of the proposed firewall provision. The commenter noted that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on data collected in the same calendar year if that data is inaccessible to the lender. Another commenter asked for clarification whether data (specifically demographic data) collected in prior years could be reused, and what to do if there are multiple collections.

Specifically, the commenter gave the example of an applicant that provides demographic information for one application, and then chooses not to provide demographic information for a subsequent application, and asking which collection should be reported.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.107(d) (proposed as § 1002.107(c)(2)) to permit, but not require, a financial institution to reuse previously collected data to satisfy § 1002.107(a)(13) through (20) if (a) the data were collected within the 36 months preceding the current covered application (except that to satisfy § 1002.107(a)(14), on gross annual revenue, the data must be collected within the same calendar year as the current covered application) and (b) the financial institution has no reason to believe the data are inaccurate. As discussed above, the majority of commenters to weigh in on this issue supported reuse of data for some period of time, with many commenters urging the Bureau to extend the time period for reuse from the same calendar year to multiple years. As noted by one bank, it is common for businesses to seek a new product within three years of a prior origination, with fewer requests occurring within one year. Allowing reuse will also reduce the need for applicants to repeatedly provide the same information over a short period of time, as noted by some commenters. The Bureau also believes permitting reuse will reduce burden on financial institutions, particularly those with an established relationship with a business. In addition, the Bureau believes that permitting reuse will assist in fast-paced transactions, such as requests for additional credit amounts on an existing account. Based on these reasons and the feedback from commenters, the Bureau now believes that 36 months strikes the appropriate balance of permitting reuse for a short enough period of time that the data are likely to be reliable, while also permitting a long enough period of reuse to avoid a financial institution from having to make repeated information requests to returning customers.

In response to a commenter's concern that characteristics of a small business may change during a time period greater than a year, the Bureau notes that any dramatic shifts will likely be

known to a financial institution considering a new covered application. In those circumstances, the financial institution either will have already collected updated information (in which case the updated information would be reported pursuant to final comment 107(d)-4) or the financial institution will have reason to believe certain data are inaccurate, in which the case the financial institution cannot reuse that data pursuant to final § 1002.107(d)(2). Indeed, the Bureau believes that final § 1002.107(d)(2), the provision prohibiting reuse of data if the financial institution has reason to believe the prior collected data are inaccurate, will identify the majority of situations where the data are no longer reliable. For example, as set forth in final comment 107(d)-6, a financial institution may have reason to believe data are inaccurate if it knows that the applicant has had a change in ownership or a change in an owner's percentage of ownership. Similarly, a financial institution may also have reason to know data are inaccurate if the business indicates that is has opened several new store locations recently. In that case, the financial institution may have reason to ask for updated data on gross annual revenue, number of workers, and potentially other data points.

Some commenters raised concerns about reuse of data regarding a principal owner's race, sex, and ethnicity information, particularly if the business previously responded "I do not wish to provide this information." Another commenter stated that identities, and particularly gender identity, may shift, and so the information should be collected at least every year. The Bureau understands that how an applicant wishes to identify may shift over time. However, as noted above, the Bureau believes that a 36-month period provides the right balance of permitting reuse for a period of time to reduce repetitive collections, but also require financial institutions collect the data anew once a substantial amount of time has passed. Although the final rule permits reuse of applicant demographic data pursuant to final § 1002.107(d), final comment 107(d)-9 provides that a financial institution may not reuse data to satisfy § 1002.107(a)(18) and (19) unless the data were collected in connection with a prior covered application pursuant to subpart B. The Bureau believes that reuse of applicant demographic data should be limited in this manner to

ensure that data reported were collected in a manner that aligns with the protections and selection options set forth in final § 1002.107(a)(18) and (19).

Although the Bureau is finalizing § 1002.107(d) to permit reuse of certain data collected within a 36-month period, the Bureau notes that a financial institution may—at any time, even outside a three-year period—use reasonable procedures to reaffirm data previously collected. The Bureau understands that many financial institutions have years of experience serving a particular small business's credit needs and so may seek to streamline new credit requests to avoid duplicative or unnecessary collection efforts. In this respect, it is important to note that the final rule does not prevent a financial institution from identifying efficient ways to gather 1071 required data, including by leveraging prior 1071 data to streamline the collection process. For example, even if it has been more than three years since a business submitted an application for credit, a financial institution may reaffirm prior collected data about whether the business is minority-owned, women- owned, and LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business by, for example, providing the applicant with a data collection form pre-populated with its prior responses and confirming with the applicant that the information remains accurate or making any changes noted by the applicant. Methods that reaffirm prior collected data may be particularly useful in faster-paced transactions, such as requests for additional credit amounts.

A bank asked how the reuse provision can be implemented in light of the proposed firewall provision, noting that because the firewall provision prohibits review by underwriters of demographic information, it is unclear how a financial institution can reasonably rely on previously collected data if it is inaccessible to the lender. The Bureau does not believe that the firewall provision in final § 1002.108 will conflict or render unusable the reuse provisions in final § 1002.107(d), as suggested by some commenters. Initially, the Bureau notes that the firewall provision only applies to information regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under

§ 1002.107(a)(18) and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), but not other applicant-provided data. In any event, if an employee or officer is typically tasked with collecting data required under § 1002.107(a)(18) and (19), and is otherwise not involved in making any determination concerning a covered application, providing that employee with access to an applicant's prior responses to data requests under § 1002.107(a)(18) and (19) would not violate the firewall. Thus, final comment 108(a)-1(ii)(f) provides the example that reviewing previously collected data to determine if it can be used for a later covered application pursuant to § 1002.107(d) is not an activity that constitutes being involved in making a determination regarding a covered application. Finally, if a financial institution determines that it is not feasible to limit an employee's or officer's access to an applicant's prior responses to the financial institution's inquiries under final § 1002.107(a)(18) and (19) and provided the notice required under final § 1002.108(d) to the applicant at the time the data were collected, the financial institution can permit that employee or officer to reuse the collected data for a 36-month period as set forth in final § 1002.107(d).

In response to a commenter's question concerning what previously reported data can be used, and how to resolve conflicting answers provided at different times, the Bureau notes that final comment 107(d)-4 provides that a financial institution should use updated information if available.

In response to its request for comment on the issue in the NPRM, the Bureau received feedback from an industry commenter that the sample data collection form should include a disclosure that information can be reused for section 1071 reporting purposes, and that an applicant should inform its lender if there have been any changes. The Bureau is finalizing the sample data collection form without a disclosure about potential reuse of data. Including such language could distract an applicant from other language on the form (such as why the data is being collected) and risks potentially confusing an applicant, who might not understand that reuse is limited to 1071. Relatedly, the collection form accurately identifies why the information

is being collected whether or not the data are later reused—to help ensure that all small business applicants are treated fairly and that communities' small business credit needs are being fulfilled.

Final comment 107(d)-1 (proposed as comment 107(c)(2)-1) is revised to clarify that reuse of data pursuant to final § 1002.107(d) is limited to reuse for the purpose of reporting such data pursuant to § 1002.109. In response to an individual commenter's concern about potential misuse of 1071 data, the Bureau has adopted new § 1002.110(e), which prohibits a financial institution from disclosing or providing to third parties the information it collects pursuant to final § 1002.107(18) and (19) except in limited circumstances. In addition, financial institutions remain prohibited from using 1071 data—particularly data about whether the business is minority-owned, women-owned, or LGBTQI+-owned, and the ethnicity, race, and sex of the principal owners of the business—in a manner that violates ECOA, existing Regulation B, or any other applicable law. For example, existing § 1002.4(a) prohibits a creditor from discriminating against an applicant on a prohibited basis in any aspect of a credit transaction. Similarly, existing § 1002.6(b)(1) prohibits a creditor from taking a prohibited basis into account in any system of evaluating the creditworthiness of an applicant, except as expressly provided for by ECOA or Regulation B. Thus, just because this final rule gives a financial institution permission to *collect* ethnicity, race, and sex/gender information for the limited purposes of section 1071, a financial institution still remains prohibited from *considering* that data in a manner that violates ECOA, existing Regulation B, or any other applicable law.

Final comments 107(d)-2 and -3 (proposed as comments 107(d)-2 and -3) contain minor revisions for consistency and clarity. Final comment 107(d)-2 identifies the particular data that can be reused. The comment also clarifies that other data required by final § 1002.107(a) cannot be reused, as those data points are specific and unique to each covered application. Final comment 107(d)-3 clarifies instances where data have not been "previously collected" and so cannot be reused under final § 1002.107(d).

The Bureau is adopting new comment 107(d)-4 to clarify that if a financial institution obtains updated information relevant to the data required to be collected and reported pursuant to final § 1002.107(a)(13) through (20), and the applicant subsequently submits a new covered application, the financial institution must use the updated information in connection with the new covered application or seek to collect the data again. Final comment 107(c)(2)-4 also provides an example of updated information.

Final comment 107(d)-5 (proposed as comment 107(c)(2)-4) is revised to provide guidance on how to measure the 36-month period for potential reuse of certain data, and provides an illustrative example.

Final comment 107(d)-6 (proposed as comment 107(c)(2)-5) contains minor revisions for consistency and clarity, and an example of when a financial institution has reason to believe data may be inaccurate and so cannot be reused for a subsequent covered application.

As noted above, final § 1002.107(d)(1) permits a financial institution to reuse gross annual revenue data if collected within the same calendar year as the current covered application. The Bureau is adopting a narrower window for the reuse of gross annual revenue data than other previously collected data given the language in ECOA section 704B(e)(2)(F) requiring financial institutions to compile "gross annual revenue of the business in the last fiscal year . . . preceding the date of the application." Given that the statute identifies a specified time frame for the collection of gross annual revenue, it would be more consistent with the statute to permit reuse of gross annual revenue only within the same calendar year. Moreover, given that gross annual revenue data already looks back to the prior fiscal year, adding an additional 36-month period could affect data quality. The Bureau is also adopting new comment 107(d)-7 to provide guidance on when gross annual revenue information is considered collected in the same calendar year, and so may be reused by a financial institution in certain circumstances. In particular, the comment discusses applications that span more than one calendar year.

The Bureau is adopting new comment 107(d)-8 to clarify that if a financial institution decides to reuse data about the applicant's time in business, the financial institution must update the data to reflect the passage of time, and provides an illustrative example.

Lastly, final comment 107(d)-9 (proposed as comments 107(c)(2)-6 and -7) is revised to provide guidance on when data regarding minority-owned business status, women-owned business status, LGBTQI+-owned business status, and data on the principal owners' ethnicity, race, and sex may be reused by a financial institution in a subsequent covered application.

Section 1002.108 Firewall

Background

ECOA section 704B(d) generally limits the access of certain individuals at a financial institution or its affiliates to certain information provided by an applicant pursuant to section 1071. The Bureau calls this requirement in 704B(d) to limit access to information a "firewall."

More specifically, ECOA section 704B(d)(1) states that "[w]here feasible," underwriters and other officers and employees of a financial institution or its affiliates "involved in making any determination concerning an application for credit" cannot have access to any information provided by the applicant pursuant to a request under 704B(b). That is, the statute limits access not only by underwriters and persons making an underwriting decision but also by anyone else involved in making any determination concerning an application. However, it does not expressly define the term "feasible" or provide clarification regarding what it means to be "involved in making any determination concerning an application for credit."

Additionally, under ECOA section 704B(d)(2), if a financial institution determines that an underwriter, employee, or officer involved in making a determination "should have access" to any information provided by the applicant pursuant to a request under 704B(b), the financial institution must provide a notice to the applicant of the underwriter's access to such information, along with notice that the financial institution may not discriminate on the basis of such information. Section 704B(d)(2) does not expressly define or describe when an underwriter,

employee, or officer "should have access," nor does it explain the relationship, if any, between when a financial institution determines that an individual "should have access" under 704B(d)(2) and whether it is "feasible" to implement and maintain a firewall under 704B(d)(1).

Proposed Rule

Scope of the firewall. In the NPRM, the Bureau explained its belief that section 1071 is ambiguous with respect to the meaning of "any information provided by the applicant pursuant to a request under subsection (b)." On the one hand, ECOA section 704B(b)(1) directs financial institutions to inquire whether a business is "a women-owned, minority-owned, or small business," so the phrase could be interpreted as referring only to these three data points. However, section 704B(e) indicates that the scope of 704B(b) is much broader. It instructs financial institutions that "information provided by any loan applicant pursuant to a request under subsection (b) . . . shall be itemized in order to clearly and conspicuously disclose" data including the loan type and purpose, the amount of credit applied for and approved, and gross annual revenue, among other things. In other words, 704B(e) designates all of the information that financial institutions are required to compile and maintain—not simply an applicant's status as a women-owned, minority-owned, or small business—as information provided by an applicant "pursuant to a request under subsection (b)."

Information deemed provided pursuant to 704B(b) is subject not only to the firewall under 704B(d) but also to a right to refuse under 704B(c) and separate recordkeeping requirements under 704B(b)(2). Applying these special protections to many of the data points in 704B(e), such as an applicant's gross annual revenue or the amount applied for, would be extremely difficult to implement because this information is critical to financial institutions' ordinary operations in making credit decisions.

In order to resolve these ambiguities, the Bureau gave different meanings to the phrase "any information provided by the applicant pursuant to a request under subsection (b)" with respect to ECOA section 704B(e) as opposed to 704B(b)(2), (c), and (d). With respect to the

scope of the firewall, the Bureau interpreted the phrase to refer to the data points in proposed § 1002.107(a)(18) (minority-owned business status) and proposed § 1002.107(a)(19) (women-owned business status), as well as proposed § 1002.107(a)(20) (ethnicity, race, and sex of principal owners). None of these data points has any bearing on the creditworthiness of the applicant. Moreover, a financial institution generally could not inquire about this demographic information absent section 1071's mandate to collect and report the information, and ECOA prohibits a financial institution from discriminating against an applicant on the basis of the information. Thus, the Bureau believed that the best effectuation of congressional intent was to apply section 1071's limitation on access and right to refuse provisions to all demographic information collected pursuant to section 1071 and not to whether an applicant is a small business or any of the non-demographic data points proposed in § 1002.107(a).

Accordingly, the Bureau proposed that financial institutions need only limit access under ECOA section 704B(d) to an applicant's responses to the financial institution's specific inquiries regarding women-owned business status and minority-owned business status and the ethnicity, race, and sex of principal owners, but not to an applicant's small business status.[784] Additionally, the proposal would have clarified that this prohibition on allowing certain employees and officers to access certain information does not extend to ethnicity or race information about principal owners that the financial institution collects via visual observation or surname. It would have also clarified that the prohibition does not extend to an applicant's responses to inquiries regarding demographic information made for purposes other than data collection pursuant to section 1071 or to an employee's or officer's knowledge due to activities unrelated to the inquiries made to satisfy the financial institution's obligations under section 1071 (*e.g.*, an employee knows that the applicant is a minority-owned business or women-owned business due to information provided to qualify for a special purpose credit program or an officer knows a

[784] SBREFA Outline at 36-37.

principal owner's ethnicity, race, or sex due to participation in a community group or association).

As noted above, section 1071 prohibits access to certain information by underwriters and other officers and employees of a financial institution or its affiliates "involved in making any determination concerning an application for credit." Consistent with the statute, the Bureau proposed that a financial institution need only prohibit the access of an employee or officer to demographic information pursuant to section 1071 if that employee or officer is involved in making a determination concerning an applicant's covered application. The Bureau further proposed defining the phrase "involved in making any determination concerning a covered application" to mean participating in a decision regarding the evaluation of a covered application, including the creditworthiness of an applicant for a covered credit transaction. The NPRM noted that this group of employees and officers includes, but is not limited to, employees and officers who serve as underwriters. Additionally, the NPRM would have explained that the decision that the employee or officer makes or participates in must be about a specific covered application. An employee or officer would not be involved in making a determination concerning a covered application if the employee or officer is involved in making a decision that affects covered applications generally, the employee or officer interacts with small businesses prior to them becoming applicants or submitting a covered application, or the employee or officer makes or participates in a decision after the financial institution has taken final action on the application, such as decisions about servicing or collecting a covered credit transaction.

Feasibility of establishing and maintaining a firewall. In the NPRM, the Bureau also noted that ECOA section 704B(d) contains significant ambiguities with respect to how financial institutions, in practical terms, should determine how to implement a firewall to limit access to certain information provided by applicants pursuant to section 1071. Indeed, based on feedback from stakeholders during the SBREFA process, it appeared that in many instances financial institutions that find it not "feasible" to implement and maintain a firewall will be the same

institutions determining that relevant individuals "should have access" to the information provided by an applicant pursuant to 704B(b). The Bureau believed that reading these two provisions in isolation from each other would likely result in significant confusion and challenges, particularly for smaller financial institutions.

Accordingly, the Bureau proposed that section 1071's firewall requirement be implemented by reading the "should have access" language in ECOA section 704B(d)(2) in conjunction with the "feasibility" language in 704B(d)(1). As proposed, it *would not be feasible* for a financial institution to implement and maintain a firewall with respect to a given employee or officer involved in making a determination concerning a covered application if the financial institution determines that employee or officer should have access to one or more of the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Conversely, it *would be feasible* for a financial institution to implement and maintain a firewall if the financial institution determines that no employee or officer involved in making a determination concerning a covered application should have access to the applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). Thus, the Bureau proposed that the prohibition on certain individuals accessing information as set forth in proposed § 1002.108(b) would not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to one or more of an applicant's responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20), and the financial institution provides the notice required under proposed § 1002.108(d) to the applicant.

The Bureau further proposed that it is not feasible to limit access as required pursuant to proposed § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application should have access to one or more applicants' responses to the financial institution's inquiries under proposed § 1002.107(a)(18) through (20). The Bureau proposed to define the phrase "should have access"

to mean that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. As proposed, a financial institution may determine that an employee or officer should have access for purposes of proposed § 1002.108 if that employee or officer is assigned one or more job duties that may require the employee or officer to collect (based on visual observation, surname, or otherwise), see, consider, refer to, or use information otherwise subject to the prohibition in proposed § 1002.108(b). The employee or officer would not have to be required to collect, see, consider, refer to or use such information or to actually collect, see, consider, refer to or use such information. It would be sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties. Additionally, a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of proposed § 1002.108. However, if a financial institution determines that one or more employees or officers involved in making any determination concerning a covered application should have access for purposes of proposed § 1002.108, the financial institution would have been responsible for ensuring that the employees or officers only access and use the protected information for lawful purposes.

Exception to establishing and maintaining a firewall. As explained above, the Bureau proposed to implement the statutory exception to the requirement to establish and maintain a firewall in § 1002.108. The exception would allow financial institutions to give certain employees or officers access to protected demographic information if the financial institution determines that they should have access to that information. However, in such circumstances, the financial institution would need to comply with the statutory requirement to provide a notice in lieu of limiting access. Thus, the Bureau proposed that, in order to satisfy the exception, as set forth in proposed § 1002.108(c), a financial institution would be required to provide a notice.

The Bureau proposed that the financial institution be required to provide the notice to, at least, each applicant whose responses to the financial institution's inquiries under proposed

§ 1002.107(a)(18) through (20) would be accessed by an employee or officer involved in making a determination concerning that applicant's covered application. As an alternative, the Bureau proposed that the financial institution could provide the required notice to a larger group of applicants, including all applicants, if it determines that one or more officers or employees should have access to protected demographic information.

The Bureau further proposed that the notice provided to satisfy the exception in proposed § 1002.108(c) must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex. The Bureau proposed language for the required notice and stated that a financial institution would be required to use the language set forth in proposed comment 108(d)-2 or substantially similar language when providing the notice.

The Bureau also proposed timing requirements for providing the notice. The Bureau proposed that, if the financial institution provides the notice orally, it must provide the notice prior to asking the applicant if it is a minority-owned business or women-owned business and prior to asking for a principal owner's ethnicity, race, or sex. If the financial institution provided the notice on the same paper or electronic data collection form as the inquiries about minority-owned business status, women-owned business status, and the principal owners' ethnicity, race, or sex, the financial institution would have been required to provide the notice at the top of the form. If the financial institution provided the notice required by proposed § 1002.108(d) in an electronic or paper document that is separate from the data collection form inquiring about the applicant's minority-owned business status, its women-owned business status, and its principal owners' ethnicity, race, and sex, the financial institution would have been required to provide the notice at the same time as or prior to providing the data collection form. Additionally, the NPRM would have clarified that the notice required pursuant to proposed § 1002.108(d) must be

provided with the non-discrimination notices required pursuant to proposed § 1002.107(a)(18) through (20).

Requests for comment. The Bureau sought comment on its proposed approach to the statutory firewall requirement and whether a different approach might result in a better policy outcome. The Bureau also sought comment on the scope of the proposed firewall requirement and the exception to establishing and maintaining a firewall. The Bureau specifically sought comment on whether the proposed firewall should apply to information about principal owners' ethnicity and race that is obtained via visual observation and/or surname analysis. Finally, the Bureau generally requested comment on whether additional clarification is needed regarding the firewall requirement.

Comments Received

The Bureau received comments on its proposed approach to the firewall requirement from a wide range of commenters including lenders, trade associations, business advocacy groups, community groups, small business owners and other individuals, and members of Congress. A majority of these comments addressed the feasibility of establishing and maintaining a firewall and/or addressed the notice required to rely on the exception. Numerous commenters sought the elimination of or exemptions to the firewall requirement. Other commenters sought additional guidance on some or all of the firewall provisions, including the scope of the firewall and determining who "should have access" to the protected information.

General. A community group commenter said that the proposed firewall provisions appropriately protect applicants, and another stated that the formulation of the proposed firewall provisions was reasonable. A CDFI lender said that while smaller financial institutions might not be able to establish and maintain a firewall, the NPRM provided sufficient flexibility in its firewall provisions to facilitate implementation. A women's business advocacy group encouraged the Bureau to look at ways to make a more secure firewall and noted that the feasibility standard in the proposed rule seemed to remove the firewall's effectiveness. Another

commenter cautioned that the proposed firewall would not stop lenders from using information inappropriately and in a manner that harms small business applicants.

In contrast, a large number of lenders, trade associations, and individual commenters requested that the Bureau eliminate the firewall. Some of these commenters said that the firewall should be eliminated because it would create competitive disadvantages or overburden certain financial institutions. Others said that it should be eliminated because the firewall would overburden all covered financial institutions. Many commenters said that the firewall will add complexity, create burden and regulatory risk, and/or increase the cost of compliance. A few commenters said that the firewall provisions could result in financial institutions being required to purchase or create new technology or systems. Some commenters noted that the additional expense could result in an increased cost of credit, limited access to credit, and/or the cessation of certain products being offered. One commenter further stated that the costs of such a requirement would likely decimate small businesses' access to credit because financial institutions will either decrease or stop their small business lending.

One bank commenter asked that the Bureau create a simple way for the commenter to certify that the firewall concept cannot work for its entire institution without exception, equivocation, or a repetitive review. This commenter further indicated that it would provide a short and simple disclosure (one half of a letter size page or less) to all of its commercial applicants to document its compliance. The commenter said that the proposed firewall requirements gave it concern and appeared to be a "gotcha" clause in the proposed rule. In particular, they indicated it was concerned with a portion of proposed comment 108(c)-1 that would have said that a financial institution cannot permit all employees and officers to have access simply because it has determined that one or more employees or officers should have access.

Some commenters said that they had not been able to devise a workable method for improving what they called the firewall's "prohibit-or-disclose regime," and suggested that the

Bureau needed to exercise its statutory authority to eliminate the firewall provision. These commenters and others also noted that eliminating the firewall requirement would align the rule implementing section 1071 with HMDA/Regulation C, which they said has required collection of demographic information for decades without any known incidents, despite the absence of any firewall.

Some commenters said that the Bureau should eliminate the firewall because it is unnecessary. A commenter also noted that the firewall requirement presents unique compliance challenges because the requirement is different than HMDA and will require unique systems. A few commenters said that the firewall serves no purpose or has no practical value. A few other commenters noted that the firewall is impractical or serves no purpose when applications are not anonymous, such as in smaller communities or where the employee or officer making determinations has an existing relationship with the applicant.

A few commenters asked the Bureau to create a platform, portal, or other system for applicants to report demographic information directly to the Bureau so that financial institutions could avoid having to intake such information at all.

Scope of the firewall. Comments on the scope of the proposed firewall requirement largely requested clarification. These commenters requested additional guidance regarding the types of employees and officers that would be subject to the firewall with one commenter asserting that the standard in the proposed rule was vague and subjective. This commenter also requested additional clarity regarding the definition of the phrase "involved in making any determinations concerning an application for credit." Some commenters requested that specific groups of employees (such as software engineers and data scientists, bankers and managers who provide information or counseling on available credit products, and employees who gather information and submit applications to unrelated financial institutions who may take assignments of the credit contract) explicitly be excluded from the scope of the firewall requirement.

However, a trade association said it supported the proposed definition of the phrase "involved in making any determination concerning a covered application."

One commenter specifically agreed that the firewall should not extend to an applicant's status as a small business.

Regarding application of the proposed firewall requirement to demographic information collected via visual observation or surname, one commenter requested guidance on how to comply with the firewall for such information. Another commenter urged the Bureau not to include information collected via visual observation or surname within the scope of the firewall. In contrast, another commenter noted that if the firewall is meant to prevent a credit decision based on protected information, it should not matter how the demographic information is collected.

Some commenters requested clarification or guidance regarding the firewall's applicability to information collected pursuant to HMDA or other laws or regulations. One commenter said that an employee or officer should not be subject to the firewall if the employee or officer accessed demographic information collected pursuant to section 1071 in order to satisfy HMDA or another regulatory requirement.

A commenter said that the firewall should only apply to applications originated completely online.

Feasibility of establishing and maintaining a firewall. A significant majority of the comments about the firewall provisions specifically addressed the feasibility of establishing and maintaining a firewall. Overwhelmingly, these commenters said that the firewall would be impossible, difficult, inefficient, and/or costly to implement for certain financial institutions.

Numerous commenters said that the firewall is not or may not be feasible for smaller institutions, such as credit unions and other community-based financial institutions with limited staff and resources. Numerous commenters also said that the firewall would not be workable with some business models, loan processes, and/or decision-making structures. Specifically,

commenters asserted that the firewall would be impossible or impractical with high-contact and relationship-based lending models and with lending models that rely on loan officers to collect information from applicants. One commenter said that the logistics of implementing a firewall would be too much for most lenders.

While some commenters said that the firewall requirement would unfairly burden and punish smaller financial institutions or traditional financial institutions in favor of larger financial institutions and online lenders, others said that the firewall may not be feasible for larger institutions or online lenders. Specifically, some commenters said that the firewall would not be feasible for larger institutions because they would have to make substantial investments in technology to implement a firewall. One commenter said that while it was a larger financial institution, its business lending department was small, which would make establishing and maintaining a firewall impossible, infeasible, or burdensome.

Many commenters said that lenders would need to change their operations, hire additional staff, reconfigure systems, and/or invest significant sums in technology in order to establish and maintain a firewall. Some commenters asserted that the costs of doing these things may be prohibitive. A few commenters said that the firewall would disrupt their process, and one commenter said that the firewall requirement could diminish a loan officer's ability to fully engage with their clients efficiently and timely. With regard to indirect vehicle financing, a few commenters said that there is not currently a mechanism to shield and transmit data for such transactions and noted there would be a one-time cost exceeding $4 million to develop such a mechanism.

Some commenters requested additional clarification or guidance on the feasibility standard. A few commenters specifically requested a clearer feasibility standard. Some recommended that the Bureau provide clear guidance about when a firewall is or is not feasible and how a covered financial institution may determine the feasibility of establishing and maintaining a firewall. A few commenters said that the Bureau should clarify the operational

factors (such as existing staffing, software capability, other existing systems and operations, and costs of making changes) that a financial institution may consider when determining feasibility and when an employee or officer should have access to protected demographic information collected pursuant to section 1071. Two of these commenters requested that the commentary specifically state that a financial institution may determine that a firewall is not feasible if it would need to hire additional staff in a line of business. Another commenter said that a financial institution should be permitted to consider department size in determining feasibility.

Two commenters said that the Bureau should expressly state that a financial institution has discretion to determine when a firewall is or is not feasible. These commenters further said that a financial institution's determination that a firewall is not feasible should be left to the sole and exclusive discretion of financial institutions, effectively creating a safe harbor for institutions' determinations of feasibility. Another commenter said that the Bureau should also consider adding a feasibility-related safe harbor provision in § 1002.112(c) that allows for variations in determining feasibility. Other commenters recommended that a determination of feasibility or infeasibility should satisfy the rule if done in conformity with written procedures. Finally, one commenter said that it did not believe that the Bureau could create a feasibility standard that would allow a financial institution to determine whether it is required to implement a firewall pursuant to the rule.

Providing a notice in lieu of establishing and maintaining a firewall. A significant number of the commenters who said that it would not or may not be feasible to implement and maintain a firewall also opposed providing a notice in lieu of establishing and maintaining a firewall. Generally, commenters said that the notice may raise privacy concerns among some applicants, create confusion, and/or create competitive disadvantages for financial institutions that provide the notice. Some commenters said that requiring a notice would create an additional compliance and/or administrative burden, and one said that the notice may slow down the loan process because financial institutions will need to explain the required language. Several

commenters said that the notice could cause customer complaints (as well as customer confusion) if some financial institutions are not required to provide the notice. Several commenters said that applicants may want to obtain loans from financial institutions that do not provide the notice, and some said this ultimately could result in a reduction of applicant choice, a reduction of applicant access to credit, or increased cost of credit.

A number of commenters said that providing the applicant with notice of the fact that their demographic data will be shared could raise questions or suspicions of whether the data plays a role in credit decisions or doubts about the impartiality of the credit decision, or could cause unwarranted scrutiny from individuals receiving the notice. Some commenters said that the notice may cause applicants to think the financial institution is not adequately staffed or cannot maintain the confidentiality of applicant information. One commenter suggested that the language of the proposed notice is inflammatory. Another commenter said that the proposed notice implied that some financial institutions are inherently more likely to engage in unfair lending, to the extent that a "government warning" is necessary. The commenter further stated that this implication is an unwarranted insult to the integrity and fairness of the shareholders and management of smaller community banks, and they would most likely prefer to withdraw from or significantly curtail small business lending than rely on the proposed exception to the firewall requirement by providing the notice.

Different commenters identified financial institutions that would need to provide the notice as smaller financial institutions, mid-sized financial institutions, community banks, credit unions, or more traditional financial institutions (*i.e.*, not online lenders). However, one commenter predicted that lenders of many sizes, business models, and regulatory levels will conclude that employees and officers involved in making a determination concerning an application should have access to demographic information collected under section 1071 and provide the notice.

A number of commenters suggested that the notice could inhibit the collection of demographic information and/or undercut section 1071's statutory purposes because it might influence applicants not to provide the requested information. One commenter said the notice might result in more applicants at community banks opting not to provide their demographic information, and in turn, more community banks having to report ethnicity and race information based on visual observation or surname. Another commenter said that providing the notice may affect an applicant's willingness to provide demographic information as the notice gives the perception that the information would likely be used to discriminate. Likewise, some commenters said that providing the notice to qualify for the firewall exception at the same time as the non-discrimination notice is especially problematic and could result in applicants declining to provide the requested information. Some commenters said that giving the notices together could result in other harms, such as harm to existing customer relationships. Two commenters suggested that the notice requirement is counterproductive because applicants may be less inclined to provide demographic information if they are told that decision makers may access their demographic information.

A bank said that the Bureau should eliminate the notice because applicants will know that the person making the inquiries pursuant to section 1071 will be making determinations regarding applications. Another bank said that the notice is useless because no one reads disclosures, and customers already know that lenders cannot discriminate.

A few commenters requested specific revisions to the notice. One commenter said that the Bureau should revise the notice to align with a HMDA notice. Another commenter requested that the Bureau align the notice with the disclosure used for HMDA and stated that this means that the disclosure would be provided with requests for demographic information on covered applications, regardless of whether the financial institution can maintain a firewall, and would emphasize that the information is being requested/collected for government monitoring of lenders' fair lending performance and compliance, cannot influence credit decisions, and is

voluntary for applicants to provide. A third commenter said that in lieu of having a firewall requirement, the Bureau should develop a model disclosure to applicants explaining the data gathering process, similar to the disclosure provided in the government monitoring section of the home mortgage application.

A commenter said that the Bureau should exercise its authority to allow institutions to provide a Bureau-developed disclosure to applicants explaining that there may be access to the data and explain that the institution must not discriminate based on the information. The commenter further said that the Bureau should develop and provide the disclosure in Spanish as well as English when it publishes the final rule and add other translations over time.

A trade association supported the Bureau's proposal to develop model disclosures that lenders could use when notifying applicants of an employee's or officer's access to personal information. Another trade association supported an exception to the firewall requirement and a model disclosure that alerts applicants that an employee or officer may have access to demographic information, but does not tell applicants that such individuals will have access to such information. Two other commenters supported allowing financial institutions to provide a notice to applicants in lieu of restricting access to applicants' protected demographic information if a financial institution determines that it is not feasible to limit access to one or more of an applicant's responses to the financial institution's inquiries. A community group commenter said that the notice is an important aspect of the proposed rule.

Requests for exemptions from the firewall requirements. Many commenters requested that the Bureau exempt certain financial institutions from the firewall requirement, though not all commenters agreed on which institutions should be exempted. One commenter requested an exemption for financial institutions with assets of less than $1.384 billion (the CRA small bank threshold as of January 1, 2022),[785] and another for institutions with assets of less than $5 billion.

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[785] Bd. of Governors of the Fed. Rsrv. Sys. & Fed. Deposit Ins. Corp., *Agencies release annual asset-size thresholds under Community Reinvestment Act regulations* (Dec. 16, 2021), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20211216a.htm; Fed. Fin. Insts. Examination

A few commenters said that financial institutions with assets of less than $10 billion should be exempted. Other commenters said that "smaller" or "community based institutions" or "community banks" or "credit unions" should be exempted. One commenter said that community banks should be exempt from the notice requirement.

Other commenters said that certain institutions should be provided an "automatic" exception to the firewall, such that smaller institutions could avoid the analysis and documentation required to show that an institution qualifies for the exception.

Several commenters said that, due in whole or in part to the firewall requirement, certain institutions should be exempted from the entire rule. One commenter said that banks under $1 billion should be exempted on this basis, a few said community banks should be exempted on this basis, and one commenter said that all but the largest lenders or all depository lenders should be exempted.

One commenter said that as an alternative to exempting community banks from the firewall requirement, the Bureau could require all financial institutions to provide the notice to all applicants, regardless of whether information is firewalled.

Final Rule

For the reasons set forth herein, the Bureau is generally finalizing the firewall requirement with additional clarifications in the commentary regarding the definitions of "involved in making any determination concerning a covered application" and "should have access," the scope of the firewall, determining feasibility, the nature of the exception, and applying the exception to a specific employee or officer or group of similarly situated employees or officers. In addition, the Bureau has eliminated the requirement to use specific language when providing the notice required to qualify for the exception and, instead, has provided sample language for the notice. This sample language appears in the sample data collection form at

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Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (Dec. 16, 2021), https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.

appendix E. The Bureau has also revised the firewall provisions to align with other changes to the final rule, such as the inclusion of LGBTQI+-owned business status collected pursuant to final § 1002.107(a)(18) as protected demographic information subject to the firewall and the elimination of the requirement to collect certain information via visual observation or surname.

Final § 1002.108(b) states the general prohibition on access to applicants' protected demographic information by certain persons. The Bureau is finalizing § 1002.108(b) and comments 108(b)-1 and 108(b)-2 with changes for clarity and consistency with other portions of the final rule. Specifically, § 1002.108(b) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Final § 1002.108(b) states that unless the exception under final § 1002.108(c) applies, an employee or officer of a covered financial institution or a covered financial institution's affiliate shall not have access to an applicant's responses to inquiries that the financial institution makes pursuant to this subpart regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under final § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under final § 1002.107(a)(19), if that employee or officer is involved in making any determination concerning that applicant's covered application. Comments 108(b)-1 and-2 have been re-ordered. Final comment 108(b)-1 and final comment 108(b)-2 have been revised to clarify the scope of the prohibition.

While many commenters said that the Bureau should eliminate the firewall requirement, or should exempt certain covered financial institutions or certain types of transactions from the firewall requirement, the Bureau does not believe it is appropriate to abrogate this statutory requirement through section 1071's general exception authority beyond the exception provided in the statutory firewall provision itself. Congress, which would have been aware of the HMDA data collection regime (including its lack of a firewall) at the time that section 1071 was enacted, specifically required that financial institutions limit certain employees' and officers' access to demographic information that financial institutions request from applicants in order to comply

with section 1071. While Congress allowed an exception to the general requirement to establish and maintain a firewall in certain circumstances (*i.e.*, when the financial institution determined that an employee or officer should have access to the demographic information and a firewall would not be feasible), the language of the statute suggests that Congress did not intend for the Bureau to eliminate the prohibition on access more broadly. Furthermore, Congress only authorized the Bureau to create exceptions to the requirements in section 1071 where necessary or appropriate to carry out section 1071's purposes. The Bureau does not believe that eliminating the firewall is necessary or appropriate to carry out section 1071's purposes.

Moreover, the Bureau believes that it has separately addressed many of the concerns about the ability of smaller institutions and institutions with limited staff to implement a firewall in other sections of the final rule. In particular, the Bureau has increased the origination threshold for coverage in § 1002.105(b). As a result, many smaller institutions and institutions with limited staff will not be subject to any provisions of the final rule, including the firewall requirement.

Because the requirement to collect certain information via visual observation or surname is not included in final § 1002.107(a)(19), it is not necessary to address the comments about the applicability of the firewall requirements to information collected via those methods. The Bureau has accordingly removed references to collecting information via visual observation or surname from final comments 108(a)-2.i and 108(b)-2.ii. Similarly, because HMDA reportable loans are excluded transactions pursuant to final § 1002.104(b)(2), it is not necessary to address comments asking for guidance on how to apply the firewall requirement if a loan is subject to both HMDA and this final rule.

Regarding comments that the Bureau establish a platform or system that applicants can use to report demographic data directly to the Bureau, thereby eliminating the need for institutions to implement a firewall, in line with its discussion of this issue in the section-by-section analysis of § 1002.107(a)(19), the Bureau does not intend to create such a system at this

time but is open to engaging further with stakeholders on alternative approaches for how financial institutions might collect and report protected demographic information.

Final § 1002.108(a) provides certain relevant definitions, including the definition of the phrase "involved in making any determination concerning a covered application from a small business." Generally, the Bureau is finalizing the definition of the phrase "involved in making any determination concerning a covered application" in § 1002.108(a)(1) with revisions for clarity. The Bureau also is revising comment 108(a)-1 to provide additional clarity that the covered application must be from a small business and to provide clarity and examples regarding which employees and officers are subject to the prohibition set out in final § 1002.108(b) and which employees and officers are not subject to the prohibition. In response to the comments, the Bureau has clarified that certain activities do not constitute being involved in making a determination concerning a covered application from a small business and that other activities do constitute being involved in making such determinations.

While the Bureau recognizes that the "involved in making any determination concerning an application for credit" standard that Congress created in the statute is broad, the Bureau does not believe that the standard in final § 1002.108(a)(1), as further explained in the commentary, is unduly vague or subjective, as asserted by some commenters.

As explained in final comment 108(a)-1.i, an employee or officer is involved in making a determination concerning a covered application from a small business for purposes of final § 1002.108 if the employee or officer makes, or otherwise participates in, a decision regarding the evaluation of a covered application or the creditworthiness of a small business applicant for a covered credit transaction. Final comment 108(a)-1.i also explains that the decision that an employee or officer makes or participates in must be about a specific covered application or about the creditworthiness of a specific applicant. Thus, activities undertaken prior to the submission of a covered application do not constitute being involved in making a determination about a covered application. Similarly, activities undertaken after a financial institution has taken

final action on a covered application do not constitute making a determination regarding a covered application. Furthermore, an employee or officer is not involved in making a determination concerning a covered application if the employee or officer is only involved in making a decision that affects covered applications generally. Finally, the comment clarifies that an employee or officer may be participating in a determination even if the employee or officer is not the ultimate or sole decision maker and provides examples.

Additionally, in response to comments requesting further clarification regarding the definition of the statutory phrase "involved in making any determination concerning an application for credit," the Bureau has added several examples to the list of the types of activities in final comment 108(a)-1.ii that do not constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108. The Bureau has also added a list of examples in comment 108(a)-1.iii of the types of activities that do constitute being involved in making a determination concerning a covered application from a small business for purposes of § 1002.108.

Section 1002.108(c), which the Bureau is finalizing with updated cross-references to reflect other changes in the rule, explains the exception to the general prohibition set forth in final § 1002.108(b). Final § 1002.108(c) establishes an exception to the prohibition in final § 1002.108(b) and states that the prohibition does not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to an applicant's responses to the financial institution's inquiries under final § 1002.107(a)(18) or (19) and the financial institution provides the notice required under final § 1002.108(d) to the applicant. It further provides that it is not feasible to limit access as required pursuant to final § 1002.108(b) if the financial institution determines that an employee or officer involved in making any determination concerning a covered application from a small business should have access to one or more applicants' responses to the financial institution's inquiries under final § 1002.107(a)(18) or(19).

However, in response to comments (including comments requesting clarification about how a financial institution should be permitted to determine feasibility pursuant to the final rule) and to provide additional clarity and guidance, the Bureau has divided proposed comment 108(c)-1 into two comments and revised and supplemented both comments. Specifically, the Bureau has added language in final comment 108(c)-1 to clarify that a financial institution is not required to separately determine the feasibility of maintaining a firewall. A determination that an employee or officer should have access means that it is not feasible to maintain a firewall as to that particular employee or officer, and the exception applies to that employee or officer if the financial institution provides the notice required by final § 1002.108(d).

The comment also clarifies the nature of the exception (*i.e.*, that it applies on an individual employee or officer basis, not an institution-wide basis). The comment states that the fact that a financial institution has made a determination that an employee or officer should have access does not mean that the financial institution can permit other employees and officers who are involved in making determinations concerning a covered application to have access to the information collected pursuant to final § 1002.107(a)(18) and (19). A financial institution may only permit an employee or officer who is involved in making a determination concerning a covered application to have access to information collected pursuant to final § 1002.107(a)(18) and (19) if it has determined that employee or officer or a group of which the employee or officer is a member should have access to the information.

The Bureau is not adopting one commenter's suggestion that the Bureau permit a financial institution to determine that a firewall is not feasible for a single employee and then allow all employees and officers to have access to protected demographic information. As explained above, the final rule clarifies that a financial institution can permit an employee or officer who is involved in making a determination concerning a covered applications from a small business to access that small business's protected demographic information only if the financial institution has determined that employee or officer should have access (*i.e.*, either

individually or as part of a group). This requirement is not intended to be a "gotcha," as suggested by the commenter, but rather a reasonable means of allowing a financial institution to provide employees and officers to have access to protected demographic information when such access may be necessary to perform assigned job duties without allowing such information to be widely accessible to those employees and officers who make determinations concerning covered applications but do not need the information to perform their jobs. The sample data collection form at appendix E includes sample language for the firewall notice, but the Bureau is not requiring use of that specific language for the firewall notice.

Final comment 108(c)-2 addresses how a financial institution may apply the exception to a specific employee or officer or a group of similarly situated employees or officers. It clarifies that a financial institution may determine that several employees and officers, all of a group of similarly situated employees or officers, and multiple groups of similarly situated employees or officers should have access to information collected pursuant to § 1002.107(a)(18) and (19). It also provides examples. Final § 1002.108(a)(2) defines the phrase "should have access," which is used in § 1002.108(c) and related commentary. This phrase means that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties. However, in response to comments, the Bureau has revised comment 108(a)-2 and added a comment 108(a)-2.iii. The Bureau has also revised comment 108(a)-2 to align with other changes finalized in the rule (*i.e.*, the elimination of requirements to collect information via visual observation or surname and the inclusion of the LGBTQI+-business status in final § 1002.107(a)(18)). These comments clarify how a financial institution may determine who should have access.

Final comment 108(a)-2.i explains that a financial institution may determine that an employee or officer who is involved in making a determination concerning a covered application should have access to protected demographic information if that employee or officer is assigned one or more job duties that may require the employee or officer to collect, see, consider, refer to,

or use such information. The employee or officer does not have to be required to collect, see, consider, refer to, or use such information or to actually collect, see, consider, refer to or use such information in order for the financial institution to determine that the employee or officer should have access. It is sufficient if the employee or officer might need to do so to perform the employee's or officer's assigned job duties.

Final comment 108(a)-2.ii explains that a financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of final § 1002.108. If a financial institution assigns one or more tasks that may require access to one or more applicants' protected demographic information to a particular job title, the financial institution may determine that all employees and officers who share that job title should have access for purposes of § 1002.108.

Although the final rule does not provide a safe harbor for a financial institution's determination to account for variations in determining feasibility (*i.e.*, determining which employees and officers should have access) as two commenters requested, new comment 108(a)-2.iii states that a financial institution is permitted to choose what lawful factors it will consider when determining whether an employee or officer should have access to protected demographic information. A financial institution's determination that an employee or officer should have access may take into account relevant operational factors and lawful business practices. For example, a financial institution may consider its size, the number of employees and officers within the relevant line of business or at a particular branch or office location, and/or the number of covered applications the financial institution has received or expects to receive. Additionally, a financial institution may consider its current or its reasonably anticipated staffing levels, operations, systems, processes, policies, and procedures. A financial institution is not required to hire additional staff, upgrade its systems, change its lending or operational processes, or revise its policies or procedures for the sole purpose of determining who should have access.

The Bureau believes this new comment makes clear that different financial institutions may make different determinations regarding which employees and officers should have access and that those different determinations are permissible. Additionally, in response to commenters' suggestions that determinations of feasibility should satisfy the final rule if they are made in conformity with written procedures, the Bureau notes that a financial institution may choose to make its determinations regarding who should have access to protected demographic information pursuant to written procedures, but is not required to do so in order to have a determination satisfy the final rule. Furthermore, in light of the flexibility provided in § 1002.108, and because the firewall requirement was explicitly set forth by Congress in section 1071, the Bureau does not believe that providing further discretion in determining feasibility or adopting a safe harbor, as suggested by some commenters, would be appropriate.

Final § 1002.108(d) explains the requirement to provide a notice in order to qualify for the exception. The Bureau is finalizing § 1002.108(d) and comments 108(d)-1 and -3 largely as proposed, and has revised comment 108(d)-2 regarding the content of the notice. Final § 1002.108(d) has been revised to include LGBTQI+-owned business status, and cross-references have been updated to reflect changes elsewhere in the final rule. Specifically, final § 1002.108(d) states that in order to satisfy the exception set forth in final § 1002.108(c), a financial institution shall provide a notice to each applicant whose responses to inquiries for protected demographic information will be accessed, informing the applicant that one or more employees or officers involved in making determinations concerning the covered application may have access to the applicant's responses to the financial institution's inquiries regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners. The financial institution shall provide the notice required by final § 1002.108(d) when making the inquiries required under final § 1002.107(a)(18) and (19) and together with the notices required pursuant to § 1002.107(a)(18) and (19).

Final comment 108(d)-1, which includes minor revisions for clarity, explains that if a financial institution determines that one or more employees or officers should have access pursuant to § 1002.108(c), the financial institution must provide the required notice to, at a minimum, the applicant or applicants whose responses will be accessed by an employee or officer involved in making determinations concerning the applicant's or applicants' covered applications. Alternatively, a financial institution may also provide the required notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants for covered credit transactions or all applicants for a specific type of product.

Final comment 108(d)-3, which includes minor revisions to align with changes made elsewhere in the final rule, explains the timing for providing the notice. Generally, the financial institution must provide the notice required by § 1002.108(d) prior to asking the applicant if it is a minority-owned, women-owned, or LGBTQI+-owned business and prior to asking for a principal owner's ethnicity, race, or sex. Additionally, the notice must be provided with the non-discrimination notices required pursuant to § 1002.107(a)(18) and (19).

While many commenters said that the Bureau should eliminate the notice requirement or should exempt certain covered financial institutions from the notice requirement, the Bureau does not believe it is appropriate to eliminate this statutory requirement or to except certain financial institutions from providing the notice if they are relying on the exception to the firewall requirement. Congress explicitly required that a financial institution provide a notice to an applicant if the financial institution does not limit certain employees' and officers' access to protected demographic information. Congress also required that applicants be permitted to refuse to provide the requested demographic information. Thus, an applicant should be told that certain employees and officers may have access to the protected demographic information so that the applicant can make an informed decision of whether to exercise the applicant's statutory right to refuse. The Bureau does not believe it would be appropriate to allow some or all financial

institutions to forego providing applicants with the information they may need to determine whether to exercise this statutory right. Although some commenters said that the notice may undercut section 1071's purposes because the notice may cause applicants to refuse to provide the requested demographic information, the Bureau believes that Congress was aware of this potential result when it provided applicants with the right to receive a notice and the right to refuse to provide the requested information.

Additionally, other commenters undercut or contradicted the reasoning put forth by commenters opposed to providing the notice. For example, while a group of commenters opposed providing the notice based on the belief that it would create competitive disadvantages or burdens only for smaller institutions, other commenters said that larger institutions would also likely provide the notice in lieu of establishing and maintaining a firewall.[786] Other commenters supported allowing financial institutions to provide a notice in lieu of establishing and maintaining a firewall, and one commenter said that the notice was an important aspect of the proposed rule.

Nonetheless, in order to address commenters' concerns about the specific content proposed for the notice, the Bureau has revised comment 108(d)-2. That comment reiterates that the notice must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex. However, the comment no longer prescribes language to be used for the notice and, instead, directs financial institutions to the sample data collection form included in the final rule for sample language that a financial institution may opt to use when providing the notice.[787]

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[786] Aside from being speculative, such a competitive effect, if it existed, would be a direct consequence of the statutory mandate regarding the firewall: if the financial institution determines that an employee or officer should have access to protected demographic information, the notice must be provided.

[787] Regarding the comment that the Bureau should develop and provide the notice in Spanish as well as English when it publishes the final rule and add other translations over time, the Bureau notes that it will be translating the

Alternatively, a financial institution may opt to use different language as long as the notice provides an applicant with the statutorily required information (*i.e.*, that one or more employees and officers involved in making determinations regarding the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex). Final comment 108(d)-2 also notes, for clarity, that if a financial institution establishes and maintains a firewall and chooses to use the sample data collection form, it may delete the sample language for the firewall notice from the form because employees and officers involved in making determinations concerning applicants' covered applications will not have access to the applicants' responses to inquiries for protected demographic information.

Section 1002.109 Reporting of Data to the Bureau

Final § 1002.109 addresses several aspects of financial institutions' obligations to report small business lending data to the Bureau. First, § 1002.109(a) requires data to be collected on a calendar year basis and reported to the Bureau by June 1 of the following year, and addresses several related issues. Second, § 1002.109(b) details the information that financial institutions must provide about themselves when reporting data to the Bureau. Finally, § 1002.109(c) addresses technical instructions for submitting data to the Bureau.

The Bureau is finalizing § 1002.109 to implement ECOA section 704B(f)(1) and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.109(b) pursuant to 704B(e)(2)(H), which requires financial institutions to compile and maintain as part of their data any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071.

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sample data collection form in appendix E (including the sample language for the notice on the form) into several languages. See also the discussion regarding compliance and technical assistance at the end of part I above.

Details regarding each aspect of final § 1002.109, including a discussion of what the Bureau proposed and comments received, are provided in the section-by-section analyses that follow.

109(a) Reporting to the Bureau

109(a)(1) Annual Reporting

Proposed Rule

ECOA section 704B(f)(1) provides that "[t]he data required to be compiled and maintained under [section 1071] by any financial institution shall be submitted annually to the Bureau."

Proposed § 1002.109(a)(1)(i) would have required that by June 1 following the calendar year for which data are collected and maintained as required by proposed § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. This approach to reporting frequency and reporting period is consistent with the annual submission schedule specified in the statute. The Bureau sought comment on this aspect of the proposal, and how best to implement it in a manner that minimizes cost and burden to small financial institutions.

Proposed § 1002.109(a)(1)(ii) would have required that an authorized representative of the covered financial institution with knowledge of the data submitted certify to the accuracy and completeness of data submitted pursuant to proposed § 1002.109(a). A similar provision exists in Regulation C (§ 1003.5(a)(i)), and the Bureau believed it appropriate to adopt a similar requirement here as well. Based on the Bureau's experience with HMDA and Regulation C, the Bureau believed that having a specific person responsible for certifying to the accuracy and completeness of data is likely to lead to financial institutions providing better quality data.

Proposed § 1002.109(a)(1)(iii) would have clarified that when the last day for submission of data prescribed under proposed § 1002.109(a)(1) falls on a date that is not a business day, a submission is considered timely if it is submitted no later than the next business day.

The Bureau sought comment on its proposed approach to the aspects of reporting addressed in proposed § 1002.109(a), including that the reporting frequency be annual, that the reporting period be the calendar year, and that the submission date be June 1 of the next calendar year. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(1)(i) on whether requiring the submission of small business lending application registers by June 1 might give rise to complications for any persons or entities relying on data from the registers for other purposes, such as Federal regulators scheduling examinations.

Comments Received

In response to proposed § 1002.109(a)(1)(i), the Bureau received comments from lenders, trade associations, community groups, and others. Commenters discussed the reporting deadline of June 1, the calendar year reporting period, and the annual reporting frequency. Several commenters supported the Bureau's reporting frequency and period, as well as the reporting deadline of June 1. One bank urged the Bureau to permit reporting as early as March 1 for institutions who wished to do so. A few community groups and a CDFI lender supported the reporting frequency and period, but only supported the proposed deadline of June 1 contingent upon the Bureau's timely publication of the data later on in the year.

Some commenters supported the reporting frequency and period but did not support the reporting deadline. Of this group of commenters, one trade association urged the Bureau against aligning the section 1071 reporting deadline with the HMDA reporting deadline of March 1, citing a strain on resources. A trade association and a bank supported annual reporting but requested a later deadline. Finally, two trade associations requested the Bureau to permit ongoing reporting alongside annual reporting. Both of these commenters suggested the Bureau create a portal or centralized system where banks could input data as it is received. Both commenters mentioned the burden that would come along with maintaining a database internally, as well as concerns about system maintenance, cost, and risk. One of those trade associations also

described an alternative whereby the Bureau could provide a link where small business loan applicants could input their own data or opt out of sharing their data altogether.

One bank did not support any aspect of proposed § 1002.109(a)(1)(i). This bank argued that adding another reporting regime, in addition to HMDA and CRA, would add significant burden to their staff, both at the loan origination stage and at the reporting stage. It also argued that having a mid-year reporting deadline would tie up critical compliance resources and would require them to spend one quarter of the year on reporting requirements.

Two trade associations touched on quarterly reporting. The first commented that large banks (for CRA purposes) should be required to provide their data within 30 days of a request to do so. They argued that if the Bureau absolves lenders of the requirement to respond to individual requests, then data should be reported quarterly. The second commented that the frequency of reporting that financial and regulatory agencies expect to receive is quarterly (Call Reports). They also stated that non-regulated lenders, CDFIs and other similar providers should be required to report no less than semi-annually.

Many commenters did not support the June 1 reporting deadline and the calendar year reporting period in particular. A lender and a business advocacy group urged the Bureau to adopt a reporting deadline of July 1 instead of June 1 to provide more time between HMDA reporting and section 1071 reporting. The business advocacy group stated that for institutions who report HMDA data quarterly, 60 days after quarter end, a deadline of June 1 would leave no separation between reporting requirements. A cross-sector group of lenders, community groups, and small business advocates urged the Bureau to adopt a May 1 to April 30 reporting period with a reporting deadline in July, citing that staggering reporting periods would ease regulatory burden for lenders who also report HMDA data. A joint letter from community groups suggested a reporting period of July 1 to June 30, citing that covered lenders would benefit by having six months to prepare before data collection begins.

Several banks requested the reporting deadline be no earlier than June 30 so that there would be more time to perform data integrity reviews for those lenders that are HMDA and/or CRA reporters. Several commenters requested, as a general matter, that reporting-related changes be effective January 1 rather than midyear.

Finally, several lenders urged the Bureau to coordinate section 1071 reporting with CDFI Fund reporting. They argued that CDFIs are required to report for a three-year period through the CDFI Fund's Transaction Level Reporting data points that are well beyond the scope of section 1071. They also suggested that the Bureau standardize data formats to match those used in CDFI Fund reporting, and to coordinate across agencies in order to streamline data collection and reporting requirements. This, they argue, would minimize the burden on CDFIs.

The Bureau did not receive any comments in response to proposed § 1002.109(a)(1)(ii) and (iii).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(1)(i) and (ii) as proposed, and finalizing § 1002.109(a)(1)(iii) with a revision for clarity. Specifically, under final § 1002.109(a)(1)(i), on or before June 1 following the calendar year for which data are compiled and maintained as required by § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau. While several commenters advocated for more frequent reporting, the Bureau believes that its approach is consistent with the annual submission schedule specified in the statute. The Bureau is not permitting financial institutions to submit their data on a real-time basis or ongoing basis, as this approach could result in financial institutions treating the Bureau as their official recordkeeper for their data.[788] Regarding the comments supporting a June 1 submission date, contingent on rapid publication of data soon after, the Bureau addresses such comments in the section-by-

[788] With respect to comment that it should build an online platform to receive data from applicants on a real-time basis, the Bureau does not, at this time, intend to take this step, in line with its analysis of demographic data submission in the section-by-section analysis of § 1002.107(a)(19).

section analyses of § 1002.110(a) and (b), and the privacy section in part VIII. While some commenters requested that financial institutions have the ability to submit data as early as March 1, the Bureau intends to make it possible for financial institutions to report as early as possible before June 1 each year once the small business lending data reporting platform is established.

While some commenters suggested alternate reporting periods, the Bureau believes there are advantages to having data collected and reported on a calendar year basis. Calendar year reporting may facilitate other aspects of the rule that depend on data that is typically recorded on a calendar year basis. For instance, other parts of the rule look to annual data, such as § 1002.105(b), which would use a financial institution's loan volumes over the prior two calendar years to determine whether it is a covered financial institution. Further, the Bureau understands that financial institutions would generally prefer to have such data collections occur on a calendar year basis because such an approach would be generally consistent with their operations. An annual reporting period other than the calendar year—such as July 1 to June 30—could result in additional challenges for financial institutions in complying with the rule, which could in turn increase the probability of errors in collecting and reporting data to the Bureau.[789]

Regarding submission date, several commenters requested alternate deadlines such as March 1 or July 1. However, the Bureau believes that a June 1 submission deadline gives the compliance staff of financial institutions, especially smaller institutions, adequate time and resources to dedicate to preparing a small business lending application register, after meeting other reporting obligations earlier in the year, such as under HMDA or CRA. This remains true even though the final rule excludes all HMDA-reportable loans and even though the Federal prudential regulators have proposed amendments to the CRA rules that would use small business and small farm data from this rule. Many institutions will still have March deadlines for their HMDA and CRA reporting obligations unrelated to small business lending, and the Bureau

[789] Regarding concerns that a January 1 collection date would be too soon after the publication of the rule, the Bureau addresses all concerns about the amount of time lenders have to comply with this rule in the section-by-section analysis of § 1002.114(b).

believes a later deadline for reporting data collected under this final rule remains appropriate. Financial institutions with quarterly HMDA filing deadlines generally handle a high volume of mortgage loan originations and are more likely to have sufficient resources to cope with a June 1 deadline for this rule (and, indeed, any filing deadline set by the Bureau would be within 60 days of a quarterly HMDA filing deadline).

Final § 1002.109(a)(1)(ii) specifies that an authorized representative of the covered financial institution with knowledge of the data shall certify to the accuracy and completeness of the data reported pursuant to § 1002.109(a)(1)(i). The Bureau has modified final § 1002.109(a)(1)(iii) for clarity; it now provides that when June 1 falls on a Saturday or Sunday, a submission shall be considered timely if it is submitted on the next succeeding Monday.

109(a)(2) Reporting by Subsidiaries

Proposed Rule

ECOA section 704B(f)(1) states that "any" financial institution obligated to report data to the Bureau must do so annually; the statute does not expressly address financial institutions that are themselves subsidiaries of other financial institutions.

Proposed § 1002.109(a)(2) would have stated that a covered financial institution that is a subsidiary of another covered financial institution shall complete a separate small business lending application register. The proposal would have provided that a subsidiary shall submit its small business lending application register, directly or through its parent, to the Bureau. Proposed comment 109(a)(2)-1 would have explained that a covered financial institution is considered a subsidiary of another covered financial institution for purposes of reporting data pursuant to proposed § 1002.109 if more than 50 percent of the ownership or control of the first covered financial institution is held by the second covered financial institution. This proposed provision would have mirrored one that exists for HMDA reporting under Regulation C in § 1003.5(a)(2). The Bureau believed that the proposed provision would facilitate compliance by

permitting parent financial institutions to coordinate the reporting of all their subsidiaries' small business lending data together.

The Bureau sought comment on this aspect of its proposal. Additionally, the Bureau sought comment on proposed § 1002.109(a)(2) in light of proposed § 1002.105(b), which would have defined a covered financial institution as a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau sought comment on whether this provision may risk creating ambiguity with respect to compliance and whether additional safeguards may be required to dissuade financial institutions from creating subsidiaries for the sole purpose of avoiding the collection and reporting of 1071 data. The Bureau also sought comment on all other aspects of this proposal.

Comments Received

The Bureau received comments from a bank, a trade association, and a community group on the proposed provision regarding reporting by subsidiaries. The community group had no objections to the Bureau's proposal. The bank recommended that the Bureau define subsidiary in subpart B, stating that the term was used extensively in this proposed provision and to dissuade financial institutions from creating subsidiaries in order to avoid reporting data. The community group recommended that the Bureau create safeguards against the possibility that a lender will develop an ownership structure that will evade reporting requirements, specifically that originations be counted at the parent or holding company level for the purposes of determining institutional coverage under § 1002.105(b).

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(2) and associated commentary as proposed. The Bureau believes that this provision will help facilitate compliance through consistency with an existing provision in a separate regulation (Regulation C) familiar to many financial institutions and by also permitting financial institutions to coordinate the

reporting of all their subsidiaries' small business lending data. The final rule provides a definition of subsidiary in comment 109(a)(2)-1.

The Bureau does not believe it is necessary to add to the rule a requirement to count originations at the parent or holding company level for the purposes of determining whether a financial institution has met the institutional coverage threshold. Final § 1002.105(b) defines a covered financial institution as a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. The Bureau believes that the process and costs of establishing a new charter to avoid reporting data, along with other associated obligations in forming a new legal entity, will generally dissuade lenders from creating subsidiaries through whom to make small business loans specifically for the purpose of avoiding coverage under this final rule.

109(a)(3) Reporting Obligations Where Multiple Financial Institutions are Involved in a Covered Credit Transaction

Background

Section 1071's requirement to collect and report data for any "application to a financial institution for credit" could be read as applying to more than one financial institution when an intermediary provides an application to another institution that takes final action on the application. It might also apply in cases where one application is simultaneously sent to multiple financial institutions for review. This broad reading may serve a useful function, such as comprehensive reporting by all financial institutions involved in a small business lending transaction, but could also generate duplicative compliance costs for financial institutions and potentially detract from the quality of reported data, increasing the risk that certain applications are reported multiple times with potential inconsistencies.

During the SBREFA process, several small entity representatives voiced support for aligning reporting requirements for financial institutions that are not the lender of record with the approach taken for HMDA reporting in the Bureau's Regulation C. Other small entity

representatives expressed concern in adopting the Bureau's approach in Regulation C, noting the differences between small business and residential mortgage loan products, and advocated for simpler approaches.

SBREFA feedback from other stakeholders included support for a HMDA-like approach when multiple lenders are involved in a transaction, praising the Bureau's consistent approach and interest in limiting duplicative information. However, several stakeholders advocated against the HMDA approach, generally by proffering other ideas rather than criticizing the rules or outcomes of the HMDA approach. Alternative suggestions varied, but included suggesting that data collection and reporting should be required only for the company most closely interacting with the loan applicant; if a financial institution receives a covered application, then the application should be subject to reporting, regardless of outcome; the financial institution that funded (or would have funded) the loan should be required to collect and report; and the financial institution that conducts the underwriting and determines whether the small business credit applicant qualifies for credit using its underwriting criteria should be required to report and collect.

Proposed Rule

Proposed § 1002.109(a)(3) would have provided that only one covered financial institution shall report each covered credit transaction as an origination, and that if more than one financial institution was involved in an origination, the financial institution that made the final credit decision approving the application shall report the loan as an origination, if the financial institution is a covered financial institution.

Proposed § 1002.109(a)(3) would have further provided that if there was no origination, then any covered financial institution that made a credit decision shall report the application. The Bureau explained that under certain lending models, financial institutions may not always be aware of whether another financial institution originated a credit transaction. The Bureau

believed that information on whether there was an origination should generally be available, or that lending models can be adjusted to provide this information at low cost.

Proposed comment 109(a)(3)-1 would have provided general guidance on how to report originations and applications involving more than one institution. In short, if more than one financial institution was involved in the origination of a covered credit transaction, the financial institution that made the final credit decision approving the application would report the covered credit transaction as an origination. Proposed comment 109(a)(3)-2 would have offered examples illustrating how a financial institution should report a particular application or originated covered credit transaction. Proposed comment 109(a)(3)-3 would have explained that if a covered financial institution made a credit decision on a covered application through the actions of an agent, the financial institution reports the application, and provided an example. State law determines whether one party is the agent of another. While these proposed comments assumed that all of the parties are covered financial institutions, the same principles and examples would apply if any of the parties were not a covered financial institution.

The Bureau sought comment on this aspect of its proposal. In particular, the Bureau sought comment with respect to proposed § 1002.109(a)(3) 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.

Comments Received

The Bureau received comments on this aspect of the proposal from a range of stakeholders, including lenders, trade associations, and community groups.

Several commenters, including trade associations and a community group, expressed general support for the Bureau's proposed approach, stating that it would help avoid duplicative reporting, the originating lender is best positioned to obtain the necessary information from the borrower, and the approach will increase the accuracy of the reported data, especially in an

increasingly complex lending market. In addition, two credit union trade associations said that the proposal takes the correct approach for loan participation arrangements. Another trade association said that, to ensure simplicity, the Bureau should make the rule identical to Regulation C.

Conversely, several other industry commenters asserted that the proposal may be too complex or not feasible. A bank requested that the Bureau consider different reporting rules in cases where coordination among financial institutions is not feasible. A trade association stated that financial institutions are not aware of credit extensions made by competitors and are prohibited from sharing nonpublic personally identifiable information, including the existence of an account, with other financial institutions. This commenter pointed out that in indirect financing, the loan might be offered to multiple parties, so several financial institutions might be in this position.

Similarly, a joint letter from several insurance premium finance trade associations stated that insurance premium lenders generally do not know whether an application was originated by another financial institution, and it would be difficult, if not impossible to find out. These commenters suggested a new exception where insurance premium finance lenders are permitted to report data regarding any signed premium finance agreement they receive and take action upon (without requiring them to determine whether another lender originated the rare premium finance loan that is not approved and funded).

A joint letter from community and business advocacy groups argued that the proposal does not address the complexity of modern online lending. These commenters stated that online lenders often “rent a charter” to evade the limitations of State lending laws, the terms of these partnerships are often unknown, but under the proposal only one party would report the data without it being clear which one. They further noted that the final credit decision might be made by a digital algorithm but then approved by the depository institution. In addition, two credit

union trade associations expressed uncertainty regarding who is responsible for errors or noncompliance—that is, credit union service organizations or the member credit union.

A joint letter from two motor vehicle dealer trade associations requested clarification on the rule's application, stating their belief that for indirect auto lending, the responsible party would typically be the indirect lender that advances funds, not the motor vehicle dealer. They further asserted that the dealer typically is identified on the credit contract as the seller-creditor even though the indirect lender as assignee-creditor performs the underwriting, funding, and servicing functions and determines whether, and on what terms, it will agree to take assignment of the credit contract. They argued that when an origination occurs, the lender taking assignment of the credit contract should be the entity responsible for compliance with section 1071, and that when an origination does not occur, then reporting responsibility should rest with the lender that conducted underwriting and determined that they would not take assignment of the credit contract.

A financial services trade association characterized the transaction differently, explaining that indirect vehicle finance transactions involve two separate, but related transactions. The commenter stated that a customer purchases a car from a motor vehicle dealer and executes a retail installment sales contract that finances the purchase price and any other products the customer elects to purchase. The dealer is the original creditor and negotiates the financing terms with the customer. Separately, the dealer communicates with one or more other financial institutions to determine which one will purchase the completed contract and at what terms. As purchaser of the credit contract, the financial institution takes assignment of the contract and begins servicing the contract until it is paid in full.

In addition, two trade associations pointed to Board regulations implementing ECOA and argued that the dealer would be prohibited under the law from asking the business owner for protected demographic information.

Some commenters expressed uncertainty regarding the Bureau's use of the term "final credit decision" in the proposal. Two commenters asserted that it was unclear which lender makes the final credit decision in situations where two lenders are required to make a credit decision to approve an application. A number of certified development companies, their trade association, and other lenders provided the example of the SBA's 504 Development Company Loan Program, which requires loans to be financed by both a certified development company and a private lender, asking who reports in such cases.

Several farm credit institutions and a trade association requested that the Bureau clarify that its rule does not apply to credit decisions made after loan approval. The commenters explained that farm credit institutions are required to make an independent judgment on the creditworthiness of the borrower, even in secondary market transactions, so it would be helpful to make clear that those judgments are not subject to data collection and reporting obligations. In addition, a group of trade associations requested that the rule text should more closely match the text in proposed comment 109(a)(3)-1.ii, saying that otherwise it could be misinterpreted to mean that as long as one institution reports its decision, then others need not do so.

A law firm commented that the Bureau should clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that the third party/potential purchaser made the final credit decision. The commenter explained that in these types of "forward flow" transactions, the third party does not originate the credit nor does it have any particular interest in whether the creditor approves and originates the transaction.

A group of trade associations stated that in the case of withdrawn applications, it would be impractical and burdensome for a financial institution to determine whether an applicant received credit elsewhere.

Commenters offered some alternative suggestions. Two industry commenters stated that if a loan is originated, only the creditor to whom the obligation is initially payable should be

required to collect and report data. When there is no origination, only the institution that initially received the application should be required to collect and report data. These commenters asserted that this was a simpler approach, and the originating creditor is in the best position to collect and report all of the required data points.

A joint letter from community and business advocacy groups stated that the Bureau should assign reporting responsibility to the financial institution that has the predominant economic interest in and bears the predominant risk of a loan (or that would have had such an interest had the loan been consummated). These groups further asserted that it is important in online lenders' "rent a charter" arrangements for the Bureau to collect data on both the identity of the online lender and the depository institution because they are both ECOA creditors, but at a minimum the Bureau should collect data on the party that bears the bulk of the risk.

Another commenter stated that the Bureau should consider adding a non-unique (*i.e.*, shared across institutions) loan identifier that would allow matching of loans reported by multiple institutions (*e.g.*, a new data point). The commenter asserted that this would allow data users to match loans reported by multiple financial institutions and obviate the need to have such reporting rules.

Comments addressing partial interests and participation loans are discussed in the section-by-section analysis of § 1002.104(b). Moreover, several farm credit institutions urged the Bureau to clarify that in the syndicated loan context, the administrative agent is the sole lender with responsibility under the rule. Commenters explained that syndicated loans differ from participations in that multiple lenders enter into a contractual relationship with the borrower, but there is typically an administrative agent, which is primarily responsible for interacting with the applicant or borrower. A farm credit institution noted that the proposal's ambiguity with respect to syndicated loan reporting would create inaccuracies in reported information.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.109(a)(3) with modifications. Final § 1002.109(a)(3) states the general rule that each covered financial institution shall report the action that it takes on a covered application. Where it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction, however, only the last covered financial institution with authority to set the material terms of the covered credit transaction shall report the application. In addition, financial institutions report the actions of their agents.

Final comment 109(a)(3)-1 provides general guidance on how to report applications involving more than one institution. Final comment 109(a)(3)-2 provides a variety of examples to illustrate which financial institution reports a particular application when multiple financial institutions are involved in a covered credit transaction and how such applications are reported.

The Bureau has revised language in proposed § 1002.109(a)(3) that discussed outcomes "if more than one financial institution was involved in an origination" both for clarity, and to avoid complexity, logistical challenges, and potential data accuracy issues. Initially, final § 1002.109(a)(3) provides that each covered financial institution shall report the action that it takes on a covered application. Final comment 109(a)(3)-1.ii sets forth the various actions that a financial institution may take on a covered application. Certain of the examples in final comment § 1002.109(a)(3)-2 illustrate credit transactions that involve a single financial institution with responsibility for making a credit decision on a covered application. Those examples make clear that where a financial institution is only passively involved in a covered credit transaction or is only involved after the time of origination (for example, to purchase the loan), it has not taken action on the covered application and so does not report. For example, the Bureau understands that a non-originating financial institution may be "involved" with a covered credit transaction *after* closing (for example, if it purchases the covered credit transaction); however, such post-closing transactions (with the exception of applications for line increases) are generally not

covered by the final rule. The Bureau further notes that whether an entity meets the definition of "creditor" under ECOA and Regulation B is not determinative of who reports under this rule.

Despite the general rule that all financial institutions shall report action taken on a covered application, final § 1002.9(a)(3) and final comment 109(a)(3)-1.i provide that where it is *necessary* for more than one financial institution to make a credit decision in order to approve the covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to report. Setting the material terms of the covered credit transaction includes, for example, selecting among competing offers or modifying pricing information, amount approved or originated, or repayment duration. The fact that it is necessary for more than one financial institution to make a credit decision in order to approve the covered credit transaction does not mean that there was an actual approval or origination of the covered application. Rather, and in contrast to the passive conduit scenario described above, this provision applies when a financial institution would not originate a covered credit transaction unless it was approved by at least one other financial institution prior to closing.

The changes to § 1002.109(a)(3) are intended to address commenters' concerns that the NPRM approach was too complex or infeasible. Many of these commenters stated that it would be difficult for a financial institution to know if a loan was originated by another financial institution. Unlike the NPRM approach, final § 1002.109(a)(3) is not limited to requiring only one financial institution to report an *origination*. Final § 1002.109(a)(3) states that where it is necessary for more than one financial institution to make a credit decision to approve the covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction is required to report the application (*i.e.*, whether or not it was originated). In making this change, the Bureau seeks to avoid duplicative reporting in more than just cases of originated transactions; it seeks to clarify that only one financial institution is required to report on the application, no matter the action taken.

While the Bureau recognizes there may be some benefit in having multiple financial institutions reporting the same application, there are logistical challenges and potential data accuracy issues that could result from reporting by multiple financial institutions. For example, the Bureau understands that in some typical indirect lending situations, one application may be transmitted to several financial institutions to determine interest in purchasing an originated transaction, and requiring reporting from each of these financial institutions (even if the small business applicant is not aware of their involvement or the action taken by these institutions) would significantly increase reporting volumes for these types of transactions. Moreover, in this example, while this approach means a lack of visibility into purchase offers and an inability to compare them to the resulting credit contract, the Bureau believes that reporting of such data could undermine data quality and would provide only limited additional benefits where the purchase decisions are later accepted, declined, or altered by a different financial institution that ultimately presents (or does not present) a credit offer to the applicant. Thus, the Bureau believes data quality, along with the purposes of section 1071, will be better served if the financial institution with the last authority for setting the material terms of the covered transaction is the reporter.[790]

Final comment 109(a)(3)-1.i emphasizes that the determinative factor is not which financial institution actually made the last-in-time credit decision, but rather which financial institution had last authority for setting the material terms of the covered credit transaction, even if it did not actually exercise this authority in a particular case. For example, a financial institution that has the authority to modify the total loan amount prior to origination has the last authority for setting the terms of the covered credit transaction, even if it makes no changes to the total loan amount. The Bureau is adopting a categorical, rather than a case-by-case rule, to enable financial institutions to identify a reporting party at the outset of a transaction. The

[790] If the financial institution with last authority for setting the material terms of the covered credit transaction is not a covered financial institution, whether due to a statutory exemption (such as the one for motor vehicle dealers in section 1029) or other reasons, then the application is not reported under this rule.

Bureau believes that this will help eliminate uncertainty and logistical challenges concerning which institution reports, and thus provide a more straightforward and administrable bright line.

This approach will also address requests for clarification from commenters. For example, one commenter suggested that the Bureau clarify that third-party review, even if for the purposes of telling the creditor that the third party will only purchase the post-origination loan under certain conditions, does not mean that third party/potential purchaser made the final credit decision. The Bureau believes that final comment 109(a)(3)-2.vii addresses this scenario, illustrating that where another financial institution has ultimate authority for setting the material terms of the covered credit transaction, the third party/potential purchaser does not report. In finalizing this approach, the Bureau is also removing the phrase "final credit decision" from § 1002.109(a)(3) because the phrase appears to have caused confusion and is not necessary to convey the Bureau's intentions regarding which financial institution is required to report under various circumstances.

In addition, final comment 109(a)(3)-1.iii clarifies reporting obligations in circumstances where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction and where more than one financial institution denies the application or otherwise does not approve the application. In this circumstance, the reporting financial institution (the last financial institution with authority to set the material terms of the covered credit transaction) shall have a consistent procedure for determining how it reports inconsistent or differing data points for purposes of subpart B, such as reporting the denial reason(s) from the first financial institution that denied the covered application.

The Bureau believes that the revisions to § 1002.109(a)(3) and associated commentary will help ensure clarity and consistency from the outset regarding which entity has reporting responsibility in a variety of fact patterns involving multiple financial institutions. In addition, the Bureau believes that this approach advances section 1071's purposes by reducing logistical

challenges and potential data accuracy issues resulting from reporting by multiple financial institutions on the same application.

In response to commenters who urged consistency with HMDA, the Bureau notes that it initially sought alignment with Regulation C given its understanding of how well the approach has worked in the residential mortgage context and the similarities that exist with various indirect lending scenarios in the small business lending context. While the Bureau's approach in final § 1002.109(a)(3) in many situations is consistent with Regulation C outcomes, it deviates in some ways because, unlike Regulation C, this final rule does not cover purchase transactions. In addition, the Bureau believes that commenters' concerns about alignment with HMDA are mitigated by the Bureau's decision to exclude reporting of all HMDA-reportable transactions, as set forth in final § 1002.104(b)(2).

Unlike section 1071, HMDA expressly contemplates data collection for loan purchases, and Regulation C thus requires financial institutions to report purchases of covered loans.[791] Moreover, Regulation C commentary clarifies that if more than one institution approved an application prior to closing or account opening and one of those institutions purchased the loan after closing, the institution that purchased the loan after closing reports the loan as an origination.[792] The preamble to the 2015 final HMDA rule explained that requiring that only one institution report the origination of a covered loan eliminates duplicative data.[793] Identical language was included in proposed comment 109(a)(3)-1.i.

Upon further consideration, the Bureau believes that Regulation C's approach involving a purchasing institution is incongruous with section 1071 requirements and thus the final rule adopts a different approach. As described in the section-by-section analysis of § 1002.104(b)

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[791] *See* 12 U.S.C. 2803(a)(1) (stating that institutions "shall compile and make available . . . the number and total dollar amount of mortgage loans which were (A) originated (or for which the institution received completed applications), or (B) purchased by that institution"); Regulation C § 1003.4(a) (stating that a financial institution "shall collect data regarding . . . covered loans that it purchases for each calendar year").

[792] Regulation C comment 4(a)-2.i.

[793] 80 FR 66128, 66173 (Oct. 28, 2015).

above, purchases of covered credit transactions are not, in themselves, covered by the rule. Thus, the Bureau is removing language from proposed comment 109(a)(3)-1.i that would have required reporting by a purchasing financial institution that also approved an application prior to closing or account opening, and is instead placing the reporting obligation on the last covered financial institution with authority to set the material terms of the covered credit transaction. The Bureau believes that this approach is more broadly applicable to the small business financing context (particularly since the Bureau is excluding HMDA-reportable transactions) where there are some salient differences to the mortgage lending context.

For example, while there may also be intermediaries in a mortgage loan transaction, an intermediary typically does not have the discretion and authority to materially deviate from the terms expected by a secondary-market purchaser. In some small business lending contexts, even where a subsequent bona fide purchaser and holder in due course of a covered credit transaction has been identified, an intermediary may have the authority to sort through different purchase offers, select one, and present it to the applicant. Such an intermediary may also have the authority to change material terms of the covered credit transaction prior to closing, such as modifying the pricing terms, loan amount, or repayment duration. As the only party to interact with the applicant prior to closing, the intermediary can be the party with the most fair lending risk. The Bureau believes, given section 1071's statutory purposes, this last financial institution with the authority to set the terms of the small business's credit obligation should be the one to report on an application.

Indirect auto lending transactions are a common example of situations involving multiple financial institutions. It is common for motor vehicle dealers to assess specific credit information about the applicant, negotiate and set credit terms (such as the duration of the transaction), negotiate and charge for add-on products, and include loan pricing markups. Likewise, the dealer is typically the original creditor, executing and setting the terms of a retail installment sales contract with the customer, and then selling it to another financial institution. Even if the motor

vehicle dealer interacts with several financial institutions to make a credit decision and originate a credit transaction, the dealer is typically the last entity with authority to set the material credit terms of the covered credit transaction. Final comments 109(a)(3)-2.vii and viii provide examples of such scenarios.

In some cases, a financial institution's purchase of the retail installment sales contract may not even occur until well after the contract has been signed and the vehicle has been driven off the lot. The fact that a contract may be conditioned on a financial institution's purchase of the contract at a later time does not alter the analysis. In these situations, often known as "spot delivery," the applicant has met the underwriting and creditworthiness conditions used by the motor vehicle dealer and has been approved. The fact that a motor vehicle dealer has imposed other conditions on the execution of the contract (*i.e.*, a financial institution purchasing the contract) that are outside of the applicant's control does not change the conclusion. Once the contract has been signed and the terms of credit set, there is no credit decision on a covered *application* by a subsequent purchaser.

The Bureau recognizes that its rules generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.[794] This provision is codified in final § 1002.101(a). The Dodd-Frank Act also specifies that in general, "nothing in this title . . . shall be construed as modifying, limiting, or superseding the operation of any provision of Federal law, or otherwise affecting the authority of the Board of Governors . . . with respect to a [motor vehicle dealer that is predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both]."[795] Thus, consistent with this provision, if the motor vehicle dealer is the last financial institution with

[794] 12 U.S.C. 5519.

[795] 12 U.S.C. 5519(c).

authority to set the material credit terms of the covered credit transaction, that application will not be reported under subpart B.

Relatedly, several commenters asserted that motor vehicle dealers are prohibited by the Board's Regulation B from asking for protected demographic information in order to furnish it to another financial institution for reporting under the Bureau's rule. As noted above, the Bureau believes that dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting 1071 data on behalf of other reporting financial institutions. But even in situations where the dealer is acting as a mere conduit, and thus may be collecting information on behalf of another financial institution, comment 5(a)(2)-3 to the Board's Regulation B states that persons such as loan brokers and correspondents do not violate ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to HMDA or another Federal or State statute or regulation requiring data collection.[796]

The Bureau appreciates the range of potential alternatives raised by commenters as to the entity that should be required to report data when a covered credit transaction involves multiple financial institutions, but is not implementing these alternative suggestions. For the reasons described above, the Bureau believes that the last financial institution with the authority to set the material terms of the covered credit transaction should be the one to report.

The Bureau believes that the final rule is also consistent with arrangements where an online lender partners with a bank and provides further clarity regarding who reports when multiple financial institutions are involved.

[796] This language aligns with comment 5(a)(2)-3 in the Bureau's Regulation B, to which the Bureau is adding a reference to subpart B for additional clarity.

Commenters' concerns regarding reporting of insurance premium financing transactions are rendered moot by the Bureau's exclusion of such transactions from coverage under the rule. See the section-by-section analysis of § 1002.104(b)(3) for additional details.

Regarding farm credit institutions' request that the Bureau clarify that the rule does not apply to credit decisions made after loan approval, the Bureau has made clear in final § 1002.109(a)(3) and associated commentary that only the action taken on the *application* is reportable.

Regarding partial purchase interests and participation loans, as explained in the section-by-section analysis of § 1002.104(b), the Bureau has added commentary to clarify that a partial purchase of a loan does not, in itself, generate an obligation for a covered financial institution to report small business lending data. The Bureau believes that applications for covered credit transactions will generally be reported by one covered financial institution, *i.e.*, the financial institution that sold portions of the loan to other participants. The examples provided in final comments 109(a)(3)-2.ix and .x speak to such scenarios.

The Bureau further believes that the rule is consistent with loan syndication arrangements where multiple lenders come together to fund a large loan for a single borrower. Syndication is distinguishable from loan participations. In participations, the contractual relationship runs from the borrower to the lead bank and from the lead bank to the participants. In syndications, the borrower signs a loan agreement with multiple creditors, each of whom has a direct contractual relationship with the borrower. Usually, each creditor in a syndicated loan transaction receives its own promissory note from the borrower. In fact, the Farm Credit Administration legally distinguishes between the Farm Credit System's loan-making authority (which includes syndication transactions) and its participation authority.[797] The Bureau believes that syndication is typically used for large commercial projects and a limited number of reportable applications

[797] *See* 69 FR 8407 (Feb. 24, 2004).

are likely to involve syndicated loans. The Bureau also understands that typical syndication arrangements have a syndicate agent/lead bank. If the lead bank has the last authority to set the material terms of the covered credit transaction, it has the reporting obligation.

The Bureau also believes that the rule is consistent with lending through Certified Development Companies (CDCs) for SBA loans. CDCs are nonprofit organizations that are certified by, but independent of, the SBA. SBA 504 loans involve two applications—one to a CDC and one to another participating SBA lender. Generally, the transaction begins with the applicant submitting an application to the CDC to obtain approval for up to 40 percent of a project's costs. Once the application is approved by the CDC, the applicant works with another lender—typically a bank—to apply for the other portion of the financing. The other lender's loan typically covers 50 percent of a project's cost and is secured by a first lien, while the CDC's loan covers up to 40 percent of the project's cost and is secured by a second lien. The CDC loan is backed by a 100 percent SBA-guaranteed debenture. The bank earns interest from the debenture, which it receives semi-annually. The borrower contributes equity of at least 10 percent, sometimes up to 20 percent, of the project cost. The CDC and the other lender separately underwrite the loan, and the terms and conditions on the CDC and bank loans may differ. Because both the CDC and the other lender make their own credit decisions on separate covered applications, they are each responsible for reporting the application covering their portion of the financing.

109(b) Financial Institution Identifying Information

As explained in the NPRM, beginning in 1989, Regulation C required financial institutions reporting HMDA data to use a discrete transmittal sheet to provide information on themselves separate from the loan/application registers used to submit HMDA data.[798] The 2015 HMDA final rule incorporated information previously submitted on the transmittal sheet into the

[798] *See* 54 FR 51356, 51361 (Dec. 15, 1989) (requiring financial institutions to use the transmittal sheet and loan/application register in appendix A).

regulatory reporting requirements.[799] The FFIEC publishes information on financial institutions that report HMDA data in the HMDA Reporter Panel, which includes the required submission information provided by financial institutions under § 1003.5(a)(3), as well as other data derived from this information.[800]

The Bureau proposed to collect similar information regarding financial institutions that report small business lending data. Specifically, proposed § 1002.109(b) would have required that a financial institution provide the following information about itself as part of its submission: (1) its name; (2) its headquarters address; (3) the name and business contact information of a person who may be contacted with questions about the financial institution's submission; (4) its Federal prudential regulator, if applicable; (5) its Federal taxpayer identification number; (6) its LEI; (7) its Research, Statistics, Supervision, and Discount identification (RSSD ID) number, if applicable; (8) its parent institution information, if applicable (including the name, LEI, and RSSD ID number of its immediate parent entity and top-holding parent entity, if applicable); (9) the type of financial institution, chosen from a list provided; and (10) whether the financial institution is voluntarily reporting data.

The Bureau sought comment on its approach to collecting information on financial institutions, including each of the items listed in proposed § 1002.109(b)(1) through (10) as well as whether the Bureau should require the reporting of any other information on financial institutions. The Bureau did not receive any comments on the requirement to provide financial institution identifying information generally, although comments received regarding each of the items listed in proposed § 1002.109(b)(1) through (10), are discussed in turn below. The Bureau

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[799] 80 FR 66128, 66526 (Oct. 28, 2015) (deleting appendix A and relocating its substantive requirements to § 1003.5(a)(3)). The information now required by Regulation C includes: (i) the financial institution's name; (ii) the calendar year the data submission covers; (iii) the name and contact information of a person who may be contacted with questions about the institution's submission; (iv) its appropriate Federal agency; (v) the total number of entries contained in the submission; (vi) its Federal taxpayer identification number; and (vii) its Legal Entity Identifier (LEI).

[800] *See, e.g.*, Fed. Fin. Insts. Examination Council, *HMDA Public Panel*, https://ffiec.cfpb.gov/documentation/2017/panel-data-fields/ (last visited Mar. 20, 2023).

also received comments discussing the benefits and privacy risks of financial institution identifying information, which are discussed in part VIII below.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b) with modifications to move examples regarding when to report changed financial institution identifying information to new comment 109(b)-1 to streamline and ensure uniformity in the guidance, with revisions to § 1002.109(b)(3) to clarify which contact person's information must be provided, and to adjust the list provided in comment 109(b)(9)-1 based on comments received.

The Bureau believes it is appropriate to require each of these pieces of information regarding financial institutions reporting small business lending data. As a practical matter, the Bureau anticipates that this information will be provided by a financial institution when it initially sets up an account with the Bureau's small business lending data submission platform to allow it to file data as required by the rule. Thus, this information will exist in the Bureau's data submission system and will be updated by the financial institution as needed.

The Bureau believes that collecting a financial institution's name (as well as all the other identifying information in proposed § 1002.109(b)) is necessary to carry out, enforce, and compile data under section 1071, and will aid in fulfilling the purposes of section 1071. For both of section 1071's statutory purposes, the identity of the financial institution taking covered applications and originating covered credit transactions is critical as it will (1) make fair lending enforcement possible, and (2) make analyzing business and community development needs of small businesses more effective.

With the possible exception of the LEI (in final § 1002.109(b)(6) and (8)(ii) and (v)) in certain circumstances, the Bureau believes that financial institutions already have all the information that is required of them under final § 1002.109(b), and that being required to provide this information to the Bureau should not pose any particular difficulties or costs on financial institutions.

Paragraph 109(b)(1)

Proposed § 1002.109(b)(1) would have required a financial institution to provide its name. Regulation C (§ 1003.5(a)(3)(i)) requires financial institutions to provide their names when filing HMDA data, and the Bureau believed that a similar requirement would have been appropriate here.

The Bureau detailed several practical considerations for proposing to require a financial institution to provide its name, including identification for examination purposes and administration of the Bureau's website for data submissions. Additionally, the Bureau noted that it proposed in § 1002.110(c) that financial institutions' statutory obligation to make data available to any member of the public, upon request, pursuant to ECOA section 704B(f)(2)(B) would have been satisfied by the institutions' directing the public to the Bureau's website for this information. Without the financial institution's name (and other relevant identifying information), proposed § 1002.110(c) would not have satisfied this statutory requirement.

The Bureau received two comments on this aspect of the proposal from community groups, both of which supported § 1002.109(b)(1) as proposed. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(1) as proposed.

Paragraph 109(b)(2)

Proposed § 1002.109(b)(2) would have required a financial institution to provide the physical address of its headquarters location. The headquarters address of a financial institution would provide geographic information that would aid in fulfilling the statutory purposes of section 1071, including, for instance, analyses of the connection between a financial institution's location and the business and community development needs where it operated. It would also help identify and differentiate financial institutions, particularly nondepository financial institutions, that have similar names.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(2) as proposed.

Paragraph 109(b)(3)

Proposed § 1002.109(b)(3) would have required a financial institution to provide the name and business contact information of a person who may have been contacted with questions about the financial institution's data submission. The Bureau noted that Regulation C includes a similar requirement in § 1003.5(a)(3)(iii), and the Bureau believed it would have been appropriate to require such information here. In general, the Bureau found, from its experience with HMDA and Regulation C, that requiring the name and business contact information of a person who may have been contacted with questions generally facilitated communication in the event that follow-up on a submission is required.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is generally finalizing § 1002.109(b)(3) as proposed. However, the Bureau is revising final § 1002.109(b)(3) to make clear that the contact reported is a person responsible for responding to Bureau or other regulator inquiries about the submission, rather than inquiries from the general public.

Paragraph 109(b)(4)

Proposed § 1002.109(b)(4) would have required a financial institution that is a depository institution to provide the name of its Federal prudential regulator, if applicable. Proposed comment 109(b)(4)-1 would have explained how to determine which Federal prudential regulator (*i.e.*, the OCC, the FDIC, the Board, or the NCUA) a financial institution should report. Proposed comment 109(b)(4)-2 would have provided guidance on when a financial institution would be required to report a new Federal prudential regulator, for instance, in the event of a merger or a change of charter.

The Bureau noted that Regulation C includes a similar provision in § 1003.5(a)(3)(iv), requiring financial institutions to identify the appropriate Federal agency. In the Regulation C context, the purpose of this requirement is to identify the agency to which a financial institution must report its HMDA data—often the financial institution's Federal prudential regulator for

depository institutions.[801] For small business lending data, the Bureau believed a requirement to report a financial institution's Federal prudential regulator would be appropriate for different reasons. The reporting of a financial institution's Federal prudential regulator would enable analysts to more easily identify other information about a financial institution that its Federal prudential regulator makes publicly available, such as Call Report data; further, such additional data may be used by regulators to perform analyses of the characteristics of financial institution's data. Nondepository institutions generally do not have Federal prudential regulators and would not have reported one under this requirement.[802]

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(4) as proposed, but has moved the example in proposed comment 109(b)(4)-2 to new comment 109(b)-1.

Paragraph 109(b)(5)

Proposed § 1002.109(b)(5) would have required a financial institution to provide its Federal taxpayer identification number (TIN). Proposed comment 109(b)(5)-1 would have explained when a financial institution should report a new Federal TIN in the event that it obtained a new Federal TIN (for instance, because the financial institution merged with another financial institution and adopted the Federal TIN of the other financial institution). The Bureau noted that Regulation C § 1003.5(a)(3)(vi) requires financial institutions to report Federal TIN with their HMDA submissions, and the Bureau believed such a requirement would be appropriate here as well. A financial institution's Federal TIN may be used to identify other publicly available information on a financial institution, and combined with a financial

[801] 12 U.S.C. 2803(h).

[802] Additionally, while some nondepository institutions have Federal regulators, those Federal regulators may not meet the definition of Federal prudential regulator provided in comment 109(b)(4)-1 and this data point still may not be applicable. For example, while Farm Credit System institutions are regulated and supervised by the Farm Credit Administration, the Farm Credit Administration is not a Federal prudential regulator as defined in comment 109(b)(4)-1.

institution's small business lending application register to enhance the types of analysis that can be conducted to further the two statutory purposes of section 1071.

Having received no comments on this aspect of the proposal and for the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(2) as proposed, but has moved the example in proposed comment 109(b)(5)-1 to new comment 109(b)-1.

Paragraph 109(b)(6)

Proposed § 1002.109(b)(6) would have required a financial institution to provide its LEI. Proposed comment 109(b)(6)-1 would have explained what an LEI is and would have made clear that financial institutions that do not currently have an LEI must obtain one, and that financial institutions would have an ongoing obligation to maintain an LEI in order to satisfy proposed § 1002.109(b)(6).

The Bureau explained that an LEI is a unique, 20-digit identifier issued by an entity endorsed or otherwise governed by the Global LEI Foundation. Regulation C requires financial institutions to obtain and use an LEI, which facilitates the analysis of HMDA data and aids in the recognition of patterns by more precisely identifying financial institutions and affiliated companies.[803] The LEI also helps financial institutions that report HMDA data generate the universal loan identifier used to identify application or application-level records in Regulation C. Similarly, in the section 1071 context, a financial institution's LEI would also likely facilitate data analyses,[804] by helping the Bureau and other stakeholders better understand a financial institution's corporate structure. Proposed § 1002.107(a)(1) would have also required that financial institutions use their LEIs in creating unique identifiers for covered applications. The

[803] 80 FR 66128, 66248 (Oct. 28, 2015) (noting that, despite the cost, the Bureau believed that the benefit of all HMDA reporters using an LEI justified the associated costs by improving the ability to identify the financial institution reporting the data and link it to its corporate family).

[804] *Id.* ("By facilitating identification, this requirement will help data users achieve HMDA's objectives of identifying whether financial institutions are serving the housing needs of their communities, as well as identifying possible discriminatory lending patterns.").

Bureau believed this, in turn, would result in more sophisticated and useful analyses of the financial institution's data.

The Bureau received a few comments on this aspect of the proposal. These commenters were supportive of proposed § 1002.109(b)(6), agreeing with the Bureau's assertion that an LEI would help facilitate analyses. One commenter stated that the Bureau needed to ensure data users could identify parent and affiliate connections. The comments also supported requiring financial institutions to provide LEI information, stating that it would be consistent with HMDA, as discussed in the proposal.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(6) as proposed. Regarding the comment requesting the Bureau make identification of parent and affiliate connections easier, the Bureau notes that it is requiring LEI information in part for this reason, as discussed in the proposal. As explained in comment 109(b)(6)-1, financial institutions are required to report the current LEI number, and if the financial institution does not currently possess one, to obtain one. Financial institutions also have an ongoing obligation to maintain their LEI number. As part of maintaining an LEI number, a financial institution must make sure the LEI number and associated information are current, including any relationship data. The Bureau believes that publication of a financial institution's LEI, as well as any parent and top parent LEIs, as applicable, will allow data users to identify these relationship connections.

Paragraph 109(b)(7)

Proposed § 1002.109(b)(7) would have required a financial institution to report its RSSD ID number, if applicable. The Bureau explained that an RSSD ID is a unique identifying number assigned to institutions, including main offices and branches, by the Federal Reserve System. All depository institutions know and regularly report their RSSD ID numbers on FFIEC regulatory forms. The Bureau believed that an RSSD ID would help data users link the data for a particular financial institution to other regulatory data, including the connections between a particular financial institution with other financial institutions. The Bureau believed that this additional

information would result in more sophisticated and useful analyses of the financial institution's small business lending data.

Proposed comment 109(b)(7)-1 would have explained what an RSSD ID number is and how financial institutions that have one might find it. Financial institutions that do not have RSSD IDs, typically nondepository institutions, would not have been required to obtain them, and would report "not applicable" in that field.

The Bureau received one comment from a community group supporting this aspect of the proposal. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(7) as proposed.

Paragraph 109(b)(8)

Proposed § 1002.109(b)(8) would have required a financial institution to provide certain information on its parent entities, if applicable. This information would have included the name, the LEI (if available), and the RSSD ID (if available) of the financial institution's immediate parent entity and the financial institution's top-holding parent entity.

Proposed comments 109(b)(8)-1 and -2 would have provided guidance on how to identify a financial institution's immediate parent entity and a financial institution's top-holding parent entity. Proposed comment 109(b)(8)-3 would have explained that a financial institution would have reported its parent entities' LEIs if they have them, but that no parent entity would be required to obtain an LEI if it did not already have one. Proposed comment 109(b)(8)-4 would likewise have explained that a financial institution would report its parent entities' RSSD ID numbers if they had them.

In the NPRM, the Bureau explained that it believed that the collection of information on a financial institution's structure would further both of the statutory purposes of section 1071. Data on a financial institution's organizational structure that is self-reported would be more accurate

than would be the case if the Bureau attempted to generate such information from publicly available sources.[805]

The Bureau further explained that better structural information would, for instance, improve the accuracy of peer analyses, which would facilitate fair lending enforcement. The Bureau stated that analyzing trends over time would be useful for identifying institutions that may give rise to fair lending risk. Given structural changes to institutions over time, information that enables the identification of institutions consistently and accurately over time is important to this trend analysis.

In addition, the Bureau believed that information on a financial institution's structure would advance the business and community development purpose of section 1071 by facilitating the analysis of whether and how corporate structure impacts how a financial institution provides access to credit to small businesses. In particular, this structural information could be used to understand how regulation in one part of a corporate structure impacts unregulated entities within the same corporate group.

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[805] With respect to HMDA, the Bureau, on behalf of the FFIEC and HUD, does currently attempt to generate and publish information on filers, including parent company and top holder information obtained from the LEI provided. *See* Fed. Fin. Insts. Examination Council, *Public Panel—Data Fields with Values and Definitions*, https://ffiec.cfpb.gov/documentation/2021/panel-data-fields/ (last visited Mar. 20, 2023). But the Bureau has encountered difficulties in using the LEI to obtain parent company and top holder information, and thus proposed for this rulemaking to require that it be provided directly by financial institutions.

From 1989 to 1998, Regulation C required financial institutions to report their parent entity information on transmittal sheets. 54 FR 51356, 51361, 51368 (Dec. 15, 1989) (adding the transmittal sheet requirement, including parent institution information, to appendix A to Regulation C); 63 FR 52140, 52141 (Sept. 30, 1998) (stating that the Board believed that the availability of information from the FFIEC website makes the continuation of the requirement for parent company information on the transmittal sheet unnecessary). In 2002, Regulation C again required financial institutions to report parent information on transmittal sheets on the grounds that data users asserted the importance of having the parent institution information associated with the HMDA data itself, rather than in a separate database provided by the National Information Center. 67 FR 7221, 7232 (Feb. 15, 2002).

In the 2014 HMDA NPRM, the Bureau proposed to continue requiring that financial institutions identify their parent companies. The Bureau stated that because information about parent companies was not yet available through the LEI, the Bureau believed it was necessary to maintain this requirement to ensure that financial institutions' submissions can be linked with those of their corporate parents. 79 FR 51731, 51861 (Aug. 29, 2014). However, required reporting of parent company information stopped under the 2015 HMDA final rule on the grounds that once the LEI is fully implemented, parent entity information was expected to become available. 80 FR 66128, 66248 (Oct. 28, 2015) (citing Fin. Stability Bd., LEI Implementation Grp., *Fourth Progress Notes on the Global LEI Initiative*, at 4 (Dec. 11, 2012), http://www.financialstabilityboard.org/wp-content/uploads/r_121211.pdf?page_moved=1) (noting that the LEI Implementation Group is developing proposals for additional reference data on the direct and ultimate parent(s) of legal entities and on relationship data more generally).

Proposed § 1002.109(b)(8) would have resulted in more accurate and comprehensive corporate structure information by requiring financial institutions to provide not only the name of one parent entity, but the immediate parent entity of the financial institution as well as the top-holding parent of the financial institution (for some financial institutions, this would be a bank holding company). For the reasons set out above in the section-by-section analyses of § 1002.109(b)(6) and (7), the reporting of LEI and RSSD ID of parent entities would improve the ability of regulators and other stakeholders to map out more precisely and fully the often-complex networks of a financial institution's corporate structure. This more detailed and accurate structural data, in turn, might be used to perform more sophisticated and useful analyses of the financial institution's small business lending data. In addition, this information would have helped the Bureau confirm whether data were appropriately being reported by financial institutions on behalf of their subsidiaries pursuant to proposed § 1002.109(a)(2).

With respect to proposed § 1002.109(b)(8), the Bureau sought comment on whether it should require any other parent entity information to be provided by financial institutions reporting data.

The Bureau received comments on this aspect of the proposal from a community group and a trade association. These commenters were supportive of proposed § 1002.109(b)(8). One commenter supported identifying the parent and top holder parent entities under proposed § 1002.109(b)(8)(i) and (iv). Both commenters supported the inclusion of LEI information for both the parent and top holder parent entities under proposed § 1002.109(b)(8)(ii) and (v). For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(8) as proposed.

Paragraph 109(b)(9)

Proposed § 1002.109(b)(9) would have required a financial institution to report the type of financial institution it is, selecting the applicable type or types of institution from a list in proposed comment 109(b)(9)-1. The comment would also have explained that a financial institution would select all applicable types. The list provided in the proposed comment included:

(i) bank or savings association, (ii) minority depository institution, (iii) credit union, (iv) nondepository institution, (v) CDFI, (vi) other nonprofit financial institution, (vii) Farm Credit System institution, (viii) government lender, (ix) commercial finance company, (x) equipment finance company, (xi) industrial loan company, (xii) fintech, and (xiii) other. Proposed comment 109(b)(9)-2 would have explained that a financial institution reports the type of financial institution as "other" where none of the enumerated types of financial institution appropriately describe the applicable type of financial institution, and the institution reports the type of financial institution as free-form text.

The Bureau believed that information regarding the type of financial institution reporting small business lending data would greatly assist in the analysis conducted by the Bureau and other data users. Information providing further details on types of financial institutions would help advance the statutory purposes of section 1071; fair lending analysts might use this information on the financial institution type (for instance, depository institutions compared to nondepository institutions) as a control variable for their analyses. The inclusion of this information may also assist in an assessment of the business and community development needs of an area as it may provide analysts a means of determining what types of financial institutions serve certain geographic areas.

In addition, the Bureau believed that this information, combined with the parent entity information required by proposed § 1002.109(b)(8), would offer more accurate and granular data on nondepository institutions within the same corporate group as depository institutions. The Bureau noted that, at the time of the NPRM, the National Information Center database, which contains information on the structure of corporate groups that contain banks and other financial institutions, provided little information on nondepository institutions. In connection with proposed § 1002.109(b)(8), information on corporate structure that financial institutions self-report could fill in reporting gaps, including more specific information on financial institution types.

With respect to proposed § 1002.109(b)(9), the Bureau sought comment on whether it should consider removing, modifying, or adding any types of financial institutions to the list in proposed comment 109(b)(9)-1, including in order to manage unique privacy interests (such as, for example, whether a category for captive finance companies that lend to applicants that share the same branding should be included on the list). The Bureau also sought comment on whether it should consider defining any of the types of financial institutions in the proposed list, in particular whether and how to define the term "fintech."

The Bureau received comments on this aspect of the proposal from several community groups and a software vendor. Generally, these commenters were supportive of proposed § 1002.109(b)(9), though some requested certain modifications. Two commenters stated that the use of "fintech" in the list of financial institution types in proposed comment 109(b)(9)-1 was not a clear descriptor, and that "online lender" would be a better term. One commenter also requested the Bureau make clear that selection of "other" as a type of financial institution does not qualify the financial institution for exemption from coverage of this rule. Additionally, the commenter requested the Bureau make clear that selection of multiple financial institution types from the list provided in proposed comment 109(b)(9)-1 is permitted. Finally, a commenter requested the Bureau require financial institutions to identify the types of products they offer, in addition to the type of financial institution.

For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(9) with a revision in comment 109(b)(9)-1 to replace the financial institution type "fintech" with "online lender" and to add commentary about how the Bureau may add additional financial institution types in the future. The Bureau agrees with commenters that using "online lender" as a financial institution type will help better identify the type of financial institution that is being described rather than "fintech." As commenters noted, "fintech" has a wide variety of uses over different industries. That variety may make it difficult to determine what "fintech" means as a financial institution type and under what circumstances a financial institution must report "fintech" as one

of their types. Using "online lender" as the financial institution type helps make clear the financial institution's business model is to conduct business primarily online. For example, an online lender would include a platform or peer-to-peer lender that generally only receives applications and originates loans through a website and that does not have in-person encounters with small businesses, such as accepting applications or having meetings with loan officers, at a physical office. In such a case, the financial institution would select "online lender" as the type of financial institution (in addition to any other applicable financial institution types listed in final comment 109(b)(9)-1).

For similar reasons as those discussed in the section-by-section analysis of § 1002.107(a) regarding the addition of comment 107(a)-4, the Bureau is also adding a comment in § 1002.109(b)(9) to facilitate flexibility and account for the evolution of small business lending market, identifying how the Bureau may add additional financial institution types in the future. Comment 109(b)(9)-3 provides that the Bureau may add additional types of financial institutions via the Filing Instructions Guide and related materials. Comment 109(b)(9)-3 refers financial institutions to the Filing Instructions Guide for any updates for each reporting year.

Regarding commenters' requests for clarity regarding selection of multiple financial institution types, and that selecting "other" does not exempt an institution from coverage under the rule, final comment 109(b)(9)-1 states a financial institution shall select *all* applicable types, confirming that multiple financial institution types should be selected if more than one type applies to the financial institution. Additionally, the Bureau notes that final § 1002.105 addresses institutional coverage under this rule. Financial institution type is not a determinative factor for coverage; in fact, an exempt institution (unless voluntarily reporting data pursuant to §§ 1002.107 through 1002.109 as discussed in comment 105(b)-6) would not be submitting information pursuant to § 1002.109 in the first instance. Final comment 109(b)(9)-2 explains the circumstances for which a financial institution is required, or permitted, to report "other."

Finally, the Bureau does not believe it is necessary to add a requirement for financial institutions to provide their product types as part of the financial institution identifying information, as suggested by one commenter. Section 1002.107(a)(5), as finalized, requires a financial institution to identify the credit type for each application or origination reported. This information, together with the other financial institution identifying information required pursuant to § 1002.109(b), will allow data users to identify the product types offered by each financial institution in the dataset.

Paragraph 109(b)(10)

Proposed § 1002.109(b)(10) would have required a financial institution to indicate whether it was not a covered financial institution under proposed § 1002.105(a) and was thus voluntarily reporting covered applications.

The Bureau believed it was important to be able to specifically identify these institutions' transactions in the dataset. If reporting were restricted to only financial institutions required to report, the data would accurately reflect the overall population of financial institutions subject to the final rule. However, institutions that do not meet the rule's loan-volume threshold in proposed § 1002.105(b) could choose to voluntarily report small business lending data pursuant to proposed § 1002.5(a)(4)(vii) through (ix). Those institutions that voluntarily reported data might not be representative of all potential voluntary reporters and might differ from required reporters. Without a specific designation, it might not be possible to distinguish an institution voluntarily reporting data after a single year of exceeding the loan-volume threshold from an institution reporting because it had already exceeded the loan-volume threshold in two consecutive years. The Bureau believed that data users would benefit from being able to use this information as a control variable, resulting in better fair lending as well as business and community development analyses, to account for certain differences that might exist as between required and voluntary reporters.

The Bureau received one comment on this aspect of the proposal from a community group. The commenter supported inclusion of § 1002.109(b)(10), agreeing with the Bureau's assertion that data users will need to identify voluntary reporters. For the reasons set forth herein, the Bureau is finalizing § 1002.109(b)(10) as proposed.

109(c) Procedures for the Submission of Data to the Bureau

Proposed Rule

Proposed § 1002.109(c) and comment 109(c)-1 would have directed financial institutions to a publicly available website containing the Bureau's Filing Instructions Guide, which would have set out technical instructions for the submission of data to the Bureau pursuant to proposed § 1002.109. Regulation C § 1003.5(a)(5) contains a comparable provision, which directs users to a Bureau website that sets out instructions for the submission of HMDA data, and the Bureau believed a similar approach would be appropriate here.

The Bureau sought comment on this aspect of the proposal, including the provision of technical instructions for data submission via a Bureau website and how best to implement the provisions of this section in a manner that minimizes cost and burden particularly to small financial institutions while implementing all statutory obligations. The Bureau also sought comment on ways it could streamline reporting for small financial institutions.

Comments Received

The Bureau received comments from two lenders, several trade associations, and a community group concerning the Bureau's publication of a Filing Instructions Guide to assist lenders in their submission of small business lending data to the Bureau. A CDFI lender and two trade associations supported the publication of technical instructions for data submission in the Filing Instructions Guide, stating that it would greatly aid in complying with the rule. One of these commenters requested that the Bureau dedicate staff to provide answers that can be relied on, such that community banks could not be criticized or penalized during subsequent examinations.

A bank and several trade associations expressed concern about the possible timing for the Bureau's publication of its Filing Instructions Guide, noting the importance of receiving such instructions well in advance such that lenders could comply with the rule and provide accurate and reliable data. Two of these commenters requested that the Bureau release the Filing Instructions Guide at least six months before any required data collection begins.

A trade association inquired whether the Filing Instructions Guide for this regulation would be similar to the one for HMDA and Regulation C, and whether the Bureau would make the Filing Instructions Guide available for comment. A joint letter from community and business advocacy groups suggested that certain data categories for race and ethnicity be contained in the Filing Instructions Guide, so they could be adjusted from time to time to align any changes in the OMB's Federal Data Standards on Race and Ethnicity, rather than being codified in the commentary to this regulation.

Final Rule

The Bureau is finalizing § 1002.109(c) as proposed. The Bureau is developing a system to receive, process, and publish the data collected pursuant to this final rule. In doing so, the Bureau has benefitted from what it learned in its multiyear effort in developing the HMDA Platform, through which entities file data as required under HMDA and Regulation C. As it did in developing the HMDA Platform, the Bureau's ongoing work in developing the small business lending data submission system focuses on satisfying all legal requirements, promoting data accuracy, and reducing burden. The Bureau is publishing, concurrently with this final rule, a Filing Instructions Guide and related materials for financial institutions.[806] The Bureau does not believe proposed comment 109(c)-1 is necessary as it is duplicative of the regulatory text, and thus has removed it from the final rule.

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[806] *See* https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/.

ECOA section 704B(g)(1) authorizes the Bureau to prescribe rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Section 704B(g)(3) provides for the Bureau to issue guidance to facilitate compliance with the requirements of section 1071. Here, final § 1002.109(c) is justified under both ECOA provisions because the issuance of the means of submitting data to the Bureau are both necessary to compile data pursuant to section 1071 and to facilitate compliance with section 1071.

The Bureau agrees with commenters that the Filing Instructions Guide will significantly facilitate compliance with section 1071. Regarding the request that the Bureau provide staff to answer questions about complying with the rule before the rule's compliance date, Bureau staff will be available after the publication of this final rule to provide guidance to lenders in complying with the rule. The Bureau will make other compliance and technical resources available as well, as described at the end of part I above.

The Bureau notes, in response to the question of whether the Filing Instructions Guide would be similar to the one for HMDA, that many aspects of the Filing Instructions Guide for this regulation are based on the HMDA guide. The Bureau does not believe it is necessary to request public comment on the Filing Instructions Guide, as it is a technical document that reflects the regulatory requirements of § 1002.107 and § 1002.109(b) such that data can be submitted to the Bureau's small business lending data submission platform. However, as with HMDA, various iterations of the Filing Instructions Guide will be published over time with changes based in part on feedback from financial institutions and third-party providers. Regarding the comment that certain data categories for race and ethnicity contained in the Filing Instructions Guide be adjusted from time to time to align any changes in the OMB's Federal Data Standards on Race and Ethnicity, the Bureau recognizes that it may need to adjust some data categories over time, but that the statute may not permit exact alignment with all future developments by another agency that is not itself implementing section 1071.

Other Reporting Issues

With respect to HMDA data, Regulation C § 1003.5(a)(1)(i) provides that a financial institution shall submit its annual loan/application register in electronic format to the appropriate Federal agency. Regulation C does not provide for the submission of HMDA data by unaffiliated third parties directly on behalf of financial institutions in the way that a parent institution may submit HMDA data on behalf of its subsidiary under § 1003.5(a)(2) and comment 5(a)-3. The Bureau understands from financial institutions that report HMDA data to the Bureau that most institutions use third-party software vendors in some way to help them prepare or submit their loan/application registers to the Bureau. The Bureau sought comment on whether it should permit third parties (such as financial software vendors) to submit to the Bureau a small business lending application register on behalf of a financial institution, including whether financial institutions should be required to designate third parties authorized to submit registers on their behalf.

Commenters did not directly address the topic of third-party submissions of small business lending application registers on behalf of financial institutions. One trade association, in the context of proposed § 1002.109, noted that its members rely on third-party vendors for many important business processes, and the contributions of such vendors to support financial institution innovation is important. Industry commenters, including trade associations and lenders, widely noted their reliance on third-party vendors for many important business processes in commenting on other sections of the proposed rule, as is noted, for instance, in the section-by-section analysis of § 1002.114(b). The commenter asked that the Bureau encourage vendors to develop solutions to help financial institution clients comply with section 1071.

The Bureau is finalizing § 1002.109 as proposed. While there is no explicit provision addressing financial institution use of service providers in connection with submission of applicant registers, informed by its HMDA experience, the Bureau is open to such submission, so long as it complies with all applicable provisions of the final rule, including the restrictions on

disclosure of protected demographic data contained in final § 1002.110(e). In addition, the Bureau will continue to engage with vendors and industry to assess future demand for service provider use in this area. Regarding the comment asking the Bureau to encourage third-party solutions to help covered financial institutions comply with section 1071, the Bureau agrees and has engaged in outreach to third-party vendors, as discussed in part III above, since the issuance of the NPRM to facilitate their development of solutions to assist financial institutions in complying with this rule.

Section 1002.110 Publication of Data

Final § 1002.110 addresses several issues surrounding publication of small business lending data. First, final § 1002.110(a) addresses annual publication of application-level data on the Bureau's website, subject to modification and deletion decisions by the Bureau based on consideration of privacy interests. Second, final § 1002.110(b) states that the Bureau may compile and aggregate data submitted by financial institutions and may publish such compilations or aggregations as the Bureau deems appropriate. Third, final § 1002.110(c) requires a covered financial institution to publish on its website a statement that its small business lending data, as modified by the CFPB, are or will be available on the CFPB's website. Finally, final § 1002.110(d) provides when a covered financial institution shall make the notice required by final § 1002.110(c) available to the public and how long it shall maintain the notice on its website.

The Bureau is finalizing § 1002.110 to implement ECOA section 704B(f)(2)(B) and (C), which require the Bureau to adopt regulations addressing the form and manner that data are made available to the public, and pursuant to its authority under 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. The Bureau is also finalizing § 1002.110(b) pursuant to 704B(f)(3), which permits the Bureau to compile and aggregate small business lending data, and to publish such aggregate data.

110(a) Publication of Small Business Lending Application Registers and Associated Financial Institution Information

ECOA section 704B(f)(2)(C) requires the Bureau to annually make the small business lending data it receives from financial institutions available to the public in such form and in such manner as the Bureau determines by regulation.

Proposed Rule

Proposed § 1002.110(a) would have provided that the Bureau shall make available to the public generally the data reported to it by financial institutions pursuant to proposed § 1002.109, subject to deletions or modifications made by the Bureau if the Bureau determines that, based on the proposed balancing test, the deletion or modification of the data would advance a privacy interest.[807] The Bureau proposed to make such data available on an annual basis, by publishing it on the Bureau's website. The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(2)(C).

Comments Received

In response to proposed § 1002.110(a), the Bureau received comments from a range of lenders, trade associations, community groups, individual commenters, and others. Many commenters supported the Bureau's proposal to make data available on an annual basis by publishing it on the Bureau's website. Some noted that publication of disaggregated data is critical to achieving the statutory purposes of section 1071. Some commenters indicated the Bureau should make clear that the Bureau *must* publish data annually, citing their concern that any discretion in data publication could allow for inconsistent data publication in the future. A commenter further supported publication on the Bureau's website, stating that it preferred the

[807] As discussed in part VIII below, the Bureau is not announcing how it will consider different factors when implementing its discretion to delete or modify application-level data before publication. The Bureau will continue to engage with stakeholders on publication and it intends to make final decisions only after that continued engagement and receipt of a full year of application data. Part VIII lays out the CFPB's preliminary views, in light of comments received on the balancing test articulated in the NPRM, on how to assess and protect privacy interests through modifications and deletion.

Bureau as the singular source for published data because it would ensure the data was uniform and consistent in data and publication formats, which would help to prevent obfuscation efforts by bad actors. The commenter noted that, based on their historical experience with HMDA data, without publication on the website, the public would need to request data from each financial institution individually and the data provided may not be in the same file format, may not be in an accessible file format, and the data may have variations in formatting, which could hide data anomalies or patterns of discrimination.

Some commenters opposed publication of disaggregated data entirely, citing various privacy risks, or otherwise preferred the Bureau publish small business lending data only in aggregate form.[808] Some commenters supported publication of disaggregated data publication, but also supported modifications in light of privacy risk.

Commenters also discussed timing of data publication. Some supported annual publication, as proposed. Others requested publication as soon as possible but did not suggest a specific schedule. Two requested quarterly data publication, and one suggested publication every six months. A few commenters requested the Bureau also establish a deadline by which it would annually publish data; some did not suggest a specific deadline while others requested a fall publication deadline, shortly after data are submitted to the Bureau, in order to maximize the data's currency and usefulness.

Many commenters requested the Bureau ensure that published data are accessible to the general public. These commenters noted that the data should be easily searchable or filterable so that anyone with an interest in fair lending can use and understand the data. Some of these commenters noted that data can sometimes be inaccessible if provided in a very technical manner, such that only those with expertise in data analysis can understand and use the data. One commenter suggested that this concern was of particular concern for ethnicity and race data.

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[808] *See also* part VIII below.

Additionally, a few commenters pointed to previous Bureau data releases as examples of publication that worked well, such as the consumer complaint database, and those that they would prefer the Bureau not follow, including the current data tool used to publish HMDA data.

Some commenters requested the Bureau add disclaimers or explanations to data fields when the data is published to aid in user understanding about the data, such as data limits, caveats, or exceptions. For example, several commenters requested the Bureau add a disclaimer to data submitted by Farm Credit System lenders identifying their unique statutory coverage limitations and dividend structures. Other commenters requested a disclaimer that identifies when ethnicity, race, and sex data was collected on the basis of visual observation pursuant to proposed § 1002.107(a)(20). One commenter requested a publication disclaimer for amount of credit applied for and amount of credit approved or originated, that would explain that applicant-provided information can be arbitrary and may not match the amount of credit approved or originated. Another commenter requested that the Bureau include a disclaimer for private label credit because, they said, private label credit should not be compared to other small business credit products because it is based on the availability of the financial institution's retail partners and those partners' geographic locations. Conversely, one commenter requested the Bureau not add any disclaimers to pricing data points on the grounds that they would cause further misunderstanding of the data.

Two commenters suggested the CFPB establish an advisory group to offer advice or it should seek public feedback on ways to improve publication and enhance data accuracy. One commenter asked that it establish an authorization program to certify as "CFPB-approved" particular data products and programs created from 1071 data. Another commenter stated that when publishing the data, the Bureau should ensure that the data are organized by institution and credit product type as a default setting, rather than only by institution, to ensure proper comparison by data users.

Final Rule

For these reasons set forth herein, the Bureau is finalizing § 1002.110(a) largely as proposed. As finalized, subject to modification or deletion decisions made by the Bureau to advance privacy interests as discussed in part VIII below, the Bureau has committed itself in § 1002.110(a) to making application-level data available to the public via annual publication. Because publication is subject to any modification or deletion decisions made by the Bureau pursuant to its privacy analysis, the Bureau concludes that § 1002.110(a) itself adequately addresses commenter concerns about privacy risks. As discussed in part VIII, the CFPB is also of the view that application-level data have significant disclosure benefits that will facilitate the fair lending and business and community development purposes of section 1071. This determination strongly supports disclosure of the data in a disaggregated format to the extent consistent with the privacy interests. As a result, the Bureau does not intend to publish only aggregate data compilations pursuant to § 1002.110(b).

Publication of application-level data on an annual basis is appropriate. While a few commenters proposed shorter cycles, the Bureau would not have new data to publish more frequently because, as discussed in the section-by-section analysis of § 1002.109(a), the Bureau is requiring financial institutions to report annually. Further, the Bureau concludes that until it obtains a full year of reported data and performs a full privacy analysis, as discussed in part VIII below, it cannot know with certainty the amount of time it will take to analyze the privacy risks, and make modifications or deletions as needed, particularly for the first publication of application-level data. Accordingly, the final rule does not set a publication deadline.

Because the Bureau is still creating its data publication platform, it takes under advisement commenter concerns about accessibility and ease of use, and will make efforts to be responsive to those comments as the platform and user tools are built. The Bureau is also taking under advisement suggestions on how to organize and display data.

Similarly, the Bureau is taking under advisement requests to make data limitations, such as related to credit or financial institution type, clear to data users. But it does not intend to state that the amount of credit applied for and amount of credit approved or originated may have discrepancies because the applicant underestimated their credit limitations. As discussed in the section-by-section analyses of § 1002.107(a)(7) and (8) above and in the NPRM, there are several other reasons for discrepancy between the amount an applicant applies for and the amount for which they are approved. A disclaimer asserting the discrepancy may be attributable to applicant overconfidence would minimize the serious risk of fair lending concerns that these data points may otherwise identify. For similar reasons, the Bureau does not intend to add disclaimers to pricing data.

Finally, the Bureau notes that while it does not have an advisory group dedicated to small business lending data publication, there are several avenues through which it expects to receive feedback from the public on small business lending data in the future, including the Bureau's Advisory Committees, as well as any regulatory or technical assistance function created for data submitters. The Bureau also intends to pursue continued public engagement, including with respect to its intended privacy assessment and associated modification and deletion decisions, as discussed in part VIII below. Further, the Bureau will not approve or endorse any particular entity's use of or republication of data, although entities may use and republish the data once it is made available in the public domain pursuant to this rule. Because the statutory purposes and noted benefits of data publication (as discussed herein) include providing information to the public to identify and address fair lending issues in the small business lending market, the Bureau encourages data users to analyze the data to address the statutory purposes. It also encourages technologists to develop tools to assist in this analysis.

110(b) Publication of Aggregate Data

ECOA section 704B(f)(3) provides that the Bureau may "compile and aggregate data collected under this section for its own use" and "make public such compilations of aggregate data."

Proposed § 1002.110(b) would have provided that the Bureau may compile and aggregate data submitted by financial institutions pursuant to proposed § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate. The proposal explained that publication of certain such compilations and aggregations would provide useful data to the public to supplement the Bureau's publication of application-level data. In particular, the Bureau noted the importance of providing aggregations for the application-level data fields that may be modified or deleted before publication to protect privacy interests.

The Bureau received comments on this aspect of the proposal from several community groups, business advocacy groups, and a software provider. These commenters were supportive of proposed § 1002.110(b), though some requested modifications. Several commenters requested the Bureau make specific aggregations available, based on their experience with HMDA or for specific user purposes. Additionally, two commenters requested that the Bureau commit to annual publication of aggregate data.

For the reasons set forth herein, the Bureau is finalizing § 1002.110(b) as proposed. It is unnecessary for the rule to commit to specific timing for publication of aggregate data or to identify the specific aggregations that it will make available. ECOA section 704B(f)(3) provides the Bureau discretion to compile and aggregate data collected, and to make those aggregations publicly available. Any aggregations compiled using the data collected will be dependent on multiple factors, including privacy considerations, the volume of data, and the trends in the data received. For these reasons, the Bureau believes it is important to preserve flexibility as to both

the content and timing of any aggregate data publications, although it anticipates publishing aggregate data before releasing application-level data.

110(c) Statement of Financial Institution's Small Business Lending Data Available on the Bureau's Website and 110(d) Availability of Statements

Proposed Rule

ECOA section 704B(f)(2)(B) requires that the data compiled and maintained by financial institutions shall be "made available to any member of the public, upon request, in the form required under regulations prescribed by the Bureau."

Proposed § 1002.110(c) would have required that a covered financial institution make available to the public on its website, or otherwise upon request, a statement that the covered financial institution's small business lending application register, as modified by the Bureau pursuant to proposed § 1002.110(a), is or will be available on the Bureau's website.

Proposed § 1002.110(c) would have also stated that a financial institution shall use language provided by the Bureau, or substantially similar language, to satisfy this requirement to provide a statement. Proposed comment 110(c)-1 would have provided model language that a financial institution could use to comply with proposed § 1002.110(c). Proposed comment 110(c)-2 would have provided guidance to financial institutions that do not have websites.

Proposed § 1002.110(d) would have provided that a covered financial institution shall make the notice required by proposed § 1002.110(c) available to the public on its website when submitting its small business lending application register to the Bureau pursuant to proposed § 1002.109(a)(1), and shall maintain the notice for as long as it has an obligation to retain its small business lending application registers pursuant to proposed § 1002.111(a).

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(3), including how best to implement proposed § 1002.110(c) and (d) in a manner that minimizes cost and burden particularly on small financial institutions while implementing all statutory obligations.

Comments Received

In response to proposed § 1002.110(c) and (d), the Bureau received comments from a number of lenders, trade associations, and community groups, along with one individual commenter. A majority of those commenters supported the proposed approach to making financial institutions' data available to the general public on the Bureau's website, citing reasons including reduction of compliance burden, cost, and redundant data. However, a few commenters argued that covered financial institutions should be required to make their data available on their own websites. One such commenter asserted that financial institutions (particularly large banks) should be required to make their data available within 30 days of a request to do so, which they stated has worked well for HMDA.[809] This commenter also stated that if the Bureau were to adopt proposed § 1002.110(c), it should require quarterly public data reporting. An individual commenter suggested that without a requirement that financial institutions release their own data, the public would have no way to confirm the "legitimacy" of data released by the Bureau.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.110(c) with a minor modification and § 1002.110(d) as proposed, to implement ECOA section 704B(f)(2)(B). The Bureau's revision to § 1002.110(c) removes the specific URL at which the Bureau will publish 1071 data on its website. The Bureau has made several small revisions to the notice language set forth in comment 110(c)-1 for clarity. The Bureau is also adopting new comment 110(c)-3 to explain that the Bureau may modify the location specified in the notice language provided in comment 110(c)-1, at which small business lending data are available, via the Filing Instructions Guide and related materials.

The approach set forth in final § 1002.110(c) and (d) will reduce potential burdens on financial institutions associated with publishing modified data. It will also reduce privacy risks

[809] The Bureau's approach to § 1002.110(c) aligns with Regulation C § 1003.5(c)(1). However, prior to the 2015 HMDA Amendments, covered financial institutions were required to make their HMDA data available upon request.

resulting from errors by individual financial institutions implementing any modifications or deletions required by the Bureau, and would be more efficient overall. Regulation C (§ 1003.5(c)(1)) implements a similar statutory requirement regarding the form of data reporting and requires financial institutions to direct any public requests for HMDA data they receive to the Bureau. A similar provision is appropriate here to maintain continuity across reporting regimes, and because this centralized approach will help ensure consistent implementation of any modifications or deletions made to protect privacy interests. Commenters' concerns regarding the timing of financial institutions making their own data available are thus rendered moot.

The Bureau does not believe that financial institutions should be required to make their data available within 30 days of a request to do so. Such requests can be fulfilled as easily by accessing small business lending application registers on the Bureau's website, after modifications or deletions are made to protect privacy interests. Nor does the Bureau believe that quarterly public data reporting is appropriate, as discussed in the section-by-section analysis of § 1002.110(a) above. Further, the Bureau does not believe that a requirement that financial institutions release their own data is necessary to confirm the "legitimacy" of data released by the Bureau. The Bureau will conduct examinations of unredacted small business lending data, and will make application-level data (subject to privacy modifications and deletions) available for review and analysis by members of the public.

110(e) Further Disclosure Prohibited.

ECOA section 704B(e) and (f) require financial institutions to compile and maintain records of information provided by applicants and to submit such data annually to the Bureau. However, the statute does not expressly address what a financial institution may do with data collected pursuant to section 1071 for purposes other than reporting such data to the Bureau, nor did the proposal specify restrictions on a financial institution's use or disclosure of data collected pursuant to this rulemaking for purposes other than collecting, maintaining, and reporting such data to the Bureau.

The Bureau received comments from individuals and industry that raised concerns about potential misuse of protected demographic data provided pursuant the small business lending rulemaking. For example, one commenter expressed concern that LGBTQ community members are at risk that their data may be used for unintended and harmful purposes outside of 1071 data collection. Commenters further noted that applicants may be hesitant to provide certain information if the data can be inappropriately used. The Bureau also received comments from industry commenters urging that protected demographic data be reported directly to the Bureau, stating, in part, that such a regime would likely increase response rates because applicants would not be concerned that financial institutions would improperly use the data.

In order to safeguard protected demographic data against possible misuse and encourage applicant responses, and in response to comments, the Bureau is adding new § 1002.110(e) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071. New § 1002.110(e) prevents misuse of applicants' protected demographic information in two ways.

First, § 1002.110(e)(1) prohibits a financial institution from disclosing or providing to a third party the protected demographic information it collects under subpart B except in limited circumstances. First, a financial institution may disclose such information to a third party to further compliance with ECOA or Regulation B. This exception permits disclosure, for example, to a third-party service provider that is assisting the financial institution in auditing or submitting small business lending data to the Bureau. This exception also permits disclosure to a third party for uses consistent with how such protected demographic information may currently be used under ECOA and Regulation B, such as to conduct internal fair lending testing or to extend special purpose credit programs. Section 1002.110(e)(1) further states that a financial institution may disclose or provide protected demographic information collected pursuant to this rule as required by law.

Second, § 1002.110(e)(2) prohibits further redisclosure of protected demographic information by a third party that initially obtains such information for the purposes of furthering compliance with the ECOA and Regulation B. In such situations, the third party is prohibited from disclosing the protected demographic information except to further compliance with ECOA and Regulation B or as required by law.

Section 1002.111 Recordkeeping

Final § 1002.111 addresses several aspects of the recordkeeping requirements for small business lending data. First, final § 1002.111(a) requires a covered financial institution to retain evidence of its compliance with subpart B, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the Bureau pursuant to final § 1002.109. Second, final § 1002.111(b) requires a financial institution to maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under final § 1002.107(18) and regarding the ethnicity, race, and sex of the applicant's principal owners under final § 1002.107(19). Finally, final § 1002.111(c) requires that, in compiling, maintaining, and reporting data pursuant to final § 1002.109 or § 1002.111(a) or (b), a financial institution shall not include personally identifiable information concerning any individual who is, or is connected with, an applicant.

The Bureau is finalizing § 1002.111 to implement ECOA section 704B(f)(2)(A), which requires financial institutions to compile and maintain data for at least three years; 704B(b)(2), which requires financial institutions to maintain a record of the responses to the inquiry required by 704B(b)(1), separate from the application and accompanying information; and 704B(e)(3), which provides that in compiling and maintaining data, a financial institution may not include personally identifiable information concerning an individual who is, or is connected with, an applicant. The Bureau is also finalizing § 1002.111 pursuant to its authority under 704B(g)(1) to

prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.

111(a) Record Retention

Proposed Rule

ECOA section 704B(f)(2)(A) requires that information compiled and maintained under section 1071 be retained for not less than three years after the date of preparation. Proposed § 1002.111(a) would have required that a financial institution retain a copy of its small business lending application register for three years after the register is submitted to the Bureau pursuant to proposed § 1002.109. By way of comparison, under Regulation C, financial institutions must retain the loan/application registers that they submit to the Bureau for three years.[810] This reflects the requirement in HMDA itself that a loan/application register be retained for three years after it is made available.[811]

Proposed comment 111(a)-1 would have provided examples of what evidence of compliance with the proposed provision is likely to include. Proposed comment 111(a)-2 would have required that a creditor that is voluntarily, under proposed § 1002.5(a)(4)(vii) and (viii), collecting information pursuant to subpart B but is not required to report that data to the Bureau, complies with proposed § 1002.111(a) by retaining evidence of compliance with subpart B for at least three years after June 1 of the year following the year that data was collected.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(f)(2)(A), including how best to implement proposed § 1002.111(a) in a manner that minimizes cost and burden particularly on small financial institutions while implementing all statutory obligations.

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[810] Regulation C § 1003.5(a)(1).

[811] 12 U.S.C. 2803(j)(6).

Comments Received

The Bureau received comments from several lenders, trade associations, and others on this aspect of its proposal. One trade association supported the proposed requirement that financial institutions retain their data for at least three years after submission to the Bureau, noting that this retention period is congruent with the five-year period that banks must maintain data under the Bank Secrecy Act. A CDFI lender agreed the proposal was reasonable and stated that it did not foresee issues with compiling and maintaining data for three years.

A trade association, a business advocacy group and a software vendor recommended that the Bureau instead align the recordkeeping requirement with ECOA's 25-month retention period rather than HMDA's three-year retention period. The software vendor asserted that the proposed provision appeared to be in conflict with ECOA's 12-month record retention period for commercial loans under $1 million. The trade association recommended avoiding requirements that would necessitate the acquisition of costly record retention systems. Another industry commenter said that the proposed provision would unnecessarily burden community banks.

A joint letter from two trade associations recommended that the Bureau expressly state that financial institutions without a reporting obligation under the rule, in particular motor vehicle dealers, are not required to comply with the other obligations in the rule, including the recordkeeping requirements of the rule.

Final Rule

The Bureau is finalizing § 1002.111(a) as proposed. The Bureau is also finalizing the associated commentary with an adjustment as discussed below. The Bureau is finalizing this provision to implement section 1071's recordkeeping requirement as set forth in ECOA section 704B(f)(2)(A).

Regarding commenters' requests that the Bureau should adopt either existing Regulation B's 25-month retention period for consumer credit or its 12-month retention period for business credit, rather than a three-year period, ECOA section 704B(f)(2)(A) mandates that

the Bureau adopt a three-year recordkeeping requirement for applications for small business loans. In any case, the Bureau notes that, in contrast to these commenters, at least one lender suggested that § 1002.111(a) was congruent with other recordkeeping requirements applicable to certain extensions of credit.[812] The Bureau is finalizing comment 111(a)-1 (regarding evidence of compliance) with an additional sentence to reiterate that final § 1002.111(a)'s three-year record retention requirement applies to any records covered by § 1002.111(a), notwithstanding the more general 12-month retention period for records related to business credit specified in existing § 1002.12(b). The Bureau is finalizing comment 111(a)-2 (regarding record retention for creditors that voluntarily collect data under § 1002.5(a)(4)(vii) and (viii)) as proposed.

The Bureau acknowledges commenters' concerns that this provision would necessitate the acquisition of costly record retention systems or about its impact on community banks, but does not believe that further adjustments would be appropriate. While financial institutions may incur added expenses in complying with final § 1002.111(a), the provision does not itself suggest or mandate that lenders must acquire new record systems; the provision simply requires that financial institutions adjust their procedures if they do not already retain certain records for the period specified in § 1002.111(a). In any case, as noted above, final § 1002.111(a) implements the record retention period set forth in the statute.

Regarding the comment concerning the obligations of financial institutions that are not required to report data under the rule, the Bureau agrees that a financial institution that is not covered by the rule is not subject to its provisions, including the recordkeeping provisions. However, a covered financial institution must keep records in accordance with § 1002.111(a). In order to satisfy its own recordkeeping obligations, a covered financial institution must ensure that it has obtained the necessary records from third parties through which it receives applications or ensure that those third parties keep adequate records on its behalf.

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[812] *See, e.g.*, 31 CFR 1010.410(a) and 1010.430(d).

111(b) Certain Information Kept Separate from the Rest of the Application

Proposed Rule

ECOA section 704B(b)(2) requires financial institutions to maintain a record of the "responses to [the] inquiry" required by 704B(b)(1) separate from the application and accompanying information. Consistent with the approach the Bureau is finalizing as set forth in E.2 of the *Overview* to this part V, the Bureau proposed to interpret the term "responses to such inquiry" in 704B(b)(2) to be the applicant's responses to inquiries regarding protected demographic information—that is, whether the applicant was a minority-owned business or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners.

Proposed § 1002.111(b) would have stated that a financial institution shall maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries to collect data pursuant to proposed subpart B regarding whether an applicant for a covered credit transaction is a minority-owned business under proposed § 1002.107(a)(18) or a women-owned business under proposed § 1002.107(a)(19), and regarding the ethnicity, race, and sex of the applicant's principal owners under proposed § 1002.107(a)(20).

Proposed comment 111(b)-1 would have explained that a financial institution may satisfy this requirement by keeping an applicant's responses to the financial institution's request pursuant to proposed § 1002.107(a)(18) through (20) in a file or document that is discrete or distinct from the application and its accompanying information. For example, such information could be collected on a piece of paper that is separate from the rest of the application form. In order to satisfy the requirement in proposed § 1002.111(b), proposed comment 111(b)-1 would have clarified that an applicant's responses to the financial institution's request pursuant to proposed § 1002.107(a)(18) through (20) need not be maintained in a separate electronic system, nor need they be removed from the physical files containing the application. However, the

financial institution may nonetheless need to keep this information in a different electronic or physical file in order to satisfy the requirements of proposed § 1002.108.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(b)(2), including how best to implement proposed § 1002.111(b) in a manner that minimizes cost and burden, particularly on small financial institutions, while implementing all statutory obligations. The Bureau also sought comment on whether, for financial institutions that determine that underwriters or other persons should have access to applicants' demographic information pursuant to proposed § 1002.108(b), it should likewise waive the requirement in proposed § 1002.111(b) to keep that information separate from the application and accompanying information.

Comments Received

A number of lenders and trade associations commented on the proposed requirement that protected demographic information be kept separate from application or loan files. A CDFI lender said the proposal was reasonable and did not foresee issues with maintaining demographic information separate from applications. A trade association, while claiming proposed § 1002.111(b) would be difficult to comply with, acknowledged that the provision was mandated by section 1071. Another trade association agreed with the Bureau that ECOA section 704B(b)(2) should be interpreted as referring to applicants' responses to the inquiries regarding minority-owned and women-owned business status in proposed § 1002.107(a)(18) and (19), as well as the ethnicity, race, and sex of applicant's principal owners in proposed § 1002.107(a)(20). A joint letter from two trade associations supported the limitation on accessing protected demographic information but expressed concern about the effort and cost it would take to segregate and limit this information and ensure the accuracy of reports and files that must be maintained. These trade associations suggested that all regulations and guidance related to record retention be consistent with the FTC's newly amended Gramm-Leach-Bliley Safeguards Rule and Privacy Rule.

A trade association and a business advocacy group requested clarifications to improve feasibility and reduce technical challenges, expressing concern that compliance with proposed § 1002.111(b) could require expensive technical solutions to separate protected demographic information from applications in different electronic or physical files. One sought clarity as to what proposed comment 111(b)-1 meant, stating that, to satisfy § 1002.108, some financial institutions may need to keep protected demographic information in a different electronic or physical file.

Some industry commenters opposed the proposal on the grounds of cost, complexity and practicality. A few of these commenters argued that proposed § 1002.111(b) would add unnecessary cost and complexity to compliance and would make audits of data more difficult. Others asserted the provision would be difficult to implement or unworkable. One commenter stated that this requirement would impact small lenders in particular and would increase ongoing costs.

Several industry commenters requested that the Bureau exercise exemption authority to exempt all lenders from having to comply with this provision on the grounds that it would make examinations and audits more cumbersome and costly because demographic information would need to be retrieved from separate files. Commenters also requested that, to remain consistent with proposed § 1002.108(b), the Bureau waive this requirement for financial institutions that determine that underwriters or other persons should have access to applicants' demographic information. They also stated that both provisions were operationally burdensome without any benefit, and that if a firewall was infeasible, so was the proposed recordkeeping provision.

Several industry commenters requested that the Bureau not prohibit the collection of demographic information on the same form as the rest of the application, explaining that such a prohibition would disrupt SBA's 7(a) loan process, and because section 1071 itself does not prohibit including demographic questions on an application form; rather, it requires "recording" the information separately. A bank also that such a prohibition would disrupt loan processes and

data integrity audits. Another bank requested that the Bureau not specify that protected demographic information be kept in a separate file, which it said would be costly and burdensome for financial institutions, but rather that the Bureau leave to lenders how to comply with this provision.

A bank and a trade association asserted that proposed § 1002.111(b) was not feasible or necessary, and noted that Regulation C does not require lenders to keep demographic information separate from mortgage loan files. They also asserted that there was no evidence of violations of Regulation B because demographic information was not kept separate from loan files. Another bank requested that the Bureau align the requirements of HMDA and section 1071 by waiving § 1002.111(b) for applications reportable under both regimes.

Final Rule

The Bureau is finalizing § 1002.111(b) with adjustments to reflect updated cross-references to other portions of the final rule and to refer to LGBTQI+-owned businesses along with women- and minority-owned businesses, as per final § 1002.107(a)(18). The Bureau is also finalizing the comment 111(b)-1 with one adjustment as discussed below, and the Bureau is adding a new comment 111(b)-2.

As discussed in detail above in part V.E.2, the Bureau believes the best reading of the statutory provisions that mention the inquiry made under ECOA section 704B(b)(1)—in 704B(b)(2) as well as in 704B(c) regarding the right to refuse and 704B(d) regarding the firewall—is that they refer to applicants' responses to the inquiries regarding protected demographic information: minority-owned, women-owned, and LGBTQI+-owned business statuses in final § 1002.107(a)(18) and the ethnicity, race, and sex of applicants' principal owners in final § 1002.107(a)(19). Each of these data points require financial institutions to request demographic information that has no bearing on the creditworthiness of the applicant. Moreover, a financial institution generally could not inquire about this demographic information absent section 1071's mandate to collect and report the information, and ECOA prohibits a

creditor from discriminating against an applicant on the basis of the information. The Bureau accordingly believes that the best effectuation of congressional intent is to apply section 1071's special-protection provisions to this demographic information, regardless of whether the statutory authority to collect it originates in 704B(b)(1) (women-owned business status and minority-owned business status), 704B(e)(2)(G) (race, sex, and ethnicity of principal owners), or 704B(e)(2)(H) (LGBTQI+-owned business status, which is additional data that the Bureau has determined would aid in fulfilling the purposes of section 1071). The Bureau similarly believes that Congress did not intend these special protections to apply to any of the other applicant-provided data points in final § 1002.107(a), which the financial institution is permitted to request whether or not it is covered under section 1071, which are not the subject of Federal antidiscrimination laws, and many of which financial institutions already collect and use for underwriting purposes.

The Bureau does not believe it would be appropriate to modify the statutory requirements implemented in final § 1002.111(b) (or elsewhere in § 1002.111), as requested by some commenters, for consistency with the FTC's newly amended Gramm-Leach-Bliley Safeguards Rule[813] and Privacy Rule.[814] Commenters did not identify any inconsistency between § 1002.111 and the requirements of the Gramm-Leach-Bliley Act.[815] The Bureau notes that the privacy and data security provisions of these rules apply to consumer information, and the Gramm-Leach-Bliley Act defines consumer to mean an individual who obtains, from a financial institution, financial products or services which are to be used primarily for personal, family, or household purposes. The Bureau is finalizing comment 111(b)-1 with updated cross-references to other portions of the final rule and additional text explaining that while § 1002.111(b) does not always

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[813] Fed. Trade Comm'n, *Standards for Safeguarding Customer Information*, Final Rule, 86 FR 70272 (Dec. 9, 2021).

[814] Fed. Trade Comm'n, *Privacy of Consumer Financial Information Rule Under the Gramm-Leach-Bliley Act*, 86 FR 70020 (Dec. 9, 2021).

[815] 15 U.S.C. 6801 through 6809.

require that a financial institution maintain certain information in separate physical or digital files, a financial institution may nonetheless as a practical matter need to keep this information in a different electronic or physical file in order to satisfy the requirements of § 1002.108(b) to establish and maintain a firewall. Final comment 111(b)-1, as revised, is intended to clarify, and facilitate compliance with, the statutory directive that financial institutions must keep certain information separate from the credit application. The Bureau is also adding comment 111(b)-2 to the final rule, which states that a financial institution is permitted to maintain information regarding the applicant's number of principal owners pursuant to final § 1002.107(a)(20) with an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19). The Bureau believes that as a practical matter, the demographic information that financial institutions would have to maintain separately would inherently and necessarily include the applicant's number of principal owners. For example, if an applicant had three principal owners, the separately maintained demographic information would necessarily contain three sets of responses to questions about principal owners' race, sex and ethnicity, even if no part of the separately maintained information explicitly listed "3" as the information responsive to § 1002.107(a)(20).

Regarding comments seeking further clarification of § 1002.111(b) and comment 111(b)-1, the Bureau intended in these provisions to provide financial institutions with flexibility in complying with § 1002.111(b), which some industry commenters favored. The Bureau believes that some commenters overstate the complexity of § 1002.111(b); several appeared to interpret this provision as requiring financial institutions to create separate physical or digital files in all instances. This is contrary to proposed comment 111(b)-1, which explicitly states that the demographic information need not be maintained in a separate electronic system, nor removed from the physical files containing the application. The Bureau's intent was to acknowledge that different lenders may implement § 1002.111(b) in varying ways, depending on how they choose to comply with the firewall requirement. For instance, a lender that complies with § 1002.108(b)

may determine that to keep demographic information from underwriters and other employees, it must maintain such information in a separate file from the application, rather than on a separate piece of paper in the same file as the application. However, for those financial institutions that, pursuant to § 1002.108(c), determine it is not feasible to limit access to an applicant's protected demographic information, the Bureau believes that compliance with ECOA section 704B(b)(2), as implemented in § 1002.111(b), does not necessitate maintaining such information in separate files.

Regarding several commenters' request that the Bureau use its exemption authority generally to exempt all lenders from having to comply with § 1002.111(b) and should, in any case, waive the requirement for lenders where the firewall under § 1002.108(b) is infeasible, the Bureau does not believe it would be appropriate to do so. The request for a general exemption appears to be based on the premise that proposed § 1002.111(b) would have required demographic information be stored in separate files. As explained above, final § 1002.111(b) and final comment 111(b)-1 make clear that there is not a mandate for all financial institutions to maintain protected demographic information in separate files, and the commenters do not explain why financial institutions would choose to maintain separate files for protected demographic information when they have determined that one or more officers or employees should have access to that information.

Regarding the various comments opposing § 1002.111(b) on the grounds of cost, complexity, and feasibility of compliance, the Bureau acknowledges that the provision adds effort and expense to complying with this rule. However, the Bureau believes that comments overstate the magnitude of the costs, complexity, and purported infeasibility of complying with § 1002.111(b). Comment 111(b)-1 provides for flexibility in complying with § 1002.111(b) in retaining records containing demographic information required by section 1071. The commenters addressing the cost, complexity, and feasibility did not identify any less costly, complex, and more feasible methods of compliance, especially for those financial institutions

that found it infeasible to maintain a firewall pursuant to § 1002.108(b). In any case, several other commenters, including a lender, agreed with the Bureau that compliance with § 1002.111(b) is feasible.

The Bureau does not believe that § 1002.111(b) would be counterproductive in the conduct of examinations or audits, as suggested by some commenters. As with the comments concerning cost, complexity and feasibility, these comments—assuming the necessity of separate electronic or physical files in all cases—overstate the complexity of § 1002.111(b). As final comment 111(b)-1 establishes, in many instances, simpler means of separating protected demographic information from other information within an application file would suffice, and, the Bureau believes, would not impede audits or examinations. Further, the Bureau believes that for purposes of complying with ECOA and subpart A of Regulation B, many financial institutions already maintain certain documents in files separate from the application, such as copies of drivers' licenses, that may reveal protected demographic information about business applicants' owners, such as race and sex.

The Bureau likewise disagrees with the assertion that § 1002.111(b) is not necessary; this provision implements a statutory requirement in ECOA section 704B(b)(2). In addition, in its interpretation of 704B(b)(2), the Bureau has endeavored to minimize cost and complexity by reading the provision narrowly. Regarding the comment that § 1002.111(b) would impact small lenders in particular and increase ongoing costs, the Bureau does not believe the cost and complexity of small lenders' compliance efforts will necessarily be greater than for other institutions, as discussed in part IX below.

Regarding comments that the Bureau should not prohibit the collection of demographic information on the same form as the rest of the application, the Bureau disagrees. The Bureau interprets ECOA section 704B(b)(2), which § 1002.111(b) implements, to suggest that collection of protected demographic information on separate forms may be a practical necessity. That is, it would be difficult, if not impossible, to determine whether a financial institution had complied

with § 1002.111(b), or the firewall provision, if demographic information is collected with the information from which it must be kept separate. This is also illustrated in final comment 107(a)(18)-5.

The Bureau does not believe that § 1002.111(b) would disrupt the SBA's 7(a) loan process, as a commenter suggested—neither § 1002.111(b) nor § 1002.107(a)(18) and (19) affect how demographic information gathered for purposes other than compliance with this final rule are to be collected or retained.

Regarding the request that the final rule mirror HMDA's approach to the collection of demographic information, the Bureau notes that HMDA does not include a requirement comparable to the one in ECOA section 704B(b)(2) mandating the separation of certain information from the application; Regulation C thus permits demographic information required under HMDA to be retained as part of the application.[816] Regarding the claim that no evidence exists of fair lending violations from a failure to separate demographic information separate mortgage files, the Bureau reiterates that § 1002.111(b) implements a statutory requirement in ECOA. Regarding the request to exempt HMDA-reportable loans from complying with § 1002.111(b), the request is mooted by the Bureau's adoption of new § 1002.104(b)(2), which excludes HMDA-reportable transactions from the requirements of this final rule.

111(c) Limitation on Personally Identifiable Information Retained in Certain Records under this Section

Proposed Rule

ECOA section 704B(e)(3) provides that in compiling and maintaining any record of information under section 1071, a financial institution may not include in such record the name, specific address (other than the census tract), telephone number, electronic mail address, or any

[816] *See* 80 FR 66128, 66192-93 (Oct. 28, 2015).

other personally identifiable information (PII) concerning any individual who is, or is connected with, an applicant.

The Bureau proposed in § 1002.111(c) that in compiling and maintaining any records under proposed § 1002.107 or § 1002.111(b), or reporting data pursuant to proposed § 1002.109, a financial institution shall not include any name, specific address, telephone number, email address, or any PII concerning any individual who is, or is connected with, an applicant, other than as required pursuant to proposed § 1002.107 or § 1002.111(b). The prohibition on the inclusion of PII in ECOA section 704B(e)(3), which covers the "compiling and maintaining [of] any record of information," implicates proposed §§ 1002.107, 1002.109, and 1002.111, which together would address the compilation, maintenance, and reporting of data by financial institutions.

Proposed comment 111(c)-1 would have clarified that the prohibition in proposed § 1002.111(c) applies to data compiled and maintained pursuant to § 1002.107, data in the small business lending application register submitted by the financial institution to the Bureau under proposed § 1002.109, the version of the register that the financial institution maintains under proposed § 1002.111(a), and the separate record of certain information created pursuant to proposed § 1002.111(b).

Proposed comment 111(c)-2 would have addressed the types of information (including PII) that a financial institution is prohibited from including in the data it compiles and maintains pursuant to proposed § 1002.107, in its records under proposed § 1002.111(b), or in data reported to the Bureau under proposed § 1002.109.

Proposed comment 111(c)-3 would have clarified that the prohibition in proposed § 1002.111(c) does not extend to the application or any other records that the financial institution maintains. This comment was intended to address the request by stakeholders in the SBREFA process that the Bureau clarify that this prohibition does not extend more broadly to a financial institution's application or loan-related files.

Proposed comment 111(c)-4 would have clarified that the prohibition in proposed § 1002.111(c) does not bar financial institutions from providing to the Bureau, pursuant to proposed § 1002.109(b)(3), the name and business contact information of the person who may be contacted with questions about the financial institution's submission.

The Bureau sought comment on its proposed approach to implementing ECOA section 704B(e)(3), including how best to implement this requirement in a manner that minimizes cost and burden, particularly on small financial institutions, while implementing all statutory obligations. Regarding comments by stakeholders in the SBREFA process that reporting small business lending data to the Bureau could give rise to a potential conflict with the data protection and privacy laws prohibiting the disclosure of nonpublic personal information to unaffiliated third parties, the Bureau noted that such laws typically provide an exemption for disclosures made pursuant to Federal and State law.[817]

The Bureau sought comment on whether the requirements in this proposed rule could conflict with other data privacy or data protection laws, and whether the Bureau might need to use its preemption authority under ECOA,[818] Regulation B,[819] and/or section 1041(a)(1) of the Dodd-Frank Act to ensure that financial institutions do not violate State law in reporting 1071 data to the Bureau. The Bureau also sought comment on whether it should include a provision to preempt any State data privacy or data protection laws that would prohibit the collection, maintenance, and reporting to the Bureau of 1071 data. In the SBREFA process before the publication of the proposed rule, some industry stakeholders expressed concern regarding a

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[817] *See, e.g.*, California Consumer Privacy Act, Cal. Civ. Code 1798.145(a)(1) (noting that the obligations imposed on businesses by CCPA "shall not restrict a business' ability to . . . comply with federal, state, or local laws"). Some other laws on this topic may apply only to consumers acting primarily for personal, family, or household purposes, but they also provide an exemption for disclosures made pursuant to Federal and State law. *See* Gramm-Leach-Bliley Act section 502(e)(8), 15 U.S.C. 6802(e)(8), and Regulation P § 1016.15(a)(7)(i) (stating that the limitations on disclosing nonpublic personal information to unaffiliated third parties do not apply if the information is disclosed to comply with Federal, State, or local laws, rules and other applicable legal requirements).

[818] 15 U.S.C. 1691d(f).

[819] Existing § 1002.11.

different issue related to data privacy, specifically that reporting 1071 data to the Bureau may cause them to violate other data privacy laws, including State data privacy laws.

Comments Received

The Bureau received comments on this aspect of the proposal from several lenders and trade associations. A CDFI lender said the proposed provision was reasonable and that it did not foresee an issue with ensuring that the enumerated PII is not connected to the applicant. A trade association stated the Bureau, in proposing this provision, identified a consistent and correct approach to protecting PII. Another trade association said that the Bureau should issue a provision clarifying when PII must be excluded in the compiling and maintaining of any record of information at the different stages in the process.

A bank opposed the proposal, observing that most small community banks correlate documents to a specific borrower and application using PII, and that if the rule prohibited the inclusion of such information on the collection form, there would be no way to tie demographic information to the specific application in order to aggregate and accurately report the data.

A credit union trade association stated that the proposed visual observation and surname data collection requirement for principal owners' ethnicity and race (pursuant to proposed § 1002.107(a)(20)) may expose covered financial institutions to compliance costs related to an evolving patchwork of State personal data privacy laws, including in California, which provides financial institutions only an information-level exemption from its data privacy law.[820]

Final Rule

The Bureau is finalizing § 1002.111(c) and associated commentary with revisions for clarity. Final § 1002.111(c), and the associated commentary, is intended to implement ECOA section 704B(e)(3), which provides that in compiling and maintaining any record of information under section 1071, a financial institution may not include in such record the name, specific

[820] 4 Cal. Civ. Code 1798.145(c).

address (other than the census tract), telephone number, electronic mail address, or any other PII concerning any individual who is, or is connected with, an applicant. The Bureau further clarifies in final § 1002.111(c) that it does not interpret ECOA section 704B(e)(3) as prohibiting a financial institution from including PII in its application or other files, but only the small business lending application register submitted by the financial institution to the Bureau, the copy of the submitted register that is retained for inspection, and the separately maintained record of protected demographic information kept pursuant to § 1002.111(b).

Final § 1002.111(c), along with corresponding passages in the commentary, now states that in reporting a small business lending application register pursuant to § 1002.109, maintaining the register pursuant to § 1002.111(a), and maintaining a separate record of information pursuant to § 1002.111(b), a financial institution shall not include any name, specific address, telephone number, email address, or any other PII concerning any individual who is, or is connected with, an applicant, other than as required pursuant to § 1002.107 or § 1002.111(b). Final § 1002.111(c) and final comment 111(c)-2 now refer to "any *other* personally identifiable information" for the sake of clarity and to better conform with ECOA section 704B(e)(3). Final § 1002.111(c) and associated commentary incorporate several revisions compared to the proposal. First, to address a potential misunderstanding regarding the first cross-reference to § 1002.107 in proposed § 1002.111(c)—as some comments reflected—as to whether a financial institution is prohibited from maintaining PII with not only the small business lending application register but also any other records related to the collection and maintenance of data points specified in § 1002.107, including an application for a covered credit transaction. The Bureau acknowledges the comment that, as drafted, the reference to "compiling and maintaining any records under § 1002.107" in proposed § 1002.111(c) made it unclear exactly what documents, beyond the small business lending application register and the separately maintained demographic information of applicants, are subject to the prohibition on the inclusion of PII.

The Bureau understands that the initial collection of records relevant to the data points specified in § 1002.107 will commence in the normal course of business for financial institutions when they receive a covered application from a small business. At that phase, and during the underwriting of the application, it would be impractical to expect that financial institutions could keep the PII of the individuals associated with an application separate from all of the other information in the application from which the various data points in § 1002.107(a) would be derived. The Bureau acknowledges comments suggesting that a prohibition on including PII on forms—such as the applicant's name—to tie an application for credit to the separately kept demographic information would likely impede the accurate compiling and reporting of data.

As a result, the Bureau has revised § 1002.111(c) to clarify that financial institutions are prohibited from maintaining certain types of PII in reporting data pursuant to § 1002.109, the provision concerning the creation and maintenance of the small business lending application register. Likewise, final comments 111(c)-1 and 111(c)-2 now refer to the reporting of data pursuant to § 1002.109, rather than the compilation and maintenance of any records pursuant to § 1002.107, to focus on PII associated with the small business lending application register, rather than any records, even those loosely associated with, the data points under § 1002.107.

Second, the Bureau is finalizing § 1002.111(c) and comment 111(c)-2 to refer explicitly to § 1002.111(a) for clarity. Proposed comment 111(c)-1 referred to § 1002.111(a) in prohibiting PII in the copy of the small business lending application register maintained by the financial institution, but proposed § 1002.111(c) and proposed comment 111(c)-2 did not explicitly mention § 1002.111(a). Final § 1002.111(c) and final comment 111(c)-2 have been modified to remedy this omission. If financial institutions are prohibited from including PII not only in the small business lending application register they submit to the Bureau pursuant to § 1002.109, logically they must also be prohibited from including PII in the copy of the register they retain pursuant to § 1002.111(a). The Bureau clarifies in final § 1002.111(c) that it is the Bureau's interpretation that ECOA section 704B(e)(3) should be read as prohibiting lenders from

including PII in the small business lending application register submitted to the Bureau pursuant to § 1002.109, and, logically, as requiring lenders to also exclude PII from the copy of this register that a financial institution is required to retain pursuant to § 1002.111(a).

Third, the Bureau is finalizing § 1002.111(c) and comment 111(c)-2 to refer explicitly to § 1002.111(b) earlier in both provisions. Section 1002.111(b) is mentioned towards the end of both proposed § 1002.111(c) and proposed comment 111(c)-2; however, in neither provision is it abundantly clear that the protected demographic information that lenders must maintain separately from the application pursuant to § 1002.111(b) must itself be free of PII. This lack of clarity is remedied in final § 1002.111(c) and final comment 111(c)-2.

Fourth, the Bureau is finalizing § 1002.111(c) and comment 111(c)-2 to clarify that financial institutions are prohibited from including in the enumerated records certain enumerated types of PII specified in the statute, as well as any other PII. The proposed § 1002.111(c) referred simply to "any" PII (rather than "any other"), which the Bureau believes could have been misinterpreted to suggest that the list of specific items preceding "any" (name, specific address, telephone number, email address) were not themselves forms of PII. As a result, to avoid any potential confusion, in both final § 1002.111(c) and final comment 111(c)-2, the Bureau refers to "any other" PII, which also better conforms with the text of ECOA section 704B(e)(3).

Finally, the Bureau is finalizing comment 111(c)-3 to specify that the prohibition in § 1002.111(c) does not extend to an application for credit, or any other records that the financial institution maintains that are not specifically enumerated in final § 1002.111(c). Proposed comment 111(c)-3 simply noted that § 1002.111(c) did not apply to an application for credit or any other records that the financial institution maintains. The addition of the phrase "that are not specifically enumerated in § 1002.111(c)" is intended to eliminate any uncertainty about the scope of application of § 1002.111(c).

Regarding the comment requesting clarification on whether the prohibition on PII includes different stages in the process of compiling and maintaining any record of information,

the Bureau addresses these concerns in final § 1002.111(c), and comments 111(c)-1 and 111(c)-2, as revised, as well as comment 111(c)-3, which is finalized as proposed. Final comment 111(c)-1 specifies the categories of information that § 1002.111(c) applies to, and final comment 111(c)-3 makes clear that the prohibition on PII does not extend to the application or other records that the financial institution maintains beyond the small business lending application register.

Regarding the comment that a prohibition on the inclusion of PII on forms—such as the applicant's name—to tie an application for credit to the separately kept demographic information would impede the accurate aggregation and reporting of data, the Bureau believes that for this specific purpose, other identifiers not involving PII may be used. For instance, the unique identifier data point in § 1002.107(a)(1) is specific to a particular applicant and can be used to tie an application to the separately maintained demographic information for that applicant. By definition and according to comment 107(a)(1)-3, the unique loan identifier may not include PII prohibited by § 1002.111(c).

The concern that the visual observation and surname provision of the proposal would expose covered lenders to compliance costs related to State personal data privacy laws, such as California's, is rendered moot by the Bureau's decision not to finalize its proposal for financial institutions to use visual observation and surname analysis to determine principal owners' ethnicity and race in certain circumstances.

Section 1002.112 Enforcement

Final § 1002.112 addresses several issues related to the enforcement of violations of the requirements of proposed subpart B. First, § 1002.112(a) states that a violation of section 1071 or subpart B of Regulation B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA. Second, § 1002.112(b) provides that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to

avoid such an error. This provision also addresses the maintenance of procedures reasonably adapted to avoid such errors. Third, § 1002.112(c) identifies four safe harbors under which certain errors—namely, certain types of incorrect entries for the census tract, NAICS code, and application date data points, or incorrect determination of small business status, covered credit transaction, or covered application—do not constitute violations of ECOA or Regulation B.

The Bureau is finalizing § 1002.112 to implement sections 704 and 706 of ECOA, pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071 and pursuant to its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

112(a) Administrative Enforcement and Civil Liability

Proposed Rule

A violation of section 1071 is subject to the enforcement provisions of ECOA, of which section 1071 is a part. ECOA contains administrative enforcement provisions in section 704,[821] and it provides for civil liability in section 706.[822] The enforcement provisions in existing Regulation B (§ 1002.16(a)(1) and (2)) cross-reference and paraphrase these administrative enforcement and civil liability provisions of ECOA. Proposed § 1002.112(a) would have provided that a violation of section 1071 or subpart B of Regulation B is subject to administrative sanctions and civil liability as provided in sections 704 and 706 of ECOA, where applicable. The Bureau sought comment on its proposed approach to administrative enforcement and civil liability.

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[821] 15 U.S.C. 1691c.

[822] 15 U.S.C. 1691e.

Comments Received

Several lenders and several trade associations commented on the proposed administrative and civil enforcement provisions of the rule. A CDFI lender and two trade associations supported the proposed provision as appropriate and in line with other regulations. Several commenters observed that, with respect to Farm Credit lenders, the Farm Credit Administration examines and enforces compliance with fair lending laws, including compliance with any rule implementing section 1071. A trade association observed that for banks with $10 billion or less in assets, this regulation will be enforced under section 8 of the Federal Deposit Insurance Act by the appropriate Federal banking agency.

One community group asked that the final rule provide for the recording and enforcement of whistleblower complaints in the event that rural farm lenders retaliate against farmers for the good faith exercise of their rights under various Federal consumer protection laws, as protected by ECOA and subpart A of Regulation B. The community group had cited farm loan servicing in particular as an area where minority famers faced the most discriminatory terms and conditions.

One bank opposed the proposed administrative enforcement and civil liability provisions in general. A trade association requested that the Bureau prohibit private causes of action based on 1071 data, including discovery in private proceedings. The commenter claimed that the Bureau had overemphasized the use of these data by non-governmental entities such as researchers, economists, industry, and community groups, and that only governmental agencies should have the power to use such data for supervision and enforcement because only they were capable of providing appropriate governance to covered institutions. The same commenter opposed the Bureau's use of such data in its own enforcement and supervision actions because the right of applicants to refuse to provide demographic information would render the data incomplete, unreliable, and inherently inaccurate. The commenter also claimed that the Bureau had not explained how it would acquire data on the broader business credit market, without which accurate decisions on potential violations of fair lending or other laws could not be made.

One trade association requested that the Bureau, and any regulators responsible for implementing section 1071, train examiners well and assign senior staff to examine CDFI banks. The commenter further observed that the small business lending market is mostly unregulated, and requested that the Bureau develop examination capacity to cover currently unregulated lenders such that it should delay implementation until it has the capacity to enforce compliance with section 1071 across all covered lenders. A women's business advocacy group indicated support for auditing by the Bureau to ensure that financial institutions do not alter information to manipulate the data to their benefit. Another trade association asked what underwriting imbalance threshold would cause the Bureau to initiate investigation and enforcement, and how such a process would allow for the mitigation of data anomalies and errors. Finally, one trade association supported and deferred to the views of covered lenders, and other trade associations, and their opinions on the proposed administrative and civil enforcement provisions of the rule.

A trade association said that because small business loans vary widely in design and purpose, use of the same analytical techniques and examination approaches applicable to HMDA's enforcement may yield erroneous results, and that the Bureau must coordinate with other FFIEC agencies, including NCUA, to develop model examination procedures in advance of a final rule. A bank asked that the Bureau limit the use of data by regulators to conduct fair lending exams only, and not to subject financial institutions to technical audit and compliance requirements, based on its experience with HMDA.

Final Rule

The Bureau is finalizing § 1002.112(a) as proposed. Final § 1002.112(a) is necessary to implement the administrative and civil enforcement provisions of ECOA. A violation of section 1071 is subject to the enforcement provisions of ECOA, of which section 1071 is a part. ECOA contains administrative enforcement provisions in section 704, and it provides for civil liability in section 706. The enforcement provisions in existing Regulation B (§ 1002.16(a)(1) and (2)) cross-reference and paraphrase these administrative enforcement and civil liability provisions of

ECOA. The Bureau notes that several commenters, including trade associations to industry, agreed with the Bureau's proposed implementation of the administrative and civil enforcement provisions of ECOA. Regarding the comments noting the role of other statutory regimes in the enforcement of section 1071, the Bureau agrees and notes that the administrative enforcement provisions of ECOA cross-reference the enforcement authority of other Federal regulators, including the agencies mentioned by the commenters.

Regarding the request to record and enforce whistleblower complaints against farm lenders, the Bureau notes that this would be outside of the scope of this regulation, although the commenter correctly notes that retaliation for the good faith exercise of rights under various Federal consumer protection laws could violate ECOA and subpart A of Regulation B.

Regarding the comment opposing § 1002.112(a) in its entirety, the Bureau notes that § 1002.112(a) simply implements, by cross-reference, the existing administrative enforcement and civil liability provisions of ECOA. Regarding a commenter's request that the Bureau prohibit private causes of action, including discovery proceedings, the Bureau is not making such a change as § 1002.112(a) implements, by cross-reference, the existing administrative enforcement and civil liability provisions of ECOA, of which section 1071 is a part. Further, as specified in the preamble to the proposed rule, the Bureau expressed its belief in response to stakeholders' comments on the SBREFA Outline that the administrative enforcement mechanisms under ECOA would be appropriate to address most instances of non-compliance by financial institutions that report small business lending data to the Bureau, based on its experience with Regulation C and HMDA.[823] Further, other provisions would serve to limit private liability, especially for unintentional errors, including the bona fide error provision of § 1002.112(b) and the various safe harbors in § 1002.112(c).

[823] 86 FR 56356, 56503 (Oct. 8, 2021).

The same commenter claimed that the proposal overemphasized the use of data by non-governmental entities such as researchers, economists, industry, and community groups, and that only government agencies should have access to these data. However, ECOA section 704B(a) explicitly states that one of the purposes of the statute is to enable communities and creditors to identify business and community needs and opportunities; researchers and economists work at community groups and within industry to assist their analyses in identifying business and community needs. Moreover, the Bureau does not believe the statute's other purpose—facilitating enforcement of fair lending laws—was intended to be limited to enforcement by only governmental entities. Regarding the commenter's claim that only governmental agencies should have the power to use such data for supervision and enforcement because only they are capable of providing appropriate governance to covered institutions, the commenter undercuts this claim by, in the same comment letter, also opposing the Bureau's use of small business lending data in its own enforcement and supervision actions on the grounds that applicants' right to refuse to answer demographic information would render the data incomplete, unreliable, and inherently inaccurate. The Bureau recognizes that the applicant's right to refuse pursuant to 704B(c) may result in a less complete dataset, but compared to the status quo, this rule will result in a vastly expanded dataset on the market for small business credit.

Regarding the varied supervision-related requests for ensuring sufficient examiner training, assigning senior staff to CDFI banks, training for examiners to supervise currently unregulated lenders, and conducting audits to check for the manipulation of data, the Bureau notes that such requests are outside of the scope of this rulemaking; the Bureau establishes supervisory and examination procedures only after a regulation has been finalized, and such procedures will be consistent with the Bureau's existing policies regarding supervision and examinations. The Bureau does not believe it would be appropriate to state, at this time, what would cause the Bureau to initiate investigation and enforcement, and how it would allow for the

mitigation of data errors. The Bureau notes, however, that § 1002.112(b) and appendix F establish thresholds for errors in the reporting of data.

Regarding the comment concerning how the Bureau should conduct examinations, the Bureau observes that such comments are outside of the scope of this regulation. In any case, the Bureau agrees that the analytical techniques and examination approaches for HMDA may differ somewhat from the small business credit context, in part because small business credit products differ widely in design and purpose, and the Bureau's supervision and enforcement will reflect this. However, because HMDA as implemented by Regulation C is a data collection regime that shares similar structures and goals as section 1071 and this regulation, including the manner in which HMDA data facilitates fair lending enforcement, the Bureau believes that its experience with HMDA/Regulation C is instructive for this rulemaking and will inform its enforcement and supervisory work. Regarding the comment that the Bureau must coordinate with other FFIEC agencies, including NCUA, to develop examination procedures in advance of a final rule, the Bureau notes that examination procedures normally follow after the publication of a new rule. Regarding the comment that the Bureau should only use the data it receives to conduct fair lending examinations, and not technical compliance examinations, the Bureau does not believe that such a limitation would be appropriate and notes that fair lending examinations are less effective if the underlying data are not accurate; technical compliance examinations help ensure the accuracy of data.

112(b) Bona Fide Errors

Background

During the SBREFA process, small entity representatives and other industry stakeholders expressed concern about private litigants suing them for non-compliance with the rule.[824] In addition, several small entity representatives requested that the Bureau not assess penalties for

[824] The small entity representative feedback discussed in this section-by-section analysis can be found in the SBREFA Panel Report at 34-36.

the first year of data collection and reporting, as it did following the 2015 HMDA final rule; prior to the compliance date for that rule, the Bureau issued a policy statement announcing it would not seek penalties for errors for the first calendar year (2018) of data collected under the amended Regulation C.[825] Stakeholders asked the Bureau to emulate that approach for this rulemaking. Other stakeholders expressed concern about the potential consequences of committing what they viewed as technical or inadvertent errors in collecting or reporting data. One financial institution stakeholder suggested that the rule adopt or emulate the good faith error provisions set out in Regulation C, including § 1003.6(b)(1), which provides that an error in compiling or recording data for a covered loan or application is not a violation of HMDA or Regulation C if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. Stakeholders also referred to the existing error-related exemptions in ECOA and Regulation B.[826] ECOA's civil liability provision states that creditors will not be liable for acts done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the Bureau.[827]

Proposed Rule

Proposed § 1002.112(b) would have provided that a bona fide error in compiling, maintaining, or reporting data with respect to a covered application is an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. A bona fide error is not a violation of ECOA or subpart B. A financial institution would be presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for

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[825] CFPB, *CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance* (Dec. 21, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/ (noting that the Bureau did not intend to require data resubmission unless data errors were material, or assess penalties with respect to errors for HMDA data collected in 2018 and reported in 2019).

[826] *See, e.g.*, § 1002.16(c).

[827] 15 U.S.C. 1691e(e).

this purpose in proposed appendix H. However, an error would not be a bona fide error if either there is a reasonable basis to believe the error was intentional or there is other evidence that the financial institution did not maintain procedures reasonably adapted to avoid such errors.

The Bureau believed that a similar approach to Regulation C, modified and combined with the approach taken by Federal agencies in HMDA examinations, would be appropriate here. Regulation C § 1003.6(b)(1) provides that an error in compiling or recording data for a covered loan or application is not a violation of HMDA or Regulation C if the error was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. In an examination of a financial institution for compliance with Regulation C, a financial institution may make a certain number of unintentional errors in a testing sample of applications for a given data field in the institution's loan/application register, the HMDA analog to the small business lending application register, before it must resubmit its loan/application register. These tolerance thresholds are based on the number of loans or applications in a loan/application register as set out in the HMDA tolerances table in the FFIEC's Interagency HMDA examination procedures.[828]

The Bureau provided a table of thresholds in proposed appendix H and incorporated it in the bona fide error provision in proposed § 1002.112(b). Under this proposed provision and the table of thresholds in proposed appendix H, financial institutions that report a number of errors equal to or below the applicable thresholds would have been presumed to have in place procedures reasonably adapted to avoid errors; those that report a number of errors above the applicable thresholds would not be presumed to have in place procedures reasonably adapted to avoid errors.

Proposed comment 112(b)-1 would have explained that a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data

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[828] Fed. Fin. Insts. Examination Council, *Interagency Examination Procedures: HMDA* (Apr. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_hmda-exam-procedures_2019-04.pdf.

field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose. Proposed comment 112(b)-1 would also have explained that the Bureau's thresholds appear in column C of the table in proposed appendix H, and that the size of the random sample shall depend on the size of the financial institution's small business lending application register, as shown in column A of the table in appendix H.

Proposed comment 112(b)-2 would have provided that, for purposes of determining bona fide errors under § 1002.112(b), the term "data field" generally refers to individual fields, but that, with respect to information on the ethnicity or race of an applicant or borrower, or co-applicant or co-borrower, a data field group may consist of more than one field. Proposed comment 112(b)-2 would have provided that if one or more of the fields within an ethnicity or race field group have errors, they count as one (and only one) error for that data field group.

Proposed comment 112(b)-3 would have provided that an error that meets the criteria for one of the four safe harbor provisions in proposed § 1002.112(c) would not be counted as an error for purposes of determining whether a financial institution has exceeded the error threshold for a given data field.

The Bureau sought comment on its proposed approach to bona fide errors, including whether the tolerance levels in proposed appendix H were appropriate.

Comments Received

The Bureau received comments on this aspect of the proposal from lenders, trade associations, a community group, a women's business advocacy group, and a third-party service provider. Several lenders and trade associations expressed support for the proposed provision on bona fide errors. One trade association also noted that the provision, with a table of thresholds, was broadly consistent with HMDA.

A women's business advocacy group and a community group expressed some concerns about the provision. The trade association understood that the proposal would hold financial

institutions harmless for bona fide errors, and encouraged a limit to the number of safe harbors. The community group expressed the concern that the tolerances must not be overly generous because if the rule was too lax, data quality would suffer and the statutory purposes of the rule would be imperiled.

A community group asked the Bureau to clarify that certain types of errors might still prompt an examination or enforcement action even if the number of errors in a sample did not exceed the threshold, citing the example provided by the Bureau in proposed comment 112(b)-1 in which a lender coded withdrawn applications as denials to conceal a potential fair lending deficiency. The commenter asked that the Bureau further spell out these examples so as not to completely overrule the proposed table of tolerances, noting that perhaps extra scrutiny should apply mainly to the action taken categories, revenue size, and ethnicity, race, and sex data points and fields.

A CDFI lender observed that, as a lender focused on women and minority-owned small businesses, it had noticed discrepancies in self-reporting ethnicity and race, where a minority self-reported as non-minority, and vice versa. The commenter said that this could have serious consequences for non-profit lenders focused on minorities, and that it used software and other relevant information to reconcile ethnicity and race information when possible. The commenter asked if the Bureau recognized this as an issue, and if the Bureau would have an issue with lenders correcting or overriding inaccurate self-reported ethnicity and racial data.

A group of trade associations asked that any errors associated with special lending programs, such as the SBA's Paycheck Protection Program, that would require financial institutions to quickly provide credit to their communities and that involved changing guidance, should not be counted toward the tolerances.

A service provider requested clarification of the "good faith" compliance provision of ECOA, especially what would fall outside of the definition of "good faith" under ECOA's civil liability provision, which provides that "creditors will not be liable for acts done or omitted in

good faith in conformity with any official rule, regulation, or interpretation thereof by the CFPB." The commenter also suggested that clarity on this provision would reduce compliance friction, and lenders would feel secure in providing information to the Bureau if they had certainty that the data would not be used against them.

A community group suggested that an example identified in proposed comment 112(b)-2 should constitute two errors, not one, for purposes of the thresholds. The commenter stated that the example involved the Bureau examining a lender's data finding an error in the ethnicity and race fields of the applicant and co-applicant in the same data record, and counting the two errors in the applicant and co-applicant field as only one error.

Final Rule

The Bureau is finalizing § 1002.112(b), associated commentary, as well as appendix F (renumbered from appendix H in the proposal), with minor revisions. The Bureau has revised comment 112(b)-2 slightly by changing references from "data field groups" to "data fields," because the Bureau will not use data field groups as it does in the HMDA data collection. The Bureau has also revised an example in comment 112(b)-2 to clarify that, regarding the example provided in the comment, one error rather than two would be reported for purposes of the tolerance thresholds.

The Bureau believes that a similar approach to Regulation C, modified and combined with the approach taken by Federal agencies in HMDA examinations, is appropriate here. These tolerance thresholds are based on the number of applications in a register. as set out in the HMDA tolerances table.[829] Accordingly, the Bureau believes that the approach set out in § 1002.112(b), including the accompanying comments and appendix F, is broadly consistent with the approach it has taken for HMDA.[830] The Bureau also believes that this approach

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[829] For HMDA, similar error tolerance thresholds are set forth in the FFIEC's Interagency HMDA examination procedures, rather than in Regulation C itself. Fed. Fin. Insts. Examination Council, *Interagency Examination Procedures: HMDA* (Apr. 2019), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_hmda-exam-procedures_2019-04.pdf.

[830] *Home Mortgage Disclosure (Regulation C)*, 80 FR 66128, 66269 (Oct. 28, 2015).

addresses the concerns first expressed by stakeholders in the SBREFA process regarding liability for some data reporting errors, especially in the earlier years of reporting, as processes are first being implemented. Moreover, the Bureau believes that this provision will help to ensure the accuracy of the data submitted by requiring the maintenance of appropriate procedures; at the same time, this provision will prevent financial institutions from being subjected to liability for some difficult-to-avoid errors that could drive those institutions from the small-business lending market. Therefore, the Bureau believes this provision is necessary to carry out, enforce, and compile data pursuant to section 1071, as well as necessary or appropriate to carrying out section 1071's purposes.

The Bureau notes that while a handful of commenters expressed concern about this provision, the vast majority approved of the inclusion of the bona fide error provision, even if most criticized the tolerance thresholds, as further described in the section-by-section analysis of appendix F. The Bureau agrees with the comment that expressed its strong support on the grounds that the bona fide error approach was consistent with HMDA.

Regarding the concern that the bona fide error provision might make it harder to hold lenders accountable for data errors, the Bureau acknowledges the potential trade-offs between maximizing data quality and practicability of implementation for lenders, and believes that the tolerances in appendix F strike a reasonable balance between these factors based on the experience of the tolerance thresholds in HMDA. Regarding the request to clarify the types of errors that might prompt regulatory action even if the number of errors in a sample did not exceed the tolerance threshold, the Bureau notes that the example of denials coded as withdrawals in comment 112(b)-1 was merely illustrative; the bona fide error provision is a general standard. Regarding the concerns of erroneous self-reporting of ethnicity or race, the Bureau notes that for purposes of reporting data under this regulation, as specified in § 1002.112(b) and comment 107(a)(19)-1, a financial institution relies on an applicant's self-reporting of ethnicity and race.

The final rule does not include a provision that errors associated with applications and loans associated with emergency or special lending programs such as the Paycheck Protection Program not be counted towards the tolerances, as requested by some commenters. The Bureau appreciates the logistical difficulties that might have been encountered by financial institutions in compiling accurate data associated with the Paycheck Protection Program and the Economic Impact Disaster Loan Program, but believes it is more appropriate to consider guidance in the future tailored to emergency programs as they arise.

Regarding the request to clarify "good faith" in the ECOA provision absolving creditors of liability for "acts done or omitted in good faith in conformity with any official rule, regulation, or interpretation thereof by the CFPB," the Bureau notes that the provision speaks for itself and applies generally to any ECOA violation, not only violations of this regulation. The Bureau does not believe it would be appropriate to state that data collected under this rule would not be used in supervisory or enforcement actions against covered financial institutions, given that one of the statutory purposes of this regulation is the facilitation of fair lending enforcement.

Regarding the comment stating that the example in comment 112(b)-2 should have constituted two errors, not one, for purposes of the thresholds, the commenter referenced the ethnicity and race fields of the applicant and co-applicant in the same data record, but the example did not mention these. In any case, the example in comment 112(b)-2 expresses how the Bureau intends to treat certain types of errors within data fields.

112(c) Safe Harbors

Proposed Rule

Proposed § 1002.112(c) would have established four safe harbor provisions, providing that certain types of errors would not constitute violations of ECOA or Regulation B. Proposed § 1002.112(c)(1) would have provided a safe harbor for an incorrect entry for census tract obtained by correct use of a geocoding tool provided by the FFIEC or the Bureau. Proposed § 1002.112(c)(2) would have provided a safe harbor for an incorrect NAICS code determined by

a financial institution under certain circumstances. Proposed § 1002.112(c)(3) would have provide a safe harbor for the collection of applicants' protected demographic information pursuant to proposed § 1002.107(a)(18) through (20) after an initially erroneous determination that an applicant is a small business. Proposed § 1002.112(c)(4) would have provided a safe harbor for the reporting of an application date that is within three calendar days of the actual application date.

Comments Received

The Bureau received a number of comments from banks, trade associations, banks concerning the safe harbor provision generally or not addressing the specific safe harbors in (c)(1) to (c)(4). A women's business advocacy group encouraged the Bureau to generally limit the number of safe harbors. Two banks encouraged the general expansion of safe harbors.

Several banks and trade associations requested a general safe harbor from liability applying to data if the financial institution reports what the applicant submitted in the application process, even if that data are incorrect or inaccurate. One bank further asserted that it is burdensome for a financial institution to review each data point for accuracy, and the ability to rely on applicant provided data would limit the corrections needed. A trade association pointed out that under the proposal, lenders may rely on some but not all data provided by applicants, and recommended that the Bureau permit lenders to rely on all data, without verification, in all circumstances.

Two industry commenters suggested that the Bureau adopt a general safe harbor for any data that is reasonably documented, and the financial institution can demonstrate that it has policies and procedures in place to capture the data. Another commenter recommended a safe harbor setting a reasonableness standard for data collection and/or relying on self-reporting, where lenders are not held liable for the accuracy of the applicant's responses because they are in jeopardy of violating other laws.

A number of commenters suggested more specific safe harbors. Two suggested that the Bureau provide an express safe harbor for applicant-provided data on the applicant's number of workers, § 1002.107(a)(16), and the applicant's time in business, § 1002.107(a)(17). Another suggested that the Bureau provide an express safe harbor for gross annual revenue, § 1002.107(a)(14), asserting that ensuring precision in the data is difficult, often requiring manual review, that the precision of the data does not affect interpretation of data. The bank stated that, for instance, an applicant might report an initial estimate (*e.g.*, $900,000), but that during underwriting, preliminary financials may show a different amount (*e.g.*, $915,000), and audited financials yet another (*e.g.*, $912,000), making it likely that the final number may not be the one reported to the Bureau. To penalize such errors, which the commenter described as immaterial, would, according to the commenter, burden lenders and regulators as well. The bank suggested that the Bureau should institute a 10 percent tolerance for errors made in reporting gross annual revenue. A trade association suggested a safe harbor for when an applicant misidentifies itself as a women- or minority-owned business, which would then cause the lender to ask questions about ethnicity, race, and sex that may be in violation of ECOA. Another trade association asked the Bureau to consider adding a safe harbor related to the feasibility of the firewall, allowing for variations in determining feasibility.

Final Rule

As described in further detail below, the Bureau is finalizing four safe harbors established in final § 1002.112(c) with modifications. In addition, the Bureau has renumbered the four subsections to be more aligned with the order in the data points these safe harbors address.

The Bureau is finalizing these safe harbors pursuant to its authority under ECOA and as amended by section 1071. ECOA section 703 provides the Bureau the authority to prescribe regulations to carry out the purposes of ECOA, including such adjustments and exceptions for any class of transactions that in the judgment of the Bureau are necessary or proper to effectuate the purposes of ECOA, to prevent circumvention or evasion thereof, or to facilitate or

substantiate compliance therewith. Section 704B(g)(1) provides that the Bureau shall prescribe such rules as may be necessary to carry out, enforce, and compile data pursuant to section 1071. Section 704B(g)(2) authorizes the Bureau to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements of section 1071, as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

The Bureau is not further modifying the safe harbor provisions in response to commenters' requests that the Bureau either generally limit or expand the number of safe harbors. Regarding the request for a safe harbor from liability when a financial institution submits applicant-provided data, the Bureau does not believe a safe harbor is necessary because pursuant to § 1002.107(b) and comment 107(b)-1, financial institutions are already permitted to rely upon applicant-provided data in accord with those provisions. Regarding the comment that it is burdensome for financial institutions to review each data point for accuracy, the Bureau again notes that financial institutions may rely upon applicant-provided data and need not verify such data, subject to the requirements of § 1002.107(b) and comment 107(b)-1. Regarding the comment that the Bureau should permit lenders to report and rely solely on applicant-provided data even when they have verified some of that data for their own business purposes, the Bureau believes that such a safe harbor would result in a reduction of data quality. The Bureau believes that final § 1002.107(b) and comment 107(b)-1 strikes a reasonable balance between data quality and cost and effort incurred by lenders.

Regarding the comment that the Bureau adopt a general safe harbor for any data that is reasonably documented by financial institutions with policies and procedures in place, the Bureau does not believe such a safe harbor would be consistent with the statutory purposes of section 1071. Such a safe harbor would appear to shield a lender from liability even if the data submitted to the Bureau were not accurate, *i.e.*, did not reflect the underlying documentation. Regarding the comment requesting that the Bureau adopt a safe harbor establishing a general

reasonableness standard for errors in data reporting, the Bureau does not believe it consistent with the statutory purposes of section 1071 to adopt such an apparently open-ended safe harbor without further consideration of what the limits to this provision would be. The Bureau believes the bona fide error provision in this final rule will serve the function requested by the commenter's suggested safe harbor in a manner consistent with the statutory purposes of section 1071, for the reasons set out in the section-by-section analysis of § 1002.112(b).

The Bureau does not believe any of the more specific safe harbors suggested by commenters are needed. The Bureau believes that a safe harbor for the number of workers data point is not necessary because final § 1002.107(a)(16) does not require the reporting of a precise numbers of workers, but rather permits the selection of ranges of numbers. Similarly, the Bureau believes that a safe harbor for the time in business data point is not necessary because final § 1002.107(a)(17) does not require the reporting of exact years in business for this data point unless the financial institution already obtains that information for its own purposes.

The Bureau also does not believe that a safe harbor for gross annual revenue is needed, as § 1002.107(a)(14), and comments 107(a)(14)-1 and -2, permit financial institutions to report gross annual revenue in the manner they collect it. The Bureau disagrees, however, with the comment that the precision of the data would not materially affect data analysis. The commenter offered a specific example of discrepancies between different estimates of gross annual revenue that were minor and might not be material; the commenter did not suggest that in practice that the differences between self-reported and verified measures of revenue would consistently be as small as in the example presented. In any case, the commenter did not address whether the time between when an application was submitted and when the financial institution would have to submit the data related to the application to the Bureau was insufficient to arrive at a final gross annual revenue number. Neither does the Bureau agree with the comment offering examples of errors in reporting gross annual revenue would not really impact the overall integrity of the data; based on its experience with other data reporting regimes such as HMDA, the 10 percent error

range suggested by the commenter in the reporting of gross annual revenue could be material and impact the integrity of the data the Bureau received.

A safe harbor for when an applicant misidentifies itself as a women-owned or minority-owned business is likewise not necessary, as financial institutions are required to report business statuses as provided by the applicant, without verification, pursuant to final § 1002.107(a)(18) and comment 107(a)(18)-8. Regarding the request to add a safe harbor related to the feasibility of the firewall, allowing for variations in determining feasibility, the Bureau notes that its implementation of the statutory firewall provision, in § 1002.108, provides financial institutions substantial leeway; as specified in comment 108(c)-1, a financial institution is not required to perform a separate analysis of the feasibility of maintaining a firewall beyond determining whether an employee or officer should have access to an applicant's protected demographic information.

112(c)(1) Incorrect Entry for Application Date

Final § 1002.107(a)(2) requires financial institutions to report application date. In the NPRM, the Bureau proposed § 1002.112(c)(4), which would have provided that a financial institution does not violate proposed subpart B if it reports on its small business lending application register an application date that is within three calendar days of the actual application date pursuant to proposed § 1002.107(a)(2). The Bureau sought comment on its proposed approach to this safe harbor.

The Bureau received comments on proposed application date safe harbor from a handful of lenders and trade associations. Most of these commenters generally supported the safe harbor, with one commenter stating that it would reduce the compliance burden of pinpointing an exact application date. A trade association supporting the safe harbor further stated that the application process is fluid and that it should be sufficient for the financial institution to reasonably document the data point and have policies and procedures in place to capture the data. Another trade association stated that the proposed safe harbor is appropriate, but questioned its utility.

The commenter noted that it was unclear who or how the "actual" application date would be determined and the proposed definition of a covered application was already flexible and subjective.

Two banks urged the Bureau to change "calendar" days to "business" days in the safe harbor. These commenters stated that they often operate their business seven days a week or may approve requests for credit on non-business days. They argued that business days would allow for consistent application of the safe harbor regardless of the date a business applied for credit, retaining only calendar days would mean financial institutions would lose the flexibility afforded by a safe harbor when it is most needed, and that failure to make the change could preempt the ability of financial institutions to provide "off-hour" services. Finally, a couple commenters urged the Bureau to provide additional clarifications, such as examples of how to calculate the safe harbor date range or illustrations in the commentary on how the safe harbor would operate.

The Bureau is finalizing § 1002.112(c)(1) (proposed as § 1002.112(c)(4)) with modifications to provide that a financial institution does not violate ECOA or subpart B if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to final § 1002.107(a)(2). The Bureau believes this provision will both ensure the level of accuracy needed for the resulting data to be useful in carrying out section 1071's purposes and minimize the risk that financial institutions will be held liable for difficult-to-avoid errors, which might otherwise affect their participation in the small business lending market. The Bureau therefore believes final § 1002.112(c)(1) is necessary or appropriate to carry out section 1071's purposes pursuant to ECOA section 704B(g)(1) and (2).

In response to commenters' concerns that "calendar" days would disadvantage a financial institution that receives applications on non-traditional business days, the Bureau is revising "calendar" days to "business" days. A business day means any day the financial institution is

open for business.[831] The Bureau agrees with commenters that the safe harbor should apply equally regardless of which day of the week an application is received. In response to commenters' request for illustrations as to how the safe harbor would work, the Bureau believes the text of final § 1002.112(c)(1) provides sufficient guidance on how to calculate whether a reported date falls within the safe harbor. For example, in accordance with final § 1002.112(c)(1), if a covered application is received by a financial institution on Saturday, January 5, and the financial institution is closed for business on Sunday, January 6, the safe harbor would apply so long as the financial institution reports an application date that falls between Wednesday, January 2 (three business days preceding the actual date of a covered application) and Wednesday, January 9 (three business days following the actual date of a covered application). Sunday, January 6 does not count as one of the three business days because it was not a business day for the financial institution.

112(c)(2) Incorrect Entry for Census Tract

Proposed Rule

Proposed § 1002.112(c)(1) would have provided that an incorrect entry for census tract is not a violation of ECOA or this subpart if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau. Regulation C § 1003.6(b)(2) contains a similar provision, and the Bureau believed a similar approach would be appropriate here.

Proposed comment 112(c)(1)-1 would have explained that the safe harbor provision under proposed § 1002.112(c)(1) would not extend to a financial institution's failure to provide the correct census tract number for a covered application on its small business lending application register, as would have been required by proposed § 1002.107(a)(13), because the FFIEC or Bureau geocoding tool did not return a census tract for the address provided by the

[831] If a financial institution accepts covered applications online at any time, but under its procedures does not actually receive or review the application until the next business day, the mere willingness to accept applications online does not mean the financial institution is open for business seven days a week.

financial institution. In addition, proposed comment 112(c)(1)-1 would have explained that this safe harbor provision would not extend to a census tract error that results from a financial institution entering an inaccurate address into the FFIEC or Bureau geocoding tool.

The Bureau sought comment on its proposed approach to this safe harbor.

Comments Received

Several lenders and trade associations commented on the proposed safe harbor for incorrect census tract. Some commenters supported the safe harbor as proposed; several further requested that the safe harbor also protect the use of reasonable processes to identify and report census tract data where the FFIEC and Bureau tools did not return a census tract. Two commenters requested that the Bureau create an exclusion from census tract reporting when the applicant only provides a P.O. Box or other mailbox that is not connected to a physical address. Another requested, because the Bureau census tract tool is not yet available and because the FFIEC tool does not permit batch geocoding, that the Bureau extend the safe harbor to include commercially available batch geocoders often found within HMDA and CRA reporting software. One commenter supported the safe harbor but asserted that the safe harbor's usefulness was limited because of the difficulty in proving that a geocoding tool was used correctly. Two commenters requested additional latitude if a census tract is reported for a business where the business has a physical location, even if it is not the business's main address or where loan funds are spent.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.112(c)(2) (proposed as § 1002.112(c)(1)) and comment 112(c)(2)-1 (proposed as 112(c)(1)-1) as proposed. As noted above, Regulation C § 1003.6(b)(2) contains a similar provision, and the Bureau believes a similar approach is appropriate here. Given the number of years that financial institutions have been relying on the FFIEC geocoding tool in the HMDA context, the Bureau believes it is reasonable to similarly permit financial institutions to rely on information provided by a

geocoding tool offered by the FFIEC or the Bureau, subject to the caveats in comment 112(c)(2)-1. Additionally, the Bureau believes that this safe harbor will ultimately improve the accuracy of the data submitted by encouraging the use of reliable FFIEC geocoding tools, and preventing financial institutions from being subject to liability for difficult-to-avoid errors that some commenters said could drive those institutions to eschew these useful tools. The Bureau thus believes this provision is necessary to carry out, enforce, or compile data pursuant to section 1071, and necessary or appropriate to carry out section 1071's purposes pursuant to ECOA section 704B(g)(1) and (2).

Regarding commenters' request that the safe harbor be adjusted to protect the use of reasonable processes to identify and report census tract data where the FFIEC and Bureau geocoding tools did not return a census tract, or that the Bureau expand the safe harbor to include commercially available batch geocoding tools, the Bureau does not believe that such changes are warranted. Both Regulation C § 1003.6(b)(2) and final § 1002.112(c)(2) permit financial institutions to rely on the accuracy of tools provided by the Federal government when they are able to return a census tract. Where such tools return no census tract at all, financial institutions must rely on other tools, such as geocoding tools provided by third parties, or must use other means to determine census tract. The Federal government does not review, and therefore cannot verify or take responsibility for, the accuracy of commercially available geocoders.

Similarly, the Bureau is not adopting an exception for situations in which the applicant only provides a P.O. Box or other mailbox that is not connected to a physical address. The "waterfall" reporting method for the census tract data point implements the statutory term "principal place of business." Pursuant to final § 1002.107(c), a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes an address or location for purposes of determining census tract. Because a P.O. or other mailbox address is generally unrelated to the location of the principal place of business or another location associated with the business, the Bureau expects that in most instances (for its own

purposes or as needed to comply with other regulations) a financial institution will attempt to collect an address more suitable for determining the census tract. If the financial institution is unable to do so, it may use a P.O. or other mailbox address for reporting census tract.

Despite the assertion that this safe harbor is limited because of the difficulty in proving that a geocoding tool was used correctly, the Bureau does not believe that changes to the safe harbor would be appropriate. The safe harbor, which the Bureau notes is broader than the one in Regulation C (this safe harbor extends to the Bureau geocoding tool; the one in Regulation C does not), is intended to be narrowly applicable to government-provided geocoding tools. Financial institutions have relied for years on existing geocoding tools, including the FFIEC tool in the HMDA context. The use of the FFIEC tool, and the manner that the Bureau has dealt with any errors derived from the use of the tool, are well established. Thus, the Bureau does not anticipate difficulties identifying whether an error is caused by user error (which would not be protected by the safe harbor) or by the geocoding tool itself (which would be protected). The Bureau does not believe that, as requested by the same commenter, any further latitude is required in the reporting of census tract (*i.e.*, if the census tract is reported for a physical location, even if it is not the business's main address or where the proceeds of the credit applied for or originated will be or would have been principally applied) for the reasons set out here and in the section-by-section analysis of § 1002.107(a)(13) above.

112(c)(3) Incorrect Entry for NAICS Code

Proposed Rule

The Bureau proposed to require financial institutions to collect and report an applicant's 6-digit NAICS code in proposed § 1002.107(a)(15). A financial institution would have been permitted to rely on statements of or information provided by the applicant in collecting and reporting the NAICS code as described in proposed comments 107(a)(15)-3 and -4. The Bureau also proposed a safe harbor, in § 1002.112(c)(2), to address situations where a financial institution does not rely on such information, but instead identifies the NAICS code for an

applicant itself and the identified NAICS code is incorrect. Specifically, proposed § 1002.112(c)(2) would have provided that the incorrect entry for that institution-identified NAICS code is not a violation of ECOA or subpart B, provided that the first two digits of the NAICS code are correct and the financial institution maintains procedures reasonably adapted to correctly identify the subsequent four digits.

The Bureau sought comment on its proposed approach to this safe harbor. The Bureau also sought comment on whether requiring a 3-digit NAICS code with no safe harbor would be a better alternative.

Comments Received

The Bureau received a number of comments on its proposal to require collection and reporting of a 6-digit NAICS code, as discussed in the section-by-section analysis of § 1002.107(a)(15) above. The Bureau received comments from some lenders and trade associations specifically regarding the related safe harbor in proposed § 1002.112(c)(2). Several industry commenters reiterated their general opposition to the proposed NAICS code data point but asserted that they supported the safe harbor if the Bureau were to require financial institutions to collect and report NAICS code. A trade association stated that as long as the data point reported is reasonably documented and the financial institution can demonstrate it has policies and procedures in place to capture the data, the Bureau should recognize that it is sufficient. A bank and a trade association for online lenders stated that where an institution in good faith reports a NAICS code, believed to be accurate based on the attestation and information provided by the applicant, but was provided with inaccurate information, a reporting financial institution should not be deemed to be in noncompliance with the regulation. A few commenters asserted that if the Bureau requires NAICS code to be collected, then the Bureau should permit lenders to rely upon applicant statements or codes obtained through the use of business information products as proposed in comments 107(a)(15)-3 and -4.

A few trade associations and a business advocacy group expressed the belief that the safe harbor was insufficient and should be broader. In particular, these commenters asserted that the safe harbor would not apply when the institution relied on the applicant's statement for the NAICS code. A group of trade associations concluded that financial institutions that want to use the safe harbor would be required to try to determine the NAICS code themselves and said that this process would be burdensome and fraught with the risk of inaccuracies.

Final Rule

For the reasons set forth herein, the Bureau is finalizing § 1002.112(c)(3) (proposed as § 1002.112(c)(2)) with certain adjustments. As discussed in the section-by-section analysis of § 1002.107(a)(15) above, the Bureau is requiring that financial institutions collect and report a 3-digit NAICS code for the applicant. The Bureau is revising the safe harbor to account for this modification for the required number of digits and to clarify what information the financial institution may rely on in reporting NAICS codes. In addition, while the bona fide error provision in final § 1002.112(b) continues to apply (provided its requirements are met), the Bureau is deleting that language from comment 112(c)-2 for consistency across the safe harbor provisions and because comment 112(b)-3 addresses the issue.

Specifically, final § 1002.112(c)(3) makes clear that an incorrect entry for a 3-digit NAICS code is not a violation of ECOA or subpart B, provided that the financial institution obtained the 3-digit NAICS code by: (i) Relying on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code; or (ii) identifying the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

As discussed above, some commenters believed that the proposed safe harbor would not apply when the institution relied on the applicant's statement for the NAICS code, and as a result financial institutions could be penalized for reporting erroneous NAICS codes provided by applicants and thus may have to re-check such NAICS codes themselves in order to qualify for

the safe harbor. Given the provisions in proposed § 1002.107(a)(15) and (b) (finalized in § 1002.107(b) with additional detail) that expressly permitted a financial institution to rely on applicant-provided information in reporting NAICS code, the Bureau did not believe that such a safe harbor was necessary. However, to address commenters' concerns, the Bureau is expressly including NAICS codes provided by applicants or obtained from an appropriate third-party source, in accordance with § 1002.107(b), within the scope of final § 1002.112(c)(3).

The Bureau is adopting this safe harbor pursuant to its statutory authority under section 704B(g)(1) and (2). The Bureau believes that this safe harbor, as revised, is responsive to commenters' concerns about the difficulties in correctly classifying an applicant's NAICS code (whether because the business may change over time, codes may have overlapping definitions, small businesses may not know their NAICS code, or because classifications may otherwise be prone to human error). The Bureau also believes that the safe harbor will help to ensure the accuracy of the data submitted by requiring the maintenance of appropriate procedures when the financial institution is determining an applicant's NAICS code itself; at the same time, the safe harbor prevents financial institutions from being subjected to liability for some difficult-to-avoid errors. Therefore, the Bureau believes final § 1002.112(c)(3) is necessary or appropriate to carry out section 1071 purposes pursuant to ECOA section 704B(g)(1) and (2).

112(c)(4) Incorrect Determination of Small Business Status, Covered Credit Transaction, or Covered Application

Proposed Rule

Proposed § 1002.112(c)(3) would have provided that a financial institution that initially determines that an applicant for a covered credit transaction is a small business, as defined in proposed § 1002.106(b), but later concludes the applicant is not a small business, does not violate ECOA or Regulation B if it collected information pursuant to subpart B regarding whether an applicant for a covered credit transaction is a minority-owned business or a women-owned business, and the ethnicity, race, and sex of the applicant's principal owners. Proposed

§ 1002.112(c)(3) would further have provided that a financial institution seeking to avail itself of this safe harbor would have to comply with the requirements of subpart B as otherwise required pursuant to proposed §§ 1002.107, 1002.108, and 1002.111 with respect to the collected information.

The Bureau proposed this safe harbor to address situations where a financial institution may otherwise be uncertain about whether it "may obtain information required by a regulation" under existing § 1002.5(a)(2), which could deter financial institutions from complying with the rule implementing section 1071. The Bureau believed that this safe harbor would facilitate compliance with ECOA by eliminating a situation in which a financial institution might be deterred from appropriately collecting applicants' protected demographic information due to the possibility that their understanding of an applicant's small business status might change during the course of the application process.

Proposed § 1002.112(c)(3) would have made it clear that a financial institution seeking to avail itself of this safe harbor must comply with the requirements of subpart B as otherwise required pursuant to proposed §§ 1002.107, 1002.108, and 1002.111 with respect to the collected information. Relatedly, proposed comment 106(b)-1 would have clarified that, in such a situation, the financial institution does not report the application on its small business lending application register pursuant to § 1002.109.

The Bureau sought comment on its proposed approach to this safe harbor.

Comments Received

As set out above in the section-by-section analysis of § 1002.112(c), the Bureau received comments generally supporting all four of the proposed safe harbors, including proposed § 1002.112(c)(3), as well as comments suggesting that the proposed safe harbors were too narrow. With respect to proposed § 1002.112(c)(3) specifically, a CDFI lender and two trade associations supported this safe harbor generally. The trade association further urged the Bureau to allow banks to rely on applicant-provided revenue data in determining whether to collect data

pursuant to this regulation. Several other industry commenters, apparently unaware of proposed § 1002.112(c)(3), requested that the Bureau adopt a safe harbor, in substance, identical to proposed § 1002.112(c)(3). A bank and a business advocacy group suggested that the Bureau adopt a new safe harbor applying to an application for a covered credit transaction where the applicant ultimately accepts a product that is not reportable; the trade association suggested that the collection of data for such applications would not advance the statutory purposes of section 1071.

Final Rule

For the reasons set forth herein, the Bureau is finalizing this safe harbor, renumbered as § 1002.112(c)(4), with revisions. The Bureau has expanded the safe harbor for the reasonable, yet erroneous, collection of demographic data beyond an initial determination that an applicant is a small business, to also cover an initial determination that the application is for a covered credit transaction and that there is a covered application.

Specifically, final § 1002.112(c)(4) provides that a financial institution that initially collects protected demographic data—regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or a LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners pursuant to final § 1002.107(a)(18) and (19)—but later concludes that it should not have collected such data does not violate ECOA or Regulation B if the financial institution, at the time it collected these data, had a reasonable basis for believing that the application was a covered application from a small business for a covered credit transaction pursuant to §§ 1002.103, 1002.104 and 1002.106. Consistent with the proposal, final § 1002.112(c)(4) further states that a financial institution seeking to avail itself of this safe harbor shall comply with the requirements of subpart B as otherwise required pursuant to §§ 1002.107, 1002.108, and 1002.111 with respect to the collected data. The Bureau is also adopting new comment 112(c)-3 to provide an example of the kinds of errors covered by the safe harbor in final § 1002.112(c)(4).

The Bureau is adopting this safe harbor pursuant to its authority under ECOA sections 703(a), 704B(g)(1), and 704B(g)(2). The Bureau has determined it is appropriate to expand the safe harbor to address other situations which could pose the same challenges to financial institutions as the one addressed by proposed § 1002.112(c)(3). Specifically, the safe harbor as revised addresses several determinations a financial institution must make as a threshold matter in order to collect applicants' protected demographic data pursuant to the rule: whether an application is reportable pursuant to § 1002.103, for a covered credit transaction under § 1002.104, and from a small business applicant pursuant to § 1002.106.

Comments the Bureau received on the safe harbor in proposed § 1002.112(c)(3), and on the underlying substantive provisions including proposed §§ 1002.103, 1002.104 and 1002.106, suggested that financial institutions need additional leeway in making threshold determinations, particularly when those determinations are based on applicant-provided data that may later change or otherwise turn out to be incorrect. Under existing § 1002.5(a)(2), a creditor may only obtain otherwise protected information if "required by a regulation," or some other express exception applies. Absent this expanded safe harbor, financial institutions may be deterred from appropriately collecting applicants' protected demographic information for fear of running afoul of existing § 1002.5(b) due to the possibility that their understanding of an application—whether the application is for a covered credit transaction, and is from a small business applicant—may change during the course of the application process and so collection of demographic data will no longer be "required by a regulation." The Bureau thus believes that the safe harbor in § 1002.112(c)(3), as revised from the proposal, will facilitate compliance with ECOA and the rule.

The Bureau agrees, as suggested by several commenters, that the safe harbor in proposed § 1002.112(c)(3) may have been too narrow, focused as it was on errors in determining the small business status of an applicant. For the reasons explained herein, the Bureau believes it is appropriate to extend the safe harbor to other threshold determinations: whether an application is reportable at all under § 1002.103 and whether the application in question is for a covered credit transaction under § 1002.104.

Regarding a commenter's request that banks should be allowed to rely on applicant-provided revenue information in deciding to collect demographic data, the Bureau notes that, pursuant to final § 1002.107(b), financial institutions may rely on unverified applicant-provided

gross annual revenue (although if the financial institution verifies that information, it must use the verified information instead).

Regarding the same commenter's request to expand the safe harbor to include any application for a covered credit transaction where the applicant accepts an offer for a financing product that is not reportable, the Bureau does not believe any further expansion of final § 1002.112(c)(4) is warranted. Final § 1002.112(c)(4) addresses the collection of demographic data from a small business that initially applies for a covered credit transaction but, before final action is taken, instead seeks a non-covered transaction, such as a lease.[832] The safe harbor suggested by the commenter, on the other hand, would be unnecessarily broad, reaching a covered application from a small business that accepted a non-covered product after final action has been taken on the covered application for a covered credit product. In such circumstances, the initial decision of the financial institution to collect demographic data on such applications for covered credit transactions was not erroneous and would not have violated ECOA or Regulation B, and thus a safe harbor is not necessary. Further, the commenter did not explain why a safe harbor covering the situations it described would be consistent with the statutory purposes of section 1071, which requires the collection of "*any* application to a financial institution for credit" (emphasis added).

Section 1002.113 Severability

Proposed § 1002.113 would have provided that the provisions of subpart B are separate and severable from one another, and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

One trade association said that it had no comments on proposed § 1002.113.

The Bureau is finalizing § 1002.113 with revisions to clarify that applications of provisions are also severable. This is a standard severability clause of the kind that is included in

[832] See also comment 103(a)-9, which discusses reporting where there is a change in whether there is a covered credit transaction.

many regulations to clearly express agency intent about the course that is preferred if such events were to occur.

Section 1002.114 Effective Date, Compliance Date, and Special Transitional Rules

Final § 1002.114 addresses when the final rule becomes effective and when financial institutions will be required to comply with the rule, as well as how financial institutions can choose to comply with the rule during this transitional period. Final § 1002.114(a) states that this small business lending data collection rule will become effective 90 days after the final rule is published in the *Federal Register*. Final § 1002.114(b) provides a tiered approach to compliance dates. Specifically, the dates by which covered financial institutions are initially required to comply with the requirements of this rule are specified in four provisions based on the number of covered originations. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026.

Final § 1002.114(c)(1) permits covered financial institutions to begin collecting information pursuant to final § 1002.107(a)(18) through (19) beginning 12 months prior to the compliance date. Final § 1002.114(c)(2) permits a financial institutions that do not have ready access to sufficient information to determine their compliance tier (or whether they are covered by the rule at all) to use reasonable methods to estimate their volume of originations to small businesses for this purpose.

114(a) Effective Date and 114(b) Compliance Date

Background

Section 1071 does not specify an implementation period, though pursuant to ECOA section 704B(f)(1) financial institutions must report data to the Bureau on an annual basis. In the SBREFA Outline, the Bureau noted that it sought to ensure that financial institutions have

sufficient time to implement the rule, and stated that it was considering proposing that financial institutions have approximately two calendar years for implementation.[833]

Small entity representative and stakeholder feedback regarding the two-year period for implementation under consideration during the SBREFA process was mixed.[834] Some found the two-year period to be adequate, some requested more time, and a few urged for less. Some provided related feedback about adopting a grace period for data errors in the first year(s) after the rule becomes effective. A fuller discussion of the feedback from small entity representatives and stakeholders on implementation period is included in the NPRM and in the SBREFA Panel Report.

Proposed Rule

The Bureau proposed in § 1002.114(a) that its small business lending data collection rule become effective 90 days after the final rule is published in the *Federal Register*. At that time, the rule would become part of the Code of Federal Regulations; this would permit financial institutions to avail themselves of the special transitional rule in proposed § 1002.114(c)(2), discussed below. However, pursuant to proposed § 1002.114(b), compliance with the final rule would not have been required until approximately 18 months after the final rule is published in the *Federal Register*.

The Bureau's proposed approach was a compromise between the two-year implementation period under consideration at SBREFA that a slight majority of stakeholders found acceptable and the shorter one-year implementation period requested by certain stakeholders. The Bureau believed that the statutory purposes of section 1071 are better served by an earlier compliance date that would, in turn, result in earlier publication of data by the Bureau. The Bureau acknowledged the preference of various small entity representatives and

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[833] SBREFA Outline at 42.

[834] The small entity representative feedback discussed in this section-by-section analysis can be found in the SBREFA Panel Report at 36-37.

other stakeholders for a compliance period of two or more years to comply. The Bureau noted, however, that some small entity representatives and other industry stakeholders said that they could be ready in less than two years. The Bureau agreed with the stakeholders that asserted that a shorter implementation period is preferable given the length of time that has elapsed since the passage of section 1071 of the Dodd-Frank Act.

The Bureau believed that permitting or requiring a partial year collection in the initial year of compliance would further the purposes of section 1071 by expediting the collection and, potentially, the publication of data to be used to further the fair lending and community development purposes of the statute.

The Bureau sought comment on its proposed effective date of 90 days following publication of an eventual final rule and its proposed compliance date of approximately 18 months after the publication of its final rule to implement section 1071. In particular, the Bureau sought comment on which aspects of the Bureau's proposed rule might require more or less time to implement, and ways in which the Bureau could facilitate implementation for small financial institutions, especially those that have had no experience with other Federal data reporting regimes. The Bureau further sought comment on two alternatives: (a) whether the Bureau should adopt a compliance date of two years after the publication of the final rule; and (b) whether the Bureau should adopt different compliance dates based on the size of a financial institution (*e.g.*, one year for large financial institutions, two years for smaller institutions).

Comments Received

The Bureau received several comments in response to proposed § 1002.114(a). A CDFI lender approved of the proposed effective date of 90 days after *Federal Register* publication of this rule. A joint letter from several trade associations did not object to the 90-day effective date. A business advocacy group requested a that there be no retroactive application of the rule prior to the effective date. They noted that the proposed rule would require numerous complex compliance burdens based on the collection of new data, the establishment of new internal

processes, and the development of new systems, and urged the Bureau to clearly explain that the final rule does not apply retroactively, including as to draws made after the effective date on loans made before the effective date.

The Bureau received a large number of comments in response to proposed § 1002.114(b). Several comments supported an 18-month compliance period or requested a shorter period, but the vast majority of comments suggested a longer compliance period, for varied reasons.

Support. One community group preferred a 1-year implementation but was satisfied that the Bureau did not provide for a 2-year period as requested by lenders. A trade association offered appreciation that the proposed compliance period reflected consideration by the Bureau for the lenders but still requested a longer compliance period than proposed.

Requests to publish data quickly and frequently. A number of commenters urged the Bureau to finalize the rule quickly to collect and publish data as soon as possible. A range of commenters emphasized the urgency of the Bureau implementing this rule carefully and quickly. Two commenters stated that the ongoing failure to collect and publish data harms women-owned and minority-owned small businesses and communities because discriminatory practices are permitted to continue. One also said that the absence of 1071 data would compromise the goals of mission-driven lenders. A joint letter from community groups and community oriented lenders said that swift implementation was critical for consumers, regulators, and advocates to assess markets given the limited data currently available.

A number of commenters asserted that the Bureau should move quickly to implement the rule, collect and publish data given that more than 10 years have passed since the Dodd-Frank Act required the promulgation of this rule. A minority business advocacy group requested that initial data findings be published as soon as possible, and every six months so that stakeholders can monitor progress and utilize data.

Less than 18 months. Several commenters asserted that an 18-month compliance period was too long. Some commenters, including a joint letter community groups, community oriented

lenders, and business advocacy groups, requested that the compliance date for this rule be January 1, 2024. Another commenter argued that a one-year period better served the statutory purposes of the rule. Several CDFI lenders stated that mission-based lenders ready to report within 18 months should be permitted to opt-in to report data. A community group suggested that section 1071's statutory purposes are better served by shorter compliance period considering Congress enacted section 1071 in the Dodd-Frank Act in 2010.

More than 18 months. A large number of commenters, including lenders, trade associations, and a community group, opposed the proposed compliance date. Many of these commenters asked for a longer compliance period without specifying how much time lenders needed. One commenter stated that even if the final rule were shorter than the NPRM, lenders would need more than 18 months.

Resources. Two industry commenters asserted that lenders needed more resources for new data collection and reporting systems to comply. A bank noted that it already faced thin margins and already had to comply with the Financial Accounting Standards Board's Current Expected Credit Losses rule.[835]

Scope and complexity. Two trade associations claimed that lenders needed more time to understand the scope of the final rule and to apply new processes to various lines of business. One commenter noted that the much of the data to be collected would be novel for lenders.

Previous experience. Two lenders requested additional time because of their lack of experience with Federal data collections, such as HMDA or CRA.

Policies and procedures. A number of commenters requested more time to develop and/or update policies and procedures for application intake and data collection. Several small lenders

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[835] Off. of the Comptroller of the Currency, Treasury; Bd. of Governors of the Fed. Rsrv. Sys.; and Fed. Deposit Ins. Corp., *Regulatory Capital Rule: Revised Transition of the Current Expected Credit Losses Methodology for Allowances*, Final Rule, 85 FR 61577 (Sept. 30, 2020) (delaying for two years the requirement that banking organizations implement the estimated impact on regulatory capital stemming from the implementation of Accounting Standards Update No. 2016-13, Financial Instruments—Credit Losses, Topic 326, Measurement of Credit Losses on Financial Instruments).

asserted that they would have to implement new application processes and adopt new forms. One bank noted that it would have to create formal applications and associated procedures for agricultural or business loans.

Technology. A number of commenters identified the need to purchase or upgrade compliance software in support of extending the compliance period. Some banks said they needed time—for some, years—to rewrite core processors to add data points for this rule. Several banks said they needed to automate their small business lending processes, a difficult task with many systems to choose from, review, develop and implement. Several banks asked for more time to buy software from vendors, including time to conduct due diligence, allow vendors to develop systems, test integration with existing systems, and manage vendors. One lender stated that 10 percent of agricultural loans are made using a scoring system called AgScore, which must be re-engineered to support this rule, a costly and time-consuming task.

Training. A number of banks said they needed more time to hire new staff and/or train existing employees.

Other regulations. Commenters asserted that other comparably complex data collection regulations provided for longer compliance periods. A number of banks and two credit union trade associations noted that the 2015 HMDA rule had a two-year compliance period, and by contrast that this rule is a major regulation covering many different products, requiring even more time for vendors to adapt. Several commenters cited their experience with the TILA/RESPA integrated disclosure rule, which gave two years to comply with updated requirements, as proof that 18 months was not sufficient to comply with this new rule.

Specific industries. Different types of lenders requested longer compliance periods for their industries. One commenter stated that 18 months was insufficient because most mission-based lenders were small, and that compliance would take time and resources. They also suggested that CDFIs unable to meet the 18-month deadline should get more time to comply. Two trade associations claimed that 18 months was insufficient even for larger credit unions, and

that most credit unions had to wait for vendors to create compliance products. One commenter requested more time because equipment finance companies are not accustomed to Federal regulators. A commenter requested more time for community banks because they would have to rely on software and vendors, not internal staff.

Other comments. One bank claimed that a short deadline would cause unintended errors, leading to actions against the bank. Another bank claimed that compliance costs will increase cost of small business and agricultural lending, affecting customer profitability. A different bank claimed that it needed more time because many borrowers may not have or want to provide this data, and that small business owners require education to be willing to provide data for this rule. Another said rushed implementation would lead to unintended consequences.

Two years. Many banks, credit unions, and trade associations requested a two-year compliance period. A joint letter from several trade associations suggested a compliance period starting the January 1, two full years after the calendar year of the effective date. A bank asserted that an 18-month period would make the rule an undue regulatory burden, costly, and not commensurate to any reporting benefit.

Scope and complexity. Several industry commenters asserted that lenders needed two years to understand the full scope and complexity of the rule. One argued that two years was warranted because the scope of rule expanded after the SBREFA process, adding additional data points pursuant to ECOA section 704B(e)(2)(H) and a visual observation and surname requirement. The commenter also argued that car dealers face open scope and coverage issues, specifically the involvement of dealers exempt from Bureau rulemaking. One lender asked for more time because the rule is a new regulatory paradigm, applying to multiple credit products and loan systems even within one bank. Another lender justified two years because small businesses need more time to understand the requirements of the final rule.

Policies and procedures. Several industry commenters requested two years to permit lenders to develop and test new policies and procedures.

Technology. Some industry commenters requested at least two years to comply to have enough time to deal with all of the steps related to purchasing or upgrading compliance software, including finding and onboarding vendors, conducting due diligence on vendors (some lenders said they were required to vet third parties), integrating compliance software with existing software, testing software, and reconfiguring platforms, all before the compliance deadline. Some noted that no vendors, at the time comments were submitted, offered compliance software for this rule. One bank asked for more time to ensure that their software differentiated between data reported under different overlapping regulations, including CRA, HMDA, and FinCEN's beneficial owner rule. Two industry commenters noted that lenders needed more time to accommodate core providers to adjust and update their software. One bank observed that, by way of example, its core provider only finished software six weeks before the end of the two-year compliance period for the beneficial owner rule.

Staff and training. Several lenders said they needed at least two years to adjust staffing and train staff. A number of banks stated that they would need to hire new staff. Some industry commenters stated that lenders would need to train staff on compliance policies as well as new software.

Two industry commenters argued that small financial institutions in particular needed more time. One trade association said that early stage online lenders would be burdened by the rule while seeking to expand access to credit for small businesses. A bank asserted that small banks needed two years because, unlike large banks, vendors and not internal staff would develop compliance systems.

Other regulations. Several industry commenters justified a two-year period based on the compliance periods for comparable data collection regulations, including HMDA. One bank said that this rule was no less complex than HMDA and that no less time should be given to comply. Another bank observed that the 2015 HMDA rule justified a two-year period in part on the new time-consuming and complex requirement to collect open-end mortgage data; the bank argued

that this rule was also new and complex. Two commenters noted that lenders' experience with HMDA showed how much time was needed to implement new systems, policies, procedures, data privacy, data security, staff training and compliance programs. One trade association noted that this rule would be harder for financial institutions with no experience with data reporting regimes such as HMDA.

Other comments. A trade association argued that the proposed 18-month period was inconsistent with the two-year period in the SBREFA Outline of proposals under consideration.

30 months. Some industry commenters requested at least 30 months to comply with the final rule, for several reasons.

Scope and complexity. Several banks asserted that the scope and complexity of the rule warranted a 30-month compliance period. One bank stated that each product had a unique application process and record system, and different personnel. Another bank stated that the rule would result in far-reaching, expensive changes across the bank's many branches, including front and back-end staff. Several banks requested more time because of the strain on dedicated resources. One bank said it needed more time to ensure compliance as to all its products.

Processes. Several industry commenters requested 30 months to comply to create or change processes and procedures in response to the rule, including new collection and reporting processes.

Software. Some industry commenters requested 30 months to have time to purchase or upgrade software. Several noted that software to comply with this rule does not yet exist. Commenters also noted that vendor management requires time, including conducting third-party due diligence, integrating compliance software with existing software, and training staff on new software. One bank said that 30 months would give vendors time to develop and test solutions, and banks time to evaluate these solutions. One software vendor asserted that vendors needed 30 to 36 months to work with business partners, such as form vendors, to coordinate, make changes, and distribute work to lenders. The commenter noted that it needed lead time to analyze, plan,

design, develop, test, document and distribute software changes to its financial institution clients before the compliance date. A bank stated that the collection of new data points would require extensive changes to software for applications, loan processing, core processing, data collection and fair lending, and that each update required testing and training.

Commenters offered specific concerns regarding small lenders and software. One trade association noted that core providers that small banks rely on do not now offer tools to comply with this rule. One bank, not a HMDA filer, expressed that it was at the mercy of its core provider regarding timing and expense. Another bank said it needed more time because it did not have ready access to its vendors because it was small compared to other lenders.

Several industry commenters requested 30 months to have time to hire new staff and/or train existing staff to comply with this rule. One bank noted that such training would involve staff from different areas of the bank, including commercial lending, compliance, underwriting, applications support, and business systems support. A community bank said that it would not have a dedicated team for this rule, but rather existing staff, including a loan operations manager, loan audit clerk, and compliance officer, with competing concerns, would meet monthly to work slowly through the rule. One bank noted the particular importance of training its lending staff.

A trade association requested a 30-month period on the grounds that a shorter period would result in flawed data the first few years, which could negatively impact analysis. Another commenter noted that small business lending is varied, involves more negotiation than consumer lending, and is therefore more difficult to capture consistent data for.

Some commenters justified a 30-month period on compliance periods for other complex regulations. Several lenders cited their experience with HMDA to justify a 30-month period. One noted that many HMDA software kits barely met deadlines, and significant updates were still needed after the deadline. Another bank, based on its experience with the TILA/RESPA integrated disclosure rule, stated that it would take longer than 18 months to comply with this rule.

Several lenders commented that they needed 30 months to comply because they had no experience with other data collection regulations such as HMDA or CRA.

Two banks expressed a concern that an 18-month period would hamper their ability to serve customers. One also said it would be challenging to comply with the new rule while still serving customers and maintaining day-to-day bank operations. Another said that to ensure data consistency, the adoption of new processes may produce less access to credit.

Some commenters supported a 30-month period for specific small business lenders. Some stated that 18 months was not sufficient for small and community banks to review, develop and implement collection systems. A number of smaller lenders and a trade association stated that while large lenders have dedicated compliance staff, smaller banks need more time because they rely on vendors and software. One bank stated that regulations should target large and not small banks, that rules often apply to lenders regardless of size, and that the Bureau should set a longer period for all lenders for the sake of small ones. A bank emphasized that a 30-month period would give smaller community banks time to prepare processes that work for both the bank and its customers.

A number of mission-based lenders stated that small CDFIs had limited capacity and needed more time to develop compliance systems. Several commenters stated that mission-based lenders should be able to opt-in to comply in 18 months if they were ready to do so.

A trade association expressed concern that banks it represented would have difficulties with the proposed 18-month period, especially for rural lenders with no HMDA experience, which would have to create new processes.

A software provider identified a sequence of factors justifying a 30-month period. First, this rule would require new data collection fields to collect, store, and report data. Such changes could only begin when this rule is finalized. After software changes are distributed, lenders must test software, implement procedural changes, and train employees on system updates prior to compliance date. Further, some clients may operate on different releases of software so multiple

versions will have to be supported, requiring changes for multiple versions. The commenter requested more time to address these steps in an orderly fashion.

Several other comments supported a 30-month period. One bank noted that the time is needed to resolve unanticipated implementation issues. Another bank supported a 30-month period to match compliance examination cycles. A third bank argued that a 30-month to three-year period was not much more time than the proposed 18-month period, given that the Bureau justified its proposal on the 10 years that elapsed since the passage of the Dodd-Frank Act.

Three years. A plurality of commenters requesting a longer compliance period than proposed suggested three years to comply, including a wide variety of trade associations, as well as midsized and smaller banks, credit unions, and agricultural lenders.

General comments. Several commenters stated that a three-year period would permit lenders to make changes to achieve the statutory purposes of section 1071. One lender suggested a compliance date of January 1, 2026. A trade association asserted that the compliance period should be three years and should start on January 1 on the grounds that a partial year of data would not provide meaningful benefits and would be ignored because data users would want to make year-over-year comparisons.

Several industry commenters favoring a three-year period argued that it was inappropriate for the Bureau to use its 10-year delay in issuing this rule pursuant to the Dodd-Frank Act as grounds to burden lenders with a short compliance period. Two bank trade associations asserted that it was arbitrary and unreasonable for the Bureau to propose an 18-month period to comply with the broader requirements of the NPRM compared to the SBREFA outline of proposals under consideration, which contemplated a two-year compliance period.

Sequential changes. Two trade associations noted that compliance steps in sequence, each step dependent on the completion of prior one—vendors create new data collection and reporting systems, lenders develop and test procedures for these systems, staff are trained on the systems and procedures, then further testing may identify issues that require revisions and iterating again

before the deadline. One commenter stated that, ideally, at least six months before the compliance date, lenders would receive software that can be tested and validated.

Scope and complexity. Some industry commenters based a three-year period in part on the need for time to understand and interpret this rule. Several commenters noted that this new rule involves the collection of new data and would be a "sea change" for small business lenders, especially those with no experience with HMDA or data reporting. A trade association stated it did not know how much more time to request without knowing the content of the final rule. Another trade association stated that a three-year period would give the Bureau time to educate and support lenders as they implement this rule, based on the experience with the Paycheck Protection Program.

Many banks and several trade associations cited the scope and complexity of the rule to justify a three-year period, specifically, that the rule would cover many different products with different processes. Two commenters requested a three-year period because compliance involves changes across many business units, systems, and small business lending channels. A group of trade associations asserted that the rule would require the collection of 21 data points, the separate maintenance of demographic information, and the firewall. Two trade associations stated that compliance with this rule would be significant and time-consuming. One bank noted that small business lending involved a wider variety of solutions than consumer lending. One bank noted that the rule as proposed would have required the reporting of 6,500 loans, 44 percent more than its 4,500 CRA-reportable small business loans.[836]

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[836] This comment highlights the extent to which this final rule will greatly improve the comprehensiveness of application-level small business lending data available for analysis, compared to the data available under the status quo, such as current CRA regulations. The CFPB has worked closely with the OCC, FDIC, and Federal Reserve Board to harmonize this rule with those agencies' proposed CRA amendments; more comprehensive small business lending data from this final rule can lead to better analysis of business and community development needs in the context of the amended CRA regulations. *See, e.g.*, Bd. of Governors of the Fed. Rsrv. Sys.; Fed. Deposit Ins. Corp.; and Off. of the Comptroller of the Currency, *Treasury, Community Reinvestment Act, Joint Proposed Rule*, 87 FR 33884, 33941 (June 3, 2022) ("[T]he agencies propose using section 1071 data, once available, to develop market benchmarks."); *id.* at 33998 ("In the longer term, the CRA's data collection and reporting requirements for small business loans and small farm loans would be eliminated and replaced by the CFPB's section 1071 data collection and reporting requirements.").

A number of industry commenters and a business advocacy group justified a three-year period to create, update, and test non-software processes and policies. Some commenters stated that lenders would need new procedures or workflows for applications and data collection. One bank stated that existing workflows would change to align with firewall. Several commenters stated that lenders would need to overhaul or obtain new forms and applications after the final rule. Other commenters claimed not to use written applications for small business and farm loans. One bank stated that it needed to develop a high-touch data collection system because of its variety of small business lending products. One trade association noted that lenders must wait for the final rule to change their policies and procedures, and that clarifications and questions regarding the rule would take months to address, especially new proposed provisions not discussed at SBREFA. One bank said it needed to establish controls and processes to train staff. A trade association stated lenders needed time to assign responsibility across departments, including compliance. Another bank observed that it would take time to receive direction from compliance vendors.

Software. Many comments supported a three-year compliance period based in part on technological issues. Some industry commenters justified a three-year period on the need to automate processes and update small business lending applications. One bank stated that it needed to build data collection procedures for its manual lending processes, and that small business lending is not automated to same extent as consumer lending. One bank stated that many lenders report HMDA and CRA data via a manual process, and this will need to be automated to collect the significantly expanded data under section 1071.

A number of industry commenters stated that lenders would need time to choose, onboard and integrate new software. Several banks said no existing software complies with this rule, and one bank stated that many providers were waiting for this rule to be finalized and would still take time to make a proven and accurate solution available. Some lenders and trade associations noted that many lenders need to find and vet vendors before buying a software system. Some industry

commenters stated that lenders do not have technology in place to collect data for the rule. One bank offered a contrary view, reporting that its software vendor was already working on software to comply with this rule. A large bank stated that it would need additional time to build compliance software itself.

One bank said that it had no relationship with vendors and no data collection programs. A trade association stated that this rule would require significant infrastructure investments for credit unions. Another bank that it needed addition time to implement software before updating its processes. A trade association stated that lenders needed software before training staff. A group of trade associations stated that the integration of compliance systems would be an iterative process of testing, finding and fixing problems, and testing again, all across multiple lines of small business lending products. Another commenter identified a sequential process to purchasing software, including selection, installation, training and testing.

Several commenters offered other details on why their technology requirements justified three years to comply. One bank stated that it needed at least 24 months to implement new software, and 12 months more to have accurate reporting. Another bank stated that 18 months suffice for vendors to develop and install a data collection and reporting system but would not suffice for lenders to implement the software and train staff. A different bank stated that it searched for 1071 software for over two years and would need 18 months to integrate the software with other systems. Another bank said it needed more than two years to develop, test, and implement systems of this scope. One bank stated that its vendor would take six months to upgrade software after the final rule is released. Yet another bank needed 18 months for software to become available, vetted and installed, and 18 months more to train staff. A trade association claimed that lenders needed more time because they decide what technology to build one to two years in advance, and more time was needed to take into account “blackout” periods, during which technology builds stop eight weeks before calendar year end, which the commenter believed could add up to four months to timeline to comply with this rule.

A number of industry commenters stated that lenders needed time to wait for vendors to prepare new software or update existing software, and time to test it. Several industry commenters and a business advocacy group also stated that lenders needed more time to onboard and test software.

A number of lenders, particularly small and mid-sized banks, requested more time to comply because they lacked control over the speed and preparation of third-party software vendors. A trade association for community banks stated that small banks depend more on vendors to develop new systems. Several commenters stated that core providers, particularly relied upon by community banks, need more time to adjust to collect new data points. That is, community banks must wait for core providers to update their systems, test updates and resolve problems, after which compliance vendors can develop systems to integrate with the core system. The same commenter stated that community banks that use a platform, not a core provider, to originate loans must ensure that, once their core provider has built the fields for all of the data points, each is mapped individually to the small business lending platform, requiring the creation of multiple APIs, which would result in more costs and delays.

Smaller lenders described complications they would face in obtaining software for this rule. One bank stated that lenders needed time to conduct due diligence on these vendors. Another bank stated that many financial institutions may make demands on the same vendors at the same time, slowing implementation. A third bank stated that covered financial institutions would compete for software implementation dates to comply with this rule, and that the smallest lenders will be at the greatest disadvantage for getting software in time to comply with this rule. Another commenter stated that community banks face higher costs to buy compliance software.

Two trade associations asserted that three years would suffice for credit unions to work with vendors to revise systems for this rule. Another trade association stated that credit unions required more time than 18 months because they are at the mercy of vendors and must train staff and update forms and processes.

A business advocacy group stated that the rule would result in significant, time-consuming changes to reprogram software because online lenders do not currently collect demographic information so as to avoid accessing data that would make intentional discrimination possible.

Staffing. A number of commenters, including a number of lenders and trade associations, justified a three-year compliance period on the time lenders needed to hire and/or train existing staff to collect, verify, and report data for this rule.

Some industry commenters stated that lenders would have to hire new staff for data collection, verification, and reporting. One bank stated that time would be needed to determine staffing needs. Two smaller banks stated that they would need an additional employee to collect and verify data for this rule. A State bankers association said that lenders needed more time because they and their small business customers were struggling with the lasting effects of the pandemic and labor market shortages.

Many commenters, including a number of lenders and trade associations, justified a three-year compliance period in part on the need to train staff, both new and existing employees, to comply with the rule. Several banks stated that they could not start to train staff until software and processes exists for compliance with this rule; one bank said that 18 months was not sufficient to do this well.

Several commenters said that lenders would need to train a variety of staff on compliance and software for this rule, including loan officers and customer-facing staff as well as compliance, risk, legal, and technology employees. Further, several banks and a business advocacy group observed that lenders needed to train staff on what to collect, including data points for this rule. A group of trade associations noted that some lenders are not accustomed to collecting data to the accuracy standards of the Bureau, and that staff familiar with HMDA and CRA would require more training not to be confused with overlaps with this rule.

Several industry commenters noted that the rule would require greater staffing resources. One bank said it would increase staff hours to collect and review data, which would impact operations. Another bank stated that the biggest hurdle to compliance would be allocating employee resources. Yet another bank noted that staff training is time consuming. One bank noted that it needed several months to train its 3,000 employees. A credit union trade association stated that a tight labor market, global pandemic, and economic crisis make updating services harder.

Some commenters stated that they needed three years to comply to communicate changes caused by the rule to consumer to minimize disruption. Several commenters noted the need to accustom small business applicants to the collection of ethnicity, race, and sex information. One bank stated that borrowers may resist this type of inquiry. Another bank said that customer education for this rule was important, that many customers already believe that lenders ask for too much information, and that customers may be driven from traditional banking to less safe products as a result.

Access to credit. Several commenters supported a longer compliance period on the grounds that financial institutions might need to pause or stop their small business lending until they were in compliance with this rule, hurting vulnerable small businesses that section 1071 was intended to benefit.

Data accuracy. A number of commenters stated that hasty implementation of the rule would result in data errors, bad data quality and bad analysis based on that data. A group of State banking regulators asked the Bureau to consider a longer compliance period so that financial institutions can better prepare to compile and accurately report data. Several banks and trade associations asserted that rushed implementation generally would make data in the first few years after the compliance date flawed, incomplete, or unusable, limiting the usefulness of the data for fair lending and business and community development purposes.

Some commenters asserted that more time to comply would make data more accurate, or otherwise justified a three-year compliance period on the grounds of data accuracy. Several commenters stated that rushed compliance would result in errors which, in turn, would lead to Bureau actions against lenders as well as unnecessary public scrutiny, ultimately harming small businesses that section 1071 was intended to help. One bank stated that the implementation of policies and procedures, acquisition of software, and training of employees would take more than 18 months to implement, but that three years would suffice to ensure the collection of reliable data. Another bank stated that data will be error-laden in early years of collection until systems can be refined. A different bank stated that the proposed 18-month period will likely lead to flawed initial data reporting and flawed analyses. A trade association asserted that a three-year period more closely adhered to the expectation in the statute. Another trade association stated that a compliance period of fewer than three years would risk the viability of CDFI lending programs.

Many industry commenters requested a longer compliance period because many lenders lacked experience with data reporting regulations, such as HMDA or CRA. Specifically, a number of lenders and trade associations stated that lenders not subject to HMDA reporting needed three years to comply because they will start from scratch without existing vendors, processes or procedures to adapt to small business lending or train staff. A group of trade associations stated that banks that do not report HMDA/CRA data will meet vendors for first time and will not have experience with testing process. One bank stated that for lenders with limited staffing resources and no existing reporting mechanisms, 18 months to comply is unreasonable. Another bank stated that many lenders have not had to collect this amount of data.

Other regulations. A number of commenters compared the proposed compliance date with those of other regulations. One said that the proposed 18-month period was short compared to those of other complex rules. A bank said, based on past regulatory reporting rollouts, it would

take three years to comply with this rule. Another commenter stated that historically, short implementation periods for complex rules are not feasible.

Some commenters compared the proposed 18-month period to comply with a new, complex rule with the more than two years that lenders had to comply with the 2015 HMDA rule, which only modified existing requirements. Commenters pointed out that, unlike the 2015 HMDA rule, this rule requires the construction of new systems for a new data collection regime rather than building on systems already in place. One commenter encouraged the Bureau to consider a period of three years or longer, especially to ensure that smaller lenders would have time to comply. A large bank pointed out that, unlike HMDA, this rule covers numerous credit products offered by lenders to small businesses, including loans, lines of credit, and credit cards, each of which uses a unique application process and system of record, and different personnel.

Other lenders and trade associations expressed concern about the proposed compliance period based on their experience with HMDA, noting that vendors were not ready before the initial deadlines established by the Bureau, which then had to provide leniency related to data accuracy for HMDA data, as well as issue multiple corrections and clarifications to HMDA rule since 2015. Several commenters noted that the 2015 HMDA rule took several years and resulted in Congress amending HMDA in 2018. One bank noted that, as with HMDA, lenders will spend many hours reviewing data to avoid errors and resubmission.

Commenters also compared the proposed § 1002.114(b) with compliance periods of other Federal rulemakings. One bank said that, based on its experience with the CRA, this rule would require more than 18 months. Several commenters stated that the experience with the TILA/RESPA integrated disclosure rule shows that 18 months were insufficient for major changes. One commenter requested three years to comply based on its experience with that same rule, noting that vendors sought clarity on that rule to make and deploy solutions, and the Bureau answered questions until the effective date, making implementation challenging. A trade

association observed that industry had two years to comply with the FinCEN's customer due diligence rule,[837] which it said was a simpler regulation.

Two industry commenters took the opposite view, noting that lender experiences with past regulations are irrelevant. A bank said that a successful rollout would take more than 18 months even if a lender was experienced with data collection regulations. A trade association stated that even current HMDA reporters would find compliance with this rule challenging because of the differences between small business and agricultural lending and mortgage lending, specifically because small business lending involves different loan platforms, small business lending units do not offer a "menu" of standardized credit products, and clear application procedures do not exist because small business customers are unique.

Industry-specific rationales. A number of industry commenters suggested rationales specific to their industries to justify a three-year compliance period. An agricultural lender stated that many FCS lenders, community banks, and small credit unions would incur great expense if required to obtain new technology and train new employees within 18 months. A trade association noted that a compliance period of less than three years would burden CDFIs.

Some commenters, including a trade association and a number of banks, stated that small and community banks needed three years to comply rather than 18 months. One commenter emphasized that stakeholders it consulted stated that an 18-month period was inadequate, and that small lenders may take three years to comply. A bank emphasized that while larger banks have more resources for compliance, small banks will struggle without more time to comply and will be disadvantaged. A trade association noted that smaller banks that are not HMDA reporters would find a new data collection regime challenging. A group of State banking regulators stated that small lenders would face particular challenges early on in implementation. A trade

[837] FinCEN's customer due diligence rule requires financial institutions to have procedures for each of its legal entity customer to identify each 25 percent natural person who owns more than 25 percent of the legal entity as well as one natural person executive of the legal entity. Fin. Crimes Enf't Network, *Customer Due Diligence Requirements for Financial Institutions*, Final Rules, 81 FR 29397 (May 11, 2016).

association and a bank noted that small banks depend on vendors to develop systems. A bank stated that small and mid-sized lenders are a lower priority for vendors, which would erode their participation in small business lending. Two banks noted that small and community banks would struggle because of shortfalls in staffing and technology.

A trade association stated that mid-sized banks were unlikely to stand up systems in 18 months despite best efforts, based on the experience of lenders with other data reporting regimes.

A business advocacy group stated that innovative start-ups, small banks, and credit unions would struggle to implement the rule given the resources at their disposal.

A group of State banking regulators requested a longer compliance period, in part, so that the Bureau could "demonstrate" its ability to collect data from nondepository institutions subject to the rule.

A joint comment from two auto dealer trade associations requested a three-year period because they said the proposed 18-month period is untenable for dealerships in general and small dealerships in particular, which must coordinate compliance efforts with credit application system providers, vendors, and finance sources, after which systems must be updated and tested, and staff must be trained.

More than three years. One commenter said that the compliance period should be three to five years because the bank would have to make hard decisions on staffing and its lending capacity due to the additional reporting measures, and may exit the market. The commenter expressed concern that a short implementation period would force the bank to exit the small business lending market and hurt its current customers.

Tiered compliance. Some commenters supported some kind of phased or tiered compliance under which larger lenders would have earlier compliance dates and smaller lenders would have later compliance dates. Many industry commenters requested tiered compliance dates in addition to, or as an alternative to, a longer single compliance period for all lenders. Two commenters suggested tiered compliance starting not less than three years after the final rule is

issued because the process of implementation would raise issues that require time and deliberate action to frame and solve.

Industry commenters justified tiered compliance on a number of grounds, including the scope and complexity of the rule, as well as the need for smaller lenders to implement and test automated collecting and reporting. One trade association observed that some lenders needed time to test systems to ensure accurate collection and reporting, and asserted that with an 18-month period, a bank would have just six months to collect data to do a trial run with one year of data before the compliance date.

Many commenters, including lenders and trade associations for State banks and credit unions, argued for tiered compliance because of the need to purchase or develop new software to comply with the rule. Industry commenters also pointed to other factors requiring a longer compliance period, include the time to find vendors, time to develop software, time for vendors to plan and execute network changes, and time to train and hire staff to integrate systems with software for this rule.

Two industry commenters emphasized the dependence of smaller lenders on third-party vendors to justify tiered compliance—that small lenders would need time to evaluate lenders and complete due diligence, that vendors would need time to develop new compliance software, and that lenders would need time to integrate and test software with existing systems.

Several trade associations emphasized that many lenders needed the additional time that tiered compliance would provide to permit them to hire and/or train compliance staff, and train existing lending staff, to comply with the rule.

Two trade associations suggested that tiered compliance dates were necessary for credit unions to educate their members and allow for the development of member notifications.

A number of commenters justified tiered compliance based on industry experience with complying with other regulations. Several commenters noted lenders had more than two years to comply with the 2015 HMDA rule, which amended existing regulations, while this rule is new

and complicated. Several trade associations pointed to industry experience with Financial Accounting Standards Board's Current Expected Credit Loss rule as an example of rushed implementation; after initially setting a single compliance date, regulators later staggered implementation, requiring smaller institutions to comply later, recognizing high one-time costs and advantages large institutions had in negotiating with vendors.

A bank justified tiered implementation on the grounds that hasty implementation would lead to inaccurate data in the first few years of the rule.

Two trade associations stated that phased compliance is important for lenders not experienced with data collection rules to give them time to build infrastructure. One commenter noted that lenders that are not federally insured depositories in particular need more time to start training programs from scratch, and that it would be hard for such lenders to find and hire enough staff with coding expertise without regulatory data systems in place. Another commenter said that banks that do not comply with HMDA would need more time to comply with this rule than money-center banks that have HMDA experience.

Smaller lenders and trade associations justified longer compliance dates for smaller lenders on various grounds. One bank stated that smaller lenders could learn from the earlier compliance rollouts of large banks. Others said that tiered compliance would give smaller lenders more time to resolve unanticipated issues.

Several commenters suggested several compliance dates, tiered by lender type. A trade association suggested that smaller lenders should have a later compliance date to learn from largest banks, and to have time to resolve unanticipated issues. In particular, the commenter said that rural and underserved communities need more time than money-center banks.

Amongst commenters that supported tiered compliance dates, there was a variety of comments on how to determine which financial institutions should report later. Two commenters requested tiered or staggered compliance in any manner, whether by transaction type, lender type, or lender size. A community bank asked that the Bureau tier compliance dates based on

asset-size or some other factor to provide a longer compliance period for community banks. One CDFI lender requested that the Bureau extend the compliance date to at least 30 months for mission-based lenders.

Two trade associations and a large credit union supported tiering based on loan volume. One of the trade associations asked for tiered compliance with the earliest date starting three years after the final rule is issued, on the grounds that credit unions often have little bargaining power with vendors and are often the last to receive system upgrades.

Several lenders suggested two compliance dates, with tiers set by asset size. One lender suggested two tiers, giving more time to lenders with less than $2 billion in assets because smaller institutions have smaller compliance and information technology staffs. The lender did not place much weight to the $2 billion threshold it proposed other than it would match "small lender" definitions in other areas of consumer financial law.

Several industry commenters suggested two compliance date tiers. One bank suggested giving smaller lenders 24 to 36 months more than large banks. Two banks suggested giving smaller lenders one year more than larger banks, which they argued could reduce competition for software installation, implementation help, and training, which in turn could reduce costs and resource issues for small lenders. These commenters believed that smaller lenders could learn best practices from larger banks. A trade association said that large lenders ($10 billion or more in assets), should have two years to comply, while smaller lenders should have three years. The commenter stated this manner of tiering compliance dates would allow the Bureau to collect a large amount of data earlier, and would also give vendors more time to develop and integrate compliance products.

Several commenters suggested three compliance date tiers by asset size. A trade association suggested that the Bureau adopt three compliance tranches, giving large lenders one year to comply, medium-sized lenders two years, and small lenders three years. The commenter suggested the third tier should include the smallest lenders, community banks, and lenders to

small businesses that the Bureau trusts and knows to be successful. Another bank proposed giving lenders with $5 billion or more in assets 18 months to comply, lenders with $1 billion or more 24 months to comply, and banks with $1 billion or less 30 months to comply. One bank suggested three tiers by size, without defining size, and proposing that the largest lenders comply in the first year, mid-sized lenders comply in second year, and small lenders comply in the third year. The commenter justified the earliest compliance date for large lenders because of the greater staff expertise, capacity and resources that these institutions had to comply with the rule.

Several commenters opposed tiered compliance dates. The industry commenters asserted that this rule represents a major change for small and large lenders alike, from a ban on collecting protected demographic information data to requiring collection of it for small business loans. These commenters claimed that no vendors have a compliance software ready for this rule, that all lenders need sufficient time to understand the content of this rule, change processes, build and test systems, train employees, and implement procedures and controls. These commenters warned that a failure to give financial institutions of all sizes adequate implementation time will limit access to small business credit, which negatively impact the economy. A community group opposed tiered compliance dates on the grounds that the proposed 18-month period was sufficient for all institutions, and that lenders had from the release of the NPRM in September 2021 to begin preliminary planning to comply with this rule.

Final Rule

The Bureau is finalizing § 1002.114(a) as proposed. The small business lending data collection rule will become effective 90 days after it is published in the *Federal Register*. The Bureau confirms, as requested by a commenter, that this final rule does not apply retroactively, including for funds drawn after the effective date where the loan was originated before the effective date. See also final comment 114(c)-2, which makes clear that covered applications received prior to a financial institution's compliance date, but final action is taken on or after that date, are not required to be reported.

The Bureau is not finalizing § 1002.114(b) as proposed, which would have required compliance with the final rule approximately 18 months after publication of the final rule in the *Federal Register*. Instead, the Bureau is finalizing a tiered approach to compliance dates. Specifically, the dates by which covered financial institutions are initially required to comply with the requirements of this rule are specified in four provisions:

First, under § 1002.114(b)(1), a covered financial institution that originated at least 2,500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning October 1, 2024. This compliance date is 18 months after the Bureau's issuance of this final rule.

Second, under § 1002.114(b)(2), a covered financial institution that is not subject to § 1002.114(b)(1) and that originated at least 500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning April 1, 2025. This compliance date is 24 months after the Bureau's issuance of this final rule.

Third, under § 1002.114(b)(3), a covered financial institution that is not subject to § 1002.114(b)(1) or (2) and that originated at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning January 1, 2026. This compliance date is 33 months after the Bureau's issuance of this final rule.[838]

Finally, under § 1002.114(b)(4), a financial institution that did not originate at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 but subsequently originates at least 100 such transactions in two consecutive calendar years shall comply with the requirements of this subpart in accordance with § 1002.105(b), but in any case

[838] The Bureau considered giving Tier 3 financial institutions 36 months to comply with the rule, as requested by many commenters. This would have resulted in a Tier 3 compliance date of April 1, 2026. However, the Bureau believes that there is no material difference between the 3 years (36 months) requested by certain commenters and the 33 months provided to covered financial institutions subject to Tier 3.

no earlier than January 1, 2026. This compliance date is 33 months after the Bureau's issuance of this final rule.

In addition, the Bureau has added a number of provisions to the commentary accompanying § 1002.114. New comment 114(b)-1 explains that the applicable compliance date in § 1002.114(b) is the date by which a covered financial institution must begin to compile data as specified in § 1002.107, comply with the firewall requirement of § 1002.108, and begin to maintain records as specified in § 1002.111. In addition, the covered financial institution must comply with § 1002.110(c) and (d) no later than June 1 of the year after the applicable compliance date. New comment 114(b)-2 provides that when the compliance date of October 1, 2024 specified in § 1002.114(b)(1) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from October 1 to December 31, 2024. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirement of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2025. New comment 114(b)-3 addresses informal names for compliance date provisions, providing for informal, simplified names to facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3). Under this new comment 114(b)-3, Tier 1 refers to the cohort of covered financial institutions that have a compliance date of October 1, 2024 pursuant to § 1002.114(b)(1), Tier 2 refers to the cohort with a compliance date of April 1, 2025 pursuant to § 1002.114(b)(2), and Tier 3 refers to the cohort with a compliance date of January 1, 2026 pursuant to § 1002.114(b)(3). New comments 114(b)-4(i) through (vii) provide examples of various scenarios that illustrate how to determine which compliance date specified in § 1002.114(b) applies to financial institutions.

The Bureau is adopting § 1002.114(b) pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071.

The Bureau is adopting a tiered approach to compliance for a number of reasons. The Bureau believes, all else equal, that the statutory purposes of section 1071 are better served by an earlier compliance date because it will result in the earlier publication of data by the Bureau and use by the public.

Most industry commenters that addressed the issue of the compliance date opposed § 1002.114(b) as proposed, and requested more than 18 months to comply with the rule. Views varied widely on how much more time was necessary. While commenters suggested compliance periods of 24 months, 30 months, three years, and in one case 3.5 years or more, a plurality of industry commenters supported a single compliance date of three years for all lenders. A sizable number of commenters also supported tiered compliance dates based on the size of the lender, as an alternative to single, compliance period longer than 18 months.

The Bureau gives credence to a set of three major factors commenters cited in requesting additional time, beyond 18 months, to comply with the rule (whether from 24 months to 3.5 years): the need to purchase or upgrade compliance software (including time to find and perform due diligence on vendors, purchase software, integrate compliance software with other systems, and test all of these); the need to create or adjust policies and procedures to comply with the rule; the need to train and, in some cases, hire staff to use the new software and implement the policies and procedures to collect data. Commenters did not clearly tie these factors to precise periods of time.

Many commenters identified the sequential and iterative nature of these major factors. Generally, a lender must purchase and integrate new software before developing new policies and procedures concerning the use of the software, and the lender must have new policies in place before hiring and training staff to implement the software and follow the new processes.

These processes are also iterative in that, in testing software, procedures and staff training, lenders may identify errors in software, processes, or training, and need to make adjustments that may then require additional changes in other aspects of the overall compliance program or system.

The Bureau believes from comments received, and consistent with feedback received in SBREFA, that smaller financial institutions may face particular difficulties that justify providing them additional time to comply with the rule. Several industry commenters expressed their concern that they were at the mercy of their software vendors and other third-party providers and could not start compliance steps, such as establishing new policies and training employees, in the absence of such software. By contrast, one large bank requested more time to comply to develop in-house compliance software.

Other commenters noted that with a shorter compliance period, vendors may be overloaded with requests from a market of financial institutions attempting to comply at the same time with this rule. Several commenters cited their experience in attempting to obtain the services of third-party vendors to comply with other rules such as the TILA/RESPA integrated disclosure rule and the HMDA 2015 updates, and observed that vendors tended to service larger lenders first, leaving smaller lenders with little time to integrate software, update policies and procedures, train and hire employees, and test all of these systems.

Compounding these issues, many commenters—generally smaller lenders, some of which were rural or community financial institutions—stated that they did not have previous experience with data collection rules, such as HMDA or CRA. The Bureau is aware that this rule may be the first contact that many covered non-depository institutions have with a Federal data collection regime. Further, a substantial number of commenters noted that they used manual or analog systems and claimed that they would have to automate their operations to comply with the rule. The Bureau believes that the increased originations threshold under in final § 1002.105(b) may

preclude many financial institutions that expressed concern that they would have to automate their processes from having to report data at all.

All of these factors suggest that smaller financial institutions would face particular difficulties in complying with this rule within 18 months. The comments suggested a variety of potential consequences stemming from insufficient time to comply. Some suggested that financial institutions would exit the market, that they would face greater costs to comply more quickly (for instance, a financial institution that might be able to use existing staff over the course of three years may need instead to hire additional staff to comply with the rule in 18 months), and/or that they may submit inaccurate or data of lesser quality to the Bureau than they would have if given more time to the comply.

The Bureau does not believe that financial institutions would exit the small business lending market because of the compliance date, but rather believes that many smaller institutions may simply find it challenging to comply within the 18-month compliance period. The Bureau gives some credence to the concern that a shorter compliance period may result in somewhat higher, though not significant, costs that in turn may be passed on to customers. The Bureau believes that smaller financial institutions, especially those unaccustomed to data collection rules, may stay in the market but may be unable to comply within 18 months for reasons at least partly out of their control. The Bureau believes, based on comments received, that generally smaller financial institutions are more likely to be at the mercy of vendors that may prioritize larger customers.

While a plurality of commenters requested a single, three-year compliance period for all lenders, the Bureau does not believe that such a change is justified. The Bureau received comparatively few comments from large banks regarding the sufficiency of an 18-month compliance period. One large bank stated that it would require additional time to develop its own compliance software. A trade association requested three years to comply with the rule on the grounds that larger lenders have more complex compliance systems to establish and operate

because such lenders often had different divisions dedicated to different small business lending products. The Bureau does not believe, given the dearth of comments on this point, that the quality of data from large financial institutions is compromised by an 18-month compliance period. The Bureau thus believes that it would not be consistent with the statutory purposes of this rule to provide large financial institutions a longer compliance period.

As a result, the Bureau believes that tiered compliance dates balance several factors at once; that the statutory purposes of section 1071 are best advanced by, in aggregate collecting as much data as possible, as accurately as possible, as soon as possible; and that a system of tiered compliance dates accomplishes this better than a single 18-month compliance period.

In part, the Bureau believes that is accomplished by maintaining the existing 18-month compliance period for the largest-volume financial institutions that are likely to report the bulk of the application-level data, and are likely to do so accurately. These financial institutions are more likely than smaller and even mid-sized institutions to have the resources and experience to, with relative celerity, upgrade or purchase compliance software, create pertinent policies and procedures, and train or hire existing staff. The Bureau believes that the experience that many of these larger-volume financial institutions have with other Federal data collection regimes, such as HMDA or CRA, gives them the ability to adapt to this rule within the time given to collect and submit data.

Further, by maintaining the 18-month compliance period for larger-volume financial institutions in Tier 1, collection and reporting of most small business lending data will begin quickly. That is, covered financial institutions will report to the Bureau the vast majority of small business lending applications—approximately 90 percent of the applications covered by this rule, as detailed in part IX.D.2 Table 4—on the timeline proposed in the NPRM.

The Bureau also believes that the statutory purposes of section 1071 are best advanced in aggregate by permitting small and mid-sized financial institutions, by volume of originations, to have more than 18 months to comply with this rule. As discussed above, the Bureau believes,

based on the large volume of comments and the rationale provided by them, that an 18-month compliance period increases the likelihood that small and mid-sized financial institutions, for a variety for reasons that are unique to them, will have difficulty collecting and reporting data, and that the data reported would be more likely to be inaccurate or unreliable. Further, the Bureau believes based on the comments it has received, feedback received in SBREFA, and its own observations about the small business lending market that the smallest financial institutions, especially those that do not already report data to Federal agencies, have more manual processes and relatively few employees, which increases the likelihood that they submit unreliable and inaccurate data to the Bureau.

The Bureau believes that tiered compliance dates will improve the accuracy of data from smaller and mid-sized financial institutions. Later compliance dates for smaller and mid-sized financial institutions will mean they do not have to compete with larger financial institutions for the time and attention of software and compliance vendors. The Bureau understands that while the largest lenders are more likely to rely on in-house capacity to comply with the final rule, many other financial institutions with loan volumes likely to place them in Tier 1 may still rely on software vendors and may compete with smaller-volume financial institutions for the time and attention of software vendors. With a longer timeframe to comply, smaller and mid-sized financial institutions might also be able to avoid expedited and more costly overtime and overflow work, and would have time to learn lessons from the compliance experience of larger institutions.

Regarding the criteria for tiering, most commenters who addressed the issue suggested asset size as the criteria to determine which financial institutions should comply later. The primary virtue of that approach is its simplicity—most depositories know their total assets. However, many financial institutions that will be covered by this rule are nondepository institutions that may originate a large volume of loans but may have relatively few assets compared to depository institutions. Conversely, some depositories with a large volume of assets

may have a low volume of small business loans. A tiering approach based on assets may require early reporting by large depositories with little interest in small business lending and exclude large-volume small business lenders with comparatively few assets. The Bureau does not believe that this approach would be as consistent with the statutory purposes of section 1071 as a criterion for tiering directly tied to a financial institution's relative activity in the small business lending market. As a result, the Bureau believes that the number of annual originations of covered credit transactions for small businesses should be the basis for tiering compliance dates

On the number of tiers, commenters tended to favor two tiers rather than three. The Bureau believes that the statutory purposes of the rule are better served by three tiers. The Bureau determined from reviewing all of the comments that there were meaningful differences in the compliance challenges faced by smaller volume, middle-volume, and large-volume financial institutions. The Bureau believes that three compliance dates will help vendors better manage their capacity to serve their customers. The Bureau also believes that three compliance dates may also help the Bureau be more responsive to industry during the transition period. By extending the implementation period, the Bureau will be better able to provide more tailored attention to smaller and mid-sized financial institutions.

General responses to comments received. The Bureau observes that the vast majority of comments it received identified specific factors or concerns regarding compliance with this rule that justified a longer compliance period. Nearly all of these comments also identified multiple factors or steps in the process of complying with this rule that justified a compliance period longer than the one proposed in the NPRM. As noted above, the Bureau observes that these comments, with very few exceptions, did not quantify specific amounts of additional time attributable to each specific factor or step in the compliance process that were identified. For instance, a frequent industry comment might have requested a three-year, rather than 18-month, compliance period, citing the need to purchase and implement software, create processes, and

train staff, without attempting to attribute the additional 18 months to each of these three steps in the compliance process.

Requests to publish data quickly and frequently. Regarding requests to collect and publish small business lending data as soon as possible, the Bureau agrees that the absence of these data will continue to hinder vital capital flow to small businesses, as small business and community development needs cannot be effectively identified without this data. However, the Bureau must conduct its privacy analysis, so the publication of data will not immediately follow its collection. Regarding the request to publish data as soon as possible, and to publish data every six months so that stakeholders can monitor progress and utilize data, the Bureau is not adopting a 6-month reporting requirement because requiring financial institutions to provide multiple data submissions a year may be administratively challenging for both financial institutions to comply with and for the Bureau to process. However, the Bureau may consider publishing aggregate data more often than once a year in the future if administratively feasible.

Less than 18 months. The Bureau has considered comments asserting that 18 months is too long a compliance period. While some financial institutions could comply with this rule in less than 18 months, the Bureau believes that most financial institutions appear unable to, given the volume and intensity of comments requesting more time. The Bureau believes a one-year compliance period would be inconsistent with the statutory purposes of the rule because it appears that such a short period could be costly for financial institutions and result in inaccurate data. The Bureau agrees that mission-based lenders (or any other lenders) ready to report within 18 months should be permitted to do so, and the rule permits them to do so.

More than 18 months. Regarding the comments requesting a compliance period of more than 18 months, the Bureau agrees in part. As discussed above, the Bureau believes that many lower-volume financial institutions, with either lower assets or a low volume of small business lending and thus potentially fewer resources dedicated to that line of business, may need additional time to comply with the rule for the reasons provided above.

Regarding comments concerning resources, the Bureau agrees in part. The Bureau does not believe that more time is justified solely because the rule may cause a financial institution to expend resources to comply with the rule. However, the Bureau agrees that smaller financial institutions may need more time to marshal the necessary resources, as discussed above.

The Bureau has considered comments stating that financial institutions needed more time to understand the final rule and its scope. While the application of this rule would be new to some lines of business, and while some data would be novel the Bureau believes that financial institutions have had enough time to understand the concepts in the rule, especially for those financial institutions that have had experience with other Federal data collection rules, such as HMDA, CRA, or CDFI Fund. The concepts in the rule implement 2010 statutory language, and the rule's implementation of those statutory concepts relies on well-known concepts from existing rules, particularly the HMDA and the CRA regulatory requirements. Nonetheless, the Bureau acknowledges that preparing for compliance may be somewhat more difficult for financial institutions, particularly smaller institutions, with no previous experience with Federal data collections. The Bureau believes that final § 1002.114(b) provides sufficient additional time for such financial institutions to come into compliance with the final rule.

Regarding comments that financial institutions need more time to establish policies and procedures, the Bureau does not believe this is necessary for larger-volume lenders. The Bureau's proposed 18-month compliance period was intended to accommodate the need of financial institutions to develop or update policies and procedures to comply with the rule. The Bureau believes, however, that more time may be warranted for smaller financial institutions that do not have existing written policies or procedures and do not currently use written applications for small business or agricultural lending applications. The Bureau does not have reason to believe that there are larger-volume lenders that do not currently use forms or formal written applications.

Regarding comments requesting more time to comply because of technological issues, the Bureau acknowledges the various steps that may be involved in obtaining software needed to imply with this rule, including updating core processors, automating analog systems, conducting due diligence, choosing vendors, and testing and integrating systems.

The Bureau agrees with commenters that smaller-volume lenders may need more time than proposed to prepare software before the rule's compliance date. In particular, the Bureau understands that smaller financial institutions may need time to transition from informal applications to automated systems. Regarding the reengineering of agricultural credit scoring systems, the Bureau understood this issue to apply to smaller FCS lenders and believes that the additional time provided by the final compliance period provision would suffice for changes to be made to AgScore and for them to adjust accordingly.

Regarding the comments that banks needed more time to hire new staff and/or train existing employees, the Bureau notes that not enough detail was provided by commenters that explained why this factor on its own justified more than 18 months to comply with this rule.

Regarding the comments that the compliance periods for other similar regulations provided more time, the Bureau acknowledges that this rule, unlike HMDA and the TILA/RESPA integrated disclosure rule, covers a variety of different product types, that this rule is a new rulemaking rather than an amendment to existing regulations. The Bureau notes from its experience that smaller financial institutions in particular appeared to face challenges complying within the timeframe given for the 2015 HMDA rule amending Regulation C and the TILA/RESPA integrated disclosure rule. The Bureau agrees, from the experience of past rulemakings, that smaller financial institutions may wait longer than larger institutions for vendors to prioritize them.

Regarding various industry-specific rationales given for extending the compliance period, the Bureau observes that many of the comments advocated for types of financial institutions that tended to be smaller, such as CDFIs, credit unions, and community banks. The Bureau believes

that final § 1002.114(b) will provide most of the smaller volume lenders the additional time they need to comply.

Regarding comments that even larger credit unions would have to wait for vendors to create compliance products, the Bureau agrees only in part. The Bureau believes that vendors are more likely to focus on larger financial institutions —including larger credit unions—earlier, but that smaller financial institutions, including credit unions, are more likely to have to wait longer.

Regarding the comment that equipment finance companies may be less accustomed to Federal regulators, the Bureau agrees but does not believe that this justifies a longer compliance period specifically for this type of lender. The Bureau believes that equipment finance companies with larger volumes of originations are likely to have sufficient experience and resources to prepare to come into compliance more quickly.

Regarding the comment that a short compliance period would promote unintentional errors, the Bureau agrees in part. The Bureau believes that faced with limited time and resources, smaller financial institutions are more likely to submit inaccurate data, and that this is one of the rationales for providing lower-volume institutions additional time to comply with the rule. Regarding the concern that compliance costs will directly increase lending costs, the Bureau acknowledges in its impacts analysis in part IX below that this may take place, but that the per-loan impact of this rule will be relatively low.

Regarding the comments that many borrowers do not possess or are unwilling to provide data pursuant to this rule, the Bureau agrees that educating small business applicants would improve their responses to requests for data under this rule. Regarding the comment that rushed implementation would lead to unintended consequences, the Bureau observes that the notice and comment processes has identified potentially unintended consequences of an 18-month compliance period, and that the final tiered compliance provision is intended to address these concerns.

Two years. Regarding the comments favoring a two-year compliance period for financial institutions, the Bureau agrees in part. Based on a consideration of a variety of factors, including the comments it has received, the Bureau has determined that a two-year compliance period is appropriate for mid-sized financial institutions. The Bureau does not believe that two years is an appropriate compliance period for all institutions. The Bureau believes that two years more time than is needed by the largest volume financial institutions, which have the ability to comply earlier, and too little time for the smallest volume financial institutions, which need closer to three years to comply with this rule.

The Bureau has considered the comment asserting that the proposed compliance period would make the rule an undue regulatory burden, costly, and not be commensurate to any potential reporting benefit. As set out above, the Bureau believes that a shorter compliance period would be challenging for many smaller and mid-sized financial institutions, and the Bureau believes that it is more likely to obtain more accurate data if it provides smaller volume financial institutions more time to comply with this rule.

Scope and complexity. The Bureau has considered comments stating that financial institutions needed a two-year compliance period to understand the full scope and complexity of the new rule. While the proposed rule included provisions not considered during SBREFA, such as additional data points pursuant to ECOA section 704B9(e)(2)(H), the Bureau does not believe that the increased complexity of the rule alone justifies additional time. Most of the new provisions in the NPRM are well-known outside of the context of this rule. In addition, the Bureau has in some ways limited the scope of this rule further by, for instance, not finalizing certain more complex provisions, such as the proposed visual observation and surname analysis requirement. Regarding scope and coverage issues faced by motor vehicle dealers, the Bureau does not believe that there are open issues requiring resolution as suggested by some commenters. The issues raised concerning the application of Bureau regulations to indirect motor vehicle lenders are well-established and not unique to this rulemaking. The Bureau likewise does

not believe that this rule represents an entirely new regulatory paradigm; the many comments the Bureau received concerning the overlap between this rule and HMDA, CRA, and CDFI Fund data collections suggest that the concepts in this rule are already well understood by many financial institutions and not necessarily novel or paradigm-shifting. While the Bureau agrees that this rule is the first to attempt to collect application-level data comprehensively from the entire small business lending market, the Bureau does not believe that this alone is a reason to extend the compliance period of the rule.

Policies and procedures. The Bureau has considered comments stating that financial institutions needed two years to develop and test new policies and procedures. However, the comments did not provide enough detail to support extending the compliance period based on this factor alone.

Technology. Regarding comments requesting two years to comply because of the need to purchase or upgrade compliance software, the Bureau agrees in part. The Bureau acknowledges the various steps related to implementing or updating compliance software, including finding and vetting vendors, integrating compliance software with other systems. The Bureau acknowledges the concerns of some commenters that vendors may not be ready with compliance software before the proposed compliance date. The Bureau, as noted in part II above, has worked proactively with vendors and technology departments of financial institutions since the release of the NPRM to help them speed their work The Bureau believes that the tiered compliance schedule will ensure that financial institutions in need of time to buy or upgrade software will have that time.

Staff and training. Regarding comments requesting a two-year compliance period in order to have additional time to hire new staff and train existing staff, the Bureau took those factors into account when proposing an 18-month compliance date. However, the Bureau agrees that small financial institutions may require additional time to comply because they may not have the staff to develop compliance systems that larger financial institutions may have. The Bureau

believes that smaller institutions may be particularly reliant upon vendors and third-party software and, as mentioned before, may not be prioritized by these providers.

Other regulations. Regarding the comments that a two-year period based was justified based on the compliance periods for other similar data collection regulations, the Bureau agrees in part for the reasons specified above. The Bureau acknowledges that industry's experience with the 2015 HMDA rule suggests that more time is required for smaller financial institutions in particular, and especially those with no past experience with a data collection regime like HMDA.

Other comments. Regarding concerns that the proposed compliance period was inconsistent with the two-year period that the Bureau previously considered in the SBREFA process, the Bureau now believes that the two-year period is appropriate for financial institutions with a moderate volume of originations.

30 months. The Bureau has considered comments requesting a single 30-month compliance period but does not believe this approach would be appropriate, for the reasons provided below.

Scope and complexity. Regarding the comments that the scope and complexity of the rule warrants a 30-month compliance period, the Bureau acknowledges the breadth and complexity of this rule but does not believe that the time needed to understand the rule in itself justifies one additional year to comply with the rule.

Processes. The Bureau acknowledges that compliance with the rule may itself entail complex changes to the various processes pertaining to small business lending, including front and back-end operations, and operations across different branches. The Bureau notes that while industry commenters explained the complexity of changing processes and procedures with some clarity, the Bureau anticipated these types of changes in proposing an 18-month compliance period. In any case, these commenters identified various changes they would have to make in

response to the rule without explaining why these changes justified extending the proposed compliance period by 12 months.

Software. Regarding the comments requesting 30 months to comply with the rule because of the need to purchase new software or upgrade existing software, the Bureau agrees in part. The Bureau acknowledges the various steps and complexities in the process to upgrade or purchase software that commenters have identified, but the Bureau does not believe that all financial institutions need more time to purchase or upgrade software. The Bureau also acknowledges concerns that compliance software for this rule did not exist when comments were submitted in response to the NPRM. The Bureau understands from its outreach that software providers have been developing compliance products since the release of the NPRM, and while such products cannot be finalized until after the final rule, the Bureau believes that such software will be available for timely implementation by financial institutions, especially because the Bureau is committed to providing assistance to technology departments from financial institutions and software providers to develop compliance solutions in time to meet the final tiered compliance dates. Regarding the comment that software providers need 30 to 36 months to work with their business partners, the Bureau believes based on its outreach and comments received from some banks that this work had already begun with the release of the NPRM, and that the compliance dates provided in final § 1002.114(b) should be sufficient for software providers to work with their business partners and financial institutions.

The Bureau acknowledges commenters' concerns about small financial institutions and their ability to implement software before the proposed compliance date. The Bureau believes that lower volume lenders, especially those without previous experience with data collection rules, are likely to be at the mercy of compliance software providers and core providers, and are not as likely to have priority access to new software or provider assistance in implementing it. The Bureau does not, however, agree that these concerns justify a single 30-month compliance

period. Instead, the Bureau believes that these concerns justify tiered compliance based on the financial institution's transaction volume.

Staffing and training. Regarding comments that a single, 30-month compliance period is needed to accommodate the hiring of new staff and/or training of existing staff, the Bureau agrees in part. The Bureau acknowledges that this rule may require the hiring or training of staff in variety of different areas and roles across financial institutions. The Bureau emphasizes, however, the comment specific to smaller volume lenders that a community bank would not have a dedicated implementation team for this rule, but rather would assign responsibility for rule implementation to existing employees across the bank in addition to their existing tasks.

Data accuracy. The Bureau acknowledges the comments that the proposed compliance period may result in data inaccuracies, but does not believe that a single, 30-month compliance period would be the most appropriate way to address these concerns. The Bureau, for the reasons provided already, believes that smaller and even moderate volume lenders, if subject to an 18-month compliance period data, may be at particular greater risk of collecting and submitting inaccurate data to the Bureau. The Bureau acknowledges the comment that small business lending is varied, involves more negotiation than consumer lending, and therefore makes it more difficult to capture consistent data for, but the Bureau does not believe that this factor alone justifies extending the compliance period. The Bureau observes that the existing regulations that collect data on small business and small farm lending already take into account the varied and more individually negotiated nature of such transactions.

Other regulations. The Bureau acknowledges the comments concerns that other comparably complex regulations identified by commenters, such as the 2015 HMDA rule amendments and the TILA/RESPA integrated disclosure rule, provided for compliance periods longer than the 18 months proposed by this rule. The Bureau acknowledges the comment observing that in response to the 2015 HMDA amendments, many software providers barely met the compliance date for that rule, and that significant updates were still required after the

deadline. The Bureau agrees that smaller lenders may need more time to comply because of their lack of experience with data collection regulations such as those under HMDA or CRA. However, the Bureau does not believe that a uniform, 30-month compliance period would be the appropriate way to address all these concerns. The Bureau believes that the specific comments it received advocating for a 30-month compliance period for smaller volume lenders or for those inexperienced with data collection rules support the tiered compliance dates set forth in the final rule.

Customer relationships. Regarding the concerns that a short compliance period would hamper the ability of their ability to serve commercial lending customers, the Bureau agrees in part. The Bureau believes that smaller lenders and, to a lesser extent, moderate volume lenders may find it challenging to comply with the new rule while still serving customers and maintaining day-to-day bank operations. The Bureau acknowledges the concern that some commenters may adopt new processes to ensure data quality but provide less access to credit for applicants. The Bureau does not believe that a uniform, 30-month compliance period would be the appropriate way to address these concerns in a manner consistent with the statutory purposes of the rule. Rather, the Bureau believes that the customer relationships of smaller volume lenders are likelier to be affected by a shorter compliance period than the customer relationships of larger lenders.

Sector specific. Regarding the comments that 18 months was not sufficient for smaller lenders, the Bureau agrees. The Bureau believes the differences between the compliance challenges faced by smaller and larger lenders suffice to justify a longer compliance period for smaller-volume lenders. The Bureau agrees with the multiple comments stating that smaller institutions, such as community banks, CDFIs, and rural lenders, are more limited in their capacity to expend the additional time and resources needed to comply with this rule within 18 months, and with comments that larger lenders do not have such limitations and often have staff dedicated to regulatory compliance. Regarding the comment that regulations should apply only

to large banks, not smaller banks, the Bureau notes that while the Dodd-Frank Act contains provisions specific to larger institutions, it does not apply exclusively to larger lenders. The Bureau, however, agrees that the compliance date provision of this rule should not apply to all financial institutions regardless of size, given the differences in the relative capacity to comply quickly, as the final tiered compliance date provision recognizes.

Regarding the comments of a software provider concerning the various steps in the process to implementing compliance software, the Bureau appreciates the complexity of the process and the back-and-forth between software vendors and lenders. The Bureau, however, believes that the tiered compliance provision provides for more time for a majority of smaller and moderate volume lenders to work through the software implementation process. The Bureau is providing resources, such as the Filing Instructions Guide, concurrent with the release of this final rule to aid software vendors' and financial institutions' development of software expeditiously.

Other comments. Regarding the comment requesting for 30 months to address unanticipated implementation issues, the Bureau believes that the final compliance date provision provides enough time and leeway for lenders to address any such issues. Regarding the comment that a 30-month compliance period would match the normal compliance examination cycle, the Bureau disagrees as not every financial institution subject to this rule has examinations on this schedule. Regarding the comment that an 18-month compliance period is not justified by the length of time that has elapsed since the passage of the Dodd-Frank Act, the Bureau notes that in part, it agrees, providing an additional six to 18 months to most lenders.

Three years. The Bureau is not adopting a single compliance period of three years for all covered financial institutions, for the reasons below. The Bureau acknowledges that much of the reasoning provided in support of a single, three-year compliance period justifies the compliance period for Tier 3 financial institutions. As noted above, the Bureau believes that there is no

material difference between 33 months and three years for purposes of this rule and the compliance of Tier 3 institutions.

General comments. Regarding the comments that a single, three-year period would achieve the statutory purposes of the rule, the Bureau believes that having larger- and moderate-volume lenders begin collecting data in 18 or 24 months, respectively, rather than 33 months, while waiting to obtain more accurate data from smallest-volume financial institutions, is most likely to maximize the speed with which the Bureau receives the largest possible volume of accurate data. Because of this, the Bureau believes that the final tiered compliance provision better accomplishes the statutory purposes of the rule. Regarding the comment that such a three-year compliance period should start on January 1, the Bureau believes that earlier collection of data is consistent with the purposes of section 1071, even if it results in the collection of a partial year of data. While less useful in a year-over-year comparison, a partial year of data would not be ignored entirely. Given the new data points that would be collected under the final rule, a partial year of collection will give data users valuable information they could not access from other sources, for the purposes of facilitating fair lending enforcement and identifying business and community development needs.

The Bureau has considered comments asserting that by proposing an 18-month compliance period, the Bureau has shifted the burden of rapidly complying with the rule onto lenders. The proposed compliance date reflected an attempt to balance competing concerns, and the final compliance date reflects a reconsideration of how best to balance the need to collect data quickly, and the need to collect it accurately.

Regarding the comments that it was arbitrary and unreasonable for the Bureau to propose a broader rule with an 18-month compliance period in the NPRM, compared to a rule of lesser scope and a two-year compliance period in the SBREFA process, the Bureau is not finalizing a blanket 18-month compliance period in this final rule, as explained above. And even if the

Bureau were finalizing an 18-month compliance period as proposed, the Bureau would disagree with the commenters for a number of reasons.

First, the Bureau does not believe that the scope of data collection and reporting under the NPRM expanded greatly compared to the SBREFA outline of proposals under consideration. While several data points were proposed pursuant to ECOA section 704B9(e)(2)(H), most of these data points (such as pricing, application method, application recipient, reasons for denial) are data in possession of financial institutions, as items that are part of the underwriting or lending process. Some of the other items, such as time in business and NAICS Code, are captured by some lenders in any case. Similarly, the NPRM (but not the SBREFA Outline) included several provisions giving leeway to financial institutions attempting to comply in good faith, such as the bona fide error and safe harbor provisions.

Second, even assuming that the scope of data collection and reporting under the NPRM were greatly expanded as compared to the SBREFA Outline, the final rule includes a variety of provisions intended to streamline compliance as compared to the NPRM. For instance, the Bureau has simplified the approach to pricing, time in business, and NAICS code (requiring the collection of just 3 digits rather than 6), and the Bureau is no longer requiring the use of visual observation and surname analysis. The Bureau is also providing a grace period during which it does not intend to assess penalties, so long as financial institutions attempts to comply with this rule in good faith (see part VII below). The Bureau also believes that the materials it has prepared for concurrent release with the final rule, including the initial version of the Filing Instructions Guide, will have the effect of facilitating compliance with the rule.

Regarding the comment that the Bureau was shifting the burden of its delay in issuing the rule to industry, the Bureau disagrees. The Bureau's intention in proposing an 18-month compliance period was balancing two factors—providing sufficient time to comply while obtaining data as soon as possible. The Bureau believes that the final tiered compliance provision

better strikes that balance by differentiating between lenders more likely to be able to comply earlier with accurate data, and lenders that are likely to need more time to report accurate data.

Sequential changes. The Bureau acknowledges the comments that the implementation of compliance systems involves numerous steps in a specific order. However, the Bureau does not believe that this justifies a single, three-year compliance period for all financial institutions. The Bureau believes that it is generally correct that compliance must proceed in a specific order, and it also believes that larger lenders are more likely to have the capacity and resources to work on different steps of compliance implementation in parallel rather than purely sequentially, and thus comply in a shorter amount of time than smaller-volume lenders with less capacity and resources.

Scope and complexity. Regarding the comments that a three-year period is needed to carefully understand and interpret the new rule, the Bureau agrees that this rule will be entirely new to many lenders with no experience with other data collection rules. However, the Bureau believes that such lenders are likelier to be smaller, lower-volume lenders, and that the final tiered compliance regime give them the additional time they need to understand this rule. Regarding the comment that lenders could only understand the content of the regulations after the issuance of the final rule, the Bureau observes that it has endeavored to simplify this final rule compared to the content of the NPRM. Regarding comments that a single three-year period would give the Bureau time to educate and support lenders as they implemented this rule, the Bureau believes that the finalized system of tiered compliance dates provides sufficient time to educate and support smaller, lower-volume lenders more likely to need this help.

The Bureau acknowledges that this rule would cover many different financial products and services, often with different processes, involving many changes across business units and systems, but the Bureau does not believe that a single three-year compliance period for all financial institutions is warranted on these grounds. The Bureau acknowledges that this rule is more comprehensive than existing collections of small business lending data, both in terms of

how many financial institutions will be required to report under the rule, and in terms of the scope of what is required of any given financial institutions. However, the Bureau observes that many larger volume lenders have already complied with similar data reporting requirements for small business lending, including CRA and the Paycheck Protection Program, which also involved many data points and, for larger volume lenders, compliance across different business units and systems. The scope of this rule is somewhat more expansive than past data collections, but, as many other commenters have pointed out, the significant overlap between this rule and the data required by other rules means that the content of this rule is likely to be well understood by many financial institutions.

Regarding the comments that the rule requires the collection of 21 data points, the separation of demographic information, and consideration of the feasibility of a firewall, the Bureau notes that these comments summarized the provisions of the rule without explaining how compliance with these provisions would require three years rather than 18 months. Regarding the comment that the regulatory burden of the rule would be significant and time-consuming, the Bureau refers to the impacts analysis in part IX. In short, such comments do not explain how the Bureau's specific attempts to quantify costs were erroneous, and do not address specific amounts of time that tasks would take.

Policies and processes. Regarding comments that lenders need three years to create, update, and test non-software processes and policies, the Bureau acknowledges that some lenders do not currently use written applications for small business and farm loans, and would need to start using them. The Bureau believes that these lenders are more likely to be smaller lenders with lower volumes of originations. The Bureau also acknowledges that lenders would not be able to change procedures, forms, policies, and systems until the final rule is issued, and that clarifications and questions may take some time to address. The Bureau does not believe this justifies a single three-year compliance period for all lenders.

Further, while stating that 18 months was insufficient, commenters did not specify the additional amount of time needed to create new procedures or workflows for applications, change existing workflows to align with the firewall requirement, overhaul their forms and applications, or to obtain new ones. The Bureau believes that the proposed compliance date would have provided sufficient time for these processes. The Bureau believes, however, that smaller lenders with lower volumes of originations may need more time than other lenders to adjust their processes and procedures to comply with the rule for the reasons provided.

Technology. The Bureau acknowledges the many comments that it received requesting a longer compliance period to implement software solutions, and the various steps in that process, including identifying, vetting, and choosing vendors, and integrating and testing software. The Bureau acknowledges that the implementation process for software can be iterative and sequential. The Bureau understands that many lenders, especially smaller and community banks, that will need to automate currently manual lending processes to collect data for this rule. In particular, primarily lower-volume lenders, such as community banks and rural institutions, will need additional time to automate their processes with software to accurately collect data, including some lenders that collect HMDA and CRA data by manual processes. The Bureau also understands that many lenders not experienced with data collection rules have no relationships with vendors.

While some lenders said that they could not begin to implement software until vendors create it, the Bureau notes that one commenter had identified a vendor already at work on compliance software for this rule as of early 2022. Regarding the comment from a larger lender stating that it would need additional time to build compliance software itself, the Bureau notes that it received relatively few comments from larger lenders.

The Bureau notes that of the comments citing software changes to justify a three-year compliance period, only several provided any estimates of the time needed to implement software. The few estimates there were ranged from as few as six months from the issuance of

the final rule to upgrade software to 18 months to two years to implement software, and further time still to train staff and test software. The Bureau believes that these comments may overestimate the time vendors will take to prepare compliance software. Some estimates assumed that vendors would not start their work until after the release of the final rule, but the Bureau understands from comments and other feedback that some software vendors started work on compliance software for this rule not long after the release of the NPRM. The Bureau also believes, based on other comments received, that the longer periods suggested by commenters are most likely to apply to smaller and mid-sized lenders, for the reasons discussed before—that vendors are likely to prioritize larger lenders in implementing new or upgraded software.

Regarding the comment that lenders should have software six months before the compliance date for testing, the Bureau believes that the tiered compliance provision would provide most lenders this extra time. In any case, the Bureau believes that the grace period discussed in part VII may permit lenders to continue testing after their compliance dates, if needed. Regarding the comment that lenders need more than 18 months to comply because they make build technology decisions one to two years in advance, the Bureau believes that the release of the NPRM gave lenders time to plan and budget for compliance technology well in advance of this final rule. Regarding the comment that some lenders adopt blackout periods of eight weeks at the end of the year, which could add four months to the time needed by lenders, the Bureau does not believe additional changes are needed to final § 1002.114(b). The commenter did not suggest how common such blackouts were amongst lenders, nor how an eight-week blackout period would necessitate a four-month compliance date delay.

The Bureau acknowledges commenters' concerns that small and mid-sized banks will likely need more time to comply because of their greater dependence on the timing of third-party software vendors because these comments were based on industry experience with software vendors in the context of past rulemakings. The Bureau believes comments that vendors may become time or resource-constrained and have difficulties serving many lenders at once, and,

given a single compliance date, are less likely to prioritize smaller lenders. The Bureau gives credence to comments that small lenders struggled to implement compliance systems for the TILA/RESPA integrated disclosure and HMDA rulemakings before their respective compliance dates because small lenders competed with larger lenders for the limited time and attention of vendors in advance of regulatory deadlines.

Staffing. The Bureau acknowledges the many comments that lenders need more time to hire new staff and train existing staff to collect, verify, and report data for this rule; that training may apply to staff across different departments and business units within financial institutions; and that training can be time-consuming. The Bureau observes that comments requesting a three-year period based in part on staffing concerns did not estimate how much of the additional time requested was attributable to staffing issues. One exception was a comment from a lender that said it would need several months to train its staff of 3,000 employees; the Bureau believes that this comment tends to support an 18-month compliance period for larger lenders.

The Bureau understands that certain staff training—on compliance software for this rule—may occur only after software is implemented. However, the Bureau believes that other training may be conducted in parallel with the development of software, such as the training on the content of this rule. The Bureau agrees that lender staff with no familiarity with data collection rules may need more time to be trained in complying with this rule. The Bureau notes that the concern that staff already familiar with the HMDA and CRA rules would need training to avoid confusion with this rule is mooted by the Bureau's decision to exclude HMDA-reportable loans from reporting under this rule, and the proposed amendments to the CRA rules that would eliminate the existing CRA reporting regime.

Regarding other comments, the Bureau agrees that part of the compliance process will involve communicating operational changes resulting from this rule to customers to minimize disruption and increase the likelihood that they will answer inquiries related to protected demographic information. The Bureau acknowledges that some customers may believe that

lenders already request too much data but believes that it is speculative to say that customers may be driven to less safe financial products to avoid providing data for this rule.

Access to credit. Regarding comments requesting a longer compliance period because lenders might need to pause or stop their small business lending until they were in compliance with this rule, hurting the small businesses that section 1071 was intended to benefit, the Bureau does not believe that a reduction in access to credit is likely for the reasons set out in part IX.

Data accuracy. The Bureau, for the reasons stated above, agrees that smaller and mid-sized lenders are more likely to need more time to comply with this rule to ensure the accuracy of the data that they will submit. The Bureau agrees with the group of State banking regulators that the implementation timeframe should be increased for many financial institutions to better equip them to accurately report data.

The Bureau makes particular note of comments from smaller lenders and their representatives that lenders lacking experience with data reporting regulations, such as HMDA or CRA, require more time to report accurate data. Inexperienced lenders must create processes from scratch, develop vendor relationships, and become accustomed to new procedures, such as testing software and other systems, to ensure the accuracy of data. The Bureau also agrees that the proposed 18-month period is not sufficient for lenders with lower-volume small business lending operations that may face limited staffing resources and that have never before collected the amount of data required by this rule.

The Bureau agrees in principle that rushed implementation generally would make data in the first few years after the compliance date flawed, incomplete, or unusable, limiting the usefulness of the data for section 1071's fair lending and business and community development purposes. The Bureau believes that the tiered compliance date approach it is taking in this final rule will not result in rushed implementation. Rather, its final compliance provisions will provide sufficient time for especially smaller and mid-sized lenders to implement compliance systems and prepare to collect and report accurate data.

Regarding the comments that data will be error-laden in the first few years of collection until systems, policies, and procedures can be refined, the Bureau has accounted for this in its final rule, with its bona fide error provision and additional safe harbors for certain data points. As discussed in part VII, the Bureau is also providing a grace period for lenders during which it does not intend to assess penalties for errors, so long as lenders engaged in good faith compliance efforts.

Regarding the assertion that a three-year compliance period more closely adhered to the expectation in the statute, the Bureau notes that text of the statute does not identify a specific compliance period, much less one as specific as three years. The Bureau interprets section 1071 as requiring a compliance period that best advances the statutory purposes of the rule. For the reasons specified above, the Bureau believes that its tiered compliance provision does this. In any case, the Bureau believes that the majority of covered financial institutions will report data with Tier 3, and thus will have 33 months to comply with the rule from its issuance.

Other regulations. Regarding the comments that other comparably complex regulations—such as the 2015 HMDA rule, CRA, the TILA/RESPA integrated disclosure rule, and FinCEN's customer due diligence rule—provided for more time to comply that the proposed 18-month compliance period, the Bureau agrees that these other rules may be instructive as to how much time smaller and mid-sized lenders might need to prepare to comply with this rule. However, the Bureau does not believe that this necessitates a single compliance period of three years.

The Bureau acknowledges the comment that, unlike the 2015 HMDA rule, this rule does not involve building on an existing system but rather making a new data collection system, and that smaller-volume lenders in particular should therefore have closer to three years to comply. The Bureau also acknowledges that this rule, unlike HMDA, encompasses different credit products for small businesses which may use or require different processes, systems, and personnel.

The Bureau agrees that smaller-volume lenders should have more time because they are more likely to have to build new systems and face challenges. The Bureau believes that larger lenders are less likely to have to start from scratch in complying with this rule, that they are more likely to be familiar with concepts from this rule borrowed or analogous to provisions in other existing data collection regulations, such as HMDA and CRA. This remains true even if larger lenders are more likely than smaller lenders to offer different credit products for small businesses which use different processes, systems, and personnel.

The Bureau acknowledges commenters' concerns that based on industry experience with the 2015 HMDA rule, vendors were not likely to be ready in time for lenders to comply with this rule. The Bureau believes that the tiered compliance provision will give vendors time to work with covered financial institutions on a timely basis by spreading out software needs across three compliance dates. Vendors will be able to focus on smaller-volume lenders in Tiers 2 and 3, avoiding the hasty implementation or inattentive or delayed service commenters mentioned experiencing in complying with the 2015 HMDA rule and the TILA/RESPA integrated disclosure rule.

The Bureau acknowledges comments that the Bureau to provide leniency regarding data accuracy for initial submissions after the 2015 HMDA rule, and that lenders spent hours reviewing data to avoid errors and resubmissions under HMDA. The Bureau notes that the final rule contains provisions—including the bona fide error provision and the various safe harbors for several data points—that relieve lenders of the need to provide perfectly accurate data, especially in early submissions of data. As discussed in part VII below, the Bureau is also providing a grace period for lenders during which it does not intend to assess penalties for errors.

The Bureau appreciates the concerns that vendors may need time to make inquiries to obtain clarity on the provisions of this final rule after its release to deploy solutions, as they did with the TILA/RESPA integrated disclosure rule. The Bureau intends to work with vendors to answer inquiries about this rule as early as possible. The Bureau is releasing certain compliance

aids and guides concurrently with the final rule to assist vendors in advance of the compliance dates; with previous rules; in the past, such materials were only made available months after the release of final rules. The Bureau believes that the leeway the Bureau is providing, in the form of the grace periods for all three compliance tiers, also may give vendors more time to test, adjust and improve their systems.

Regarding the comments that experiences with past regulations are irrelevant, the Bureau disagrees that experience with past rules will not help lenders comply more quickly with this rule. The Bureau believes that experienced lenders, especially larger ones, have developed institutional knowledge and infrastructure in complying with regulations that will enable them to adapt to more quickly to new rules than lenders without such experience. The Bureau believes that the experience with data collection regulations, such as HMDA and CRA, is particularly relevant to compliance with this rule.

Industry-specific rationales. The Bureau finds compelling the comments arguing that smaller-volume lenders—including FCS lenders, community banks, small credit unions, CDFIs, and start-up lenders—would face greater challenges and costs in complying with the rule within the proposed 18-month period. The Bureau gives particular weight to concerns of other regulators that small financial institutions may need closer to three years to comply with the rule because they face particular challenges in implementation.

In short, the Bureau finds the specific explanations compelling and reasonable—larger banks, as commenters pointed out, have more resources for compliance efforts, while smaller and even midsized banks may have less resources to, for instance, pay for staff for overtime or other short-term capacity to comply within 18 months. The Bureau also believes that small and mid-sized financial institutions will be a lower priority for vendors, based on the Bureau's outreach and comments by smaller lenders that experienced this in complying with past Bureau rulemakings. All of this suggests that smaller and, to a lesser extent, mid-sized financial

institutions may face a tradeoff between speedy compliance and expending resources that larger lenders do not face.

The Bureau acknowledges the comment that mid-sized banks may face challenges standing up systems in 18 months despite their best efforts. The Bureau believes, however, that relative to the lenders with the smallest volume of small business loans, middle-volume lenders tend to have more resources and are more capable of complying somewhat more quickly with this rule. The Bureau believes that while a 33-month compliance period may be appropriate for smaller-volume lenders, a two-year compliance period is appropriate for middle-volume lenders.

Regarding the comment that the Bureau should consider a longer compliance period based on its capacity to collect data from non-depository institutions subject to the rule, the Bureau believes the challenge may be ensuring compliance by non-depositories that have not previously been subject to Federal data collection regimes. Nonetheless, the Bureau believes that larger non-depository lenders are likelier to be able to prepare to comply with this rule more readily while smaller volume lenders have additional time to prepare to comply.

Regarding the comments that the Bureau should provide three years to comply because the proposed 18-month period is not tenable for motor vehicle dealers in general and small dealerships in particular, the Bureau observes that motor vehicle dealers are not covered financial institutions under this rule. Moreover, as described in the section-by-section analysis of § 1002.109(a)(3), the Bureau believes that motor vehicle dealers are often the last entity with authority to set the material credit terms of the covered credit transaction, and so are generally unlikely to be collecting small business lending data on behalf of other reporting financial institutions.

More than three years. Regarding the comment that the Bureau should adopt a compliance period of three to five years because community banks would have to make hard decisions on staffing and lending capacity, resulting in potential market exit, the Bureau does not believe that such a lengthy compliance period is necessary for all financial institutions. The

Bureau is providing Tier 3 lenders—which the Bureau believes will include many smaller community banks—33 months, or nearly three years, to prepare to comply with the final rule. The commenter did not provide any details that would justify an even lengthier compliance period.

Tiered compliance. Regarding the large number of comments received from industry commenters that requested tiered compliance—often as an alternative to a single compliance date longer than 18 months—the Bureau agrees for the reasons set out above.

The Bureau appreciates industry comments in support of tiered compliance periods on the grounds that such a system would give smaller lenders would have more time to comply with the rule, including that the scope and complexity of the rule and the need to test systems to ensure accurate reporting would be particularly challenging to smaller lenders.

The Bureau observes that many commenters that requested tiered compliance periods on the grounds that smaller banks and credit unions, especially those serving rural and underserved communities, needed more time to comply to have time to implement new compliance software. The Bureau acknowledges the comments identifying discrete steps in the process of implementing software, including finding vendors, giving vendors time to develop software, planning and executing network changes, and training staff but notes that these steps are not unique to smaller or mid-sized lenders. The Bureau observes that smaller-volume lenders may find these steps more challenging for a number of reasons already articulated above. The Bureau acknowledges that smaller lenders may have little bargaining power with vendors and are often the last to receive system upgrades. The Bureau believes that tiered compliance dates are justified because hasty implementation by smaller banks facing difficulties implementing this rule may result in inaccurate data.

The Bureau acknowledges certain factors identified by commenters, such as the need for lenders to hire and/or train additional compliance staff, train existing lending staff, educate customers on the content of the rule, are not unique to smaller lenders. However, the Bureau

believes that smaller-volume lenders, especially those without previous experience complying with data collection rules, may face more challenges with all of these factors than larger lenders.

The Bureau agrees with the comments that smaller financial institutions—including CDFIs, credit unions, and lenders servicing rural and underserved communities—should have a later compliance date to learn from money-center banks. The Bureau agrees that tiered compliance is important for lenders inexperienced with data collection rules to give them time to build compliance infrastructure. The Bureau agrees that such lenders may face more challenges than depository institutions in complying quickly with this rule, needing to create compliance training programs from scratch, and that they may have a harder time obtaining expertise to implement compliance software and procedures. The Bureau agrees with the comment that banks with no HMDA compliance experience may need more time to comply with this rule than larger banks with such experience. The Bureau believes that the experience of larger banks with HMDA will enable them to more quickly comprehend this rule and implement compliance systems for this rule. This experience will also enable such banks to train their staffs more quickly. The Bureau further agrees that, under a tiered compliance system, smaller-volume lenders may learn from the earlier implement of large banks, and that tiered compliance would give smaller lenders more time to resolve unanticipated issues.

The Bureau believes that industry experience with the staggered effective dates in the Financial Accounting Standards Board's Current Expected Credit Loss rule somewhat informs the final tiered compliance provision. The Bureau believes that the approach taken by the Financial Accounting Standards Board and other Federal regulators regarding the Current Expected Credit Loss rule support the Bureau's approach here.

Regarding the number of compliance date tiers, the Bureau believes that the three tiers included in this final rule are more appropriate than two as suggested by some commenters, for the reasons already articulated. However, commenters distinguished not just between smaller and larger lenders; comments also identified mid-volume lenders as facing unique issues in

complying with the rule, occupying a space between large and small lenders. Mid-volume lenders face certain challenges complying with the rule compared to larger lenders, but have greater resources and, often, more experience with Federal regulations and data collections than small lenders.

Regarding the comments supporting the adoptions of three compliance tiers, the Bureau agrees. Regarding the comment that the Bureau should adopt three compliance tiers, giving the largest lenders one year to comply, medium-sized lenders two years, and small lenders three years, the Bureau agrees in part. The Bureau agrees that earlier compliance dates are justified for large lenders because they have greater staff expertise, as well as capacity and resources, to comply with data collection regulations. However, the Bureau believes that a one-year compliance period may be insufficient for many larger financial institutions to comply with this rule.

Regarding the comment that the third compliance tier should include trusted small business lenders, the CFPB intends to propose, in a follow-on notice of proposed rulemaking, that lenders with strong records under the CRA or other relevant frameworks be permitted additional time to come into compliance with the rule. That approach is consistent with the statutory purposes of the rule.

Regarding the request for tiered compliance starting not less than three years after the final rule, the Bureau does not believe such an approach would be appropriate, for the reasons specified above concerning the request for a single three-year compliance period. The Bureau believes that a three-year period for the earliest tier is inconsistent with the statutory purposes of the rule because larger volume financial institutions are capable of adequate compliance with this rule within 18 months. Further delay for these lenders would result in a longer period during which data are unavailable to facilitate the enforcement of fair lending laws or to identify business and community development needs and opportunities.

Regarding the requests that the Bureau use asset size to determine compliance date tiers, the Bureau acknowledges that asset size can sometimes be a proxy for determining the resources and capacity a lender has to prepare to come into compliance with the rule. It is also a simple metric to implement, given that there are recognized standards for reporting assets. The Bureau agrees that institutions with less assets often have smaller compliance and information technology staffs.

However, the Bureau notes that this rule applies to non-depository institutions as well. Some such lenders may have high volumes of originations but relatively low assets. As a result, the Bureau observes that asset size may not be as reliable a proxy for the capacity and resources a non-depository institution has to comply quickly with the rule. The Bureau believes that volume of originations is, in the context of small business lending, a better proxy than asset size for determining the capacity of a lender to comply with this rule. The Bureau also believes that tiering based on volume of originations is proportional to the interest a lender would have in complying with this rule, regardless of asset size.

Regarding the comments opposing tiered compliance dates, the Bureau appreciates that this rule represents a great change for small and large financial institutions that may proceed through similar steps to implement the rule, including understanding the rule, changing processes, building and testing systems, training staff, and adding procedures and controls. The Bureau does not believe, however, that the magnitude of challenges lenders face is the same regardless of the size or capacity of the institution. The Bureau believes that the largest volume lenders that will be in Tier 1 have the capacity to comply with this rule within 18 months, especially given the leeway provided by this rule—in the form of the bona fide error thresholds and safe harbors—and by the grace period to report data that is sufficiently accurate. The Bureau agrees with the comment that limiting access to small business credit could have a negative impact on the economy, but does not believe the final tiered compliance date provision would

"inevitably" result in any diminishing of access to credit for small businesses, as discussed in more detail in part IX below.

Regarding the comment opposing tiered compliance dates on the grounds that 18 months was sufficient for all institutions, the Bureau disagrees for the reasons specified above. While many smaller-volume lenders may be able to comply within 18 months, the Bureau believes that many such lenders may find it challenging to comply within 18 months. Regarding the comment that financial institutions have had since the release of the NPRM in September 2021 to begin preliminary planning to comply with this rule, the Bureau agrees in part. While the final rule differs from the NPRM in several aspects, many provisions are based on statutory requirements—such as the mandatory data points, the firewall provision, the recordkeeping requirements, and the privacy analysis—and would have been finalized in some manner, permitting some planning for financial institutions concerned with preparing for implementation well in advance of the eventual compliance date. The Bureau does not believe, however, that the September 2021 release of the NPRM gives smaller volume lenders the ability to comply with this rule within 18 months of its issuance.

Regarding the comment that the proposed compliance period of 18 months would give banks just six months to collect data to do a trial run with one year of data before compliance date, the Bureau observes that smaller volume lenders in Tiers 2 or 3 would have more time to test their collection systems. The Bureau also notes that pursuant to final § 1002.114(c)(1), all financial institutions may start collecting data one year before their respective compliance dates, giving especially smaller-volume lenders more time to test their systems.

114(c) Special Transitional Rules

The Bureau is adopting two transitional rules in § 1002.114(c) to facilitate the initial compliance of financial institutions with subpart B. Final § 1002.114(c)(1) permits, but does not require, financial institutions as described by § 1002.114(b)(1) through (3) to collect information regarding applicants' minority-owned business status, women-owned business status,

LGBTQI+-owned business status, and the ethnicity, race, and sex of applicants' principal owners under final § 1002.107(a)(18) and (19) beginning 12 months prior to the financial institution's applicable compliance date as set forth in § 1002.114(b)(1) through (3). A financial institution collecting such information pursuant to § 1002.114(c)(1) must do so in accordance with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c). In addition, comment 114(c)-2 clarifies that a financial institution that receives an application prior to its compliance date under § 1002.114(b), but takes final action on the application after the compliance date, is not required to collect data regarding that application under § 1002.107 and not required to report the application pursuant to § 1002.109.

Final § 1002.114(c)(2) permits a financial institution that is unable to determine the number of originations of covered credit transactions for small businesses for calendar years 2022 and 2023, because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as defined in § 1002.106(b), to use a reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023.

The Bureau believes that these transitional rules pursuant to its authority under ECOA section 704B(g)(1), are necessary to carry out, enforce, and compile data pursuant to section 1071.

114(c)(1) Collection of Certain Information Prior to a Financial Institution's Compliance Date

Proposed Rule

Proposed § 1002.114(c)(1) would have provided that a financial institution that will be a covered financial institution as of the compliance date in proposed § 1002.114(b) is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business under proposed § 1002.107(a)(18), a women-owned business under proposed § 1002.107(a)(19), and the ethnicity, race, and sex of the applicant's principal owners under proposed § 1002.107(a)(20) beginning 12 months prior to the compliance

date. A financial institution collecting such information pursuant to proposed § 1002.114(c)(1) would have been required to do so in accordance with the requirements set out in proposed §§ 1002.107(18) through (20) and 1002.108.

The Bureau sought comment on the approach in this proposal.

Comments Received

A joint letter from several trade associations supported the proposed provision permitting early collection of data. A community group agreed with the reasoning and approach to allowing voluntary reporting by financial institutions, inquired whether the Bureau was permitting voluntary reporting of date only for demographic information, and suggested that to permit the reporting of only demographic information would be of limited use. A business advocacy group commended the Bureau for encouraging the reporting of data before the start of the compliance period, and encouraged the Bureau to offer incentives to enable collection of data as early as possible to help enable the analysis of fair lending. Several CDFI lenders suggested that mission-oriented lenders ready to report data in 18 months should be able to opt in. Two banks recommended that the 12-month period of voluntary collection in advance of the compliance date should be extended further, noting that such a transitional period would be a critical period for lenders to implement, test, and if necessary, modify data collection and maintenance processes and systems before the compliance date. One trade association requested that the Bureau clarify that applications submitted before the compliance date, but approved after the compliance date, not be considered covered applications for purposes of determining coverage.

Final Rule

The Bureau is finalizing § 1002.114(c)(1), maintaining the provision in principle but making several changes. First, final § 1002.114(c)(1) permits, but does not require, a financial institution that will be a covered financial institution by the compliance dates set out in § 1002.114(b)(1) through (3) to collect protected demographic information pursuant to § 1002.107(a)(18) and (19) beginning 12 months prior to the compliance date applicable to that

financial institution. This regulatory text has been adjusted to account for the change from a single compliance date in proposed § 1002.114(b) to the three different compliance dates in final § 1002.114(b)(1) through (3). Second, final § 1002.114(c)(1) clarifies that any protected demographic information collected under this provision must comply with the requirements of § 1002.107(a)(18) and (19), and § 1002.108, as proposed, and adds a new requirement that any demographic information collected must comply with the requirements of § 1002.111(b) and (c). Third, final § 1002.114(c)(1) clarifies that a financial institution that receives an application prior to its compliance date specified in § 1002.114(b), but takes financial action on or after that compliance date, is not required to collect data regarding that application pursuant to § 1002.107 nor to report the application pursuant to § 1002.109.

The Bureau is also finalizing new comments 114(b)-1 through 4. Comment 114(b)-1 specifies the provisions of this rule that a covered financial institution must comply with by the compliance date that applies to it under § 1002.114(b). Comment 114(b)-2 specifies the provisions of this rule that covered financial institutions that must comply with the initial partial year collection pursuant to § 1002.114(b)(1), from October 1, 2024 through December 31, 2024. Comment 114(b)-3 establishes informal names for compliance date provisions (Tier 1, Tier 2 and Tier 3) to facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3). Comment 114(b)-4 illustrates the application of § 1002.114(b) to determine the compliance dates of a variety of financial institutions, based on a variety of volumes of originations of covered credit transactions to small businesses.

The Bureau believes that this provision will give financial institutions time to test their procedures and systems for compiling and maintaining this information in advance of actually being required to collect and subsequently report it to the Bureau. Under this provision, financial institutions will have time to adjust any procedures or systems that may result in the inaccurate compilation or maintenance of applicants' protected demographic information, the collection of which is required by section 1071 but otherwise generally prohibited under ECOA and

Regulation B. (Financial institutions could of course collect the other information that would be required by this proposed rule at any time, without needing express permission in Regulation B to do so.) The Bureau believes that this provision will facilitate compliance and improve the quality and accuracy of the data reported to the Bureau and therefore is necessary to carry out, enforce, and compile data pursuant to section 1071, and will carry out the purposes of ECOA, and is necessary or proper to effectuate the purposes of ECOA and facilitate or substantiate compliance therewith.

Regarding the question as to whether the proposed provision permits voluntary reporting only of protected demographic information, the Bureau observes that the provision actually only permits the collection, not reporting, of demographic information. The provision is necessary because, in its absence, ECOA and § 1002.5(b) of Regulation B would otherwise prohibit creditors from collecting such demographic information, while creditors are not prohibited by ECOA and Regulation B from collecting the other data points required by this rule. Regarding the comments encouraging the Bureau to offer incentives to collect data as early as possible to help enable the analysis of fair lending, the Bureau notes that the provision exists only to help financial institutions better prepare to comply with the rule. The Bureau is not adopting any additional incentives, as suggested by commenters, and indeed it is unclear what incentives it might offer to further encourage early reporting.

Regarding the comment that mission-oriented lenders ready to report data in 18 months should be able to opt in, the Bureau agrees. Regarding the request to extend the transitional period further such that financial institutions could collect protected demographic information without being required to report it for a period longer than 12 months, the Bureau acknowledges these concerns but does not believe such a change would be appropriate. The Bureau's decision to provide most smaller-volume financial institutions additional time by way of tiered compliance dates, as well as a grace period during which it does not intend to exercise its supervisory or enforcement authorities, all give financial institutions additional time and leeway

to establish their compliance systems. Further, institutions seeking longer periods to collect demographic information would not necessarily have even one year of information upon which to base a determination that they may have to begin preparing to comply with the rule, potentially resulting in the collection (but not reporting) of protected demographic data in a way that completely overrides the general prohibition in existing § 1002.5(b).

Regarding the request to clarify that applications submitted before the compliance date, but approved after, not be considered covered applications, the Bureau agrees that such clarity is useful and thus final § 1002.114(c)(1) addresses and implements this request.

114(c)(2) Determining Which Compliance Date Applies to a Financial Institution that Does Not Collect Information Sufficient to Determine Small Business Status.

Proposed Rule

Proposed § 1002.114(c)(2) would have provided that for purposes of determining whether a financial institution is a covered financial institution under proposed § 1002.105(b) as of the compliance date specified in proposed § 1002.114(b), a financial institution would be permitted, but not required, to use its originations of covered credit transactions for small businesses in the second and third preceding calendar years (rather than its originations in the two immediately preceding calendar years).

The Bureau sought comment on the approach in this proposal.

Comments Received

A joint letter from trade associations representing the commercial real estate industry supported the proposed provision and suggested an edit to the regulatory text of proposed § 1002.114(c)(2) specifying that a financial institution is permitted, but not required, to use its originations in the first two full calendar years after the effective date of the rule, rather than its originations in the two immediately preceding calendar years.

A joint letter from trade associations, in commenting on the proposed compliance date, claimed that 18 months was not enough time to determine covered financial institution status

pursuant to § 1002.105(b) because lenders would be required to collect gross annual revenue data to determine the small business status of their originations for purposes of originations thresholds, but they could not collect such data until after the publication of the final rule. The commenter noted that many lenders do not collect gross annual revenue for their commercial loans (*e.g.*, investment property loans are underwritten based on net operating income), and that some lenders that collected gross revenue data did not have it readily accessible. The commenter requested a longer compliance period to give lenders time to understand the content of the final rule before the start of a calendar year to track originations for small businesses to avoid retroactive application of the final rule. The commenter suggested, instead, a two-calendar-year period to collect gross annual revenue data, followed by the compliance date starting the third calendar year for those financial institutions that determine they are covered. The commenter noted that its proposed schedule was a minimum, and was predicated on having a gap between publication of the final rule and the start of the first calendar year during which lenders would track the small business status of originations, and that the Bureau published technical specifications sufficiently in advance of the third calendar year. A trade association, also commenting on the compliance period, claimed that two years would allow for implementation by lenders, would provide time to track originations of covered transactions and, therefore, the small business status of applicants, and would allow lenders to make changes necessary to achieve the statutory purposes of the rule.

Final Rule

The Bureau is not finalizing § 1002.114(c)(2) as proposed. The Bureau is instead implementing a different provision stating that a financial institution that is unable to determine the number of covered credit transactions it originated for small businesses for calendar years 2022 and 2023 for purposes of determining its compliance date pursuant to § 1002.114(b), because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as

defined in § 1002.106, is permitted to use any reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023. The Bureau is also implementing new comments 114(c)-3 through -6. Comment 114(c)-3 specifies circumstances under which a financial institution has readily accessible the information needed to determine the small business status of its covered credit transactions for purposes of determining its compliance date. Final comment 114(c)-4 specifies certain circumstances under which a financial institution does not have readily accessible the information needed to determine small business status of its covered credit transactions for purposes of determining its compliance date. Final comment 114(c)-5 identifies three reasonable methods that may be used by financial institutions to estimate the number of covered credit transactions for small businesses for purposes of determining its compliance date. Final comment 114(c)-6 provides examples of financial institutions applying each of the three reasonable methods identified in comment 114(c)-5 by financial institutions, as well as financial institutions applying reasonable methods not specified in comment 114(c)-5, to estimate the number of covered credit transactions for purposes of determining its compliance date.

The Bureau believes that, in the context of the proposed single compliance date, proposed § 1002.114(c)(2) would have provided greater clarity and certainty to financial institutions as to whether or not they would be covered financial institutions. This may have been particularly important for those financial institutions that originated a volume of covered credit transactions close to the threshold under proposed § 1002.105(b) and a single compliance date. The Bureau believed this provision would have been necessary to carry out, enforce, and compile data pursuant to section 1071.

However, because of the changes to the compliance date provision in final § 1002.114(b), from a single compliance date to several tiers of compliance dates, the Bureau believes that § 1002.114(c)(2) as originally proposed may no longer effectively serve the purposes for which it was originally intended. The Bureau believes that because the final rule provides for several

compliance dates, the optionality provided by proposed § 1002.114(c)(2) is no longer necessary and may even make compliance more confusing. The transition to several compliance dates in the final rule, from a single compliance date in the proposal, means that many lower-volume financial institutions will have one to two years in advance of their compliance date to determine whether they are covered financial institutions that must report data at all. For instance, an institution with a compliance date of January 1, 2026, based on its annual originations in 2022 and 2023, may not be a covered financial institution at all by its compliance date if it has less than 100 annual originations in 2024 or 2025.

The Bureau received one comment directly addressing proposed § 1002.114(c)(2). By contrast, the Bureau received multiple comments on the difficulty that some financial institutions may face in determining their coverage under this rule, and therefore their compliance date, because they do not collect information on the gross annual revenue of their applicants for business credit. Some industry commenters, as set out in the section-by-section analysis of § 1002.107(a)(14), noted either that they did not collecting data on gross annual revenue of some small business applicants, or that there would be difficulties in collecting such data.

In response to these comments, the Bureau has revised § 1002.114(c)(2) to provide greater flexibility for those financial institutions that do not have ready access to data on gross annual revenue to determine what compliance date will apply to them for purposes of § 1002.114(b). Because of the changes to this rule after the proposal, the Bureau believes that this provision, as finalized, will provide greater clarity and certainty to those financial institutions that do not currently collect gross annual revenue data as to which compliance date will apply to them. This will be particularly important for those financial institutions that originated a volume of potentially covered credit transactions close to the threshold under § 1002.105(b), and those financial institutions that originated a volume of potentially covered credit transactions close to the thresholds in § 1002.114(b). The Bureau believes this provision is necessary to carry out, enforce, and compile data pursuant to section 1071.

Appendix E to Part 1002—Sample Form for Collecting Certain Applicant-Provided Data under Subpart B

Proposed Rule

The Bureau proposed a sample data collection form that financial institutions could choose to use to collect minority-owned business status, women-owned business status, and principal owners' ethnicity, race, and sex. The proposed sample data collection form would have been similar to the HMDA data collection form and would have included a notice of the applicant's right to refuse to provide the information as well as an explanation of why the financial institution is requesting the information. The sample data collection form would have also included the definitions of minority individual, minority-owned business, principal owner, and women-owned business as they would have been defined in proposed § 1002.102(*l*), (m), (o), and (s), respectively.

Additionally, to aid financial institutions with the collection of the information in proposed § 1002.107(a)(21), the sample data collection form would have included a question about the applicant's number of principal owners. The sample data collection form would have also included language that a financial institution would have been able to use to satisfy the notice requirement under ECOA section 704B(d)(2) if it determined that one or more employees or officers should have access to the applicant's protected demographic information pursuant to proposed § 1002.108(b)(2).

The Bureau requested comment on the proposed sample data collection form, including the proposed language for the notice under ECOA section 704B(d)(2). The Bureau also generally requested comment on whether to provide additional clarification regarding any aspect of the sample data collection form or the related notice provided pursuant to ECOA section 704B(d)(2). In addition, the Bureau sought comment on whether the sample data collection form should identify the Bureau to applicants as a potential resource in connection with their applicable legal rights or for additional information about the data collection, including concerns regarding non-

compliance. It also sought comment on whether financial institutions need additional information on how to adapt this form for use in digital modes of data collection, and, if so, what specific information would be most useful. The Bureau further requested comment on whether a sample data collection form in Spanish or other languages would be useful to financial institutions.

Comments Received

Commenters were generally supportive of the Bureau's inclusion of a sample data collection form in the final rule, stating that the sample data collection form would help financial institutions meet the demographic data collection requirements.

Several commenters had suggestions for language to add to the proposed sample data collection form. One trade association suggested that the data collection form disclose, as the beginning, that the applicant is not required to respond to the questions, and second inquire as to whether the applicant is a small business based on its gross annual revenue and establish that the form is not required if the applicant is not a small business. One bank commented that the form should include language, in bold, to the applicant stating that the information provided will not be used against them and is not derogatory.

A bank urged providing an option on the proposed form for an applicant to indicate if the applicant's principal owner was present when the form was completed or if the responses were provided by the principal owner, to lessen confusion and discomfort during the application process. The bank stated such an option would also improve data quality where a financial institution does not meet with a principal owner in person and thus cannot make ethnicity and race determinations on the basis of visual observation and/or surname analysis. A trade association suggested including options to indicate on the form if the applicant declined to answer and that the applicant was not available, which could be used if an applicant representative was uncertain of an absent principal owner's ethnicity, race, and/or sex or was unsure if the principal owner wished to provide such information.

A community group commenter recommended that the sample data collection form include a notice that the Americans with Disabilities Act prohibits discrimination in lending practices on the basis of an applicant's disability.

An individual commenter suggested that applications include an explanation of why the Bureau is collecting protected demographic information after a demographic information collection section, which would allow an applicant to make an informed decision in providing information and know who to contact in the event of discrimination.

A bank and a trade association stated that the proposed sample data collection form is misleading because it would have indicated that the demographic information is required and would not have stated that the borrower has the right to refuse to provide the requested information. In contrast, however, a CDFI lender supported the statement on the proposed form that applicants are not required to provide the information requested but are encouraged to do so. This commenter also supported the notice on the sample form that while provided information could not be used to discriminate against the applicant, some employees may have access to the information.

Some lenders and trade associations expressed concerns about the text on the proposed sample form that would have disclosed that, if an applicant does not provide ethnicity, race, or sex information for at least one principal owner and the financial institution meets with a principal owner in person or via electronic media with an enabled video component, the financial institution is required by Federal law to report at least one principal owner's ethnicity and race based on visual observation and/or surname. Some of these commenters, who also opposed the proposed visual observation and surname data collection requirement this language would have referenced, stated that the proposed disclosure language may discourage an applicant from seeking an in-person meeting with the financial institution or pressure applicants to provide the information to avoid inaccurate guesses by bank employees or officers. Other commenters requested that the disclosure about the proposed visual observation and surname data collection

requirement be removed from the form, because it would inform an applicant that the financial institution will be collecting information about their principal owners' ethnicity and race regardless of their choice to not provide the information. A joint letter from several trade associations representing the commercial real estate industry opposing the proposed visual observation and surname data collection requirement stated that the related disclosure language on the proposed form should be removed if the data collection requirement is not adopted for the final rule.

Some community groups, a CDFI lender, and a joint trade association letter recommended that the Bureau provide non-English translations of any sample forms, including in Spanish. Two community groups suggested that the data collection form be provided in English, Spanish, and Mandarin Chinese. They stated that providing the forms in multiple languages would help reduce confusion and help lenders. Other community groups and a lender suggested that the proposed form be provided in at least the top ten spoken languages in the United States, as determined by the Census, so applicants can understand the data being collected and its context. They stated that the translations are necessary to honor the statutory intent, and that immigrants are more likely to start businesses than non-immigrants, and research shows that many immigrants and immigrant entrepreneurs have limited English proficiency, which leads to difficulties in navigating the financial marketplace.

A trade association and a bank requested flexibility to solicit responses to the questions on the proposed sample collection form across different circumstances, and specifically asked for clarification that financial institutions could list the response "I do not wish to provide this information," as the first response option and not the last, as it is listed for all the proposed questions on the form. The commenters also asked for flexibility, when using an electronic data collection form, to collapse subcategories of questions, so that they appear only when an applicant clicks on a question to facilitate readability. The commenters also asked for clarification for applications taken orally, as to whether all categories of responses must be read

to the applicant, even if the applicant has responded to an earlier response option. These commenters also requested a safe harbor from liability for not using the language of the sample data collection form when taking a covered application orally, stating that some words on the form are long, complex, and may be difficult for employees to pronounce. These commenters also stated that the sample data collection form should disclose which data points will be published to allow applicants to make informed decisions, address privacy concerns, and improve data quality.

Some commenters had suggestions for additional forms or materials the Bureau should issue. A trade association stated that the Bureau should create a business-specific form to request information, which the commenter stated should be optional for financial institutions to use. Several commenters, including banks, community groups, and a minority business advocacy group, asked the Bureau to create a uniform or model data collection or application form. The commenters generally stated that such a form would facilitate accurate data collection. One bank asserted that the likelihood of a respondent providing information would be higher, citing Paycheck Protection Program data that the majority of applicants chose not to provide demographic information. The bank stated that absent a uniform CFPB-issued form, collection and the resulting data will be flawed. Two commenters cited the HMDA model application forms as an example of such a uniform application, which one said effectively explains to borrowers why data are being collected and encourages completion of the data while also giving the borrower some assurance that they will not be discriminated against for either furnishing (or not) the data. A trade association and a bank urged the Bureau to create a specific data collection form for loans covered by HMDA and by section 1071, if HMDA-reportable loans are included in the final rule, to facilitate consistent reporting. A trade association and a business advocacy group encouraged the Bureau to evaluate the sample data collection form and instructions on an ongoing basis for any necessary changes.

Final Rule

Pursuant to its authority under ECOA section 704B(g)(1), the Bureau is finalizing appendix E to help financial institutions comply with requirements to collect applicants' protected demographic information and to keep an applicant's responses to inquiries for such information separately from the credit application and accompanying information. The introductory language in the sample form includes right to refuse, firewall, and non-discrimination notices. When lenders choose to use the form, this language serves to facilitate compliance with ECOA section 704B(c) and, when applicable, 704B(d)(2), as well as with comment 107(a)(19)-4, which requires that applicants be informed that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. Though the sample form reflects a number of legal requirements applicable to collection, the rule does not require use of the form itself. Rather, the sample form is intended as a compliance resource for lenders who choose to use it.

The Bureau agrees generally with commenters that the sample data collection form at final appendix E will help facilitate financial institutions' efforts to comply with the data collection requirements of the final rule, meet their statutory obligations, and that it will streamline the data collection process. To further these goals, the sample data collection form at final appendix E reflects edits made by the Bureau in response to comments received and further Bureau consideration. The final version of the form also considers feedback from user testing, conducted to learn about small business owners' likely experience in filling out the form and to explore design and language options to make the form effective.[839]

The Bureau received comments suggesting that the Bureau provide more guidance or specific text on the form about the purpose of the data collected through the form. The Bureau

[839] CFPB, *User testing for sample data collection form for the small business lending final rule* (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

agrees with commenters that it is important to provide applicants with a general explanation of the rule and its purpose. As discussed in the section-by-section analysis of § 1002.107(a)(19), in response to similar comments and in consideration of feedback from the user testing, comments 107(a)(18)-4 and 107(a)(19)-4 provide that a financial institution must inform an applicant that Federal law requires it to ask for the applicant's principal owners' ethnicity, race, and sex to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. The Bureau has also included sample language for the statement on the sample form at appendix E. In the Bureau's user testing, participants also generally reflected a preference for upfront placement of language establishing that Federal law requires the collection of the requested information and emphasizing the purpose of collecting the information, to ensure that small business owners are treated fairly. As revised, the introduction on the first page of the final sample data collection form starts with this statement and also reiterates the purpose of the data collection in the last sentence. As discussed in the section-by-section analysis of § 1002.108, the Bureau has also revised the firewall notice in the introduction. The Bureau has moved its placement to the second paragraph of the introduction. In line with a suggestion by a commenter, the Bureau has also generally revised the language of the non-discrimination notice to emphasize that the financial institution may not discriminate against the applicant on the basis of its answers, by bolding and capitalizing the phrase, "Federal law prohibits discrimination" in that disclosure, along with other edits.[840]

To accommodate the changes described above, the right to refuse notice is now included later in the introduction. The Bureau received comments that the proposed sample data collection form does not state that applicants have the right to refuse to provide the information requested—which the Bureau notes is incorrect—and a suggestion that the form emphasize that right at the very beginning. In the user testing, some participants also recommended greater

[840] *Id.* at app. A.

emphasis on the right to refuse.[841] After consideration of all the received feedback, the Bureau believes that the introduction of the sample data collection form appropriately addresses an applicant's right to refuse to provide the information requested. In particular, the preceding introductory material in the sample data collection form, as described above, will inform applicants about what they are refusing when exercising that right.

The first page of the final sample form also includes a question about the applicant's business status under final § 1002.107(a)(18). Whereas the proposed sample form originally had separate inquiries for an applicant's minority-owned business status and women-owned business status, the final sample data collection form combines those questions, along with the inquiry about whether the applicant is an LGBTQI+-owned business, into one question to streamline the questions on the data collection form.[842] The Bureau also received feedback during its user testing of the forms that the term "business status" was confusing for applicants. In consideration of that feedback and comments received generally urging the Bureau to make the sample data collection form clearer for applicants, the Bureau has revised the sample question heading to read "Business ownership status."

As discussed in the section-by-section analysis of § 1002.102(m), the Bureau is not adopting its proposed definition for minority individual in the final rule, because it is incorporating the substance of the minority individual definition in the "minority-owned business" definition at final § 1002.102(m). To facilitate the readability of the combined business ownership status question on the final sample data collection form, the Bureau is including a separate explanation for what is meant by a minority individual, which is similar to the approach to the minority-owned business question on the proposed sample data collection form. A

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[841] *Id.*

[842] Two versions of a combined question were tested in the Bureau's user testing. The version in final appendix E is the version the Bureau believes is conceptually simpler for applicants to understand.

financial institution is permitted to use the language on the sample form to satisfy the rule's requirement to provide certain definitions when requesting an applicant's business status

The first page of the final sample data collection form also includes a question about the number of the applicant's principal owners, as did the first page of the Bureau's proposed form. The Bureau has revised the question to include check boxes for potential responses instead of a write-in text field as proposed, to reduce the likelihood of error by applicants in responding to the question.

Final comments 102(o)-3 and 107(a)(20)-1 clarify that a financial institution must provide the definition of principal owner set forth in § 1002.102(o) when requesting information about the number of an applicant's principal owners. As discussed further in the section-by-section analyses of §§ 1002.102(o) and 1002.107(a)(20), in consideration of overall feedback from commenters to improve applicant understanding of the data collection and positive feedback received in the course of the user testing, the Bureau has revised the number of principal owners inquiry on the final sample data collection form to use the term "individual" instead of the term "natural person" when providing the definition of a principal owner.

As explained in the section-by-section analysis of § 1002.107(a)(19), the Bureau has elected to not adopt the proposed requirement that a financial institution collect at least one principal owner's ethnicity and race information through visual observation and/or surname analysis under certain circumstances. As a result, the Bureau has removed the proposed disclosure regarding this requirement from the second page of the final sample data collection form, rendering commenters' objections to the disclosure moot.

In the Bureau's user testing, some participants expressed confusion about differences between the ethnicity and race questions on the sample data collection form. Some users also stated it was not obvious how many separate questions they had to answer. To ensure that the sample data collection form is clear and easily understood, on the second page of the form the Bureau has numbered the sample questions about a principal owner's ethnicity, sex (as

"sex/gender"), and race (from one to three, in that order) to make more apparent that the questions are separate inquiries. The Bureau has also changed the inquiries on that page to appear as questions (*e.g.*, for ethnicity, to ask "Are you Hispanic or Latino?") to make the substance of each inquiry clearer. The Bureau has also made edits to rearrange the questions and to the format of the ethnicity and race aggregate categories and disaggregated subcategories on the final form, to make clearer for the reader that the disaggregated subcategories are associated with the aggregate categories. The Bureau has further updated the instruction associated with each of the response options with a write-in text field to direct the applicant to "specify" a response and not "print" a response as proposed, to facilitate the use of the instruction for paper, electronic, and oral applications.

The Bureau carefully considered the comment suggesting that the sample form first note applicants' right to refuse and, second, establish that if the applicant is not a small business it does not need to fill out the form, by including an inquiry about the applicant's gross annual revenue. However, in the Bureau's user testing, participants preferred having information explaining that the data collection was required under Federal law at the beginning of the form and emphasized the importance of explaining the purpose of the data collection.[843] And, for the reasons explained above, the Bureau believes the placement of the right to refuse in the introductory text is appropriate.

The Bureau also does not believe that it is necessary for the sample form to include an inquiry establishing the applicant's small business status. Financial institutions will be required to maintain reasonably designed procedures to collect applicant-provided data, pursuant to § 1002.107(c). The Bureau has also included a safe harbor under § 1002.112(c) for a financial institution that initially collects data under § 1002.107(a)(18) and (19) regarding whether an applicant for a covered credit transaction is a minority-owned, a women-owned, and/or an

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[843] CFPB, *User testing for sample data collection form for the small business lending final rule* at app. A, at 6, 11-12, 14 (Mar. 2023), https://www.consumerfinance.gov/data-research/research-reports/user-testing-for-sample-data-collection-form-for-the-small-business-lending-final-rule/.

LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners, but later concludes that it should not have collected this data, if certain conditions are met. The Bureau believes these other regulatory provisions will mitigate the possibility that data will be incorrectly collected and protect financial institutions from inadvertent collection. As a result, the Bureau does not believe that it is necessary for the sample form to include a question to establish the applicant's small business status.

The Bureau considered the commenter's suggestion to include a disclosure about the American with Disabilities Act on the final sample data collection form. The sample form has been developed by the Bureau to address a financial institution's disclosure and data collection obligations under section 1071 and the Bureau believes it would be confusing for the sample form to include text as to the applicability of other laws.

The Bureau is not adopting commenters' suggestions that the sample data collection form include options for indicating whether an applicant's principal owners or the applicant are not present or available, that the data was not provided by principal owner, or that the applicant declines to fill out the form. As discussed above, the proposed form would have included a notice about the applicant's right to refuse to provide the information requested. This right to refuse notice also appears, with some edits, on the final sample data collection form. The Bureau believes it is reasonable to assume that if the person filling out the data collection form on behalf of an applicant does not feel comfortable providing the information for any reason, including because they are not the principal owner at issue or do not believe they can provide accurate responses, that they will exercise the right to refuse to provide the requested information. Further, an applicant can also choose to not fill out the entirety of the form, to not provide responses to a specific question, or to select the "I do not wish to provide this information" or similar response option available for each of the demographic questions on the sample data collection form. As a result, the Bureau does not believe it is necessary to include the suggested options on the sample data collection form to address any discomfort by persons that may be

completing the data collection form, who are not principal owners, as suggested by some commenters. Further, as explained in the section-by-section analysis of § 1002.107(a)(19), the Bureau is not finalizing its proposal to require a financial institution to collect at least one principal owner's ethnicity and race on the basis of visual observation and/or surname analysis under certain circumstances. All financial institutions will be required to report only applicant-provided responses to the demographic questions on the final sample data collection form. As a result, the Bureau does not believe the suggested options are necessary to address data quality concerns relating to the proposed visual observation and surname data collection requirement, as suggested by one commenter.

The Bureau has considered comments suggesting that the sample data collection form disclose what information will be published. As discussed in greater detail in part VIII below, after receiving a full year of reported data, the Bureau will assess privacy risks associated with the data and make modification and deletion decisions to the public, application-level dataset. As a result, the Bureau does not have definitive information about the public, application-level dataset available to put on the sample data collection form. The Bureau takes the privacy of such information seriously and, as noted, will be making appropriate modifications and deletions to any data before making it public. However, the Bureau intends to continue engage with the public about how to mitigate privacy risk.

The Bureau also considered the suggestion to translate the sample data collection form into other languages. Generally, Bureau stakeholders have underscored the importance of language access as a way of ensuring fair and competitive access to financial services and products. Persons with limited English proficiency in the United States make up a significant portion of the population. According to a report, more than one in five immigrant entrepreneurs, or nearly 773,000 people, in the United States in 2018 had limited English proficiency.[844] More

[844] New Am. Econ. Rsch. Fund, *Assessing Language Barriers for Immigrant Entrepreneurs* (Aug. 13, 2020), https://research.newamericaneconomy.org/report/covid19-immigrant-entrepreneurs-languages/ (analyzing 2018 data from the Census Bureau's American Community Survey).

than 67 million people, or close to 22 percent of the U.S. population over the age of five, speak a language other than English at home.[845] In 2021, over five million households reported that all their members were of limited English speaking ability.[846]

The Bureau believes that competitive, transparent, and fair markets are supported by providing translations of key material in the customer's preferred language, along with the corresponding English-language material. Accordingly, the Bureau will make available translations of the sample data collection form, for financial institutions that wish to use them. Use of these translations, like use of the form itself, is not required under rule, but the Bureau is providing them as an implementation resource for lenders.

Some commenters asked for flexibility as to the presentation of the information, inquiries, and response options on the sample data collection form at final appendix E. Generally, the Bureau believes that applicants should have substantially similar experiences, regardless of a financial institution's method of collection, when being provided with required notices under the final rule (*e.g.*, the firewall notice, the non-discrimination notice, and the right to refuse notice) and when asked for protected demographic information. The Bureau has designed the sample data collection form at final appendix E to assist financial institutions with their compliance obligations and to maximize the likelihood that an applicant will provide demographic information, after review of the comments received, user testing feedback, and other considerations. However, the Bureau notes that the use of the sample data collection form

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[845] U.S. Census Bureau, *American Community Survey, 2021 American Community Survey 1-Year Estimates, Table S1601: Language Spoken at Home*, https://data.census.gov/cedsci/table?q=language%20spoken%20at%20home&tid=ACSST1Y2021.S1601 (last visited Mar. 20, 2023).

[846] U.S. Census Bureau, *American Community Survey, 2021 American Community Survey 1-Year Estimates, Table S1602: Limited English Speaking Households*, https://data.census.gov/cedsci/table?q=language%20spoken%20at%20home&tid=ACSST1Y2021.S1602 (last visited Mar. 20, 2023). The U.S. Census defines a "limited English speaking household" as one in which no member 14 years old and over (1) speaks only English or (2) speaks a non-English language and speaks English "very well." *See* U.S. Census Bureau, *Frequently Asked Questions (FAQs) About Language Use*, https://www.census.gov/topics/population/language-use/about/faqs.html#:~:text=What%20is%20a%20Limited%20English,least%20some%20difficulty%20with%20English (last visited Mar. 20, 2023).

at final appendix E to collect information required under the final rule is not mandatory, and financial institutions are thus not prohibited from modifying the form, so long as the resulting collection method complies with applicable rule requirements.

With regard to a couple of commenters' request for clarification as to whether a financial institution must read all of the categories of responses if collecting over the phone or orally even if an applicant has responded to an earlier response option, the Bureau is uncertain whether the commenters' request is referring to the collection of a principal owner's ethnicity and race information, which provides aggregate categories and disaggregated subcategories as response options. If so, the Bureau notes that it has revised the associated commentary for § 1002.107(a)(19) to provide financial institutions with certain flexibility when inquiring about a principal owner's ethnicity and race information. Generally, comment 107(a)(19)-16 provides that for applications taken orally through means other than by a paper or electronic form (*e.g.,* telephone applications), the financial institution will not be required to read aloud every disaggregated ethnicity and race subcategory, in the manner described in the comment. Further, because an applicant using a paper version of the sample data collection form will reference all available answer options to a question at once and may review the answer options in any order, the Bureau does not believe that the answer options for a specified question need to be provided in a specific order for an application taken over the phone, as long as all the answer options are presented. However, for the requirement to collect ethnicity and race information specifically, comment 107(a)(19)-16 clarifies that the financial institution may not present the applicant with the option to decline to provide the information requested without also presenting specified aggregate categories and disaggregated subcategories for ethnicity and race. This would apply even if the applicant informs the financial institution, before the financial institution has asked for a principal owner's ethnicity and race information, that it does not wish to provide such information.

The Bureau is not including other sample, uniform, or model applications or data collection forms in the final rule, as suggested by some commenters. There are a variety of products that are covered transactions under the final rule, and the Bureau understands that covered financial institutions may need to ask for the information (except for the protected demographic information) they are required to report to the Bureau in different ways. The Bureau does not believe that a sample, uniform, or model application or data collection form would be able to account for such potential variations. Thus, any additional forms may have limited utility and could incorrectly suggest that financial institutions are limited in the manner in which they collect non-demographic data under this final rule. As a result, the Bureau is not providing such a form at this time. The Bureau may consider issuing other guidance, tools, and compliance aids if it later determines doing so is necessary.

The Bureau notes that there is no need for a specific data collection form for loans that are reportable under both HMDA and section 1071, as the Bureau has decided to exclude HMDA-reportable loans from the data requirements of the final rule as discussed in the section-by-section analysis of § 1002.104(b)(2).

Some commenters urged the Bureau to continue to review the sample data collection form and its instructions after these final rules are issued. The Bureau anticipates receiving and feedback as the final rules are implemented and, as with all the regulations it administers, will issue guidance as necessary and consider if changes to any aspect of the final rules are required, whether through rulemaking or otherwise.

Appendix F to Part 1002—Tolerances for Bona Fide Errors in Data Reported under Subpart B

Proposed Rule

The Bureau proposed appendix H, which would have set out a Threshold Table, as referred to in proposed § 1002.112(b) and proposed comment 112(b)-1. As these provisions would have explained, a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a

random sample of a financial institution's data submission for a given data field do not equal or exceed the threshold in column C of the Threshold Table.

Under the Threshold Table in proposed appendix H, column A listed the size of the financial institution's small business lending application register in ranges of application register counts (*e.g.*, 25 to 50, 51-100, 101-130, etc.). The applicable register count range would have then determined both the size of the random sample, under column B, and the applicable error threshold, under column C. The error threshold of column C, as proposed comment 112(b)-1 would have explained, identifies the maximum number of errors that a particular data field in a financial institution's small business lending application register may contain such that the financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field. Column D would have been illustrative, showing the error threshold as a percentage of the random sample size.

Proposed appendix H would also have included examples of how financial institutions would use the Threshold Table.

The Bureau sought comment on proposed appendix H. In particular, the Bureau sought comment on whether the register count ranges in column A, the random sample sizes in column B, and the error thresholds in column C were appropriate. The Bureau further sought comment on whether a covered financial institution should be required to correct and resubmit data for a particular data field, if the institution has met or exceeded the thresholds provided in appendix H.

Comments Received

A number of commenters, including banks, trade associations, and a community group addressed the proposed appendix H and its tolerance thresholds. The community group supported the structure of the tolerances as sensible, noting that larger lenders should face more stringent tolerances, expressed as lower percentages, and that the proposed thresholds were time-tested, and balanced reasonableness and data integrity, because they were consistent with Regulation C (implementing HMDA).

Many banks and trade associations stated that the tolerances set out in proposed appendix H were too low and should be raised. One commenter said that limited error tolerances would create undue hardships for banks, and that it was imperative to work through processes to create valid data, and that invalid data are likely to raise false red flags that are burdensome for banks to defend. Another commenter stated that the tolerances were too low and needed to be raised because of the great amount of time needed to verify and re-verify data points. A trade association advocated for higher tolerance thresholds in recognition of the substantial implementation efforts which will need to occur, and to provide banks a more meaningful opportunity to effectively implement the rule.

A number of industry commenters noted that the thresholds in proposed appendix H were based on the tolerance thresholds for resubmitting data under Regulation C and HMDA, and asserted that these thresholds were too low for this rule, citing the number of data points required and the complexity of the data reporting requirements. Several of these commenters asked that the error threshold be increased to a "more reasonable level" without specifying exact threshold percentages. One commenter requesting higher tolerances noted that HMDA reporting requirements had been in place for decades and that HMDA reporters thus have had decades to fine tune their processes and procedures.

A bank said that the proposed thresholds left a margin of error that is statistically 0 percent, and claimed that by adopting error thresholds similar to the HMDA requirements, financial institutions would have to conduct a 100 percent audit to ensure accurate data collection/reporting, which they said would burden lenders. Another bank suggested that because data entry errors are inevitable the tolerance levels should be changed to a "reasonable" rate, and that a 95 percent confidence level would be sufficient. A trade association stated that the tolerance thresholds were unrealistically low, given that small business loan data collection is entirely unprecedented and would require new systems and processes. The commenter stated that 90 to 97.5 percent data accuracy was out of reach for most of the trade association's lenders,

particularly in the first year. The commenter also noted that stringent data accuracy requirements under HMDA were already costly.

A group of trade associations similarly requested that the tolerance thresholds be increased, in recognition of the substantial implementation efforts that financial institutions will undertake for a new data collection and reporting regime, requiring new processes and procedures, noting that despite all of these efforts that bona fide errors are likely to occur, especially given the substantial number of data points the Bureau is mandating.

A bank suggested that the tolerance thresholds did not appropriately scale, noting that while there were seven tiers there were only two threshold levels. The bank asked that the Bureau implement more threshold levels and increase the thresholds, especially for low and intermediate volume lenders. Another bank said that the Bureau should increases the tolerance thresholds for lenders that had between 191 to 500 applications, to at least 4 percent but preferably 5 percent. A third bank suggested expanding the threshold categories, to include different groupings, by number of applications: 501 to 1,000; 1,001 to 10,000; 10,001 to 100,000; and more than 100,000. The bank also suggested incremental increases in the threshold number of bona fide errors.

Final Rule

The Bureau is finalizing appendix H, renumbered as appendix F, with revisions that include the deletion of the first two rows of Table 1 to appendix F. These rows, covering small business lending application register counts of 25 to 50 applications and 51-100 applications, are omitted to correspond with the change in the originations threshold to determine if a financial institution is a covered financial institution under final § 1002.105(b), from 25 originations to 100 originations. While each provision looks to different metrics—originations for § 1002.105(b) and applications for appendix F—it is not possible for a lender to have originated more than 100 covered credit transactions for small businesses in a given year without also having received more than 100 applications for covered credit transactions. The Bureau believes

that rows containing register counts of less than 100 are superfluous. Table 1 of appendix F is adjusted accordingly.

For the reasons set out in the section-by-section analysis of § 1002.112(b), the Bureau is finalizing appendix F pursuant to its authority under ECOA section 704B(g)(1) to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and its authority under 704B(g)(2) to adopt exceptions to any requirement of section 1071 and to exempt any financial institution or class of financial institutions from the requirements section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

Regarding the various comments on the tolerance thresholds in proposed appendix H, the Bureau agrees with the comment that the structure of the tolerance thresholds was sensible, that larger lenders should face more stringent tolerances, and that the proposed thresholds were time-tested because of their use in examinations under Regulation C. The Bureau has considered the various comments asserting that the tolerances, based on the HMDA examination thresholds, are too low. The error thresholds were, as one commenter mentioned, tested in the HMDA context and reasonably balance the competing concerns of data quality and practicability of implementation. Further, commenters claiming that the thresholds were too low did not acknowledge one major difference with the HMDA thresholds; while the HMDA thresholds determine when lenders must resubmit their HMDA data to the Bureau, § 1002.112(b), with the thresholds in appendix F, serve to eliminate financial institution liability under ECOA and this rule for bona fide errors under the thresholds. The Bureau does not believe that limited tolerances will create undue hardships, given the need to validate and re-validate data, nor that they will raise false red flags that will be burdensome for banks to defend. The revised compliance date provision in § 1002.114(b) will provide the majority of covered financial institutions more time to validate their data in advance of the first submission to the Bureau under this rule. In addition, the Bureau is providing a grace period of one year, during which it does not intend to assess

penalties for errors in data submitted by financial institutions that make good faith efforts to comply with rule (see part VII below).

Regarding the comment that higher tolerance thresholds are needed in recognition of the substantial implementation efforts which will need to occur, the Bureau observes that it is recognizing these efforts in other ways, including the added time to comply under revised § 1002.114(b), and the grace period offered to all institutions in their first 12 months of collecting data.

Regarding the comment that HMDA reporting requirements had been in place for decades, and that HMDA reporters had decades to fine tune their processes and procedures, and that the Bureau should increase the tolerances in proposed appendix H, the Bureau acknowledges that many HMDA reporters have had time to fine tune their processes, but also notes that the tolerances apply nonetheless to new HMDA reporters as well. In any case, the comment appears to support the point that the HMDA tolerances have been time-tested and are reasonable to implement.

Regarding the comments that the proposed thresholds leave a margin of error of 0 percent, that they would require lenders to conduct a 100 percent audit to ensure accurate data collection, and that a 95 percent confidence level would be sufficient, the Bureau refers the commenter to appendix F, which specifies the actual error thresholds based on the number of transactions, ranging from 10 percent for the reporters with the lowest volumes to 2.5 percent for those with the highest. Regarding the comment that 90 to 97.5 percent data accuracy would be out of reach for most of the trade association's lenders, particularly in the first year, the Bureau notes that in addition to the error thresholds, lenders will have the benefit of several other safe harbors, a grace period, and additional time to comply for most lenders as specified in § 1002.114(b).

Regarding the comment that the tolerance thresholds do not scale and that there were only two threshold levels, the Bureau notes that proposed appendix H, finalized as appendix F,

specified more than two thresholds (five) and that final appendix F specifies four—6.4 percent, 5.4 percent, 5.1 percent, and 2.5 percent. The Bureau is not implementing more threshold levels or to increasing the thresholds, as requested by some commenters, as these thresholds are already relatively high for low and intermediate volume lenders. Regarding the comment requesting that the Bureau increases the tolerance thresholds for the lenders that had between 191 to 500 applications to at least 4 percent but preferably 5 percent, the Bureau notes that the error threshold for lenders in this range is already 5.1 percent. Regarding the suggested expansion of threshold categories, to include more groupings between 500 and 100,000, the Bureau notes that no explanation was given about what such additional ranges would accomplish, or what specific thresholds should be applied to these new ranges, other than that they should increase incrementally. The Bureau is also not adopting incremental increases in the error thresholds. Appendix F reflects the experience of HMDA examinations, and financial institutions with more applications are expected to have a lower percentage of errors than those that receive fewer applications.

VI. Effective Date and Compliance Dates

The Bureau is adopting an effective date of 90 days after the publication of this final rule in the *Federal Register* consistent with section 553(d) of the Administrative Procedure Act[847] and with section 801(a)(3) of the Congressional Review Act.[848]

This final rule includes the addition of a new subpart B to Regulation B comprised of final §§ 1002.101 through 1002.114 and related commentary, appendices E and F. This final rule also amends certain sections of existing Regulation B, renumbered as subpart A, specifically § 1002.5(a)(4) and commentary related to § 1002.5(a)(2) and (4). It also makes conforming changes in several other provisions in existing Regulation B.

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[847] 5 U.S.C. 553(d).

[848] 5 U.S.C. 801(a)(3).

Further, for the reasons specified in the section-by-section analysis of § 1002.114(b), the Bureau is finalizing three different compliance dates, based on the number of originations of covered credit transactions for small businesses, rather than the single compliance date in the NPRM, which proposed a compliance period of 18 months after the publication of the final rule in the *Federal Register*. As specified in § 1002.114(b)(1), covered financial institutions in Tier 1, which had at least 2,500 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of October 1, 2024. As specified in § 1002.114(b)(2), covered financial institutions in Tier 2, which had at least 500 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of April 1, 2025. As specified in § 1002.114(b)(3), covered financial institutions in Tier 3, which had at least 100 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, will have a compliance date of January 1, 2026. As specified in § 1002.114(b)(4), covered financial institutions which did not have at least 100 originations of covered credit transactions for small businesses in each of calendar years 2022 and 2023, but subsequently originates at least 100 such transactions in two consecutive calendar years, will have a compliance date of no earlier than January 1, 2026.

VII. Grace Period Policy Statement

During the SBREFA process and in response to the NPRM, the Bureau received numerous comments requesting a grace period in the early period after financial institutions are required to comply with the Bureau's final rule implementing section 1071. The Bureau agrees that it is appropriate to provide a grace period during which it does not intend to exercise its enforcement and supervisory authorities, assuming good faith compliance efforts by financial institutions; for instance, attempts to discourage applicants from providing data would not be in good faith. This Grace Period Policy Statement explains how the Bureau intends to implement such a grace period.

Comments Received

In the context of responding to the proposal presented during SBREFA for a two-year implementation period, some small entity representatives and other stakeholders suggested that the Bureau adopt a grace period for data errors in the first year(s) after the rule goes into effect. These comments suggested that the Bureau adopt a grace period of some kind during which financial institutions would not be penalized for errors when trying to comply with the Bureau's rule implementing section 1071. 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.[849]

In response to both the proposed enforcement and the compliance date provisions in the NPRM, the Bureau received a number of comments requesting a grace period during which the Bureau would either not examine financial institutions for compliance with this rule, or would not assess penalties for violations of the rule. Several lenders supported a grace period without specifying how long the grace period should be. One of these commenters asked that the Bureau provide a grace period for at least one exam cycle.

Many industry commenters requested a grace period of one year or more from Bureau enforcement and examinations for data errors. Commenters offered various reasons in support of this grace period. Many lenders and trade associations stated that a one-year grace period would be consistent with the Bureau's approach to the 2015 HMDA rule. Some commenters with HMDA experience observed that the one-year grace period in that context was helpful for compliance efforts. Several other industry commenters stated that the experience with the 2015 HMDA rule demonstrated that a grace period would improve data accuracy, as it would allow financial institutions time to identity errors and implement corrective action without penalty.

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[849] CPFB, *CFPB Issues Public Statement On Home Mortgage Disclosure Act Compliance* (Dec. 21, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-public-statement-home-mortgage-disclosure-act-compliance/.

Several banks stated that a grace period would be critical to give lenders an opportunity to ensure systems are working properly. One said that a one-year grace period would foster cooperation and frank discussions between covered financial institutions and the Bureau, and that lenders would be more open and proactive in working with the Bureau to ensure their compliance. Other commenters requested a grace period on the grounds that compliance with the rule was a significant change involving the revamping of systems, and that the grace period would protect lenders from scrutiny for unintentional and bona fide errors. Several stated that a grace period was necessary to provide banks an opportunity to implement the rule effectively, perform testing, and ensure that loan operation systems, software, and other technologies are functioning correctly. A trade association requested that the Bureau work with other regulators to provide a grace period so that lenders are not penalized immediately for errors. A bank stated that the numerous data points and the various reportable sub-parts to those data points would inevitably lead to errors. Another industry commenter requested a one-year grace period to permit lenders to avoid penalties for data errors in spite of their best efforts. Two trade associations requested a one-year grace period as necessary protections given the need to implement substantial changes under the rule. A trade association and a bank asserted that a one-year grace period should be provided because honest errors are only discovered in the process of implementation, and a grace period would permit not only the lenders that committed these errors to learn from them, but also the industry as a whole. Similarly, a bank stated that the grace period would help ensure that all lenders were on the same page regarding all the different circumstances presented by the rule. Another bank stated that compliance with the rule would be new to all financial institutions. A different bank stated that the grace period would ensure that the rule would not cause undue compliance hardships on banks and would help banks create valid data. A trade association urged that the Bureau use enforcement actions sparingly in the 12 months following the rule's compliance date.

A smaller number of industry commenters requested a two-year grace period. One bank justified a two-year period because of the burden of compiling, maintaining, and reporting data under the rule. Another bank cited the magnitude of the rule's requirements and the tremendous effort to implement software, create policies and procedures, and train staff appropriately, and noted that such a grace period would allow for data quality testing in a real-life environment and lead to improvements in data accuracy. Several industry commenters requested that the Bureau avoid enforcement actions related to technical deficiencies for two years. Commenters also stated, in support of a two-year grace period, that absent such a grace period small business credit may be limited and the economy may be hurt; that compliance with the rule is spread across different business units, systems, and channels for larger lenders, and that current compliance systems are built to *avoid* collecting key data required by the rule (such as demographic information).

Some industry commenters stated that the experience with the 2015 HMDA rule showed that the Bureau should provide a two-year grace period. Two of these commenters noted that the Bureau should follow its approach in the 2015 HMDA rule, in which the Bureau imposed no penalties for two years after the new HMDA data collections took effect.[850] These commenters also stated that with such a grace period, lenders could self-correct issues with data accuracy without threat of enforcement actions for the inevitable tech and other challenges that will arise initially.

Policy Statement

The Bureau agrees that a grace period is appropriate. The following discussion explains how the Bureau intends to exercise its supervisory and enforcement discretion following a covered financial institution's initial compliance date.

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

With respect to institutions subject to the Bureau's supervisory or enforcement jurisdiction, the Bureau intends to provide a 12-month grace period for the initial data submission from covered financial institutions that have compliance dates specified in § 1002.114(b)(2), and (3) (*i.e.*, Tier 2 and Tier 3 institutions), covered financial institutions subject to § 1002.114(b)(4) that must start collecting data on January 1, 2026, and any financial institutions that make a voluntarily submission for the first time for data collected in 2025 or 2026.

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(1) (*i.e.*, Tier 1 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2024, the Bureau intends to provide a grace period covering the 3 months of data collected in 2024 (from October 1, 2024 through December 31, 2024) as well as the first 9 months of data collected in 2025 (from January 1, 2025 through September 30, 2025).

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(2) (*i.e.*, Tier 2 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2025, the Bureau intends to provide a 12-month grace period covering the 9 months of data collected in 2025 (from April 1, 2025 through December 31, 2025) as well as the data collected in the first three months of 2026 (from January 1, 2026 through March 31, 2026).

With respect to covered financial institutions subject to the Bureau's supervisory or enforcement jurisdiction that make good faith efforts to the comply with the rule that have a compliance date specified in § 1002.114(b)(3) (*i.e.*, Tier 3 institution), as well as any financial institutions that make a voluntarily submission for the first time for data collected in 2026, the

Bureau intends to provide a grace period covering the 12 months of data collected in calendar year 2026 (from January 1, 2026 through December 31, 2026).

The Bureau believes that a 12-month grace period will give institutions further time to diagnose and address unintentional errors without the prospect of penalties for inadvertent compliance issues, and may ultimately assist other covered financial institutions, especially those in later compliance tiers, in identifying best practices. While the Bureau believes that financial institutions in each reporting tier are capable of fully preparing to comply with the rule by their respective compliance dates, the Bureau believes that the use of its discretion providing a grace period that covers 12 months for each tier may result in more deliberate and thoughtful compliance with the rule, while still providing important data regarding small business lending as soon as feasibly possible.

During the grace period, if the Bureau identifies errors in a financial institution's initial data submissions, the Bureau does not intend to require data resubmission unless data errors are material. Further, the Bureau does not intend to assess penalties with respect to errors in the initial data submissions. Any examinations of these initial data submissions will consider the good faith efforts of the financial institutions to comply with the data collection and reporting requirements. The examinations will be diagnostic and will help to identify compliance weaknesses. However, errors that are not the result of good faith compliance efforts by financial institutions, especially attempts to discourage the reporting of data, will remain subject to the Bureau's full supervisory and enforcement authority, including the assessment of penalties.

The Bureau believes that these initial data submissions will provide financial institutions an opportunity to identify any gaps in their implementation of this rule and make improvements in their compliance management systems for future years.

The Bureau agrees with commenters who said that a grace period will promote openness and frankness, and will permit the Bureau to help financial institutions identify errors and, thereby, self-correct to avoid such errors in the future. The Bureau can also use data collected

during the grace period to alert financial institutions of common errors and potential best practices in data collection and submissions under this rule.

The Bureau believes that a grace period covering institutions' first 12 months of data submission is sufficient, especially given the other accommodations the Bureau is making to ensure that financial institutions are not unduly penalized for good faith errors, such as the bona fide error provision and the various safe harbors the Bureau has finalized in this rule, and the other provisions that the Bureau believes are likely to lead to more accurate data, such as the tiered compliance date structure, for the reasons specified in the section-by-section analysis of § 1002.114(b). The Bureau does not believe that a two-year grace period is necessary to avoid impacting small businesses' access to credit; as the impacts analysis in part X below suggests, the Bureau does not believe that this rule will materially impact the access small businesses have to credit.

Regarding the comment that the Bureau work with other regulators to provide a grace period so that lenders are not penalized immediately for errors, the Bureau notes that, unlike with HMDA, the Bureau is the sole agency that will be in a position to examine financial institutions' submissions for data errors in the first instance.

This is a general statement of policy under the Administrative Procedure Act.[851] It articulates considerations relevant to the Bureau's exercise of its authorities. It does not impose any legal requirements, nor does it confer rights of any kind. It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act.[852]

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[851] 5 U.S.C. 553(b).

[852] 44 U.S.C. 3501 through 3521.

VIII. Public Disclosure of Data

A. Background

Section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to collect and report to the Bureau data about applications for credit for women-owned, minority-owned, and small businesses, and for those data to be subsequently disclosed to the public.[853] Section 1071 further states that the Bureau may "at its discretion, delete or modify data collected under [section 1071] which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest."[854] Under the final rule, financial institutions may not compile, maintain, or submit any name, specific address, telephone number, email address or any personally identifiable information concerning any individual who is, or is connected with, an applicant, other than as would be required pursuant to final § 1002.107. Nonetheless, as the statute recognizes, publication of the data fields set forth in § 1002.107(a) in an unedited, application-level format could potentially affect privacy interests—for example, through the re-identification of, and risk of harm to, small businesses and related natural persons.

The CFPB is not determining its final approach to protecting such interests via pre-publication deletion and modification because it lacks the reported data it needs to finalize its approach and it does not see comparable datasets to use for this purpose. In light of comments received on the NPRM's privacy analysis, this part VIII offers a preliminary assessment of how it might appropriately assess and advance privacy interests by means of selective deletion or modification. The CFPB is not at this point identifying the specific procedural vehicle for effecting its privacy assessment. With respect to both substance and process, it will continue to engage with external stakeholders; and it intends to invite further input on how it plans to appropriately protect privacy in connection with publishing application-level data.

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[853] *See* ECOA section 704B(e)(1) and (f)(2).

[854] ECOA section 704B(e)(4).

B. Preliminary Privacy Assessment

1. Overview

Under ECOA section 704B(e)(4), Congress provided the CFPB with broad discretion to modify or delete data prior to public disclosure to advance privacy interests.[855] The NPRM proposed the use a balancing test for the exercise of this discretion. Specifically, it stated that it would modify or, as appropriate, delete data fields from collected application-level data where release of the unmodified data would pose risks to the privacy interests of applicants, related natural persons, or financial institutions that would not be justified by the benefits of such release to the public in light of the statutory purposes of section 1071. The Bureau explained that disclosure of an unmodified individual data field may create a risk to privacy interests if such disclosure either would substantially facilitate the re-identification of an applicant or related natural person, or would disclose information about applicants or related natural persons, or an identified financial institution, that is not otherwise public and that may be harmful or sensitive.

This balancing test would have required that the Bureau consider the benefits of disclosure in light of section 1071's purposes and, where these benefits did not justify the privacy risks the disclosure would create, modify the public application-level dataset to appropriately balance privacy risks and disclosure benefits. The Bureau would have deleted a data field prior to publishing the application-level dataset if other modifications would not appropriately balance the privacy risks and disclosure benefits. An individual data field would have been a candidate for modification or deletion under the balancing test if its disclosure in unmodified form would create a risk of re-identification or a risk of harm or sensitivity.

Section 1071 requires financial institutions to compile and maintain data and provides that such information be made available to the public upon request.[856] Accordingly, section 1071 contemplates that the public know what published application-level data are associated with

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[855] *Id.*

[856] *See* ECOA section 704B(e), (f)(2)(B).

particular financial institutions. As a result, the re-identification risk element of the balancing test analysis would not have applied to financial institutions, although the Bureau would have considered the risk to a financial institution that the release of 1071 data in unmodified form would inappropriately disclose commercially sensitive information.

The Bureau sought comment on the design of the balancing test. It also sought comment on whether the balancing test should apply to the privacy interests of natural persons generally or only of those related to applicants.

Comments Received

A wide range of commenters provided feedback on the proposed balancing test. Many community groups, as well as a several members of Congress, generally supported the NPRM approach. Others, including industry and several community groups, saw it as too subjective. These community groups stated that future Bureau leadership could choose to restrict publication by releasing truncated or aggregated data, but not application-level data. A lender and a trade association were concerned that the balancing test would not sufficiently protect privacy interests. Another commenter stated that the approach would be ineffective if a third party had personal knowledge of an applicant or related natural person because modifications to prevent re-identification risk in this scenario would critically reduce data utility. A joint letter from community and business advocacy groups asked the Bureau to confirm that the balancing test would evolve. They asked the Bureau to assess market developments and how well the final rule achieved statutory purposes, and to use this information to modify its publication approach. Industry commenters asked the CFPB to limit or wholly abandon release of application-level data.[857] For example, one commenter said that the agency should use exception authority under ECOA section 704B(g)(2) to not publish application-level data to avoid risks and burdens to the commercial and reputational interests of financial institutions.

[857] Commenters also provided feedback on potential modification and deletions for each of the Bureau's proposed data points; those comments are addressed in detail for each data point in part VIII.B.6 below.

Several commenters provided feedback about what benefits and risks the balancing test should consider. A joint letter from community groups, community-oriented lenders, and business advocacy groups, along with a joint letter from several members of Congress, supported the Bureau's stated intent to consider the benefits of public disclosure and the statutory purposes of section 1071. In contrast, an industry commenter said that the balancing test should not consider fair lending enforcement as a relevant benefit. According to this commenter, using the data for fair lending enforcement would subject financial institutions to unjustified scrutiny by regulators and hinder the development of innovative underwriting techniques.

Several commenters specifically stressed the importance of the Bureau considering the personal privacy interests of small business owners. More generally, a number of industry commenters, as well as several members of Congress, supported the Bureau's considering the privacy interests of applicants, related natural persons, and financial institutions. Numerous commenters said that public application-level data could pose significant privacy risks to these entities. Some noted that publication carries risks of re-identification and the disclosure of sensitive commercial and financial information. Industry commenters also reported that small business customers express privacy concerns whenever the government mandates disclosure of their business information. Commenters cited negative reactions to Paycheck Protection Program reporting requirements.

Some community groups saw the privacy risks associated with publication as low. Several asserted that HMDA data, which contains similar data fields, has not resulted in an increase of fraud or identify theft against mortgage applicants. Some commenters also noted that the interval between reporting and publication would reduce the likelihood of misuse, as would the public availability of some of the date from existing sources. Several community groups and a CDFI lender urged the Bureau not to give weight to the privacy interests of financial institutions. According to these commenters, publication should not consider the commercial, proprietary, litigation, and reputational interests of financial institutions. A joint letter from

community and business advocacy groups stated that because section 1071 contemplates the disclosure of financial institution identity, the Bureau should not consider any of their privacy interests. Conversely, some commenters raised concerns about financial institution privacy interests. A trade association said that failing to consider such interests would result in the disclosure of trade secrets and other confidential information.

Some commenters suggested that the balancing test include various presumptions for or against the publication of 1071 data. Community groups and a CDFI lender generally agreed that the balancing test should include a strong presumption in favor of disclosure. For example, some commenters stated that the Bureau should only modify or delete application-level data where its unmodified publication would pose privacy risks that meet a particular significance threshold—for example, where data fields would be "highly sensitive" or "clear" re-identification risk exists). Several industry commenters, on the other hand, suggested that the balancing test incorporate a presumption in favor of protecting privacy interests. For instance, a few commenters suggested that the Bureau give special consideration to the privacy interests of small financial institutions. These commenters warned that small business customers may gravitate to larger lenders because they believe it would be harder to identify individual applicants or related natural persons in data reported by large lenders.

Current Approach

In light of the comments received on the balancing test, the Bureau is now of the preliminary view that re-identification risk to small businesses and their owners is the core risk from which the preponderance of cognizable privacy risks flow. In this respect, the Bureau is focused particularly on risks to personal privacy interests.[858] The Bureau's preliminary assessment is that it will consider modification and deletion techniques to reduce those risks, while also considering the non-personal commercial privacy risks of small businesses. Lender

[858] The Bureau is considering whether the risks to sole proprietors, where the business and owner are indistinguishable for tax or legal purposes, may also qualify as personal risks. This may be the case where information reflects the sole proprietor's personal information, such as creditworthiness.

privacy interests would be considered only where publication would create a compelling risk to those interests.

Although some comments urged that it not publish any application-level data, the Bureau does not intend to withhold all such data from the public because that would critically undermine the stated purposes of section 1071 and run contrary to the express disclosure provisions in the statute. This drastic step is also unnecessary to adequately mitigate relevant privacy risks.

In response to comments positing harms that could arise from a third party having personal knowledge of an applicant or its owners, the Bureau agrees that this scenario heightens privacy risks. The Bureau will observe market developments to assess the likelihood and nature of this risk as it considers the appropriate approach to publication.

The Bureau does not intend to separately assess disclosure benefits when making modification and deletion decisions about individual data points. After considering commenters' feedback about the value of the data fields, the Bureau is preliminarily of the view that all of the data fields have significant disclosure benefits that will facilitate fair lending enforcement as well as business and community development.

Most comments on privacy risk generally supported the Bureau's intention to consider the privacy interests of small businesses, related individuals, and financial institutions. While the Bureau cannot conduct the statistical analysis necessary for a full re-identification analysis until it receives reported data from financial institutions, the Bureau's preliminary privacy assessment accepts that some such data likely could re-identify applicants and their owners, potentially disclosing sensitive information. The personal privacy interests of small business owners, in particular, implicate compelling risks of harms or sensitivities. As acknowledged in the NPRM, some privacy risks are mitigated by the interval between collection and publication, and some 1071 data are already available from other sources. But publication of some data fields potentially poses significant risks of harm or sensitivities to both the personal privacy interests and non-personal commercial privacy interests of applicants and related individuals. While

public HMDA data do not result in substantial privacy harms for mortgage applicants, that is in part because the Bureau makes modifications and deletions before publication, informed by a privacy risk assessment.[859]

The Bureau does not intend to ignore the privacy interests of financial institutions. As discussed further below, however, the privacy risks to financial institutions raised by commenters are less significant than those to small businesses and related individuals. Accordingly, while the Bureau does not intend to exclude consideration of financial institution privacy risks, it anticipates modifying or deleting data to protect a financial institution's privacy interests only when publication poses a compelling privacy risk. At this time, commenters have not identified compelling privacy risks to financial institutions.

In response to comments, the CFPB does not believe that a presumption or threshold would provide the Bureau with a more administrable standard. However, partly in response to comments on these issues, the Bureau's preliminary privacy assessment is more directly focused on the most significant privacy risks—particularly re-identification risk—than the balancing test described in the NPRM.

2. Implementation Process

Proposed Approach

The NPRM did not include a full application of the balancing test to most of the proposed data points. It stated that the Bureau would analyze the re-identification risk element, in part, using a statistical analysis. However, the absence of an existing dataset or an alternative set of sufficiently similar data significantly impeded the Bureau's ability to discern whether a proposed data field, individually or in combination with other data, would substantially facilitate re-identification of small businesses and related persons, and how specifically to modify data to reduce that risk. Underestimating the degree to which a 1071 data field, individually or in

[859] *See generally* 82 FR 44586 (Sept. 25, 2017).

combination with other data, facilitates re-identification risk could unnecessarily increase privacy risks to an applicant or a related individual, while overestimating re-identification risk could unnecessarily reduce data utility. Accordingly, the Bureau believed that a re-identification analysis of data other than actual reported 1071 data would not provide an accurate basis on which the Bureau could apply the balancing test to modify or delete data.

In light of these limitations, the Bureau considered deferring even initial analysis until after it had obtained a full year of reported 1071 data. Doing so, however, would have reduced opportunities for public feedback on privacy issues and their relationship to the proposed rule. The Bureau saw substantial value in setting forth its partial analysis under other aspects of the balancing test. Specifically, the Bureau set forth an initial analysis of the benefits and harms or sensitivities associated with the proposed data fields, the capacity and motives of third parties to match proposed 1071 data fields to other identifiable datasets, and potential modification techniques it might consider to address privacy risks. The Bureau responds to public feedback from commenters and updates this initial analysis below.

In the NPRM, the Bureau indicated that a policy statement, rather than a notice-and-comment rulemaking, would be an appropriate vehicle for announcing its intentions with respect to data modifications and deletions. The Bureau offered several reasons for this approach. Under section 1071, the Bureau may delete or modify data at its discretion, in contrast to other provisions in the statute that require legislative rulemaking.[860] Further, the Bureau's suggested approach with respect to modifications and deletions would not impose compliance obligations on financial institutions.[861] In addition, the Bureau stated that preserving the ability to exercise its discretion to modify or delete data through policy statements would allow the Bureau to manage the relationship between privacy risks and benefits of disclosure more actively. The Bureau

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[860] *Compare* ECOA section 704B(e)(4), *with* ECOA section 704B(f)(2).

[861] Section 1071 requires financial institutions to compile and maintain data and provides that such data be publicly available upon request. *See* ECOA section 704B(e), (f)(2)(B). As discussed in the section-by-section analysis of § 1002.110, the Bureau is finalizing its proposal to publish data on behalf of financial institutions.

believed this flexibility may be especially important in the event that the Bureau becomes aware of developments that might contribute to privacy risks. The Bureau stated that potential uses of the application-level data in furtherance of the statute's purposes may also evolve, such that the benefits associated with the disclosure of certain data may increase to an extent that justifies providing more information to the public in less modified form.

As a result, the Bureau suggested that after the first full year of data are reported, but before it releases data to the public, it would publish a policy statement setting forth its intentions with respect to modifications and deletions to the public application-level data. Before publishing that policy statement, the Bureau intended to conduct a balancing test analysis based on feedback to the NPRM as well as a quantitative analysis of re-identification risk using reported 1071 data. The Bureau stated that in the interests of making data available in a timely manner, it did not intend to put its ultimate balancing test analysis out for public comment prior to issuing the policy statement. The Bureau sought comment on this approach.

Comments Received

A wide range of commenters provided feedback on the Bureau's general approach to implementing the balancing test. Several community group and industry commenters supported the Bureau's intention to defer modification and deletion decisions until it had obtained a full year of 1071 data. While not explicitly opposed, other community groups and a minority business advocacy group asked the Bureau to publish data as fast as possible to help realize the statute's purposes. Some noted that the data remain unavailable despite Congress amending ECOA on this point more than a decade ago. Commenters also provided feedback about when the Bureau should begin publishing application-level data. Several commenters stated that the Bureau should commit in the final rule to releasing data by a date certain; some suggested January 1, 2024 as a target.

Several industry commenters opposed deferring modification and deletion decisions until the Bureau received a full year of 1071 data. Some stated that if the Bureau published

modification and deletion decisions before lenders started to collect data, small business applicants would better understand how to protect their privacy interests. Another said that publishing a full privacy analysis before the rule is effective is necessary for financial institutions to evaluate privacy risks. Other commenters asserted that deferring re-identification analysis until after data are reported is unnecessary because it is already apparent that some proposed data fields, such as NAICS code and census tract, create a unique set of records that can be matched to public datasets. Several commenters offered alternative timing for modification and deletion decisions. Some suggested that the Bureau publish such decisions in this final rule. Another suggested that the Bureau publish interim decisions in this final rule, which could then be adjusted through notice-and-comment rulemaking after the Bureau receives the first full year of data. Others asked the Bureau to publish a full privacy analysis before the rule becomes effective. One lender suggested that data not be published for at least a year after the final rule is implemented to enable the Bureau to assess the effectiveness of its privacy analysis.

The Bureau received a significant amount of feedback about its intention of announcing modification and deletion decisions in a policy statement without seeking additional comment. One industry commenter supported this approach, but most industry commenters on this issue asked the Bureau to seek additional comment on its privacy analysis and on its modification and deletion decisions, regardless of whether the Bureau announced publication decisions in a policy statement or through a legislative rulemaking. Commenters stated that the opportunity to comment would promote public confidence in the data collection process and contribute to a more accurate dataset. A number of commenters argued that the opportunity to comment on the full balancing test and on modification and deletion decisions would be necessary for stakeholders to provide meaningful feedback on privacy risk. According to some commenters, this would be particularly important for smaller financial institutions that were unable to provide adequate comment on what they considered to be complex privacy issues raised in the NPRM. Two lenders urged the Bureau to hold public meetings or hearings in compliance with the

Regulatory Flexibility Act to seek feedback from smaller financial institutions and small businesses to, among other things, specifically address the privacy risks associated with reporting and publishing application-level data. A few industry commenters stated that the opportunity to comment on the full privacy analysis would be consistent with the Bureau's approach adopted in the 2015 HMDA final rule. One commenter stated that the Bureau's analysis of the first full year of reported data would likely generate additional privacy issues that would warrant public input. Two others suggested that the Bureau seek comment about how it would release unmodified data to outside parties for research or other purposes.

Several industry commenters, as well as a joint letter from several members of Congress, specifically requested that the Bureau implement its privacy assessment, and make associated modifications and deletions, via legislative rule. Some of these commenters asserted that this was required under administrative law. A group of trade associations contended that section 1071 does not permit the Bureau to use its discretion to make modification and deletion decisions outside an Administrative Procedure Act rulemaking process. According to this commenter, two provisions in section 1071 provide the Bureau "discretion": ECOA section 704B(e)(4) provides the Bureau discretion to delete or modify public application-level data and ECOA section 704B(f)(3) provides the Bureau discretion to compile and publish aggregate 1071 data. Noting that the Bureau proposed § 1002.110(b) to implement the latter provision in this rule, the commenter asserted that the Bureau did not adequately explain how it was appropriate to implement the former provision outside a rule. The commenter said that these provisions should be implemented in a formal rulemaking. In addition, some industry commenters stated that increasing transparency about forthcoming publication, including potentially through a notice-and-comment rulemaking, would protect the Bureau from litigation under FOIA. In this respect,

commenters cited litigation involving the SBA's publication of Paycheck Protection Program data.[862]

Citing the benefits of transparency and to facilitate information about credit access and fair lending information, a joint letter from community groups, community-oriented lenders, and business advocacy groups stated that the Bureau should produce and release aggregate analyses of 1071 data in addition to releasing application-level data.

Current Approach

For reasons discussed below, the Bureau intends to conduct a full privacy analysis and issue modification and deletion decisions with respect to the publication of application-level data after it obtains a full year of reported 1071 data. However, the Bureau is not committing at this time to issue modification and deletion decisions through a policy statement. Instead, the Bureau will continue to consider the specific timing and vehicle choice for issuing modification and deletion decisions, as it remains engaged with stakeholders on privacy and publication issues.

Publication of application-level data will substantially advance the fair lending enforcement and business and community development purposes of section 1071. The Bureau thus intends to conduct a full privacy analysis and issue modification and deletion decisions as soon as practicable. It will also continue to consider feedback obtained to date and to engage with the public on how best to mitigate re-identification risk and other risks to privacy interests. While the Bureau is not determining the vehicle with which it will announce modification and deletion decisions with respect to application-level data, or the precise timing of such decisions, it anticipates that those decisions will continue to be informed by public engagement.

The Bureau intends to announce modification and deletion decisions only after obtaining a full year of application-level data. The Bureau lacks the data needed to perform an accurate re-identification analysis and commenters were not able to identify an alternative dataset that could

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[862] *See, e.g.*, *WP Co. LLC v. U.S. Small Bus. Admin.*, 502 F. Supp. 3d 1 (D.D.C. Nov. 5, 2020).

be used for this purpose. Without data for an accurate re-identification analysis, the Bureau cannot conduct a full privacy analysis to inform modification and deletion decisions.[863] As discussed further below, there are certain data fields that the Bureau anticipates may present comparatively high risk to privacy interests, including the combination of NAICS code and census tract. However, the Bureau lacks data to confirm whether these data fields in fact create unique records that can be matched to public datasets.

The Bureau is not committing to a specific timeline for publishing application-level data. However, a target date of January 1, 2024 for publication, as suggested by some commenters, is not feasible because covered financial institutions are not required to begin collecting data under this rule until October 1, 2024 at the earliest. The Bureau intends to treat data under this rule as confidential in accordance with 12 CFR part 1070 until such time as it has completed its privacy analysis and published the data, and it will work expeditiously to those ends.

Robust feedback, including in response to the NPRM, SBREFA, and other outreach, about the risks and benefits of 1071 data publication, has informed the Bureau's thinking to date.[864] The Bureau intends to continue to seek further public engagement with respect to these issues. It does not believe, however, that such further engagement must be by formal comment either to ensure robust engagement or for the sake of procedural consistency with the Bureau's approach in HMDA.[865]

The Bureau is not establishing a separate program by which industry, community researchers, or academics will have access to unmodified data; the published data, subject to the modifications and deletions made by the Bureau, will be available to all users. However, it intends the Bureau plans to exercise its discretion to provide access to State or Federal regulators

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[863] As discussed below, the Bureau is announcing more conclusive intentions with respect to modifications or deletions for individual contact information, unique identifier, and the use of free-form text in responses for certain data fields.

[864] See part III above for additional information.

[865] Unlike for HMDA, no data yet exists that the Bureau could use to conduct a full privacy analysis and make modification and deletion decisions.

to the extent such disclosure is relevant to the exercise of the agency's authorities, and subject to appropriate restrictions. The Bureau plans to provide such access to Federal regulators that enforce ECOA.[866]

The Administrative Procedure Act and other laws do not require the Bureau to seek comment on the full privacy analysis or to issue modification and deletion decisions through a legislative rule with formal notice and comment. Section 1071 states that the Bureau may "at its discretion, delete or modify data collected under [section 1071] which is or will be available to the public, if the Bureau determines that the deletion or modification of the data would advance a privacy interest."[867] Statutorily, this provides the Bureau with flexibility to decide how it will make modification and deletion decisions, including the flexibility to do so without a legislative rulemaking. Other provisions of section 1071 plainly require the Bureau to engage in formal rulemaking, indicating that Congress did not intend such a requirement here.[868] The Bureau does not agree that it is implementing ECOA section 704B(e)(4) and (f)(3) inconsistently. It is codifying and implementing these provisions in final § 1002.110(a) and (b) to preserve its discretion to make publication decisions without legislative rulemaking. Further, the circumstances of this rulemaking are distinguishable from the relevant facts in the PPP litigation that commenters cited.

At the same time, the Bureau is also not committing at this time to issuing modification and deletion decisions through a policy statement. As the Bureau has not yet obtained a full year of reported data to use in completing its privacy risk assessment, it is prudent to continue considering specific timing and vehicle choice for issuing modification and deletion decisions. Following further public engagement, including further opportunities for input, the Bureau will

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[866] Other regulators with authority to enforce ECOA include the OCC, the Board, the FDIC, the NCUA, the Surface Transportation Board, the Civil Aeronautics Board, the Secretary of Agriculture, the Farm Credit Administration, the SEC, the SBA, the Secretary of Transportation, and the FTC. *See* 15 U.S.C. 1691c; Regulation B § 1002.16(a).

[867] ECOA section 704B(e)(4).

[868] *See, e.g.*, ECOA section 704B(g).

announce these decisions at a later date. Finally, the Bureau agrees with commenters that it should produce and release aggregate analyses of 1071 data in addition to releasing application-level data. The Bureau anticipates releasing select aggregated data before it publishes application-level data.

3. Publication Benefits

Proposed Approach

In the NPRM, the Bureau sought comment on its understanding of the benefits of public disclosure of the 1071 dataset as a whole as well as the disclosure benefits for individual proposed data fields. The Bureau expected that users of the data would rely on this information to help achieve the statutory purposes of facilitating the enforcement of fair lending laws, and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.[869]

Comments Received

The Bureau received robust feedback on the general benefits of public disclosure of application-level data from lenders, trade associations, community groups, several members of Congress, individual commenters, and others. It received comparatively few substantive comments on the potential disclosure benefits associated with particular individual data fields.

Many commenters supported the publication of application-level data and agreed that the data will facilitate enforcement of fair lending laws. Some community groups stated that the transparency afforded by the publication of 1071 data generally would discourage predatory and discriminatory practices in the small business lending market. One of these commenters noted that action taken data, particularly categorical information such as denials, incompletes, or approved but not accepted by the applicant, were integral to promoting the fair lending purpose

[869] *See* ECOA section 704B(a).

of section 1071. Other commenters said that transparency would protect responsible lenders from unfair scrutiny. Many community groups, along with some lenders, individual commenters, and others also stated that 1071 data would allow governmental entities and community groups to monitor individual lenders' lending practices, identify lending disparities on a granular level, and enforce ECOA to the benefit of women and minority business owners. Community groups, a business advocacy group, and a CDFI lender further stated that HMDA data reporting has demonstrated that loan-level data enables community organizations, economists, and governmental entities to identify disparities between populations, which facilitates enforcement of fair lending laws. Other commenters expressed particular support for the publication of agricultural lending data, noting that the inclusion of data from agricultural creditors would help address discrimination in farm credit lending. These commenters cited a long history of discrimination targeting socially disadvantaged farmers and producers, including women-owned and minority-owned farms, in the farm credit market. Other stated that the 1071 dataset would help reveal where responsible lenders are serving small businesses fairly, aiding in the remediation of deficiencies, or removing barriers to equitable lending. A joint letter from community groups, community-oriented lenders, and business advocacy groups stated that the data would reveal disparities in access to credit in immigrant communities. Other community group commenters, along with two minority business advocacy groups, stated that application-level data would improve the understanding of demographic disparities in small business lending and support efforts to identify, address, and eliminate practices that create lending gaps for women-owned and minority-owned small businesses.

Commenters also asserted that the publication of application-level data would promote the business and community development purpose of section 1071, stating that the data would provide greater understanding of small business credit trends, such as lending dynamics or credit request cycles for different industries, and would improve understanding of the small business lending market more broadly. Some commenters, including a minority business advocacy group,

stated that disclosure would help facilitate development of targeted programs to help address inequities and foster efficiency in the small business credit marketplace. For example, commenters said disclosure would allow community groups and lenders to compare how lenders are meeting community credit needs, develop score cards on local lending, identify gaps in lending, and advocate for low-income and microbusinesses. A CDFI lender stated that pricing information data would allow stakeholders to assess loan affordability in underserved communities. Citing the benefits of increased transparency, a commenter noted that publishing small business credit transaction data would support price discovery by allowing the comparison of credit costs between institutions, credit types, and business types, which is critical for market efficiency. Commenters also said that disclosure would help community groups educate small businesses, facilitate the development of tools to effectively identify barriers small businesses face, and empower owners to access credit on fair terms.

In contrast, several industry commenters saw little benefit from publication because the data would not include all factors that lenders rely on to make credit decisions. Some said that every small business loan is unique and without contextual information the data would not meaningfully increase understanding about the small business lending market. Others asserted that the data would be insufficient to conduct fair lending analyses, suggesting that data collection and publication are less effective mechanisms for identifying discrimination than examinations or disparate impact analyses. According to these commenters, HMDA data do not effectively reveal discrimination in the mortgage industry. One of these commenters also stated that publication would be ineffective because, as proposed, the data would not enable identification of additional types of discrimination, such as discouragement of particular groups of applicants. Two lenders suggested that the dataset duplicate data already required under HMDA and the CRA. A trade association suggested that data from credit unions would not be comparable to data from other lenders because of community-based member restrictions. A joint trade association letter disagreed with the Bureau's proposed analysis of the disclosure benefits

of application-level data, suggesting that the Bureau's analysis was vaguely defined and not clearly linked to the statutory purposes of section 1071.

Current Approach

The Bureau has considered the comments above, and also relied on the NPRM's discussion of—and requests for comment on—the potential benefits of disclosing particular data fields. Given the comparative lack of comments on such benefits, the Bureau concludes that the NPRM's initial assessments of the utility of individual data fields were generally correct.

As Congress recognized, market transparency through publication of application-level data will serve to realize their intended purposes in section 1071. Publishing such data will help to identify and discourage potential fair lending violations in small business lending, while protecting responsible lenders from unfair scrutiny. The Bureau agrees with commenters that published data will help address discrimination in agricultural lending. Publication of this data will also improve understanding of small business credit needs and will provide insights into the small business lending market, promoting the business and community development purposes of section 1071. Increased transparency can make it easier for small businesses to access credit efficiently, and easier for lenders and potential lenders to identify opportunities in the market, thereby increasing access to credit. Moreover, data users, such as community groups, researchers, and public officials, will be able to use the data to help determine whether certain types of credit are disproportionately available to different communities. Insights gained from publication will enable lenders, advocates, investors, and the public sector to better meet the needs of small businesses.

These benefits are material even as the dataset may not include all factors that lenders may rely on in making credit decisions. The Bureau notes the feedback of SBREFA commenters discussed in the NPRM and the numerous comments from lenders, trade associations, individual commenters, and community groups discussed above who expressed general agreement that public data will facilitate the observation of small business lending practices in ways that are

currently not possible. For example, data points such as pricing information and census tract will facilitate comparison of pricing data across discrete geographic locations allowing data users to efficiently compare credit costs offered by financial institutions. The relative lack of substantive comments disagreeing with the NPRM's initial assessment of the benefits of disclosing particular data fields also speaks to the utility of the data fields in relation to the stated statutory purposes.

Commenters did not offer substantive evidence to back claims that data collection and publication do not help facilitate fair lending enforcement. In addition, whether other approaches to fair lending enforcement are more or less effective misses the point that analysis of data collected under this rule—as is true for data collected under HMDA—will contribute to robust and effective fair lending analysis. Further, publication of application-level data collected under the final rule will not inappropriately duplicate efforts under HMDA or CRA. Final § 1002.104(b)(3) excludes HMDA-reportable transactions from coverage. Data collected under the final rule will cover more types of transactions from more institutions than existing CRA data, and it will include applications as well as originations. As discussed in part II.F.2.i and elsewhere, Federal prudential regulators have proposed to use data collected under the CFPB's final rule, once it becomes available, for purposes of CRA small business and small farm lending assessments, rather than drawing data from FFIEC Call Reports.[870]

The benefits from publishing application-level data are so substantial that the Bureau is now of the view that each data field warrants inclusion in public data, subject to completion of the Bureau's full privacy analysis. Accordingly, the Bureau intends to publish application-level data except to the extent that it modifies or deletes data consistent with its privacy analysis.

4. Privacy Risk

The NPRM considered the risks to privacy that might result from publication of application-level data reported to the Bureau. Based on its analysis at that time, the Bureau

[870] 87 FR 33884, 33930 (June 3, 2022).

recognized that publication of the complete data set, without any form of modification, could pose risks to privacy interests. As discussed in more detail below, this was because certain data fields could create re-identification risk and disclosure of some fields would create a risk of harm or sensitivity. Accordingly, the Bureau intended to consider whether pre-publication modifications or deletions would reduce these risks to privacy and appropriately balance them with the benefits of disclosure.

The Bureau sought comment on the range of privacy concerns discussed in the NPRM, including potential re-identification of small businesses and financial institutions, as well as the types of harms and sensitivities that unmodified release of data could have caused to financial institutions and small business applicants, which are described further below. As discussed above, informed by the comments on the NPRM, the Bureau's preliminary assessment is that it should adjust the balancing test articulated in the NPRM to assess, primarily, whether data, individually or in combination with other data, create significant re-identification risk for small businesses and their owners. Though this approach focuses primarily on re-identification risk, the privacy harms or sensitivities discussed below clarify the consequences of re-identification and underscore the importance of managing re-identification risk. Because re-identification is a prerequisite to any potential harms or sensitivities that may result from publishing data, the Bureau also concludes that actions taken to prevent re-identification will mitigate those harms or sensitivities for small business applications and their owners. In addition, the Bureau's preliminary view is that its privacy assessment should not consider financial institution privacy interests except where the Bureau identifies a compelling risk to such interests.

i. Re-Identification Risk

Proposed Approach

The NPRM explained that, while information that directly identifies natural persons, such as name, address, date of birth, or Social Security number would not be collected, publication of application-level data in an unmodified format potentially could be used to re-identify small

business applicants and related natural persons and potentially harm their privacy interests. The Bureau identified two re-identification scenarios. First, a third party may use common data fields to match a data record to a record in another dataset that contains the identity of the applicant or related natural person. Second, a third party may rely on pre-existing personal knowledge to recognize an applicant's record in the unmodified data. The Bureau used the term "adversary" to refer to either type of third party.[871]

Re-identification based on matching. Under the first scenario, the Bureau explained that it might be possible to match a data record to an identified dataset, either directly or through a combination of intermediate datasets.[872] However, successfully re-identifying a data record would require several steps and could present a significant challenge. An adversary generally would have to isolate a record that is unique or rare within the data. A record is unique or rare when the values of the data fields associated with it are shared by zero or few other records. The Bureau stated that it believed actual data would be needed to perform an accurate re-identification analysis. Thus, it did not intend to apply the balancing test until after it had analyzed re-identification risk with a full year of reported data.

The Bureau explained that a data record having unique combinations of values would not automatically result in re-identification; an adversary would also have to find a record corresponding to the applicant or related natural person in another dataset by matching similar combinations of data fields. Once a data record had been matched, an adversary would possess any additional fields found in the corresponding record but not found in the data record—including, potentially, the applicant's identity. However, even after accomplishing such a match, an adversary might not have accurately re-identified the true applicant to whom the data record relates. For example, if the corresponding record was not the only record in the other dataset to

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[871] The term does not mean that the adversary's motives are necessarily malicious or adverse to the interests of others. *See, e.g.*, Nat'l Inst. of Standards & Tech., *De-Identification of Personal Information* (2015), http://nvlpubs.nist.gov/nistpubs/ir/2015/NIST.IR.8053.pdf (using the term "adversary").

[872] For these purposes, an "identified" dataset is one that directly identifies a natural or non-natural person.

share certain data fields with the unique data record, an adversary would have to make a probabilistic determination as to which corresponding record belongs to the applicant.

The Bureau expected that census tract and NAICS code, if published as proposed and without modification, could significantly contribute to re-identification risk. Geographic and industry information are publicly available in a variety of sources and in a form that directly identifies businesses or in a way that could be derived with reasonable accuracy. This information is also likely to produce unique instances in the data, both when used separately, but particularly when combined. Other proposed data fields could have resulted in unique combinations (particularly when combined with census tract), but the Bureau stated it would need actual data to analyze their contribution to uniqueness.

In this context, the Bureau indicated that particularly relevant sources of identified data for matching purposes were UCC filings, property records, and titles. Such filings could pose a serious re-identification risk because of the availability of information about the lender, the applicant, and the date of transaction. For example, an adversary might be able to use the date and financial institution listed in UCC filings to identify the applicants of originated loans in the public application-level data. UCC filings also typically have the address of the borrower. With this information, combinations of financial institution identity, action taken date, and census tract data might result in unique combinations that an adversary could connect to a publicly available source of information to re-identify the applicant.

With respect to covered loans secured by residential and commercial property, publicly available real estate transaction records and property tax records would be particularly relevant sources of identified data, as the Bureau described in its proposed policy guidance on the disclosure of loan-level HMDA data.[873] Because some of the data fields in such public records are also present in application-level data, publication without any modifications would have

[873] *See* 82 FR 44586, 44593 (Sept. 25, 2017).

created a risk that these public records could be directly matched to a data record. UCC filings also frequently include the name of the lender, the name of the business, and the date that the filing was submitted. Though the availability differs by State, UCC filings are often searchable in State databases, and are frequently mined by data brokers. UCC statements are often filed against specific collateral and business assets generally. The NPRM accordingly indicated that such filings could pose a serious re-identification risk.

The NPRM also explained that public records in loan-level datasets for programs like the SBA's 7(a), 8(a), 504, and Paycheck Protection Program, as well as State-level registries of women-owned and minority-owned businesses for contracting purposes, could contribute to re-identification risk. These datasets include information such as loan program guarantee information, industry information or NAICS code, demographic information about the business owners, time in business, and number of employees. As a result, the time in business and number of workers data fields might significantly contribute to re-identification risk, especially in combination with other data fields like census tract and NAICS code. Similarly, loan-level performance datasets made available by the Government-Sponsored Enterprises include information such as borrower demographic information, loan program guarantee information, pricing data, loan term, loan purpose, and the year of action taken. Asset-backed securities datasets for securitized mortgage and auto loans are made available by the Securities and Exchange Commission through the Electronic Data Gathering, Analysis, and Retrieval system. These datasets, which include information about the lender, the date of action taken, pricing data, loan term, loan amount applied for and approved, are available online with limited restrictions on access. But these datasets do not include the name of the borrower; as described above, this means that an adversary who is able to match a record in one of these datasets to a record in the data would need to make an additional match to an identified dataset to re-identify an applicant. And some of these datasets contain restrictions on use, such as a prohibition on attempting to re-identify borrowers. Finally, the Bureau noted the existence of private datasets that might be

matched to the data. For example, data brokers collect information about small businesses from a wide range of sources and sell it for a variety of purposes, including marketing, identity verification, and fraud detection.[874] These datasets typically include data collected from commercial, government, and other publicly available sources and could contain data such as NAICS code, location, and estimates of gross annual income, number of workers, and information about related natural persons, including the ethnicity and race of principal owners.

In addition to considering the steps an adversary would need to take to re-identify applicants and the various data sources that may be required to accomplish re-identification, including their limitations, the Bureau considered the capacity, incentives, and characteristics of potential adversaries, including those that might attempt re-identification for harm. In particular, a competitor or potential competitor might seek information about a business's expansion strategy or financial condition, including whether it was able to obtain credit approval. As the Bureau explained, some adversaries could possess the resources to use private datasets in addition to publicly available records. However, the Bureau noted the extent to which much of the commercial benefit to be obtained by re-identifying the data would be more readily available from private datasets to which these potential adversaries already have access without the need for recourse to the data. In many cases, information from other datasets could be timelier than that found in the data. Furthermore, some of these potential adversaries might refrain from re-identifying the small business applicant for reputational reasons or because they have agreed to restrictions on using data for these purposes.

Additionally, the Bureau stated that some academics, researchers, and journalists may be interested in re-identifying published data for research purposes. As noted above, however, some private datasets have contractual terms prohibiting their use for re-identification purposes and

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[874] *See generally* Fed. Trade Comm'n, *Data Brokers: A Call for Transparency and Accountability* (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (describing the types of products offered and the data sources used by data brokers).

therefore these persons might be restricted from actually using the data to re-identify applicants. Further, some academics or journalists may be affiliated with organizations that have reputational or institutional interests adverse to re-identification efforts.

The Bureau considered whether parties intending to commit identity theft or financial fraud may have the incentive and capacity to re-identify applicants, but it assessed that the data would be of minimal use for these purposes. In addition, such adversaries are not law abiding and may have easier, albeit illegal, ways to secure data for these purposes than attempting to re-identify application-level data.

Re-identification based on personal knowledge. The NPRM also noted the potential for re-identification based on personal knowledge. Location, as well as demographic and industry information, might well be known to an adversary familiar with an applicant, meaning that they might be able to re-identify an applicant without matching a record to another dataset. The Bureau explained that the personal knowledge possessed by such an adversary would be limited to information about a subset of applicants and related natural persons. Thus, any such re-identification would impact a more limited number of applicants or natural persons than might be re-identified by adversaries possessing sophisticated matching techniques. The Bureau explained that uncertainty over the extent of relevant personal knowledge posed challenges for evaluating how much individual data fields contribute to this re-identification risk. For these reasons, the NPRM generally focused on matching-based risk. However, the Bureau sought comment on how to assess re-identification risk arising from personal knowledge.

Applications that do not result in originations. In its final policy guidance on the disclosure of loan-level HMDA data, the Bureau explained that the risk of re-identification to applicants is significantly lower for applications that do not result in originated loans.[875] A lack of public information about applications significantly reduces the likelihood that an adversary

[875] *See* 84 FR 649, 658 (Jan. 31, 2019); *see also* 82 FR 44586, 44593 n.55 (Sept. 25, 2017).

could match the record of a HMDA loan application that was not originated to an identified record in another dataset. In the NPRM, the Bureau stated that it had not identified any publicly available information about applications for business loans. However, unmodified data might still contain data fields that facilitate the re-identification of applicants. For example, census tract and NAICS code data could result in unique combinations that an adversary could use to match to an identified public record, such as a business directory.

Overlap between HMDA and 1071 data generally. The Bureau proposed that some covered applications would also be reported under HMDA.[876] The public loan-level HMDA dataset contains data fields in addition to, or that overlap with, the proposed data fields, and the proposed data would have included data fields not included in the public loan-level HMDA dataset. The Bureau recognized that, in cases of overlap, some data fields may have required additional analysis with respect to risks of harm or sensitivity and re-identification posed by such overlap. The Bureau sought comment on this issue and the implications of potential re-identification risk and potential risk of harm or sensitivity for applications reported under both section 1071 and HMDA.

Comments Received

The Bureau received comments from lenders, trade associations, community groups, a business advocacy group, a software vendor, and several individuals on re-identification risk posed by the publication of unmodified, application-level data. Nearly all of these commenters agreed that re-identification risk, either through matching or via personal knowledge, should be considered by the Bureau when determining whether to modify or delete data for publication.

Many industry commenters and a business advocacy group saw a high risk of data being used to re-identify applicants and related natural persons and that this would disclose harmful or sensitive private information. Some industry and individual commenters agreed that re-

[876] See the section-by-section analysis of § 1002.104 for additional details.

identification risk will be higher as a result of data point combinations; several pointed to the combination of NAICS and census tract. One commenter stated that because re-identification risk depends on the distinctness of the data being published and on the ability to match that data to other datasets, the Bureau should consider privacy risk for the overall dataset rather than for each data point. Another stated that unpredictable changes in re-identification technologies may make data that are currently impossible to re-identify susceptible to re-identification in the future. Commenters also stated that businesses in rural areas face particular re-identification risk because of the likelihood that those areas have low populations and a low number of small businesses. Several commenters also saw re-identification risk in rural areas as more relevant to certain products, such as agricultural lending, that are concentrated in such areas. A group of trade associations said that CRA data are not published at the application-level, in part because geography can contribute to the increased risk of re-identification.

In contrast, some commenters, primarily consisting of community groups, asserted that re-identification risk, either through matching or because of personal knowledge, is low. Two commenters stated that the risk is low because much of the information that would be included in the 1071 dataset is already publicly available, either in commercial data sources or as a result of data breaches. Some commenters also stated that there have been no reported incidents of HMDA data, which is similar to 1071 data, being used to re-identify individuals. One said that the effectiveness of modifications and deletion techniques for HMDA data suggest that similar modifications and deletions will nullify the re-identification risk for 1071 data. The Bureau did not receive comments about its assumption that data on applications that do not result in originations pose lower re-identification risk than data on originated applications.

Current Approach

In the Bureau's preliminary assessment, re-identification risk of small business applicants and their owners is the core privacy risk associated with data publication. While the primary focus of the Bureau's intended privacy analysis is the impact of re-identification risk on personal

privacy interests, controlling reidentification risk will naturally mitigate other privacy risks and harms, including commercial privacy risks for small businesses. The prevailing view of commenters was that unmodified application-level data poses re-identification risks that the Bureau should consider when making modification and deletion decisions. The Bureau also agrees with commenters that data point combinations, particularly the combination of NAICS and census tract, pose particular re-identification risks, and it intends to take this into account in making modifications and deletions.

The Bureau agrees that small businesses in small or rural areas may face heightened re-identification risk. However, overall re-identification risk depends on multiple factors. For example, while the overall transaction volume in a rural area may be lower than in an urban area, concentration of certain credit products in rural areas may change how much of an impact low transaction volume has on re-identification risk. Thus, the Bureau does not intend to rely on a categorical determination that geographical area types or particular census tracts will contribute to the risk of re-identification in every circumstance. The Bureau intends to determine whether targeted modification of individual data fields sufficiently mitigates privacy risks from geographical identifiers, rather than relying on wholesale deletion of data from rural areas.

The Bureau agrees that it is difficult to predict how technology will evolve in the future and impact re-identification risk. This is one reason it intends to track developments in the small business lending market, continue to engage with stakeholders, and reassess its privacy approach as necessary. The Bureau intends to preserve flexibility so that its privacy analysis can evolve with changes to privacy risks.

The Bureau assesses that modification and deletion techniques can effectively limit re-identification risk and therefore concludes that completely withholding data—which would be contrary to section 1071's statutory purposes and express disclosure provisions—is not necessary to manage re-identification risk. As noted by commenters, modification and deletion techniques have effectively reduced re-identification risk from HMDA data, and the Bureau anticipates the

same result with this data. The existence of some data that matches with existing data sets is not grounds to forego the full privacy analysis of collected data that will allow it to make targeted modification and deletion decisions to protect privacy interests.

For the reasons given above and as discussed in part VIII.B.4.ii below, the Bureau preliminarily views re-identification risk as the most significant privacy risk associated with publishing application-level data—and thus the most important privacy risk to consider in making modification and deletion decisions. Re-identification is a prerequisite to any potential harms or sensitivities that small business applicants or related natural persons may experience from publishing such data. As the risk of re-identification is reduced, the risk of harm caused by disclosing harmful or sensitive information also will be reduced. Further, as discussed below, because almost all the harms and sensitivities to financial institutions result from concerns about small business applicant or related natural person re-identification, preventing such re-identification will also prevent the most serious harms and sensitivities for financial institutions.

ii. Risk of Harm or Sensitivity

Proposed Approach

The NPRM considered whether a re-identified application-level record would disclose information about an applicant, related natural person, or financial institution that is not otherwise public and may be harmful or sensitive. Specifically, the Bureau evaluated whether such data could be used for harmful purposes such as fraud or identity theft or the targeted marketing of products and services that may pose other risks. The NPRM evaluated whether the data could cause competitive harm to small business applicants or to financial institutions. It also evaluated whether certain data fields might be viewed as sensitive if associated with a particular applicant, related natural person, or financial institution. In evaluating the potential sensitivity of a data field, the Bureau considered whether disclosure of the data field could cause dignitary or reputational harm to small business applicants, related natural persons, and financial institutions.

The NPRM explained that some identifiable information about small business lending is already publicly available. Such information is both in public records and in private datasets with varying barriers to access and restrictions on use. The Bureau's analysis accordingly considered the degree to which disclosure would increase this risk relative to the risk that already exists. In general, where a data field was already publicly available, the NPRM saw a reduced risk of harm or sensitivity from its further disclosure.[877]

The Bureau considered whether the data could be used for harmful purposes such as fraud or identity theft or the targeted marketing of products and services that may pose other risks. The Bureau's initial view was that unmodified application-level data would be of minimal use for perpetrating identity theft or financial fraud against applicants or related natural persons. As proposed, application-level data would not include information typically required to open new accounts in the name of a small business's principal owner, such as Social Security number, date of birth, place of birth, passport number, or driver's license number. Additionally, the data would not include information useful to perpetrate existing account fraud, such as account numbers or passwords. The Bureau acknowledged, however, that almost any information relating to a small business could, in theory, be used for these purposes. For example, unmodified data could potentially be used in a phishing attack against an applicant, or for knowledge-based authentication. Some such data, however, may already be available from public and private sources. The Bureau also noted, on the basis of its expertise and analysis, that the publication of HMDA data—which contain many data fields that are similar to data fields that would be disclosed under the proposal—has not resulted in any measurable increase in fraud or identity theft against mortgage applicants.

The Bureau also considered potential impacts on targeted marketing of products and services. The Bureau explained that although the data could be used to market products and

[877] However, where a data field was already publicly available, disclosing that data field in the data may have enabled the matching of data to other datasets that may not have been controlled by the Bureau, which could have substantially facilitated re-identification or the disclosure of harmful or sensitive information.

services that would have been beneficial for small businesses—perhaps increasing competition among creditors that could help small businesses receive better terms—they could also be used to target potentially vulnerable small businesses with marketing for products and services that may have posed risks that were not apparent. For example, users might perceive certain data to reveal negative information about an applicant's financial condition or vulnerability to scams relating to debt relief or credit repair. Information about a loan might also be used for a practice known as "stacking," in which creditors may obtain lead lists based on publicly available information and offer follow-on loans or advances that add to the debt burden carried by small businesses. Some creditors might also use the data for deceptive marketing practices. However, the Bureau noted that the utility of the data for predatory marketing practices may be limited by delay between action taken on a loan and data publication.

The Bureau considered whether unmodified data would result in competitive harm to small business applicants or related natural persons by disclosing general information about a small business's use of credit that was not currently available to the general public. The Bureau acknowledged that certain data points in unmodified form could reflect negatively on the financial condition of a business or its owners. The Bureau also considered the potential for competitive harm to financial institutions. As discussed below with respect to the financial institution identifying information that would be reported pursuant to proposed § 1002.109(b), the Bureau proposed to identify the financial institution in the public application-level data. Therefore, the data could reveal general information about a financial institution's lending practices that is not widely available to the general public. As the Bureau explained, data fields such as census tract, NAICS code, credit type, and pricing could disclose information about where a financial institution is doing business, what industries it is doing business with, what kinds of products it is offering, and what kinds of prices it is charging, respectively. Additionally, if a small business applicant were re-identified, a financial institution's competitors could identify the small businesses to which the financial institution is offering or providing

credit. A financial institution could then potentially offer credit to a particular small business at a lower price than they currently received. However, the Bureau did not assess that unmodified application-level data would include key inputs for, or be detailed enough, to substantially facilitate reverse-engineering of proprietary lending models. For example, it would not have included information about an applicant's credit history. The NPRM also noted stakeholder concern that data could harm financial institutions by increasing the amount of litigation against them. The Bureau sought comment on this risk.

With respect to feedback that disclosing information about applicants in rural areas could lead them to seek financing elsewhere, the Bureau noted that would not necessarily reduce the risk that someone in the small business's community may ultimately re-identify them because the data would be reported with respect to the location of the business, as discussed in the section-by-section analysis of § 1002.107(a)(13).

In addition to considering whether the disclosure of a data field could lead to financial or other more tangible harms, the Bureau also considered whether the data might be viewed as sensitive. In assessing whether a data field creates a risk of sensitivity, the Bureau evaluated whether its disclosure could lead to dignitary or reputational harm to small business applicants or related natural persons. For example, if re-identified, the data could reveal information that casts a negative light on a small business's financial condition, such as the fact that a loan was denied due to a business's credit characteristics or cashflow.

The Bureau also evaluated whether the disclosure of a data field could cause reputational harm to financial institutions. The Bureau discussed stakeholder concerns that the data could lead users to draw unfounded inferences about discrimination. The Bureau noted that several of the data fields, if disclosed in unmodified form, would help address this concern by serving as control variables. For example, many financial institutions consider a small business's revenue when assessing the risk of extending credit. As a result, disclosing gross annual revenue data would help ensure that data users who are evaluating potential disparities in underwriting or

pricing can compare small businesses with similar revenues, thereby controlling for a factor that might provide a reason for some disparities. The Bureau also noted that it does not expect that data alone could generally be used to determine whether a lender is complying with fair lending laws. The Bureau expected that, when regulators conduct fair lending examinations, they would analyze additional information before reaching compliance determinations.

The Bureau also considered general expectations with respect to what information is available to the general public. For example, the Bureau explained that disclosing gross annual revenue in unmodified form could disclose sensitive information because it could reflect the financial condition of a small business or, where a small business is a sole proprietorship, a particular individual. This type of information is typically not available to the general public. The Bureau also acknowledged concerns that some small businesses and their owners would consider seeking credit sensitive, or would consider the disclosure of a banking relationship sensitive because others may draw adverse inferences about the small business's financial condition. These are concerns about sensitivity that would result from the re-identification of the applicant, rather than from the disclosure of particular data fields. The Bureau sought to address these concerns by mitigating the risk of re-identification.

Comments Received

The Bureau received comments in this area from a range of commenters including lenders, trade associations, business advocacy groups, and community groups.

Risk of identity theft or fraud. Some industry and academic commenters stated that the data points may subject small business applicants and related natural persons to an increased risk of fraud or identity theft. Commenters also stated that publication may expose financial institution employees, such as the financial institution contact reported under § 1002.109(b)(3), to fraud or identity theft actions, such as phishing attacks. Another commenter stated that rural applicants will be easily identifiable in data and, as a result, at greater risk of fraud.

Risk of targeted marketing harms. A group of bank trade associations and a business advocacy group asserted that public data could be collected and sold to interested third parties, potentially for targeted marketing purposes. No commenters asserted financial institutions would experience such harms.

Risk of competitive harms. Several industry commenters and a business advocacy group expressed concern that the disclosure of application-level data would pose risks of competitive harm to small business applicants or related natural persons. Some commenters stated that if an applicant is re-identified, competitors will gain non-public insights into financial information directly bearing on that small business's long term financial health and competitive goals. Some commenters noted that larger competitors may be more likely to gain information about the financial health and long-term business goals of small businesses. For example, a lender asserted that larger companies may use the data to outbid smaller competitors. Other commenters stated that data may reveal non-public information about a small business's use of credit, such as financing terms, that competitors may use to their competitive advantage.

Some industry commenters and a business advocacy group stated that small business applicants may experience reduced availability or increased cost if other financial institutions learn of their small business loans or loan terms, which would reduce their ability to obtain liquidity or increase their operating costs as compared to their competitors. These commenters asserted that publication may impose increased compliance costs and litigation risks on financial institutions that are passed on to small business applicants or that cause financial institutions to limit credit to borrowers with higher risk profiles to prevent losses.

Many industry commenters stated that publication will present significant risk of competitive harms to financial institutions. Commenters asserted that application-level data may be used to identify or reverse-engineer proprietary lending information, such as underwriting requirements or pricing models. One commenter asserted that if the pricing information and action taken data points could be used to determine a lender's limits for other credit terms that

are not collected under the rule, such as the APR limit, the lender's competitors would be able to undercut or otherwise compete with those terms, for example by offering lower rates. This commenter stated that while lower APRs are generally beneficial for consumers, this may come at the cost of lower quality service. A lender suggested that data points such as gross annual revenue and the time in business may be used to reverse-engineer a financial institution's proprietary lending strategy. Another commenter asserted that data points for private label credit, such as the pricing information or census tracts, are particularly commercially sensitive to financial institutions and there is risk that disclosure of this information will cause competitive harm.

Other industry commenters indicated that competitive harm experienced by financial institutions may have broader impacts on the small business lending market. Some commenters suggested that if public data reveals proprietary commercial lender information, financial institutions may be compelled to engage in anti-competitive behavior, such as price-fixing, that restricts credit or offers less favorable terms, because it will effectively homogenize the market and limit their ability to compete with one another. One asserted that compliance concerns due to publication could result in reduced product availability by financial institutions, as they asserted was seen after publication of HMDA and CRA data.

Some industry and academic commenters stated that competitive harm may particularly impact smaller or rural financial institutions. They asserted that because these lenders have fewer small business customers than larger financial institutions, their customers are at a higher risk of re-identification. As such, it may be easier for the larger competitors of smaller or rural financial institutions to approach their small business applicants to underprice the loans and offer better terms. These commenters stated that smaller and rural financial institutions may have less flexibility to respond to resulting competitive harms because of their size and lower applicant volume.

Risk of reputational harms. An industry commenter and a business advocacy group stated that small business applicants and related natural persons will be subject to reputational risks as a result of publication. For example, one noted that if applicants are re-identified, small business owners may experience harm, discrimination, or stigmatization from disclosure of certain data points, such as race, sex, and ethnicity. Other industry commenters stated that financial institutions may also experience reputational harms. Many commenters stated that risks of reputational harm and frivolous litigation will result from incorrect conclusions about the data drawn by the public or regulators. These commenters asserted that incorrect data conclusions could result from the unique characteristics of small business lending generally, particular credit scenarios common within small business lending, and the fact that the data will not reflect all factors that went into underwriting decisions. For example, some commenters asserted that there is particular risk of misunderstanding with Farm Credit System credit based on how dividends are provided and the legal limitations for such loans. These commenters explained that because statutory provisions for Farm Credit System credit have specific coverage criteria, data may disclose a justified, but disproportionately high, rate of application denial. Additionally, commenters explained that Farm Credit System institutions may appear to charge a higher interest rate to certain borrowers but that the interest rates are offset by dividends based on the borrower's patronage.

A few industry commenters cited potential discrepancies between data points and those that appear in other sources, which could increase the risk of reputational harm and litigation for financial institutions. These commenters said that because data requirements for these other sources are not the same as proposed requirements, but are labeled with the same identifier, the resulting variations could unfairly increase scrutiny or lead to inaccurate conclusions. These commenters were especially concerned about this risk for loans subject to HMDA or CRA. Additionally, some industry commenters stated that financial institutions' reputations for protecting applicants' privacy may be impacted by data publication. Commenters noted that

applicants may have concerns about providing information and may feel that conversations with a financial institution are less confidential because certain information is being disclosed to the government. One commenter mentioned that if a financial institution or the Bureau experiences a data breach, the financial institution may not be viewed as trustworthy by applicants.

In contrast, other commenters stated that published data will decrease reputational and litigation risks for financial institutions. According to one commenter, the data will provide evidence of responsible lenders' fair lending practices, which will give them a competitive advantage over less scrupulous financial institutions. Additionally, a few commenters stated that reputational and litigation harm risks from publication can be mitigated by disclaimers, as well as by data modifications and deletions. For example, these commenters stated that any data publication should include a statement for agricultural lending credit types that Farm Credit System entities can only lend to applicants that are eligible under the Farm Credit Act.

Other harms or sensitivities. Commenters identified three additional harms that were not discussed in the NPRM: physical harms, data security, and harm to applicants' relationship with, or trust in, financial institutions.

A software vendor and several individual commenters stated the Bureau should consider physical harm or personal security threats that could result from publication. For example, a few commenters stated that if an applicant's LGBTQI+ status was revealed, the applicant may face threats to their personal security due to discrimination.

One industry commenter stated small business applicants or related natural persons may be exposed to data breaches because financial institutions will store and transmit data online. Some industry and business advocacy group commenters asserted that a data breach could cause privacy risks for financial institutions, including reputational harm related to litigation. The commenters said this would be true even if the Bureau were the breached entity, and that the Bureau must take action to protect reported data from potential breaches. Some also requested that the Bureau detail the steps it will take to protect data from breach or to indemnify financial

institutions impacted by data breaches arising from a breach to the Bureau. One commenter stated that the Bureau should seek comment on its data security safeguards.

Some commenters, mainly from industry, identified potential impacts that privacy risks may have on the relationships between small business applicants and financial institutions. Some commenters stated that the publication may create friction in the lending process due to negative public sentiment. These commenters asserted that, because small business applicants may view the data collection methods as invasive or because financial institutions may feel obligated to reduce tailored credit underwriting to prevent misconceptions about lending practices, financial institutions may not be able to provide customer service at the level currently obtained. Other commenters noted that applicants who are concerned about the privacy or security of this data may be hesitant to seek credit or they might seek credit from more expensive unregulated sources.

Current Approach

As discussed below, the Bureau's preliminary view is that the risk of harm or sensitivity to small businesses and related natural persons is significant and should be considered in its privacy assessment. The Bureau's current intent is to address these risks primarily by controlling for re-identification risk. The Bureau is particularly focused on risks to personal privacy interests. Such interests may involve protected demographic information or information about personal finances that could have reputational impact if disclosed; for example, this might include the reputational impact of a credit denial arising from a personal credit score.[878] The Bureau also intends to consider certain commercial risks of harms and sensitivities to small

[878] For example, § 1002.107(a)(11) requires a covered financial institution to report the principal reason or reasons the financial institution denied a covered application. Comment 107(a)(11)-1.ii states that a covered financial institution reports the denial reason as "credit characteristics of the principal owner(s) or guarantor(s)" if it denies the application based on an assessment of the principal owner(s) or guarantor(s)'s ability to meet its current or future credit obligations. Examples include principal owner(s) or guarantor(s)'s credit score, history of charge offs, bankruptcy or delinquency, low net worth, limited or insufficient credit history, or history of excessive overdraft. Thus, data about a denial reason may provide personal information about a principal owner's personal financial health that may not otherwise be known to the public.

businesses when modifying or deleting data. The Bureau does not currently intend to consider financial institution privacy interests in its analysis unless there is a compelling privacy risk.

Risk of identity theft or fraud. Based on comments received, the Bureau views any risk of identity theft or fraud for small business applicants or related natural persons resulting from the publication of data to be predicated on the small business applicant or related natural person being re-identified. As to comments that publication of financial institution contact information will subject financial institution employees to identity theft or fraud, such as phishing attempts, consistent with the NPRM, the Bureau plans to exclude from publication the name and business contact information of a person who may be contacted with questions about the financial institution's submission from the public application-level data.

Risk of targeted marketing harms. Targeted marketing harms likewise presuppose that a small business applicant or related natural person is re-identified.

Risk of competitive harms. Potential competitive harms, including information about a small business's long term financial health and competitive goals, are also predicated on re-identification. For example, commenters stating that an applicant's competitors may gain insights into its financial health, competitive strategy, and goals all assumed that the small business applicant is first re-identified.

The Bureau does not view data publication as increasing a financial institution's compliance costs and litigation risks, such that increased costs and risks would result in increased fees, reduction in credit program availability, or reduce credit availability for applicants with weak credit profiles. Historical evidence from HMDA suggests that such impacts will be minimal. Notwithstanding similar contentions prior to the 2015 HMDA Final Rule, the Bureau recently reported that, based on 2021 HMDA data, trends in mortgage origination continued to increase since the HMDA rule became effective in 2018.[879] Based on this

[879] The 2015 HMDA Final Rule noted that SBREFA SERs and NPRM commenters stated that compliance costs meant that financial institutions would increase price, reduce availability, or exit markets. *See* 80 FR 66127, 66296 (Oct. 28, 2015). But the Bureau's 2021 HMDA Data Point notes that mortgage origination trends have continued to

experience with HMDA, the Bureau does not anticipate that this final rule will significantly increase the cost of credit products, reduce credit product availability, or result in otherwise unnecessary tightening of underwriting criteria.[880]

The Bureau also disagrees that publication will reveal proprietary lending information, thereby resulting in competitive harm to financial institutions. Unmodified application-level data will not include key inputs for, or be detailed enough, to substantially facilitate the reverse-engineering of proprietary lending models. For example, it will not include applicants' credit score data. Other comments expressing concern that the data collected would provide only an incomplete picture of the financial institution's lending practices confirmed that other key information about underwriting will not be collected. These omissions should prevent competitors from reverse-engineering proprietary lending models and make it unlikely that financial institutions could use the data to engage in anti-competitive behavior like price-fixing.

By the same token, there is no basis for small or rural financial institutions to be at more significant risk of this type of harm. The Bureau acknowledges that the risk of re-identification of small business applicants and related natural persons may be greater in smaller or rural areas, but that does not increase the risk of proprietary lending models being disclosed.

Risk of reputational harms. Reputational harm to small business applicants and related natural persons is also predicated on re-identification.

The Bureau does not agree that publication will increase a responsible financial institution's reputational risk. While the Bureau recognizes that financial institutions may need to defend against some increased litigation about their small business lending practices, it agrees with commenters that publication will help responsible financial institutions defend against such litigation, accordingly making it less likely to occur in the first place. The Bureau similarly

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increase since that rule became effective in 2018. Mortgage origination volume has increased from 4.14 million in 2018 to 5.13 million in 2021. Similar increases were seen in application volume. *See* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2022-09.pdf.

[880] See part IX.F.4's analysis of small business costs for more information about the magnitude of these effects.

agrees with commenters that responsible financial institutions will be able to use the data as evidence of their fair lending compliance, as well as to prevent or counter erroneous claims that the institution is engaging in discriminatory practices. The Bureau has not seen any significant detrimental impact on mortgage applicants' trust in financial institutions, and HMDA-covered mortgage originations have increased since the Bureau's amendments to Regulation C went into effect in 2018.[881] As in the mortgage market, requesting and publishing data from applicants does not have enough reputational impact on financial institutions to impair origination activity.

With respect to reputational risk arising from overlapping databases, the Bureau is finalizing a coverage exception for transactions covered by the Bureau's HMDA rule.[882] In addition, many datasets contain data types that already overlap with HMDA and CRA data. There is accordingly no compelling reason to expect that publishing application-level data will significantly increase whatever risk already exists from HMDA coverage.

As to comments that assert that Farm Credit System products may be incomparable to other credit product types, thereby creating the risk of reputational harm or frivolous litigation, the data will provide sufficient opportunity for Farm Credit System entities to prevent and refute any erroneous conclusions. The Bureau agrees with commenters that this harm can be averted by distinguishing Farm Credit System loans in the dataset. The Farm Credit System is one of the identified types of financial institutions for the data required under § 1002.109(b)(9).[883] As a result, users can filter the data accordingly. Farm Credit System financial institutions can also filter to defend against any conclusions they believe are inaccurate because of comparisons outside the Farm Credit System.

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[881] Mortgage origination trends since the HMDA rule became effective in 2018 suggest that any distrust resulting from financial institutions seeking HMDA data has not deterred applicants from continuing to seek credit. *See* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), https://files.consumerfinance.gov/f/documents/cfpb_data-point-mortgage-market-activity-trends_report_2022-09.pdf.

[882] *See* § 1002.104(b)(2).

[883] *See* comment 109(b)(9)-1.vii.

Other harms or sensitivities. The Bureau agrees that the privacy assessment should take account of risks of physical harm and personal security threats to applicants or related natural persons, as well as the potential for data, once available, to be used by third parties to single out or target certain applicants or related natural persons for discriminatory treatment. Re-identification in some circumstances could result in significant risks, including threats of physical or personal harm and discrimination. The risks raised by commenters are supported, for example, by Hate Crime Statistics reported by the Federal Bureau of Investigation (FBI) through its Uniform Crime Reporting Program,[884] and by Equal Employment Opportunity Commission data.[885] The Bureau believes that the risk to personal privacy interests arising from physical harm, personal security threats, and discrimination resulting from information about protected characteristics warrant significant consideration when the Bureau considers modifications or deletions to data.

However, historical evidence indicates that data publication will have little long-term impact to relationships between applicants and financial institutions. The Bureau reported in 2021 that mortgage originations subject to HMDA continued to increase despite the HMDA rule becoming effective in 2018.[886] Based on this and earlier experience with HMDA, the Bureau does not agree that publication will drive small business applicants to seek alternative financing options to avoid disclosure. The HMDA evidence also suggests that any potential increase in

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[884] For 2019, the FBI's Uniform Crime Reporting Program reported that in single-bias incidents, 1,492 victims were targeted because of their sexual orientation and 227 victims because of their gender identity. *See* Fed. Bureau of Investigation, *2019 Hate Crimes Statistics*, https://ucr.fbi.gov/hate-crime/2019/topic-pages/tables/table-1.xls (last visited Mar. 20, 2023).

[885] The Equal Employment Opportunity Commission reports that from FY 2014 through FY 2021, approximately $43.5 million dollars of monetary benefits were paid on LGBTQ+-based sex discrimination charges. The amount has increased from $2.2 million to $9.2 million over this period. It also reports that it received 13,546 LGBTQ+-based sex discrimination charges in the same time period, with annual charges increasing from 1,100 in FY 2014 to 1,968 in FY 2021. https://www.eeoc.gov/data/lgbtq-based-sex-discrimination-charges (last visited Mar. 20, 2023). *See also* Off. of Mgmt. & Budget, Off. of the Chief Statistician of the U.S., *Recommendations on the Best Practices for the Collection of Sexual Orientation and Gender Identity Data on Federal Statistical Surveys* 8-9.

[886] *Compare* 80 FR 66127, 66296 (Oct. 28, 2015), *with* CFPB, *Data Point: 2021 Mortgage Market Activity and Trends* (Sept. 19, 2022), https://www.consumerfinance.gov/data-research/research-reports/data-point-2021-mortgage-market-activity-trends/.

costs after this rule becomes effective will not be prohibitive for applicants seeking financing from a regulated financial institution and that market volume will not be substantially impacted.

Finally, the Bureau takes strong measures to mitigate and address any risks to the security of sensitive data it receives, consistent with the guidance and standards set for Federal information security programs. The agency is accordingly committed to protecting the privacy and information security of the data it receives from financial institutions under this rule. In addition, the Bureau does not agree that a financial institution could be held legally liable for the exposure of data due to a breach at a government agency or for reporting data to the Bureau if the institution was legally required to provide the data and did so in accordance with other applicable law.

Based on the record to date, the Bureau intends to consider the risk of harms to small business applicants and related natural persons discussed above in its privacy risk assessment. However, the risks of harms or sensitivities to small businesses and related natural persons discussed by commenters logically assume re-identification already occurred. The harms and sensitivities recognized above clarify the consequences of re-identification and underscore the importance of managing re-identification risk. Additionally, the Bureau's preliminary view is that privacy risks to financial institutions are less significant compared to both personal privacy interests and non-personal commercial privacy risks to small business applicants and related natural persons. Many of the harms attributable to financial institutions noted by commenters are only likely if small business applicants are re-identified, are not likely to occur based on the history of HMDA data publication, or exist independent of the data and therefore do not result from publication. As a result, measures that the Bureau takes to reduce re-identification risk will also reduce the risk of harms to financial institutions. Thus, the Bureau intends to consider modifying or deleting data to protect a financial institution privacy interest where data publication creates a compelling privacy risk.

5. Privacy-informed Modification and Deletion

Proposed Approach

Generally. The NPRM stated that where disclosure of an individual data field, alone or in combination with other fields, would pose risks to privacy that were not justified by the benefits of disclosure to 1071's purposes, the Bureau would consider whether it could appropriately balance the privacy risks and disclosure benefits through modification techniques or whether the field should be deleted from the public dataset. The Bureau stated that it also would evaluate the risks and benefits of disclosing a data field in light of modifications or deletions considered for other data fields. Where the Bureau determines that modification of a data field is appropriate, the Bureau stated that its consideration of the available forms of modification for the 1071 data would also be informed by the operational challenges associated with various forms of modification and the need to make application-level data available to the public in a timely manner.

In general, the Bureau stated that deleting or modifying data because the data would disclose general information about a financial institution's lending practices—compared with information that could substantially facilitate, for example, the reverse-engineering of a financial institution's proprietary lending models—would be inconsistent with section 1071, which directly contemplates disclosure of financial institution identity in connection with the public application-level dataset.[887] Each of the data fields prescribed by the statute—with the exception of the application number—could provide some insight into a financial institution's lending practices. If the Bureau were to exclude data on this basis, therefore, it would exclude virtually all of the statutorily required 1071 data points from the public data, frustrating both of the statutory purposes of section 1071.[888] While the Bureau acknowledged financial institutions' concern about the litigation and reputational risks involving 1071 data, the Bureau did not

[887] *See* ECOA section 704B(f)(2)(B).

[888] *See* ECOA section 704B(a).

believe that this concern would justify the exclusion of data from public disclosure. One of the statutory purposes of section 1071 is to facilitate enforcement of fair lending laws, which authorize enforcement by parties other than the Bureau.[889] Additionally, section 1071 contemplates that financial institutions would make their own application-level data available to the public, which necessarily entails their identification.[890]

In light of the statutory purposes, the Bureau intended to modify or delete data only as needed under the balancing test prior to public disclosure. The NPRM discussed associated modification techniques with respect to specific data points. Where no specific modification technique was described with respect to a particular data point, the Bureau stated that it had not identified an obvious modification technique other than swapping, suppression, or deletion.

While certain information that directly identifies applicants or related natural persons generally would not be collected under the proposed rule, the Bureau did not accept that this would eliminate privacy risks that would arise from publishing the data in unmodified form. The Bureau also rejected the idea that privacy risks could be adequately resolved through rule coverage. While some re-identification risk could be reduced by increasing the number of applications reported to the Bureau, the Bureau did not believe the effects of doing so are necessarily predictable because re-identification risk depends on the characteristics of the data. Further, the Bureau did not believe that increasing the number of applications would have addressed risks of harm or sensitivity to re-identified applicants or natural persons.

Aggregate data. In the NPRM, the Bureau stated that it did not intend to address privacy risks arising from application-level data by disclosing aggregated data in its place. As required by section 1071, the Bureau proposed in § 1002.110(a) to make available to the public the information submitted to it by financial institutions pursuant to proposed § 1002.109, subject to deletions or modifications made by the Bureau. The Bureau stated that, as authorized by the

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[889] *See, e.g.*, ECOA section 706 (providing for civil liability).

[890] *See* ECOA section 704B(f)(2).

statute, proposed § 1002.110(b) would have stated that the Bureau may, at its discretion, compile and aggregate information submitted by financial institutions pursuant to proposed § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate. The Bureau initially anticipated making the data collected under section 1071 available at the application level—with appropriate potential modifications and deletions—rather than providing aggregate data with counts and averages for each data field. The Bureau stated that it may consider releasing aggregated data in the future, after it determined whether narrower modifications or deletions could address privacy risks. The Bureau had received some suggestions to consider "differential privacy" techniques,[891] which are typically used in connection with aggregate statistics to reduce the identifiability of more granular data. The Bureau sought comment on whether differential privacy techniques might be appropriate for application-level data.

Recoding. The NPRM identified the Bureau's intention to consider various methods to "recode" the proposed data fields as necessary. The Bureau explained that recoding techniques decrease the number of distinct categories for a data field. In this context, recoding would involve providing the value of a data field in a higher-level category that increases the number of records within a given combination. Some data fields like census tract and NAICS code have structures that permit recoding without developing new 1071-specific recoding categories. For instance, if the Bureau were to determine that the re-identification risk presented by the census tract data field does not justify the benefits of unmodified disclosure, the Bureau could instead provide geography at the county level because census tracts are designed to be non-overlapping subdivisions of a county.

The Bureau also stated that it intended to consider recoding via bins or intervals of values for data fields that, in unmodified form, would have continuous values. The Bureau stated that

[891] Differential privacy is a statistical method designed to protect individuals from reidentification risk. A dataset is said to be differentially private if, by looking at the dataset, one cannot tell whether any individual's data was included in the dataset.

unmodified continuous data fields can be highly identifying, but binning can significantly reduce this risk. It also noted the possibility of top- or bottom-coding a data field to prevent extreme—and potentially very re-identifiable—values from being released.

Other techniques. The Bureau stated that it might also consider "targeted suppression," which makes certain values of data points unavailable when a certain combination of values is held by too few records. The Bureau stated that it might consider treating certain values of data points as "not available" if the application is the only small business application from a particular census tract. The Bureau explained that targeted suppression can be applied in several ways. One way would be to remove the value of a field that makes the record identifiable. For example, if census tract and NAICS code identify a record, the microdata could delete the value of the NAICS code for any applications that are in cells deemed sensitive. A second approach could leave the census tract and NAICS code but suppress the values of other data points. This method would reduce the potential harm if the record were re-identified. A third approach could be to remove the record from the dataset entirely. The Bureau stated that, in general, suppression is a more common approach for aggregate data than for application-level data.

The Bureau noted that one drawback to targeted suppression is that it complicates data analysis for end users. A data user would be presented with millions of rows, but in certain rows and for certain data points, values would be missing.[892] Another identified drawback is that suppression would need to be done so that the remaining unmodified data do not provide a user with the ability to back out the modified field, sometimes involving complementary suppression or deleting values of other applications to ensure that the missing value cannot be reengineered. The Bureau sought comment on whether targeted suppression techniques could preserve the benefits of publishing application-level data, and, if so, what the Bureau should consider as the minimum cell size to implement targeted suppression.

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[892] Data users would need to understand the method behind the modifications and plan analyses to account for the fact that the suppressed data would necessarily not reflect all small business loans in a given year.

The Bureau sought comment on other modification techniques, such as "data swapping" (sometimes called "switching"). Data swapping involves finding two records that are similar on several dimensions and swapping the values for other data fields between the two records. In effect, data swapping would require that the Bureau preserve certain data fields while swapping others. The Bureau stated that another set of techniques for addressing privacy risks for continuous data would involve adding "random noise" to the reported values. For example, under "additive noise techniques," a random value is added to the existing value of the data field. Under "multiplicative noise techniques," the true value is multiplied by a random value. The Bureau sought comment on whether such techniques would preserve the benefits of publication. The Bureau explained that a drawback to these approaches is that data would be released with values that do not match the true values of the underlying data.[893] Data users would need to take such modifications into account when performing any analyses.

Comments Received

Generally. With regard to how the Bureau stated its intention to assess privacy risks that would inform modification and deletion decisions, several community group commenters, a minority business advocacy group, and several members of Congress urged the Bureau to apply the NPRM's balancing test in favor of public disclosure and to make available a robust dataset. According to some commenters, the fair lending and business and community development purposes of section 1071 militate in favor of data transparency. A number of community and business advocacy group commenters stated that if published application level data are not robust, or if specific data points are not disclosed, the dataset will not adequately reveal whether these statutory purposes of section 1071 are being met. Several commenters asserted that society's interest in tackling discrimination and closing the racial wealth gap supported robust

[893] For example, with respect to the amount applied for data field, a recoding technique would release the values of the data field in broad categories, for instance "$100,000-$150,000." In such case, the broader category provides less information but reflects the true value of the underlying data. Noise addition, by contrast, would involve the Bureau manipulating (in a standardized and documented way) the actual values of loan amount. An application's loan amount may be released as $85,000 in the public dataset when the true value was $78,000.

disclosure. A business advocacy group stated that robust 1071 data would promote financial stability in the economy, and cited insufficiently granular HMDA data as contributing to the 2008 subprime financial crisis.

Some community group commenters and a software vendor urged the Bureau not to delete or modify public application-level data because it would undermine the statutory purposes of section 1071. The software vendor stated that modifications or deletions may reduce the utility of the data for no privacy benefit. Several commenters asserted that the Bureau should only modify public 1071 data to protect the privacy interests of small business applicants. A joint letter from community and business advocacy groups agreed with the Bureau's statement that litigation and reputational risks faced by financial institutions do not justify excluding data from public disclosure.

On the other hand, several industry commenters urged the Bureau to make modification and deletion decisions to protect the privacy of financial institutions, applicants, and related natural persons. They stated that protecting these privacy interests was consistent with the statutory purposes of section 1071 because limiting disclosure would increase credit access and lower credit costs to minority-owned and women-owned small businesses.

Several industry, community group, and academic commenters supported modification and deletion of application-level data, stating that it could adequately address privacy risks posed by publication. A trade association asserted that publishing certain data points in an unedited, application-level format would increase the risk of applicant re-identification. Another trade association supported the liberal use of modification and deletion techniques to protect privacy interests of lenders, small business applicants, and related natural persons. Some commenters stated that the lack of reported incidents in which an individual has been re-identified in HMDA data suggests that modifications or deletions can reduce re-identification risks here also.

Some commenters offered views about what data points would be modified or deleted. Several suggested that data modifications or deletions should be consistent with HMDA.

According to these commenters, the Bureau should ensure that any data deleted in the HMDA dataset is also deleted in the 1071 dataset, including the unique identifier, the application date, and the action taken date. A software vendor stated that the Bureau should modify data points that reflect gender identity or sexual orientation information, which could result in persons being subject to physical harm. Several individual commenters likewise suggested that LGBTQI+ persons face particular privacy risks. A joint letter from community and business advocacy groups stated that if the Bureau modifies 1071 data, it should do so on a loan-by-loan basis because the modification of a particular data field may not be necessary for all records in the dataset.

Aggregate data. The Bureau received no comments about how differential privacy techniques may be applied to application-level data. However, the Bureau did receive comments about aggregating 1071 data. Several industry commenters suggested that the Bureau publish aggregate data, instead of an application-level dataset, to mitigate privacy risks. One stated that aggregate data are sufficient to analyze the business needs and credit access of applicants, including minority-owned and women-owned small businesses. Another said that disclosing aggregate data, as opposed to application-level data, would be consistent with the practices of other agencies. Other industry commenters stated that, while some 1071 data could be disclosed at the application level, the Bureau should aggregate any data points that present re-identification risk.

Recoding. Several community group commenters stated that if the disclosure of 1071 data fields present significant privacy risks, the Bureau should consider binning data or disclosing intervals of values. For example, these commenters stated that when disclosing gross annual revenue data, the Bureau could consider publishing data in $10,000 increments. One stated that binning would be appropriate as long as the modified public 1071 dataset could satisfy the fair lending and business and community development statutory purposes of section 1071.

Other commenters stated that the use of binning should be limited. A community group and a software vendor stated that if the Bureau bins data, it should ensure that the public 1071 dataset remains sufficiently detailed to allow meaningful analysis. To demonstrate this point, the community group asserted that the current CRA system of combining all loans for businesses with revenue under $1 million does not allow for analysis of small businesses within that range. The software vendor cautioned that binning may not always be effective.

Other techniques. With respect to other modification techniques discussed in the NPRM, a community group stated that data swapping and targeted suppression would be appropriate as long as the modified public 1071 dataset could satisfy the fair lending and business and community development statutory purposes of section 1071. The Bureau received no comments about other potential modification techniques.

Current Approach

The Bureau intends to consider modification and deletion techniques as necessary to reduce cognizable privacy risks. The Bureau agrees with comments that a robust public dataset will serve the statutory objectives of section 1071.[894] By extension, a public application-level dataset with less detailed data or that omits certain data points entirely would confer relatively less public benefit. These benefits notwithstanding, in some cases modification and deletion decisions may be appropriate to protect privacy interests. The statute empowers the Bureau to modify or delete data, and the Bureau believes that modifications or deletions may be appropriate in some circumstances to reduce the cognizable privacy risks set forth above.

Modifications or deletions will not necessarily undermine the utility of the published data or will not be futile because they will not mitigate risks. With respect to the effectiveness of modifications and deletion techniques, the Bureau points to the lack of reported incidents in

[894] The Bureau lacks evidence to assess the comment that published data would promote financial stability. If true, this result would align with the Bureau's authorizing statute whose purpose, in part, is to "promote the financial stability of the United States by improving accountability and transparency in the financial system." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

which an individual has been re-identified in public HMDA data, which the Bureau modifies to reduce re-identification risk. The Bureau concludes that targeted modification and deletion decisions can adequately reduce privacy risks while preserving the utility of 1071 data, as is the case with HMDA data. Modifications and deletions may be necessary, for example, in cases where unmodified application-level data will likely lead to re-identification of small business applicants or related natural persons. The Bureau will also consider modifications and deletions to the public 1071 dataset when data fields, individually or in combination with other data, pose cognizable privacy risks, as discussed above.

After obtaining a full year of reported data and conducting a full privacy analysis, the Bureau intends to make modification and deletion decisions tailored for individual data points where appropriate. The Bureau will not delete or modify data solely to align with HMDA practice. Small business lending and mortgage lending are distinct markets which face their own unique privacy risks, and re-identification risk depends on the characteristics of particular data. With respect to comments about modifying or deleting data that may convey the gender identity or sexual orientation of applicants' principal owners or other individuals that own or control applicants, the Bureau views this as sensitive information that implicates important personal privacy interests. While the Bureau is not making modification and deletion decisions about this information prior to conducting the full privacy analysis, it does intend to give significant consideration to personal privacy interests. However, it would not be feasible to make modification and deletion decisions on a loan-by-loan basis, as one comment suggested.

Regarding feedback on specific modification techniques, the Bureau does not intend to publish aggregate data instead of application-level data. Aggregate datasets do not permit the detailed, application-level analyses that best facilitate the fair lending enforcement and business and community development purposes of section 1071. In addition, the Bureau can adequately mitigate privacy risks through targeted modification and deletions of individual data fields—it is not necessary to avoid publication of all application-level data. While the Bureau does not intend

to publish aggregate data in place of an application-level dataset, it anticipates releasing select aggregated data before it publishes application-level data.

The Bureau sees recoding, including binning data or disclosing intervals, as an appropriate modification technique to address privacy risks that may be posed by public release of unmodified data. While the Bureau is not making specific modification decisions at this time, it intends to consider recoding data in a targeted manner that preserves the utility of the public dataset. The Bureau also views other modification techniques, including data swapping and targeted suppression, as appropriate tools to address privacy risks. Finalizing the exact tool set, however, will depend on securing a full year of data and will be informed by continued engagement with stakeholders.

When exercising its discretion to modify or delete 1071 data, the Bureau anticipates publishing data in a manner that reduces privacy risks, in particular re-identification risk. If the Bureau determines that it is necessary to modify an individual data point to address a privacy risk, the Bureau intends to consider a range of modification techniques, including, but not limited to, recoding, data swapping, and targeted suppression. The Bureau intends to engage with stakeholders in the future about these issues, including providing opportunities for additional input as the Bureau considers its privacy analysis further.

6. Preliminary Privacy Assessment of Particular Data Fields

In the NPRM, the Bureau identified certain data fields that it believed would need modification or deletion to appropriately protect privacy interests, while taking account of disclosure benefits: individual contact information at reporting financial institutions; free-form text data, which occurs in a number of data fields; and the unique identifier for each application. Beyond these specific fields, the NPRM explained that the Bureau lacked data under section 1071 or comparable proxies that it could use for its privacy risk assessment. Accordingly, it did not suggest specific modifications and deletions with respect to any other data.

In order to benefit from stakeholder engagement, however, the Bureau did set forth some initial analysis on how it would apply the NPRM's balancing test to the proposed data fields. With respect to each such data field, whether individually or in combination with others, the Bureau sought comments on: (1) whether there are additional benefits of unmodified public disclosure in light of the purposes of the statute; (2) whether disclosure in unmodified form would reveal additional information that might be considered harmful or sensitive by an applicant, related natural person, or financial institution; and (3) whether disclosure in unmodified form would significantly contribute to the risk that an applicant or related natural person might be re-identified. The Bureau also sought comment on modification techniques it could use, and whether deletion would be appropriate. Where no specific technique was described with respect to particular data points, the Bureau did not identify any obvious technique besides potentially swapping, suppression, or deletion.

The Bureau received feedback on this initial analysis from a range of commenters, including industry and community group commenters. The Bureau has taken this feedback into consideration to refine its analysis of the qualitative risks associated with disclosing particular data fields in unmodified form, although, consistent with the above analysis, the Bureau's assessment remains preliminary.[895]

Overall, with the exceptions noted with respect to unique identifier, free-form text, and individual contact information, for all other finalized data points, the Bureau intends to further consider whether modification techniques may be appropriate when it analyzes reported data and conducts its full privacy analysis. In doing so, the Bureau intends to take into account existing feedback, as well as conducting ongoing engagement, about potential modifications as it examines what modifications or deletions may be appropriate for these fields. In addition, the

[895] The Bureau sought and received feedback about several data points that it did not propose. As it is not adopting those data points, it does not address privacy risks or modification techniques associated with reporting them.

Bureau is mindful of the statutory purposes of section 1071 and will only modify or delete data to advance a privacy interest.

i. Unique Identifier

Proposed § 1002.107(a)(1) would have required financial institutions to collect and report an alphanumeric identifier, starting with the legal entity identifier of the financial institution, unique within the financial institution to the specific covered application, and which can be used to identify and retrieve the specific file or files corresponding to the application for or extension of credit. As discussed in the section-by-section analysis of § 1002.107(a)(1), the Bureau is finalizing this data point substantially as proposed.

In the NPRM, the Bureau stated that disclosing the unique identifier in the 1071 data in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. Section 1071 prohibits financial institutions from including in 1071 records certain personally identifiable information that directly identifies a natural person applicant or someone connected with the applicant.[896] In addition, the Bureau proposed to prohibit financial institutions from reporting information that would directly identify a small business. For these reasons, the Bureau did not expect that the unique identifier would be considered harmful or sensitive.

With respect to re-identification risk, the NPRM noted that although publicly available datasets do not presently include the unique identifier data field, financial institution legal entity identifiers are publicly available, and the Bureau was aware of rare instances in which a loan number was included in UCC filings. In addition, the Bureau noted that many jurisdictions publicly disclose real estate transaction records in an identified form, and the Bureau stated that many financial institutions may include loan numbers on these publicly recorded documents.[897]

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[896] ECOA section 704B(e)(3).

[897] *See* 82 FR 44586, 44599 (Sept. 25, 2017); *see also* 84 FR 649, 660 (Jan. 31, 2019).

The Bureau stated that inclusion of the proposed unique identifier, rather than application or loan numbers, would limit the possibility of using an application or loan number to match 1071 data to those publicly recorded documents, thus reducing risk of re-identification. However, the Bureau acknowledged that there is a risk that, after financial institutions begin to report data under section 1071, they may replace the loan numbers currently assigned to small business loans with the unique identifier and, if they do, the unique identifier could be included on publicly recorded documents. Considering the uniqueness of the identifiers, the Bureau reasoned that this data field on a publicly recorded document could be used to match a 1071 record to an identified public record directly and reliably.

In light of these potential re-identification risks, the Bureau stated that it did not intend to publish the unique identifier data field in unmodified form. The Bureau sought comment on whether there are modifications to the unique identifier data field that would appropriately balance identified privacy risks and disclosure benefits. The Bureau stated that it was considering the feasibility of disclosing a separate unique identifier that the Bureau could create. The Bureau also considered deleting the data field from the public application-level data, but sought comment on whether such deletion would create challenges for users of the data and, if so, how the Bureau could address those challenges other than by creating a separate unique identifier. The Bureau sought comment on this analysis as well as its intent not to publish the unique identifier in unmodified form.

An academic research and policy organization agreed with the Bureau's initial analysis, noting that public HMDA data do not include a unique identifier. Several industry commenters stated that, because lenders are allowed to use their own internal account numbers and therefore the unique identifier may include a loan number or account number, the data point in combination with the financial institution's name provides substantial opportunity for fraud. Because of the privacy risks discussed above, most of these commenters supported the Bureau's

suggestion not to publish the unmodified unique identifier field. A CDFI lender stated that the Bureau should consider publishing a modified identifier or a separate one created by the Bureau.

After considering these comments, the Bureau intends not to publish the unique identifier data field in an unmodified form. Although it has not yet conducted a full re-identification analysis for the 1071 data, the Bureau agrees with the re-identification risks raised by commenters. The universal loan identifier for HMDA data, which is similar to the unique identifier, is not published because of the re-identification risk that it poses.[898] While HMDA publication practices are not dispositive here, the Bureau draws upon its experience implementing HMDA and Regulation C where appropriate, and it does so here.

At this time, the Bureau has not decided whether to publish public application-level data without any unique identifier information, disclose instead a separate unique identifier created by the Bureau for this purpose, or employ some other modification. The Bureau will consider what modification or deletion techniques may be appropriate when it analyzes application-level data and conducts its full privacy analysis.

ii. Application Date

Proposed § 1002.107(a)(2) would have required financial institutions to collect and report the date the covered application was received by the financial institution or the date shown on a paper or electronic application form. As discussed in the section-by-section analysis of § 1002.107(a)(2), the Bureau is finalizing this data point with modifications such that financial institutions must collect and report the date the covered application was received or shown on a paper or electronic application form.

The NPRM stated that, by itself, disclosing application date in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to

[898] *See* 84 FR 649, 660 (Jan. 31, 2019).

an identified financial institution. The Bureau noted that an adversary such as a competitor may conceivably find it helpful to understand when a business is seeking credit. In addition, marketers and creditors could use this information to target products to entities recently in the market for credit, either to deploy new funds or to refinance out of a current loan. However, the Bureau did not believe that disclosing the application date would otherwise disclose sensitive information about a small business or its owner. The Bureau also reasoned that any utility of this data field for such purposes would be curtailed by the time to publication.

The Bureau was not able to identify publicly available datasets that include data fields an adversary could directly match to the application date field. However, the Bureau acknowledged that an adversary may be able to infer a likely origination date based on typical time lags between application, credit decision, and origination, potentially enabling matching to other datasets that record these later dates. The Bureau stated that, if it determined that application date should be modified, it may consider disclosing the application date at a higher level; for example, disclosing the month and year but not the specific date. In light of the potential re-identification risk arising from this data field, the Bureau sought comment on whether there are other specific modifications it should consider, and whether it should consider deletion outright.

Several commenters provided feedback on the Bureau's analysis. In supporting disclosure of the application date field, a community group stated that it would promote understanding of small business lending. However, an academic research and policy organization asserted that disclosure of application date would pose re-identification risk to applicants and noted that HMDA does not disclose application date. This commenter, along with a group of trade associations, urged the Bureau not to publish the application date field to ensure consistency between 1071 and HMDA.

As discussed in part VIII.B.3 above, the Bureau views the disclosure of application date as having significant benefits. This preliminary assessment is consistent with feedback that publication of application date would promote understanding about small business lending. The

Bureau's preliminary assessment is that the application date field does not pose re-identification risks such that the Bureau should modify or delete it before publication. Commenters supporting such modification or deletion did not provide additional evidence of re-identification risk that would alter the partial privacy analysis described above. The Bureau also preliminarily assesses that this unmodified data field would present limited privacy risk if re-identification occurred.

iii. Application Method and Application Recipient

Proposed § 1002.107(a)(3) would have required financial institutions to collect and report the means by which the applicant submitted the covered application directly or indirectly to the financial institution. A financial institution would have reported whether the applicant submitted the application in person, by telephone, by mail, or online. Proposed § 1002.107(a)(4) would have required financial institutions to collect and report whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application directly or indirectly to the financial institution. As discussed in the section-by-section analyses of § 1002.107(a)(3) and (4), the Bureau is finalizing these data points as proposed, with certain modifications to related commentary.

In the NPRM, the Bureau stated that disclosing application method and whether the application was submitted directly or indirectly, in unmodified form, would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. The Bureau reasoned that the application method is likely to be of relatively limited utility to an adversary because it conveys little information about a natural person or a business's financial condition. While adversaries interested in targeted marketing could direct future marketing efforts to a business using the same application channel, the Bureau noted that marketing firms already possess strategic information about methods for establishing contact. Unmodified disclosure of application method and whether the application was submitted indirectly may reveal information that financial institutions regard as harmful or

sensitive, but the Bureau did not believe that disclosure would permit the reverse-engineering of a financial institution's proprietary lending models.

The Bureau was not able to identify publicly available datasets that include data fields an adversary could directly match to the application method or application recipient data fields. While the Bureau's HMDA data and the Government-Sponsored Enterprises loan-level datasets include acquisition channel information in loan-level data, the Bureau stated that these datasets do not identify applicants or related natural persons. However, the Bureau sought comment on whether there are other identifiable application/loan-level datasets that include this information or whether HMDA data or the Government-Sponsored Enterprises loan-level datasets could be matched to other identifiable datasets.

The Bureau received two comments from trade associations on this analysis. These questioned whether publishing the application method and application recipient fields would provide disclosure benefits related to section 1071's statutory purposes. One stated that lenders' methods for receiving applications are strategic business decisions and disclosing this information will cause financial institutions to suffer commercial harm.

As discussed above in part VIII.B.3, the Bureau views these data fields as having significant disclosure benefits. The Bureau does not see disclosure causing significant commercial harm to financial institutions. Disclosure of application method and application recipient data would not permit the reverse-engineering of proprietary lending models. Accordingly, the Bureau preliminarily assesses that disclosing these data fields in unmodified form would present limited privacy risk if re-identification occurred.

iv. Credit Type

Proposed § 1002.107(a)(5) would have required financial institutions to collect and report to the Bureau certain information about the type of credit applied for or originated. The proposal would have required financial institutions to report three categories of information that together constitute the type of credit. First, the proposal would have required financial institutions to

report the type of credit product. Second, the proposal would have required financial institutions to report the type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction had been originated. Third, the proposal would have required financial institutions to report the length of the loan term, in months, if applicable. As discussed in the section-by-section analysis of § 1002.107(a)(5), the Bureau is finalizing this data point as proposed, with revisions to the related commentary.

The NPRM stated that data on type of credit product, type of guarantee, and loan term could disclose information that may be harmful or sensitive to applicants or related natural persons. It also stated that a business's competitors could use these data fields—in conjunction with the loan amount and pricing data fields—to draw inferences about the business's financial condition based on whether the business obtained credit on favorable or unfavorable terms. Type of guarantee data could indicate heightened credit risk for the applicant.[899] Credit type data also could be used for targeted marketing of products and services that may pose risks.

The Bureau further stated that disclosure of these data fields in unmodified form may reveal information that financial institutions regard as harmful or sensitive, such as the types of products they offer or the government programs in which they participate. However, the Bureau did not expect disclosure of these data fields to permit the reverse-engineering of proprietary lending models. Furthermore, the Bureau stated that general information about the types of credit a financial institution is offering is already widely available.

The Bureau was aware that certain identified datasets include application-level information on the type of credit product, type of guarantee, or loan term. Government lending programs, such as the SBA's 7(a) and 504 programs, publish loan-level data that indicate the term of the loan and whether the loan is a term loan or a line of credit. In some States, UCC filings may include some information related to the type of collateral. In the NPRM, the Bureau

[899] For example, the "SBA guarantee—7(a) program" data field is intended for businesses that have been unsuccessfully applying for credit or have had some other difficulty in accessing credit.

stated that the existing public availability of this information decreased the potential harm or sensitivity of disclosing information about the type of credit product, type of guarantee, and loan term in the 1071 data. By the same token, however, the Bureau recognized that an adversary could use these other datasets, combined with other fields, to match a section 1071 record to an identified publicly available record.

If it determined that modifications were ultimately needed, the Bureau identified a number of possible approaches. The Bureau could disclose "Federal guarantee" instead of disclosing the specific program. Similarly, the Bureau could recode loan term data into bins—for example, using intervals of two or five years.

The Bureau received feedback from two community group commenters. One stated that publication of credit type data would promote understanding of small business lending. The other stated that combining loans from different Federal government guarantee programs into a single category for publication would not reduce the utility of 1071 data. The commenter also stated that if the Bureau recodes length of the loan term data into bins, the Bureau should test those bins to ensure that the recoded data are useful to users.

Based on its earlier analysis and from the comments received, the Bureau assesses that disclosing credit type data in unmodified form may present significant privacy risks if re-identification occurred. For example, the Bureau believes that these data could result in non-personal commercial privacy risks to small businesses, including revealing sensitive financial information or facilitating problematic targeted marketing. However, the Bureau does not identify any compelling privacy risks to financial institutions.

v. Credit Purpose

Proposed § 1002.107(a)(6) would have required financial institutions to collect and report the purpose or purposes of the credit applied for or originated. As discussed in the section-by-section analysis of § 1002.107(a)(6), the Bureau is finalizing this data point with modifications.

The NPRM stated that disclosing credit purpose in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. It noted that information about credit purpose could be useful to adversaries such as a small business's competitors, potential acquirers, or new market entrants, since it contains information about a business's strategy and performance, such as whether a business is expanding. Even so, this information would generally not be detailed enough to cause competitive harm, and its competitive value would likely be mitigated by time to publication.

The Bureau did not identify publicly available datasets that include data fields an adversary could directly match to the credit purpose data fields in unmodified form in the public application-level data with respect to an applicant or related natural person. The Bureau stated that identified public datasets pertaining to small business loans generally do not contain information about the purpose of the credit. Therefore, the Bureau reasoned that an adversary would have difficulty using the credit purpose data fields to match a section 1071 record to an identified publicly available record accurately.

The Bureau stated that disclosure of credit purpose in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, such as information that a financial institution offers credit that is used for certain purposes. However, the Bureau did not identify reasons that disclosure would permit reverse-engineering of proprietary lending models.

Several lenders and one trade association provided feedback. These commenters generally stated that credit purpose data created privacy risks for small business applicants. For example, one commenter stated that if re-identification occurred, credit purpose data could reveal confidential commercial information, such as plans for business acquisitions or expansions. As discussed in the NPRM, the Bureau acknowledges that credit purpose data contains information about a business's strategy and performance. However, the Bureau does not view this information as posing a significant risk of harm because of its relative lack of detail and the

delay between the date of action taken on a loan and the publication of 1071 data. Commenters did not offer evidence to the contrary. Commenters also did not offer evidence that indicates that this data point presents significant re-identification risks.

Accordingly, the Bureau preliminarily assesses that disclosing credit purpose data in unmodified form would present limited privacy risk.

vi. Amount Applied For

Proposed § 1002.107(a)(7) would have required financial institutions to collect and report to the Bureau the initial amount of credit or the initial credit limit requested by the applicant. As discussed in the section-by-section analysis of § 1002.107(a)(7), the Bureau is finalizing the amount applied for data point as proposed.

The NPRM stated that disclosing this data field in unmodified form would likely disclose information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. Business owners might view details about the amount applied for as sensitive, particularly where they are concerned about the risk of being re-identified as an applicant for credit. The Bureau also noted that were re-identification to occur, the amount applied for could lead to targeted marketing of products or services that pose risks because it could help lenders target small businesses that received less credit than they requested with offers for loans at higher rates or fees. The Bureau stated that the amount applied for is generally not included in other publicly available data, so it would likely not be useful to adversaries seeking to match 1071 data with other publicly available data. However, the Bureau believed that amount applied for would be useful to an adversary in other ways. For example, a significant shortfall between the amount applied for and the amount approved could be used either by an applicant's competitor or by a consumer to infer that the business has a relatively weak financial position. With information on whether or not a business is granted a loan, an adversary might gain insight into the scale of a business's objectives based on the amount applied for or approved. The Bureau also noted that the relative scarcity of this information at present would

also increase its value to adversaries. As an additional consideration, the Bureau saw no reason that disclosure would permit the reverse-engineering of proprietary lending models.

The Bureau received comments from several industry commenters and a community group. A group of trade associations stated that if a small business applicant is re-identified, disclosing the amount applied for could reveal information about the financial status of that small business that could harm its prospects for credit. Several industry commenters expressed concern that data about the amount applied for would create privacy risks for small business applicants by revealing confidential information, such as plans for business acquisitions or expansions. Another commenter stated that disclosing the amount applied for can create privacy risks for financial institutions. This commenter noted that the amounts applicants apply for can be arbitrary and, therefore, comparing these amounts to any amounts approved could be misleading and not a reliable metric for whether credit demand is met.

The Bureau stated that if it determined that the amount applied for should be modified, it may consider recoding the data into bins. For example, the Bureau could recode the amount applied for into bins of $25,000. In response, a community group stated that the Bureau could recode the amount applied for into bins that use the mid-point of $10,000 intervals. As noted by the commenter, HMDA utilizes this technique, and, according to the commenter, it would be sufficient for privacy purposes while producing more accurate data.

After reviewing these comments, the Bureau assesses that disclosing this data field may create some privacy risk where small business applicants and related natural persons face re-identification risk that could reveal non-public commercial information, such as an application for credit or business acquisition or expansion plans. Further, to the extent that this data point, combined with the amount approved or originated data point, indicates business difficulties, this could impact the reputational interests of small businesses and their owners. The Bureau also assesses that in some circumstances disclosing amount applied for could disclose personal information about an applicant or related natural person that would be harmful or sensitive if

such person were re-identified. Comments asserting privacy risks for financial institutions, however, provided no compelling evidence of privacy risk to alter the NPRM analysis on point.

vii. Amount Approved or Originated

Proposed § 1002.107(a)(8) would have required financial institutions to collect and report to the Bureau: (i) for an application for a closed-end credit transaction that is approved but not accepted, the amount approved by the financial institution; or (ii) for a closed-end credit transaction that is originated, the amount of credit originated; or (iii) for an application for an open-end credit transaction that is originated or approved but not accepted, the amount of the credit limit approved. As discussed in the section-by-section analysis of § 1002.107(8), the Bureau is finalizing the amount approved or originated data point as proposed.

The NPRM stated that disclosing this data in unmodified form would likely disclose information about an applicant or related natural person that might be harmful or sensitive if such person were re-identified, or that might be harmful or sensitive to an identified financial institution. The Bureau stated that information about the amount approved or originated could be useful to potential adversaries. For example, these data fields would provide creditors some insight into competitors' lending practices, particularly when combined with other data points such as gross annual revenue, number of workers, time in business, and pricing. Likewise, these data might allow creditors to make general inferences about the relative risk appetites of their competitors. However, the Bureau did not see any reason that disclosure would permit the reverse-engineering of proprietary lending models.

The Bureau stated that it had identified publicly available datasets that include data fields an adversary could directly match to the amount approved or originated data fields in unmodified form. Credit amount approved or originated is often widely available in public datasets, such as loan-level data for the SBA 7(a) and 504 programs, as well as property records and UCC filings. The Bureau accordingly stated that adversaries would be able to match the amount of credit

approved or originated to an existing public record. The Bureau further stated that if it determined that the amount approved or originated should be modified, it may consider recoding.

The Bureau received comments from several industry and community group commenters. The community groups generally supported publishing these data fields. Several industry commenters disagreed. Two such commenters stated that if re-identification occurred, the amount approved or originated could harm small business applicants by disclosing information about business expansions or acquisitions. A community group stated that the Bureau could recode the amount applied for into bins that use the mid-point of $10,000 intervals. As the commenter noted, HMDA utilizes this technique and, according to the commenter, it would be sufficient for privacy purposes while producing more accurate data.

After reviewing these comments, the Bureau preliminarily assesses that disclosing amount approved or originated data in unmodified form may present significant privacy risk if re-identification occurred. In some circumstances disclosing amount approved or originated could disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. For example, because amount approved or originated was found in publicly available datasets, in combination with information about the amount applied for, this data could facilitate targeted marketing of higher interest or predatory credit products. This combination of data could also have reputational impacts on small business applicants and related natural persons. The Bureau does not see any reason, however, that this data field will create compelling privacy risks for financial institutions.

viii. Type of Action Taken and Denial Reasons

Proposed § 1002.107(a)(9) and (11) would have required financial institutions to collect and report to the Bureau the action taken by the financial institution on the covered application, and for denied applications, the principal reason or reasons the financial institution denied the covered application. As discussed in the section-by-section analysis of § 1002.107(a)(9) and (11), the Bureau is finalizing these data points as proposed.

The NPRM stated that reasons for denial data could be harmful or sensitive for applicants or related natural persons. However, the Bureau did not believe disclosing the fact that credit was sought, in and of itself, likely would be harmful or sensitive to small businesses because credit is so widely used by small businesses. Further, the harm or sensitivity of disclosing information that credit was originated is mitigated by the publication of originated loan details in other databases such as UCC filings. Additionally, the Bureau did not assess that disclosure of action taken would permit the reverse-engineering of proprietary lending models.

The Bureau had not identified publicly available datasets that include data fields an adversary could directly match to these data fields in unmodified form. At a category level, however, the Bureau noted that these data fields could tell adversaries which records it may be possible to match against databases that include originated loans. The Bureau stated that most of these data fields included in this data point are not found in publicly available records that contain the identity of an applicant; the only data field that would be consistently available would be for originated loans. Without such an identified publicly available record to match with, attempting to re-identify an applicant by matching a 1071 record using these data fields likely would be difficult. However, the Bureau stated that adversaries may be able to use other data fields, such as census tract, NAICS code, and identified public information, such as business directories, to determine the identity of an applicant or related natural person. Thus, if applicants and related natural persons could be re-identified, an adversary could learn information about application denials for these businesses and use this information for a variety of purposes.

The Bureau sought comment on this analysis, specifically in light of potential harm and sensitivity arising from the disclosure of application denials and the reasons for denial, whether there are specific modification techniques that should be considered, and whether modifying these data fields by grouping or deleting these data fields would appropriately balance the privacy risks and benefits of disclosure, in light of the purposes of section 1071.

Community group commenters stated that the Bureau should publish data about action taken, including whether the loan was approved or denied or whether it was withdrawn or left incomplete. One stated their opposition to deleting action taken categories such as "denied," "incomplete," or "approved but not accepted," stating that such data are fundamental to the fair lending purpose of the statute. Several stated that publishing data on denial reasons would promote fair lending and business and community development objectives by helping lenders and policymakers assess whether creditors are denied credit for legitimate reasons. An industry commenter said that action taken data may also be misleading in the context of agricultural loans because not all creditworthy applicants are eligible for loans through the Farm Credit System.

Other trade associations and a lender commented that disclosure of action taken could cause commercial or competitive harms to applicants and related natural persons. These commenters specifically noted that data about the action taken could reveal information about a business's financial status, or acquisition or expansion plans. Other commenters stated that including denial reasons in 1071 data, without including contextual information surrounding individual credit decisions, would result in unjustified reputational or litigation harm to smaller financial institutions, which originate a lower loan volume—possibly resulting in more pronounced statistical aberrations that could be erroneously interpreted as discrimination.

In response to the Bureau's request for comment about whether these data should be modified or deleted from the public dataset, a community group stated that the Bureau should not modify or delete these fields because they are fundamental to the fair lending purposes of the statute. The commenter further noted that for decades, and without adverse consequences, HMDA has included information on whether an application for credit was originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. This commenter stated that if the Bureau found it necessary to modify this data field, a higher level of disclosure that included reasons of denial by category of business and for groupings of census tracts could achieve important fair lending and community development objectives.

As discussed above in part VIII.B.3, the Bureau views these data fields as having significant disclosure benefits. Commenters did not offer compelling evidence that disclosure of action taken, in and of itself, would reveal information about a small business applicant's financial status or strategic plans also lacked evidentiary support.[900] If re-identification were to occur, however, information about an application for credit being denied could have detrimental impacts to applicants or related natural persons when personal credit qualifications are used in making credit decisions, including personal embarrassment. Likewise, re-identification could cause non-personal commercial harm to small businesses. Accordingly, the Bureau preliminarily assesses that disclosing these data fields in unmodified form may present significant privacy risk if re-identification occurred.

ix. Action Taken Date

Proposed § 1002.107(a)(10) would have required financial institutions to collect and report the date of the action taken by the financial institution. As discussed in the section-by-section analysis of § 1002.107(10), the Bureau is finalizing this data point as proposed.

The Bureau stated that disclosing action taken date in the 1071 data in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The NPRM noted that publicly available datasets include data fields an adversary could directly match to the action taken date data field in unmodified form in the public application-level data with respect to an applicant or related natural person. Public availability of this data depends on the type of action taken. The approval date of originated loans is widely available in SBA 7(a), 504, and other program loan-level records that identify borrowers, and the date of executed agreements, which could be closely related to the action taken date, is often available for property records and UCC filings. For

[900] When the Bureau previously assessed whether to include action taken and denial reasons in HMDA loan-level public data, it concluded that modification was unnecessary 84 FR 649, 658 (Jan. 31, 2019). The Bureau articulated its decision that "action taken and reasons for denial" would be disclosed without modification.

originated loans, therefore, the action taken date would substantially facilitate matching with publicly available datasets that identify borrowers. The Bureau also stated that action taken date may be less useful in re-identifying applicants of loans that were not originated because the action taken date for such loans is rarely publicly available.

The Bureau stated that if it ultimately determined that the action taken date should be modified for publication, it may consider disclosing at a higher level, such as month instead of a specific date. The Bureau sought comment on this analysis, including about whether there are specific modifications it should consider, and whether deletion would better balance the risks and benefits of disclosure.

In response, a group of trade associations stated that the Bureau should not disclose the action taken date, noting that this information is not published in HMDA data. This commenter expressed a concern that publishing the action taken date when the same data point is deleted or modified in HMDA public data would constitute inconsistent treatment without adequate explanation. The Bureau disagrees that it should omit action taken date from the public 1071 data simply to ensure consistency between this final rule and HMDA. Commenters did not provide additional evidence related to re-identification risk.

Commenters did not provide additional evidence related to re-identification risk that would alter the initial assessment provided in the NPRM. In addition, the Bureau preliminarily assesses that the action taken date would present limited privacy risk if re-identification occurred. This data field presents minimal, if any, personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau also does not believe publication of these data would result in non-personal commercial privacy risks to small businesses being disclosed. The Bureau also identifies no compelling privacy risks to financial institutions.

x. Pricing Information

Proposed § 1002.107(a)(12) would have required financial institutions to collect and report to the Bureau the following information, where applicable, regarding the pricing of a covered credit transaction that is originated, or approved but not accepted: (i) the interest rate; (ii) total origination charges; (iii) broker fees; (iv) initial annual charges; (v) additional costs for merchant cash advances or other sales-based financing; and (vi) prepayment penalties. As discussed in the section-by-section analysis of § 1002.107(a)(12), the Bureau is finalizing the pricing information data point largely as proposed.

The NPRM stated that information about the interest rates and fees charged in connection with credit represents basic information about the features of a product generally and would present low risk of harm or sensitivity. It further noted that disclosure of pricing data in unmodified form may reveal information that some applicants or related natural persons may regard as harmful or sensitive, such as a reflection of their perceived credit risk. However, the Bureau also reported that it had received feedback during the SBREFA process that multiple factors contribute to pricing for small business credit. While the Bureau further stated that disclosure of pricing data in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, the NPRM did not identify evidence that disclosure of pricing information would permit the reverse-engineering of proprietary lending models.

The NPRM also noted that publicly available datasets include data fields an adversary could directly match to the pricing data fields in unmodified form. Identified data about the interest rate and fees charged for a given loan are available from a limited number of publicly available datasets, such as data for the SBA 7(a) and 504 programs. The Bureau further stated that, if it were to determine that pricing data should be modified, it may consider recoding the pricing information data fields into bins, such as interest rates bins of 0.25 percentage points or origination fee bins of $500; and it also noted that it could consider top-coding pricing data.

The Bureau received feedback from a range of commenters. Community groups and some others generally agreed that publishing pricing information would serve the objectives of section 1071. These commenters saw pricing information as necessary to monitor loan affordability and assess lending in underserved communities. A software vendor stated that publishing pricing information will improve competition and pricing efficiency by allowing applicants to compare credit costs offered by financial institutions. However, industry commenters stated that pricing information would have limited benefits. Two lenders stated that pricing information is not meaningful because it is based on a complex set of factors that is unique to each transaction. A trade association stated that pricing information in small business lending would have little benefit compared to loan pricing data in HMDA because, unlike consumer mortgage data reported in HMDA, commercial data that would be reported in the 1071 dataset is not standardized or uniform. Others said that pricing information has a high risk of being misinterpreted.

Several lenders also stated that small businesses would have privacy concerns if pricing information on their loans was made public. Two industry commenters stated that pricing information would create re-identification risk, particularly in smaller and rural areas. Another stated that farm loans present risks because such credit may be extended in small markets with few customers which could increase the possibility of re-identification of small business applicants or related natural persons. Several other industry commenters said that if re-identification were to occur, the publication of pricing data information would create competitive risks for small businesses. One said that this risk is particularly high in smaller communities where it is possible to use published information to reveal pricing information about individuals. Others stated that privacy risks are especially potent for sole proprietorships because those entities' pricing may be largely based on owners' individual credit performance and personal information. A group of trade associations commented that pricing information was the most sensitive data point and it could reveal sensitive competitive information that would place

businesses at a substantial competitive disadvantage. Regarding non-personal commercial harms to small business applicants, some industry commenters aid that disclosing pricing information in 1071 data would cause some financial institutions to limit their lending to reduce reputational or litigation risk.

Other commenters addressed the risk of harm or sensitivity to financial institutions. Some industry commenters stated that publishing pricing data will create competitive risks for financial institutions by revealing pricing models for small business loans, potentially allowing competitors to undercut pricing. Two agricultural lenders commented that rural financial institutions in markets with few customers face unique risks and that they may lose customers to larger financial institutions or online lenders that have larger customer bases and thus lower re-identification risk. Several other industry commenters stated that publishing pricing information would carry reputational and competitive risks for financial institutions. Some commenters were concerned that pricing information would not capture the full context of credit decisions, risking misconceptions about the underlying rationale for pricing and creating illusory disparities in credit terms. A bank trade association stated that comparing pricing information between different types of financial institutions can be misleading and may result in reputational harm because certain lenders like credit unions and farm credit system lenders receive tax or funding advantages to offer lower interest rates. Other commenters noted the risk of reputational harm from patronage dividends in agricultural lending not being accounted for in disclosed pricing. Other commenters asserted that disclosure of pricing information in 1071 data could create litigation risk for financial institutions. Several commenters said that if regulators utilize pricing information to analyze for fair lending without taking into account all variables that went into underwriting, incorrect analyses could result in unwarranted allegations of discrimination. A bank said that litigation risk based on these misconceptions may be particularly high for smaller banks that originate fewer loans because the lower volume could result in greater variation in pricing information.

The Bureau also sought comment on whether pricing information, if published, should be modified, and if so, what modification or deletion techniques would preserve the benefits of the public application-level data. A number of lenders and trade associations stated that pricing information should not be published at all because of privacy risks. Other commenters suggested modifications. A trade association stated that published pricing information should be limited to interest rates and origination fees. This commenter also supported disclosing pricing information in bins to protect privacy without harming data utility. In contrast, a community group opposed recoding interest rates or origination fees because that might mask lending disparities, thereby hindering fair lending enforcement.

As discussed in part VIII.B.3, the Bureau views pricing information as having significant disclosure benefits. In light of the re-identification risks discussed above, the Bureau appreciates commenters' concerns that if re-identification were to occur, the disclosure of pricing information in the public application-level data could pose significant risk to sole proprietors for whom underwriting could be based on personal credit performance. The Bureau also recognizes that re-identification, if it occurred, could exacerbate privacy risks, including personal privacy risks, presented by other data fields in the dataset. Additionally, re-identification could create a risk of non-personal commercial harms for applicants, particularly in small or rural communities when combined with other data fields like census tract or NAICS code. The Bureau acknowledges commenters' concerns about potential risk of harm or sensitivity to financial institutions, including reputation and litigation risks resulting from possible misinterpretations of published pricing information. However, the Bureau does not view privacy risks to financial institutions as compelling enough to justify exclusion of the data field. As discussed in part VIII.B.4, by mitigating re-identification risk, other potential risks and harms, including those faced by financial institutions, will also be mitigated.

The Bureau preliminarily assesses that some modification techniques may be appropriate when publishing pricing information. Potential modifications that the Bureau could consider

include binning data or top-coding pricing data fields. However, the Bureau is mindful that modifying pricing information too much could mask discriminatory pricing practices, thus hindering fair lending analyses. Similarly, such modifications could hinder identification of community development needs and opportunities.

xi. Census Tract

Proposed § 1002.107(a)(13) would have required financial institutions to collect and report the census tract containing the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or if this information is unknown, the tract containing the address or location of the main office or headquarters of the applicant; or if this information is also unknown, the tract containing another address or location associated with the applicant. In addition to reporting the census tract, the financial institution would have been required to indicate which one of these three types of addresses or locations the census tract is based on. As discussed above in the section-by-section analysis of § 1002.107(a)(13), the Bureau is finalizing this data point as proposed.

The NPRM observed that the census tract itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The Bureau acknowledged that for sole proprietors, the main office is often a home address, but it noted that the applicant's actual street address would not be reported to the Bureau. The Bureau also noted that small businesses commonly make their locations available in the normal course of business—for example, to reach prospective customers.

The Bureau stated that if the address reflects where the proceeds of the credit will be or would have been principally applied, disclosing the census tract may reveal some information about an applicant's business strategy, particularly if paired with the loan purpose data field. For example, the Bureau stated that the data could indicate that a small business is pursuing or was pursuing an expansion to a particular location. However, the Bureau believed the value of this

information to a small business's competitors is likely mitigated by the time to publication. The Bureau stated that disclosure of the census tract in unmodified form may also reveal information that financial institutions regard as harmful or sensitive, such as a financial institution's trade area. However, the Bureau did not conclude that disclosure would permit the reverse-engineering of a financial institution's proprietary lending models.

The Bureau identified publicly available datasets that include data fields an adversary could directly match to the census tract data field in unmodified form in the public application-level data with respect to an applicant or related natural person. The Bureau expected that, in most cases, the census tract that financial institutions would report to the Bureau would be based on the address or location of the main office or headquarters of the applicant, either because that is where the proceeds of the credit will be applied, or because the financial institution does not know the location or address where the proceeds of the credit will be applied but does know the applicant's main office or headquarters address. The Bureau also observed that, for many small businesses, this address or location is likely to be publicly available from sources such as the business's website and review websites. Information about a business's location is also likely available from loan-level data for public loan programs as well as from private datasets, such as from data brokers. Therefore, in many cases, the Bureau expected that an adversary could use the census tract data fields, combined with other fields, to match a section 1071 record to an identified publicly available record. The Bureau also sought comment on whether disclosing county, State, or some other geographic identifier—rather than the census tract—would affect the benefits of disclosure, the potential for harm or sensitivity, and the potential for re-identification of applicants or related natural persons.

A range of commenters provided feedback on the Bureau's analysis. Community group commenters saw the publication of this data as important to both the fair lending and business and community development purposes of section 1071. Some said that because there are currently no comprehensive data on the capital access problems faced by marginalized

communities, census tract data would provide insight into small business credit challenges at the intersection of race, sex, ethnicity, and geography. Other community groups and a business advocacy group expressed support for publishing census tract data, stating that including demographic and geographic data could positively impact the reduction of economic inequality and generally would encourage lending to underserved markets via specific policy making.

A number of lenders, along with a trade association and a community group, expressed concern that publication of census tract data would pose significant re-identification risk for applicants, especially in smaller or rural communities with low levels of lending. Other industry commenters said that the unmodified publication of census tract data combined with other data points, in particular NAICS code data, would pose significant re-identification risk.

While some community groups expressly supported the unmodified disclosure of census tract data, others suggested specific modification techniques. One commenter suggested that the Bureau consider switching records for similarly situated applicants between nearby census tracts to protect the privacy of applicants in smaller geographic areas while preserving data utility. With respect to the Bureau's suggestion to consider disclosing a broader location category, at least one trade association expressed support for disclosing data at the State level. Meanwhile, a community group generally opposed disclosure limited to the county- or State-level, arguing that it would frustrate the purposes of section 1071. But this commenter did suggest that the Bureau consider combining and aggregating adjacent census tracts in rural areas with low levels of lending.

As discussed above in part VIII.B.3, the Bureau views the disclosure of census tract as having significant benefits. Further, disclosing census tract data on its own would present limited privacy risk. Application-level census tract by itself would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. In addition, the Bureau does not discern evidence of compelling privacy risks for financial institutions. However, the Bureau appreciates the potential re-

identification risks to applicants or related natural persons posed by the combination of census tract data and other data fields, such as NAICS code. With respect to privacy risks raised by commenters, as discussed above, the Bureau has identified publicly available datasets that include data fields an adversary could directly match to certain census tract data. Accordingly, the Bureau assesses that census tract data, combined with other data fields such as NAICS code, could be used to match to an identified publicly available record, particularly in rural areas, thereby potentially re-identifying a small business applicant or its ownership. Re-identification could in turn exacerbate privacy risks, including harm or sensitivity risks, presented by other data fields in the dataset.

Considering this privacy risk, the Bureau's preliminary assessment is that some modification techniques may be appropriate. Application-level census tract would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. In addition, the Bureau does not discern evidence of a compelling privacy risks for financial institutions. However, the Bureau appreciates the potential re-identification risks to applicants or related natural persons posed by the combination of census tract data and other data fields such as NAICS code, and recognizes that there may be significant geographic variation in the likelihood of re-identification risk from census tract alone. The Bureau is mindful that modifying census tract data, like disclosing a broader location category such as county or State, while reducing re-identification risk to applicants and related natural persons, could also reduce the utility of the 1071 dataset.

xii. Gross Annual Revenue

Proposed § 1002.107(a)(14) would have required financial institutions to collect and report to the Bureau the gross annual revenue of the applicant for the preceding full fiscal year prior to when the information is collected. As discussed in the section-by-section analysis of § 1002.107(a)(14), the Bureau is finalizing this data point substantively as proposed.

The NPRM stated that disclosing gross annual revenue in unmodified form would likely disclose information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. The data field could reflect the financial condition of a small business or its ownership. The Bureau stated that competitors of the small business, other commercial entities, creditors, researchers, or persons with criminal intent all may have an interest in using these data to monitor the size or performance of an applicant that may be a rival, partner, or target of inquiry, investigation, or illegal activity. With respect to the risk of harm or sensitivity to financial institutions, the NPRM acknowledged that other creditors might use gross annual revenue data to learn more about the types of small businesses with which their competitors do business. However, the Bureau did not identify evidence that disclosure would permit reverse-engineering of proprietary lending models.

The Bureau also noted that publicly available datasets include data fields an adversary could directly match to this data field in unmodified form. This availability is not widespread. Gross annual revenue data are available from private databases. They are also available for New York State's women- and minority-owned business certification program, but those data are recoded into bins. The Bureau stated that if it determined that gross annual revenue data should be modified, it may consider recoding this data into bins, for example in ranges of $25,000, or top-coding the data to mask particularly high values, thereby reducing the identifiability of application data from small businesses with especially high gross annual revenue.

Commenters did not provide additional evidence related to re-identification risk. However, community groups and trade associations commented on modifying this field prior to publication. Several community groups and a CDFI lender generally favored the Bureau publishing unmodified gross annual revenue data to maintain its utility. One such commenter opposed modification here, stating that aggregation of data by revenue size would limit the usefulness of the data to all stakeholders, including technical assistance providers who can help small businesses apply for loans, as well as parties seeking to identify and respond to

discriminatory lending patterns. Other community groups and a trade association expressed support for publishing gross annual revenue data in bins to mitigate privacy risks for applicants. These community groups stated that modified data must still be detailed enough to permit meaningful analysis, and they criticized the current CRA system of identifying all loans to businesses with revenue under $1 million as not allowing for such analysis. One commenter suggested that if the Bureau decided to modify the gross annual revenue data field it should select the mid-point and recode the data in bins of $10,000 increments. They also expressed support for top-coding provided that it did not mask any significant differences in data for larger small businesses, and suggested that the Bureau conduct testing within the first year of data to assess whether the modification was appropriate.

As discussed above in part VIII.B.3, the Bureau views disclosure of gross annual revenue data as having significant disclosure benefits. After reviewing comments, the Bureau preliminarily assesses that if re-identification were to occur, disclosing gross annual revenue data in unmodified form may present significant privacy risk to small business applicants and related natural persons. The Bureau also preliminarily assesses that modifications to this field can be made while preserving the utility of the data for statutory purposes. The Bureau will continue to consider feedback about potential modification techniques, such as binning at smaller intervals and conducting testing before top-coding.

xiii. NAICS Code

Proposed § 1002.107(a)(15) would have required financial institutions to collect and report to the Bureau a 6-digit NAICS code. As discussed above in the section-by-section analysis of § 1002.107(a)(15), the Bureau is modifying how NAICS code is reported. Under the final rule, financial institutions must collect and report a 3-digit NAICS subsector code. Using only 3-digit NAICS subsector codes will decrease the risk of re-identification to applicants and owners while adhering to the purposes of section 1071.

The NPRM stated that publishing 6-digit NAICS codes in unmodified form by itself would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. Information about a small business's industry is likely apparent to anyone interacting with it. The Bureau noted that disclosure of 6-digit codes in unmodified form may reveal information that financial institutions regard as harmful or sensitive, such as the industries with which the financial institution does business, but it did not discern that such disclosure would permit reverse-engineering of proprietary lending models.

The Bureau acknowledged that 6-digit codes were likely to produce unique instances in the data, especially if combined with unmodified census tract data. It noted the existence of 73,057 census tracts and 1,057 6-digit NAICS codes.[901] With over 77 million resulting combinations, there would likely be many instances of this data forming unique combinations. The NPRM stated that if the Bureau modified 6-digit codes for publication, it would consider disclosing 2-, 3-, or 4-digit codes to reduce re-identification risk while maintaining data utility.

Community group commenters supported disclosing 6-digit NAICS codes to support the fair lending purpose of the statute. Many industry commenters expressed concern that such codes, particularly in small or rural communities where only a limited number of businesses share certain NAICS codes, would create significant re-identification risks.

Several commenters expressed support for modifying the 6-digit NAICS code in the public application-level data. One commenter stated that the NAICS code should be truncated to general categories. Several industry commenters expressed specific support for disclosing a 2-digit NAICS code, and another supported a 4-digit modification, stating it would provide sufficient information while mitigating re-identification risk.

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[901] *See* 2010 Census Tallies; Off. of Mgmt. & Budget, *North American Industry Classification System (NAICS) Updates for 2022*, 86 FR 35350, 35352 (July 2, 2021).

As discussed above in part VIII.B.3, the Bureau views disclosure of a NAICS code as having significant disclosure benefits. In addition, the Bureau's shift to requiring collection and reporting of a 3-digit code will significantly reduce re-identification risk while preserving the utility of the dataset. This shift acknowledges privacy concerns raised by some commenters, reducing the risk of cognizable privacy harms.

Overall, the Bureau preliminarily assesses that published 3-digit codes by themselves present limited privacy risk. It is unlikely that publication of these data would disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau also does not see evidence of non-personal commercial privacy risks to small businesses, or of any compelling privacy risk to financial institutions. However, the Bureau appreciates that there is a heightened risk of re-identification when a NAICS code is combined with other data fields, such as census tract.

xiv. Number of Workers

Proposed § 1002.107(a)(16) would have required financial institutions to collect and report to the Bureau the number of non-owners working for the applicant. In the final rule, however, a financial institution complies with § 1002.107(a)(16) by reporting in ranges. The Bureau is adopting this change in response to concerns expressed by commenters about the complexity of providing an exact number.

The NPRM stated that disclosing number of workers in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified. Additionally, the Bureau did not see disclosure being harmful or sensitive to financial institutions. Financial institutions may use such data to learn more about the types of small businesses with which their competitors do business, but the Bureau did not see evidence that disclosure would permit reverse-engineering of proprietary lending models.

The Bureau noted that information about the number of workers is likely to be publicly available for many businesses. For example, State registries of businesses may include information about a business's number of workers, and private databases also commonly include this information. This decreases any potential sensitivity or harm of disclosing this data point in the application-level data, and also the direct utility of the data to potential adversaries. However, these data sources also mean that in some cases an adversary could use number of workers, combined with other fields, to match an identified publicly available record. Data on a business's number of workers could easily produce unique combinations when combined with other data fields, particularly for businesses with higher numbers of workers. The NPRM further stated that the Bureau would consider modification options, including recoding and top-coding.

Several community group commenters and a group of State banking regulators supported unmodified disclosure of this data as important to the fair lending purposes of section 1071. However, an industry commenter stated that the data point was not useful for achieving any of the statutory purposes, particularly given the difficulties in counting seasonal and part-time employees. Several industry commenters stated that publishing the number of workers without modification could create privacy risks. These commenters generally asserted that the data point should not be published because the exact number of workers could be used to re-identify applicants and would reveal sensitive commercial information about the applicant's competitive strategy or business plan. Some of these commenters also expressed concern that these data are susceptible to misinterpretation and inaccuracy, particularly for seasonal or cyclical businesses that experience routine variations in employee volume over the course of a calendar year. Several commenters expressed support for modifying the public number of workers data field by recoding the data into bins. One commenter stated that the bins would need to be developed such that they do not obscure differences in smaller businesses.

As discussed above in part VIII.B.3, the Bureau views disclosure of the number of workers to have significant disclosure benefits. In addition, the Bureau's decision to have

financial institutions report this data in ranges will reduce the risk of re-identification for applicants or related natural persons. In turn, that lowers the risk that applicants or related natural persons are subject to competitive harms, such as the disclosure of their proprietary business information. Further, although the Bureau has identified publicly available datasets that include number of workers, these data vary over time and are difficult to align across multiple datasets. Reporting in ranges will also help address concerns about data inaccuracy and variance.

The Bureau preliminarily assesses that disclosing unmodified application-level number of workers data in ranges would present limited privacy risk if re-identification occurred. It is unlikely that publication of this data would disclose personal information about an applicant or related natural person that would be harmful or sensitive if such person were re-identified; it is also unlikely that publication would result in non-personal commercial privacy risks to small businesses or compelling privacy risks to financial institutions.

xv. Time in Business

Proposed § 1002.107(a)(17) would have required financial institutions to collect and report to the Bureau the time the applicant has been in business, described in whole years, as relied on or collected by the financial institution. As discussed in the section-by-section analysis of § 1002.107(a)(17), however, the final rule requires a financial institution to report this data in whole years only if it collects or otherwise obtains that information as part of its procedures for evaluating credit applications. Otherwise, the financial institution reports whether the applicant has been in existence for less or more than two years. This change responds to commenter concerns about complexity in collecting this data.

The NPRM explained that disclosing time in business in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. The Bureau did not see evidence that disclosure would permit the reverse-engineering of proprietary lending models. In addition, information about time in

business was likely to be publicly available for many businesses in public registration filings and other sources, decreasing any potential harm or sensitivity from publishing this data. The Bureau noted that these same data sources could enable an adversary to directly match the time in business data field in unmodified form, particularly when combined with other fields.

The Bureau stated that if it were to modify the time in business data field, it may consider recoding time in business into bins—for example, using two- or five-year intervals. It would also consider top-coding time in business at a value such as 25 years, given that larger values are more likely to be unique. The Bureau specifically sought comment on what intervals the Bureau should use if it were to recode time in business into bins and what value the Bureau should use if it were to top-code this data field.

Several community group commenters and a group of State banking regulators supported unmodified disclosure of time in business in the dataset to facilitate the fair lending purpose of the statute. A few industry commenters expressed concern that publication of time in business data could create re-identification risks for small business applicants and reputational harm for financial institutions. In particular, one commenter agreed that time in business data could be combined with other data points to re-identify small business applicants. With respect to potential modification options, a trade association and a community group expressed support for either binning or top-coding. The community group noted, however, that a bin that ranged from two to five years may be too long. The commenter also stated that a top-code of 25 years may be reasonable but urged the Bureau to conduct further analysis after it received the first year's data.

As discussed in part VIII.B.3, the Bureau views disclosure of time in business as having significant benefits. The Bureau also preliminary assesses that the availability of this data in existing datasets decreases potential harm or sensitivity of disclosure if re-identification occurs, but also increases the risk of re-identification risk. The Bureau will consider whether binning, top-coding, or other modification techniques may be appropriate when it analyzes application-

level data and conducts its full privacy analysis. Commenters did not explain how the disclosure of the applicant's time in business could lead to reputational harms to financial institutions.

xvi. Business Ownership Status

Proposed § 1002.107(a)(18) and (19) would have required financial institutions to collect and report to the Bureau whether the applicant is a minority-owned business or a women-owned business and whether minority-owned business status or women-owned business status is being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). As discussed in the section-by-section analysis of § 1002.107(a)(18), the Bureau is finalizing these data points with modifications. Specifically, it is finalizing proposed § 1002.107(a)(18) and (19) as final § 1002.107(a)(18). In addition to the minority-owned and women-owned business statuses, the final rule requires financial institutions to collect and report LGBTQI+-owned business status.

The NPRM stated that publishing demographic ownership status in unmodified form would have likely disclosed minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. While some applicants or related natural persons may regard this information as harmful or sensitive, the Bureau believed this information generally would present low risk of harm or sensitivity. The Bureau also believed that this information already may be available to the general public and would have relatively limited utility for adversaries if an applicant or related natural person were re-identified.

However, the Bureau noted that in many cases an adversary could have used women-owned or minority-owned business status, in combination with other data, to match a section 1071 record to an identified publicly available record. The Bureau identified several sources that could have been used for such matching. Women- and minority-ownership is likely to be publicly available for many businesses that publicly register or certify with the SBA or State or local authorities as women- or minority-owned. Businesses' websites may also provide this information, and private commercial databases also include or estimate this information.

The Bureau did not receive any comments on this aspect of its privacy analysis. This lack of engagement suggests that the NPRM generally correctly assessed the privacy impacts that disclosing women-owned and minority-owned business statuses in the data in unmodified form would have for an applicant or related natural person if such person were re-identified. It also suggests the Bureau generally correctly surmised there would be minimal, if any, harms or sensitivities to financial institutions.

However, the Bureau received comments from several industry and individual commenters on the Bureau's request for comment in proposed § 1002.107(a)(20) about whether the Bureau should require financial institutions to ask separate questions regarding the sex, sexual orientation, and gender identity, of principal owners. As discussed below in part VIII.B.6.xvii, a few commenters urged the Bureau to not collect or publish data on sexual orientation and gender identity of principal owners. The commenters noted the significant risk of harm to small business applicants and related natural persons, due to the particularly sensitive nature of this information if re-identification occurred.

The Bureau acknowledges that an individual's LGBTQI+ status likely is sensitive personal information that could pose personal privacy risks as well as non-personal commercial privacy risks. If re-identification occurred, its disclosure could pose risks to privacy interests of small business owners. Accordingly, while the Bureau views disclosure of business ownership status as having significant disclosure benefits, the Bureau preliminarily assesses that disclosing this data may present significant privacy risks if re-identification occurred. That is particularly so as to LGBTQI+-owned business status; in contrast, women-owned and minority-owned business status information would present relatively limited privacy risk. The Bureau does not see evidence that LGBTQI+-owned status poses compelling privacy risks to financial institutions.

xvii. Number and Demographic Status of Principal Owners

Proposed § 1002.107(a)(20) would have required a financial institution to collect and report to the Bureau the ethnicity, race, and sex of the applicant's principal owners; whether

ethnicity and race were being collected by the financial institution on the basis of visual observation and/or surname analysis; and whether ethnicity, race, or sex were being reported based on previously collected data pursuant to proposed § 1002.107(c)(2). Proposed § 1002.107(a)(21) would have required that financial institutions collect and report to the Bureau the number of an applicant's principal owners. As discussed in the section-by-section analyses of § 1002.107(a)(19) and (20), the Bureau is finalizing the ethnicity, race, and sex of principal owners and number of principal owners data points with several modifications, including renumbering the sections, changing how financial institutions are required to inquire about the principal owners sex, and removing the requirement that a financial institution report whether the ethnicity and race of an applicant's principal owners was collected on the basis of visual observation and/or surname analysis.

The NPRM stated that, in general, disclosing the ethnicity, race, and sex of an applicant's principal owners in unmodified form would likely have disclosed minimal, if any, information about an applicant or related individual that may be harmful or sensitive if such person were re-identified, or that may be harmful or sensitive to an identified financial institution. As noted similarly above for the data fields on women-owned and minority-owned business statuses, while some applicants or related natural persons may regard this information as harmful or sensitive, this information generally would present low risk of harm or sensitivity. The Bureau also noted that this information may be already available to the general public, and that this information would have relatively limited utility for adversaries if an applicant or related natural person were re-identified.

The Bureau identified publicly available datasets that include data fields an adversary could directly match to the ethnicity, race, and sex of the applicant's principal owner(s) data fields in unmodified form. For example, certain State business registries, including those required to access women-owned and minority-owned business programs, provide this information. Other public record databases, such as the SBA's 8(a) program and the Paycheck

Protection Program, also include ethnicity, race, and sex data alongside the borrower's name. In many cases, therefore, the Bureau stated that an adversary could use the ethnicity, race, and sex of the applicant's principal owners, combined with other fields, to directly or indirectly match a section 1071 record to an identified publicly available record.

As discussed in the section-by-section analysis of § 1002.107(a)(19), the Bureau proposed that financial institutions would report sex as described in proposed comment 107(a)(20)-8, which would have permitted an applicant to self-describe a principal owner's sex by selecting the "I prefer to self-describe" response option on a paper or electronic form or by providing additional information for an oral application, with the financial institution reporting the response using free-form text. In the NPRM, the Bureau stated intention to exclude free-form text from public application-level data. However, the Bureau sought comment on whether there were additional specific modifications it should consider with regard to applicants who choose to self-describe their principal owners' sex. The Bureau also sought comment on whether, if finalized, disclosure of sex, sexual orientation, or gender identity could cause heightened sensitivity or risk of harm and any specific modifications the Bureau should consider if such data points were included in the final rule.

Many community group and minority business advocacy group commenters supported disaggregated disclosure of ethnicity, race, and sex of principal owners, and underscored its significance in achieving the fair lending purpose of section 1071. Some of these commenters stated that publication of disaggregated data would facilitate development of policy solutions for issues of financial inequality as it relates to ethnicity, race, and sex. A few trade associations expressed concerns about publishing information collected on the basis of visual observation or surname.

Some industry commenters expressed concerns that ethnicity, race, and sex data would create significant privacy risks for small business applicants, particularly in smaller or rural communities. Other industry and individual commenters cautioned the Bureau against collecting

and publishing the sexual orientation and gender identity of principal owners. Specifically, these commenters noted the significant risk of harm to small business applicants, due to the particularly sensitive personal nature of this information if re-identification occurred.

Some trade associations noted concerns that publishing ethnicity, race, and sex information, particularly where collected based on visual observation or surname, will present the risk of harm to financial institutions. Two such commenters asserted that financial institutions faced the potential for reputational or litigation risks if the ethnicity, race, or sex data are published because of potential conflicts with State or Federal privacy laws. One commenter stated that asking for this information without proper privacy precautions may expose the financial institution to legal risk under certain State privacy laws, such as the California Consumer Protection Act, that protect against disclosure of ethnicity and race information. Two others noted that State privacy laws may conflict with the requirement to obtain ethnicity and race data based on visual observation. These commenters also stated that the perceived intrusiveness from the acquisition of these data and the knowledge that it would become public could cause competitive and reputational harm to financial institutions as institutions that do not protect their customers' privacy. For example, one commenter asserted that visual observation collection may reduce trust in the financial institution and increase the applicant's apprehension regarding their privacy. As to whether the Bureau should publish the unmodified, applicant-level data on the number of principal owners, several industry commenters opposed the publication of these data, should it be finalized. The commenters stated that publication of the number of principal owners could facilitate re-identification, particularly in small or rural areas.

As discussed above in part VIII.B.3, the Bureau views disclosure of these data to have significant benefits. Commenters did not provide additional evidence related to re-identification risk that would alter the NPRM's partial privacy analysis. The current availability of these data in existing databases likely limits the risk of harm or sensitivity, although it may amplify re-identification risk. Comments that the disclosure of ethnicity, race, and sex data present a risk of

reputational or litigation harm to financial institutions because it may be based on visual observation or surname are moot because no visual observation requirement is in the final rule. Commenters did not explain with sufficient detail how the final rule will increase a financial institution's litigation risks due to conflicts with State or Federal privacy laws. To the extent that asking for an applicant's principal owners' ethnicity, race, or sex must be done with proper privacy protocols in place, it seems likely that a financial institution could comply with both this final rule and other privacy requirements.

Accordingly, the Bureau preliminarily assesses that disclosure in unmodified form may increase re-identification risk and presents significant risk of harm or sensitivity if re-identification occurred. The possibility of significant privacy risk primarily results from the fact that sex data will be reported as free-form text, which as discussed in part VIII.B.6.xix below, the Bureau preliminarily assesses it will include, in some form, in the public data. The disclosure of information about the ethnicity and race of principal owners generally will present lesser risk. The Bureau does not discern evidence of compelling privacy risks to financial institutions.

xviii. Financial Institution Identifying Information

Proposed § 1002.109(b) would have required a financial institution to provide the Bureau with certain information with its submission of its small business lending application register: (1) its name; (2) its headquarters address; (3) the name and business contact information of a person who may be contacted with questions about the financial institution's submission; (4) its Federal prudential regulator, if applicable; (5) its Federal Taxpayer Identification Number; (6) its LEI; (7) its RSSD ID, if applicable; (8) parent and top-parent entity information, if applicable; (9) the type of financial institution that it is, indicated by selecting the appropriate type or types of institution from the list provided or entering free-form text;[902] and (10) whether the financial institution is voluntarily reporting covered applications for covered credit transactions. As

[902] Part VIII.B.6.xix further discusses the disclosure of free-form text field information.

discussed above in the section-by-section analysis of § 1002.109(b), the Bureau is generally finalizing this data point as proposed, with certain modifications.

Regulation C requires financial institutions to report similar information when submitting their loan-level HMDA data. Regulation C also requires financial institutions to report the calendar year of submission and the total number of entries in their loan-level HMDA data. Regulation C does not require financial institutions to submit their headquarters address, RSSD ID, or financial institution type or indicate whether they are reporting data voluntarily. With the exception of contact information for a person who can be reached about the financial institution's submission, the information financial institutions are required to submit with their HMDA submissions under § 1003.5(a)(3) is publicly available through the FFIEC website.

Financial institution identifying information other than individual contact information. In the NPRM, the Bureau stated its intention to disclose the financial institution identifying information data fields in unmodified form, other than the name and business contact information of a person who may be contacted with questions about the submission. The Bureau stated that disclosing financial institution identifying information in the 1071 data in unmodified form would likely disclose minimal, if any, information about an applicant or related natural person that may be harmful or sensitive if such person were re-identified. While some businesses might view their identification as an applicant as harmful or sensitive, revealing the name of the financial institution would not significantly increase such risks. In addition, the Bureau reasoned that this information is already largely available from other identified public records, such as UCC filings. For the same reason, revealing the name of the financial institution would not significantly increase risk of fraud or identity theft. The Bureau stated that disclosing financial institution identifying information in the data in unmodified form would not, by itself, reveal information that is harmful or sensitive, given financial institutions' commercial interests. Additionally, other public records, such as public HMDA data, tax records, and commercial

databases disclose Federal Taxpayer Identification number, RSSD ID, and LEI.[903] Disclosing financial institution identifying information in unmodified form may reveal information that financial institutions regard as harmful or sensitive, but the Bureau did not discern evidence that it would permit reverse-engineering of proprietary lending models. The Bureau acknowledged, however, that this information could, in some circumstances, lead to reputational risks and increased costs for financial institutions, which might be passed on to their customers in the form of increased costs or decreased access to credit.

The NPRM noted that the Bureau had received feedback that publishing financial institution identifying information could increase re-identification risk of applicants and related natural persons. This included feedback that customers of captive wholesale finance companies with applicant bases limited to franchises or licensees of a particular distributor or manufacturer would face unique re-identification risks because, in many instances, these applicants may be the financial institution's only customer in a particular State, or one of only a very small number of customers in the State, heightening the privacy concerns for publication of data tied to these financial institutions. The NPRM also noted that the Bureau had identified publicly available datasets that include data fields an adversary could directly match to financial institution identifying information data fields in unmodified form. Therefore, in many cases, the Bureau reasoned that an adversary could use identifying financial institution data fields, combined with other section 1071 data fields, to match a section 1071 record to an identified public record.

With respect to concerns about wholesale finance companies, the Bureau acknowledged that financial institution identifying information in unmodified form in the public application-level data could, in combination with other data fields like census tract, NAICS codes, and credit type or purpose, facilitate re-identification of applicants that have a common name, without requiring that adversaries match 1071 records to other identified datasets. Under proposed

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[903] The FFIEC publishes transmittal sheet information, including LEI and Federal Taxpayer Identification number, on its website. Fed. Fin. Insts. Examination Council, *Public Transmittal Sheet—Schema*, https://ffiec.cfpb.gov/documentation/2020/public-ts-schema/ (last visited Mar. 20, 2023).

§ 1002.104(b), which the Bureau has finalized, trade credit and other transactions would be excluded from the scope of covered credit transactions. The Bureau indicated that this might eliminate some transactions involving such lenders. The Bureau sought comment on the circumstances under which a transaction involving a captive wholesale finance company would be covered by the proposal notwithstanding the exemption. To the extent there are such transactions, the Bureau also sought comment on the instances in which captive wholesale finance companies lend *exclusively* to businesses that are publicly branded in a way that can be easily matched to the identity of the financial institution. The Bureau sought comment on whether a final rule could include certain categories of financial institution types that would allow the Bureau to easily identify such financial institutions in the unmodified 1071 dataset without an application-level analysis. Finally, the Bureau sought comment on whether there are particular modification techniques that would reduce re-identification risks and risks of harm or sensitivity for applicants and related natural persons who might be re-identified in the public application-level data.

In the NPRM, the Bureau stated its intention to publish financial institution identifying information, other than individual contact information, as reported and without modification. The Bureau stated that risks to privacy interests from the disclosure of this data in unmodified form would be justified by the benefits of disclosure for section 1071's purposes. While the Bureau did not conduct a uniqueness analysis, it stated that disclosure of financial institution identifying information would very likely substantially facilitate the re-identification of applicants or related natural persons. If such persons were re-identified, the Bureau stated that disclosure of other data fields would likely create a risk of harm or sensitivity. In addition, the Bureau stated that the disclosure of other proposed data fields in combination with a financial institution name likely would reveal information that may be harmful or sensitive to financial institutions. The Bureau nonetheless stated that these risks to privacy would be justified by the benefits of disclosure in light of section 1071's purposes.

The Bureau sought comment on this analysis and its stated intention to disclose these fields without modification in the public application-level data. The Bureau received feedback on this proposed analysis from trade association and community group commenters. Two community group commenters generally supported the Bureau's proposal to disclose unmodified financial institution identifying information, other than individual contact information. A trade association opposed the proposal. This commenter urged the Bureau to withhold all financial institution identifying information data fields because, whether or not it is available elsewhere, this information would create privacy risks for financial institutions, including risks involving identity theft and data security. With respect to the Bureau's request for comment about whether these proposed data fields would pose risks to captive wholesale companies and their customers, this commenter urged the Bureau to provide additional protections for this market segment to mitigate re-identification risk.

The Bureau acknowledges that publication of financial institution identifying information may reveal information that may be harmful or sensitive to financial institutions, leading to reputational risks and increased costs. However, feedback received by the Bureau does not explain how these data would pose previously unconsidered identity theft or data security risks. Separately, the Bureau acknowledges feedback that the proposed data fields may pose special risks to captive wholesale companies and their customers. It intends to consider what additional modifications or deletions may be appropriate to protect the privacy interests of these entities.

As explained in the NPRM, this data point could potentially increase re-identification risk and commenters did not provide additional evidence related to re-identification risk that would alter the partial privacy analysis described above. However, the Bureau preliminarily assesses that disclosing the financial institution identifying information data fields in unmodified form, other than data fields containing the information for the financial institution's point of contact, would present limited risk of harm or sensitivity if re-identification occurred. The Bureau believes that it is unlikely that publication of this data would disclose personal information about

an applicant or related natural person that would be harmful or sensitive if such person were re-identified. The Bureau does not believe this data will result in significant non-personal commercial risks to small businesses. The disclosure of this data field does not pose compelling privacy risks to financial institutions. The Bureau will continue to give consideration to the scenario involving captive wholesale companies and their customers as it conducts its full privacy analysis.

Individual contact information. Proposed § 1002.109(b)(1)(iii) would have required financial institutions to report the name and business contact information of a person who may be contacted with questions about the financial institution's submission. As discussed above in the section-by-section analysis of § 1002.109(b)(1)(iii), the Bureau is finalizing this data point largely as proposed, but with certain modifications. In contrast to the other financial institution identifying information described above, in the NPRM the Bureau stated its intention to delete this data field from the publicly available data.

The Bureau stated that disclosing individual contact information in the data in unmodified form would likely not disclose any information about an applicant or related natural person if such person were re-identified. However, the Bureau stated that disclosing the name and contact information of natural persons designated by the financial institution would disclose information that may be harmful or sensitive to the identified financial institutions and their employees. Financial institutions have a legitimate interest in protecting the identities of their employees from the public, consistent with their job functions, and persons identified for purposes of questions about the financial institution's submission to the Bureau might not necessarily be responsible for engaging with the general public.

The Bureau considered whether modification other than by excluding individual contact information would appropriately balance identified privacy risks and disclosure benefits. Because disclosure of this data field in unmodified form would not promote the purposes of section 1071 and would likely reveal information that would be harmful or sensitive to a

financial institution and its employees, the Bureau did not identify any such alternative. Accordingly, the Bureau stated that deleting individual contact information would appropriately balance the privacy risks and disclosure benefits of this data field.

The Bureau received feedback from one trade association commenter, which supported the Bureau's analysis. The Bureau accordingly determines that the publication of the name and business contact information of a person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission has minimal, if any, disclosure benefits. Moreover, the Bureau concludes that the publication of this information presents significant privacy risks because it may be harmful or sensitive to identified financial institutions and their employees. Accordingly, the Bureau is announcing its intention not to publish the name and business contact information of a person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission.

xix. Free-Form Text

The Bureau proposed to require financial institutions to use free-form text to report certain data where they are reporting information that is not included in a list provided for the data fields. Under proposed § 1002.107(a)(5), (6), (11), (12), and (20), free-form text could be used in reporting credit type (product and guarantee information); credit purpose; denial reasons; pricing (the interest rate index used); and principal owners' ethnicity, race, and sex.[904] Financial institutions also would have had flexibility in describing certain identifying information provided under proposed § 1002.109(b). Free-form text used to report principal owners' ethnicity, race, and sex would have been completed based on information provided by applicants; all other free-form text would have been completed by the financial institution. As discussed above in the section-by-section analyses for particular data points within § 1002.107(a), the Bureau is

[904] Proposed § 1002.107(a)(20) is being finalized as § 1002.107(a)(19).

finalizing these data points with certain modifications. The free-form text aspect of § 1002.109(b) is being finalized as proposed.

The Bureau explained that use of free-form text would allow the reporting of any information, including information that may be harmful or sensitive to applicants, related natural persons, and possibly the interests of financial institutions. The Bureau stated that such information might also create a significant risk of re-identification for applicants or related natural persons. Given the amount of data expected to be reported each year, the Bureau stated that it would not be feasible for it to review free-form text before publishing the application-level data. Under the balancing test described in the NPRM, therefore, the Bureau initially assessed that deleting free-form text from the public application-level data (other than with respect to the financial institution identifying information described in part VIII.B.6.xviii above) would appropriately balance the benefits of disclosure with the risks to the privacy interests of applicants, related natural persons, and financial institutions.

Several industry commenters generally supported deleting free-form text from the public application-level data. A bank noted that public the HMDA data do not include free-form text fields. A group of trade associations stated that deleting this information would appropriately balance privacy risks and disclosure benefits. In contrast, a CDFI lender urged the Bureau to publish free-form text fields arguing that such fields would include important information. This commenter suggested that the Bureau could adequately mitigate the risk that the free-form text would contain sensitive or harmful information by including a disclaimer on the data collection form that free-form text may be published.

The Bureau reiterates that HMDA publication practices do not dictate decisions in this rule and that consistency between public section 1071 data and public HMDA data may not be appropriate in every instance. As an additional matter, the Bureau believes that a general disclaimer that free-form text may be published would not adequately mitigate those privacy risks. Among other considerations, because financial institutions will supply the content of most

free-form text fields, applicants and related natural persons have no direct control over what information appears in those fields. Therefore, a disclaimer would provide applicants or related natural persons limited ability to mitigate their privacy risks.

The Bureau agrees that certain free-form text fields may contain information that has some disclosure benefits. In particular, free-form text for the ethnicity, race, and sex data may contain information that is important to the statutory purposes of section 1071. As discussed in the section-by-section analysis of § 1002.107(a)(19), the Bureau is finalizing a requirement whereby applicants will indicate principal owners' sex via a write-in option. While the Bureau cannot feasibly review for privacy risks all free-form text fields supplied by all financial institutions reporting data, the Bureau expects to review the free-form text provided by applicants regarding principal owners' sex. The Bureau anticipates that this free-form text will permit identification of certain response categories appropriate for publication, based on the Bureau's assessment of privacy risks. Similarly, the Bureau may be able to review ethnicity and race free-form text, where it is provided, to discern response categories that may be appropriate for publication.

The Bureau recognizes, however, that free-form text fields may present significant privacy risks if re-identification occurred. Such privacy risks would not be mitigated in the absence of pre-publication review. Accordingly, the Bureau is announcing its intention to delete free-form text from the public application-level data, other than with respect to ethnicity, race, and sex of principal owners described in part VIII.B.6.xvii and the financial institution identifying information described in part VIII.B.6.xviii. The Bureau will continue to consider whether modification techniques may be appropriate for the data fields for ethnicity, race, and sex of principal owners and certain financial institution identifying information.

IX. Dodd-Frank Act Section 1022(b)(2) Analysis

The Bureau has considered the potential benefits, costs, and impacts of the final rule. The Bureau requested comment on the preliminary discussion presented below, as well as

submissions of additional data that could inform the Bureau's consideration of the benefits, costs, and impacts of the proposed rule. In developing the rule, the Bureau has consulted or offered to consult with the prudential regulators (the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency), the Department of Agriculture, the Department of Housing and Urban Development, the Department of Justice, the Department of the Treasury, the Economic Development Administration, the Farm Credit Administration, the Federal Trade Commission, the Financial Crimes Enforcement Network, and the Small Business Administration regarding, among other things, consistency with any prudential, market, or systemic objectives administered by such agencies.

In the Dodd-Frank Act, which was enacted "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system," Congress directed the Bureau to adopt regulations governing the collection of small business lending data. Under section 1071 of that Act, covered financial institutions must compile, maintain, and submit certain specified data points regarding applications for credit for women-owned, minority-owned, and small businesses, along with "any additional data that the Bureau determines would aid in fulfilling the purposes of [section 1071]." Under the final rule, covered financial institutions are required to collect and report the following data points: (1) a unique identifier, (2) application date, (3) application method, (4) application recipient, (5) credit type, (6) credit purpose, (7) amount applied for, (8) amount approved or originated, (9) action taken, (10) action taken date, (11) denial reasons, (12) pricing information, (13) census tract, (14) gross annual revenue, (15) NAICS code, (16) number of workers, (17) time in business, (18) minority-owned business status, women-owned business status, and LGBTQI+-owned business status, (19) ethnicity, race, and sex of principal owners, and (20) the number of principal owners.

Under the final rule, financial institutions will be required to report data on small business credit applications under section 1071 if they originated at least 100 covered credit

transactions in each of the two preceding calendar years. The Bureau is defining an application as an oral or written request for a covered credit transaction that is made in accordance with the procedures used by a financial institution for the type of credit requested, with some exceptions. Loans, lines of credit, credit cards, and merchant cash advances (including such credit transactions for agricultural purposes) all fall within the transactional scope of this final rule. The Bureau is excluding trade credit, transactions that are reportable under the Home Mortgage Disclosure Act of 1975 (HMDA),[905] insurance premium financing, public utilities credit, securities credit, and incidental credit. Factoring, leases, and consumer-designated credit that is used for business or agricultural purposes are also not covered credit transactions. In addition, the Bureau has made clear that purchases of originated covered credit transactions are not reportable. For purposes of the final rule, a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less.

A. Statement of Need

Congress directed the Bureau to adopt regulations governing the collection of small business lending data. Specifically, section 1071 of the Dodd-Frank Act amended ECOA to require financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses. Congress enacted section 1071 for the purpose of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. The Bureau is issuing this final rule to implement the section 1071 mandate.

Small businesses play a key role in fostering community development and fueling economic growth both nationally and in their local communities.[906] However, comprehensive data on loans to small businesses currently are limited. The largest sources of information on

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[905] 12 U.S.C. 2801 *et seq.*

[906] *See generally* White Paper.

lending by depository institutions (*i.e.*, banks, savings associations, and credit unions) are the FFIEC and NCUA Call Reports and reporting under the CRA. Under the FFIEC Call Report and CRA reporting requirements, small loans to businesses of any size are used in whole or in part as a proxy for loans to small businesses. The FFIEC Call Report captures banks' and savings associations' total outstanding number and amount of small loans to businesses (that is, loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000) by institution.[907] The CRA currently requires banks and savings associations with assets over a specified threshold ($1.384 billion as of 2022)[908] to report data on loans to businesses with origination amounts of $1 million or less; reporters are asked to indicate whether the borrower's gross annual revenue is $1 million or less, if they have that information.[909] Under the CRA, banks and savings associations currently report aggregate numbers and values of originations at an institution level and at various geographic levels. The NCUA Call Report captures credit unions' total originations, but not applications, on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size.[910] Some federally-funded loan programs, such as the SBA's 7(a) or 504 programs and the CDFI Fund require reporting of loan-level data, but only for loans that received support under those programs. Nondepository institutions do not report small business lending applications under any of these reporting regimes. There are no similar sources of information about lending to small businesses by nondepository institutions.

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[907] *See* FFIEC Call Report at Schedule RC-C Part II.

[908] *See* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (2022), https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.

[909] *See* 2015 FFIEC CRA Guide at 11, 13. Small business loans are defined for CRA purposes as loans whose original amounts are $1 million or less and that were reported on the institution's Call Report or Thrift Financial Report (TFR) as either "Loans secured by nonfarm or nonresidential real estate" or "Commercial and industrial loans." Small farm loans are defined for CRA purposes as loans whose origination amounts are $500,000 or less and were reported as either "Loans to finance agricultural production and other loans to farmers" or "Loans secured by farmland."

[910] *See* Nat'l Credit Union Admin., *Call Report Form 5300* (June 2020), https://www.ncua.gov/files/publications/regulations/form-5300-june-2020.pdf.

There are also a variety of non-governmental data sources, issued by both private and nonprofit entities, that cover small businesses and/or the small business financing market. These include datasets and surveys published by commercial data and analytics firms, credit reporting agencies, trade associations, community groups, and academic institutions. See part II.B for additional information on these sources. While these non-public sources of data on small businesses may provide a useful supplement to existing Federal sources of small business lending data, these private and nonprofit sources often do not have lending information, may rely on unverified research based on public internet sources, and/or narrowly limit use cases for parties accessing data. Further, commercial datasets are generally not free to public users and can be costly, raising equity issues for stakeholders who cannot afford access.

Under the final rule, covered financial institutions are required to compile, maintain, and submit data regarding the ethnicity, race, and sex of the principal owners of the business and whether the business is women-owned, minority-owned, or LGBTQI+-owned. No other source of data comprehensively collects this type of protected demographic information on small business loan applications.

Section 1071 requires financial institutions to report detailed application-level data to the Bureau, and for the Bureau to generally make it available to the public on an annual basis (subject to any deletions or modifications that the Bureau determines would advance a privacy interest). Such information will constitute a public good that illuminates the lending activities of financial institutions and the small business lending market in general. In particular, the public provision of application-level data, subject to any deletions or modifications that the Bureau determines would appropriately protect privacy interests, will: (1) provide communities, governmental entities, and financial institutions additional information to help identify business and community development needs and opportunities of small businesses and (2) allow members of the public, public officials, and other stakeholders to better assess compliance with antidiscrimination statutes.

First, the data made public pursuant to the final rule and the Bureau's subsequent privacy analysis will provide information that could help to improve credit outcomes in the small business lending market, furthering the community development purpose of the rule. As discussed above, market-wide data on small business credit transactions are currently limited. Neither the public nor private sectors provide extensive data on credit products or terms. Small business owners have access to very little information on typical rates or products offered by different lenders. As a result of the data that will be made public pursuant to the final rule and subject to modification and deletion decisions by the Bureau, community development groups and commercial services will be able to provide better information to small businesses. For example, a commercial provider could provide small businesses with information on what products lenders typically offer and at what rates. These data will allow small business owners to more easily compare credit terms and evaluate credit alternatives; without these data, small business owners are limited in their ability to shop for the credit product that best suits their needs at the best price. By engaging in more informed shopping, small business owners may achieve better credit outcomes.

Furthermore, communities will use data to identify gaps in access to credit and capital for small businesses. Financial institutions can analyze data to understand small business lending market conditions and determine how best to provide credit to borrowers. Currently, financial institutions are not able to conduct very granular or comprehensive analyses because the data on small business lending are limited. The data made public pursuant to the final rule and subsequent privacy analysis will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions. The data will help enable institutions to identify potentially profitable opportunities to extend credit. They will additionally allow governmental entities to better develop targeted lending programs, loan funds, small business incubators, and other

community-driven initiatives. Small business owners, as a result, could benefit from increased credit availability.

Second, while data made public pursuant to the final rule and subsequent privacy analysis may not constitute conclusive evidence of credit discrimination on its own, the data will enable members of the public, regulators, and other stakeholders to better identify lending patterns consistent with noncompliance with antidiscrimination statutes. As described above, there are currently no application-level data comprehensive enough or that contain the demographic information required by the final rule to enable the public to conduct these kinds of analyses. The data made public pursuant to the final rule and subsequent privacy analysis will be comprehensive and contain the necessary data fields for such analysis. Users will be able to examine whether, for example, a lender denies applications from women-owned, minority-owned, or LGBTQI+-owned businesses at higher rates than those that are not or whether these businesses are charged higher prices. This kind of transparency can place appropriate pressure on covered financial institutions to ensure that their credit lending practices comply with relevant laws. Additionally, data collected under the final rule will contain the data fields that allow users to conduct more accurate fair lending analyses by comparing applications for credit products with similar characteristics.

B. Baseline for the Consideration of Costs and Benefits

In evaluating the benefits, costs, and impacts of the final rule, the Bureau takes as a baseline the current legal framework governing financial markets, *i.e.*, the current state of the world before the Bureau's rule implementing section 1071. Under this baseline, the Bureau assumes that institutions are complying with regulations that they are currently subject to, including reporting data under HMDA, CRA, and any State commercial financing disclosure

laws.[911] The Bureau believes that such a baseline will also provide the public with better information about the benefits and costs of this rule.

The Bureau received no comments regarding its choice of baseline for its section 1022(b)(2) analysis.

C. Basic Approach of the Bureau's Consideration of Benefits and Costs and Data Limitations

Pursuant to section 1022(b)(2)(A) of the Dodd-Frank Act,[912] in prescribing a rule under the Federal consumer financial laws (which include ECOA and title X of the Dodd-Frank Act), the Bureau is required to consider the potential benefits and costs to "consumers" and "covered persons," including the potential reduction of access by consumers to consumer financial products or services resulting from such rule, and the impact of final rules on covered persons as described under section 1026 of the Dodd-Frank Act[913] (*i.e.*, depository institutions and credit unions with $10 billion or less in total assets), and the impact on consumers in rural areas.

The Dodd-Frank Act defines the term "consumer" as an individual or someone acting on behalf of an individual, while a "covered person" is one who engages in offering or providing a "consumer financial product or service," which means a financial product or service that is provided to consumers primarily for "personal, family, or household purposes."[914] In the rulemaking implementing section 1071, however, the only parties directly affected by the rule are small businesses (rather than individual consumers) and the financial institutions from whom they seek credit (rather than covered persons). Accordingly, a section 1022(b)(2)(A) analysis that considers only the costs and benefits to individual consumers and to covered persons would not meaningfully capture the costs and benefits of the rule.

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[911] *See, e.g.*, N.Y. S.898 (signed Jan. 6, 2021) (amending S.5470-B), https://legislation.nysenate.gov/pdf/bills/2021/s898; Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235; Virginia H. 1027 (enacted Apr. 11, 2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+ful+CHAP0516; Utah S.B. 183 (enacted Mar. 24, 2022), https://le.utah.gov/~2022/bills/static/SB0183.html.

[912] 12 U.S.C. 5512(b)(2)(A).

[913] 12 U.S.C. 5516.

[914] 12 U.S.C. 5481(4) through (6).

Below, the Bureau conducts the statutorily required analysis with respect to the rule's effects on consumers and covered persons. Additionally, the Bureau is electing to conduct this same analysis with respect to small businesses and the financial institutions required to compile, maintain, and submit data under the final rule. This discussion relies on data that the Bureau has obtained from industry, other regulatory agencies, and publicly available sources. However, as discussed further below, the data limit the Bureau's ability to quantify the potential costs, benefits, and impacts of the final rule.

1. Analysis with Respect to Consumers and Covered Persons

The final rule implements a data collection regime in which certain covered financial institutions must compile, maintain, and submit data with respect to applications for credit for small businesses. The rule will not directly impact consumers or consumers in rural areas, as those terms are defined by the Dodd-Frank Act. However, some consumers will be directly impacted in their separate capacity as sole owners of small businesses covered by the rule. Some covered persons, including some that are depository institutions or credit unions with $10 billion or less in total assets, will be directly affected by the rule not in their capacity as covered persons (*i.e.*, as offerors or providers of consumer financial products or services) but in their separate capacity as financial institutions that offer small business credit covered by the rule. The costs, benefits, and impact of the rule on those entities are discussed below.

2. Costs to Covered Financial Institutions

The final rule establishes which financial institutions, applicants, transactions, and data points are covered by its requirements. In order to precisely quantify the costs to covered financial institutions, the Bureau would need representative data on the operational costs that financial institutions would incur to gather and report 1071 data, one-time costs for financial institutions to update or create reporting infrastructure to implement the final rule, and information on the level of complexity of financial institutions' business models and compliance systems. Currently, the Bureau does not believe that data on section 1071 reporting costs with

this level of granularity are systematically available from any source. The Bureau has made reasonable efforts to gather data on section 1071 reporting costs. Through outreach efforts with industry, community groups, and other regulatory agencies, the Bureau has obtained some information about potential ongoing operational and one-time compliance costs, and the discussion below uses this information to quantify certain costs of the final rule. Throughout the section 1022 discussion in the NPRM, the Bureau also solicited feedback about data or methodologies that would enable it to more precisely estimate the benefits, costs, and impacts of the proposed rule. The Bureau has reviewed these comments and considered the information provided by the commenters. The Bureau believes that the discussion herein constitutes the most comprehensive assessment to date of the costs of section 1071 reporting by financial institutions, as well as the most accurate estimates of costs given available information. However, the Bureau recognizes that these estimations may not fully quantify the costs to each covered financial institution, especially given the wide variation of section 1071 reporting costs among financial institutions.

The Bureau categorizes costs required to comply with the final rule into "one-time" and "ongoing" costs. "One-time" costs refer to expenses that the financial institution will incur initially and only once to implement changes required in order to comply with the requirements of this rule. "Ongoing" costs are expenses incurred as a result of the ongoing reporting requirements of the rule, accrued on an annual basis. In considering the costs and impacts of the rule, the Bureau has engaged in a series of efforts to estimate the cost of compliance by covered entities. The Bureau conducted a One-Time Cost Survey, discussed in more detail in part IX.E.1 below, to learn about the one-time implementation costs associated with implementing section 1071 and adapted ongoing cost calculations from previous rulemaking efforts. The Bureau evaluated the one-time costs of implementing the procedures necessary and the ongoing costs of annually reporting under the rule in part IX.F.3 below. The discussion below provides details on the Bureau's approach in performing these institution-level analyses. The Bureau realizes that

costs vary by institution due to many factors, such as size, operational structure, and product complexity, and that this variance exists on a continuum that is impossible to fully represent. In order to conduct a cost consideration that is both practical and meaningful in light of these challenges, the Bureau has chosen an approach that focuses on three representative types of financial institutions. For each type, the Bureau has produced reasonable estimates of the costs of compliance given the limitations of the available data. Part IX.F.3 below provides additional details on this approach.

3. Costs to Small Businesses

The Bureau has elected to estimate the costs to small businesses in addition to those for covered financial institutions. The Bureau expects the direct costs of the final rule to small businesses will be negligible. Therefore, the Bureau focuses its analysis on whether and how the Bureau expects financial institutions to pass on the costs of compliance with the final rule to small businesses and any possible effects on the availability or terms of small business credit. The Bureau relies on economic theory to understand the potential for costs to financial institutions to be passed on to small businesses. Further, the Bureau describes feedback received through the One-Time Cost Survey process, the SBREFA process, and comments from the NPRM process on how creditors might react to increased compliance costs due to the final rule.

4. Benefits to Small Businesses and Covered Financial Institutions

Quantifying benefits to small businesses presents substantial challenges. As discussed above, Congress enacted section 1071 for the purpose of facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. The Bureau is unable to readily quantify any of these benefits with precision, both because the Bureau does not have the data to quantify all benefits and because the Bureau is not able to assess completely how effective the implementation of section 1071 will be in achieving those benefits. The Bureau believes that its final rule appropriately implements the statutory

mandate of section 1071 to effectuate the section's stated purposes. As discussed further below, as a data reporting rule, most provisions of the final rule will benefit small businesses in indirect ways, rather than directly. Nevertheless, the Bureau believes that the impact of enhanced transparency will substantially benefit small businesses. For example, the final rule will facilitate the detection (and thus remediation) of discrimination; promote public and private investment in certain underserved markets; and promote competitive markets. Quantifying and monetizing these benefits would require identifying all possible uses of data collected under this rule, establishing causal links to the resulting public benefits, and then quantifying the magnitude of these benefits.

Similar issues arise in attempting to quantify the benefits to covered financial institutions. Certain benefits to covered financial institutions are difficult to quantify. For example, the Bureau believes that the data collected under this rule will reduce the compliance burden of fair lending reviews for lower risk financial institutions by reducing the "false positive" rates during fair lending prioritization by regulators. That is, by providing more comprehensive application-level data about a covered institution's lending to small businesses, regulators will be able to better identify fair lending risks and, as such, more efficiently prioritize their fair lending examinations and enforcement activities. The Bureau also believes that data made public pursuant to the final rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions and to identify potentially profitable opportunities to extend credit. The Bureau believes that such benefits to financial institutions could be substantial. However, quantifying them would require data that are currently unavailable.

In light of these data limitations, the discussion below generally provides a qualitative consideration of the benefits and impacts of the final rule. General economic principles, together with the limited data available, provide insight into these benefits and impacts. Where possible, the Bureau makes quantitative estimates based on these principles and the data that are available.

Quantifying these benefits is difficult because the size of each effect cannot be known in advance. Given the number of small business credit transactions and the size of the small business credit market, however, small changes in behavior can have substantial aggregate effects.

5. General Comments on the Impact Analyses in the Proposed Rulemaking

Throughout the Dodd-Frank Act section 1022 discussion in the NPRM,[915] the Bureau solicited feedback that would enable it to estimate the benefits, costs, and impacts of the proposed regulation more precisely. The Bureau, for example, solicited comments on its methodology for estimating one-time and ongoing costs, the estimates of the specific costs themselves, and any information that would help it better quantify the benefits and potential impacts on small businesses and covered financial institutions. Many commenters made general statements, while several provided comments specific to certain methodologies or estimates. In this section, the Bureau describes the comments more generally, while in subsequent sections, it discusses comments specific to those sections.

Commenters offered general remarks on the quality of the Bureau's one-time and ongoing cost estimates. Several community groups described the Bureau's estimates as "well-considered" or described the costs of the proposed rule as being outweighed by the benefits. In contrast, some industry commenters and an office of a Federal agency generally asserted that the Bureau's cost estimates were too low. The Bureau has reviewed its estimates and considered the information provided by the commenters. In the sections below, the Bureau describes specific comments related to each section of benefits, costs, and the potential impact on small entities. The methodology described in the sections below for the final rule is the same methodology that the Bureau used in the NPRM unless otherwise noted.

[915] *See* 86 FR 56356, 56540-64 (Oct. 8, 2021).

D. Coverage of the Final Rule

1. Coverage in General

The final rule provides that financial institutions (both depository and nondepository) that meet all the other criteria for a "financial institution" in § 1002.105(a) would only be required to collect and report section 1071 data if they originated at least 100 covered credit transactions in each of the two preceding calendar years. See final § 1002.105(b).

As discussed above, market-wide data on small business lending are currently limited. The Bureau is unaware of any comprehensive data available on small business originations for all financial institutions, which are needed in order to precisely identify all institutions covered by the rule. To estimate coverage of the final rule, the Bureau uses publicly available data for financial institutions divided into two groups: depository (*i.e.*, banks, savings associations, and credit unions) and nondepository institutions.

To estimate coverage of depository institutions, the Bureau relies on NCUA Call Reports to estimate coverage for credit unions, including for those that are not federally insured, and FFIEC Call Reports and the CRA data to estimate coverage for banks and savings associations. For the purposes of the analysis in this section of part IX, the Bureau estimates the number of depository institutions that would have been required to report small business lending data in 2019, based on the estimated number of originations of covered products for each institution in 2017 and 2018.[916] The Bureau accounts for mergers and acquisitions between 2017 and 2019 by assuming that any depository institutions that merged in those years report as one institution.

As discussed above, the NCUA Call Report captures the number and dollar value of originations on all loans over $50,000 to members for commercial purposes, regardless of any indicator about the business's size. For the purposes of estimating the impacts of the final rule, the Bureau uses the annual number of originated commercial loans to members reported by

[916] The Bureau uses 2019 instead of 2020 or 2021 in order to estimate coverage during, or based on, a year unaffected by COVID-19 pandemic conditions.

credit unions as a proxy for the annual number of originated covered credit transactions under the rule.[917] These are the best data available for estimating the number of credit unions that may be covered by the final rule. However, the Bureau acknowledges that the true number of covered credit unions may be different than what is presented here. For example, this proxy would overestimate the number of credit unions that will be covered if some commercial loans to members are not covered because the member is taking out a loan for a business considered large under the definition of a small business in the final rule. Alternatively, this proxy would underestimate the number of credit unions covered by the final rule if credit unions originate a substantial number of covered credit transactions with origination values under $50,000.

The FFIEC Call Report captures banks' and savings associations' outstanding number and amount of small loans to businesses (*i.e.*, loans originated under $1 million to businesses of any size; small loans to farms are those originated under $500,000). The CRA requires banks and savings associations with assets over a specified threshold ($1.384 billion as of 2022)[918] to report loans to businesses in original amounts of $1 million or less. For the purposes of estimating the impacts of the final rule, the Bureau follows the convention of using small loans to businesses as a proxy for loans to small businesses and small loans to farms as a proxy for loans to small farms. These are the best data available for estimating the number of banks and savings associations that may be covered by the final rule. However, the Bureau acknowledges that the true number of covered banks and savings associations may be different than what is presented here. For example, this proxy would overestimate the number of banks and savings associations covered by the rule if a significant number of small loans to businesses and farms are to businesses or farms that are considered large under the definition of a small business in the final

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[917] For this analysis, the Bureau includes all types of commercial loans to members except construction and development loans and loans secured by multifamily residential property. This includes loans secured by farmland; loans secured by owner-occupied, non-farm, non-residential property; loans secured by non-owner occupied, non-farm, non-residential property; loans to finance agricultural production and other loans to farmers; commercial and industrial loans; unsecured commercial loans; and unsecured revolving lines of credit for commercial purposes.

[918] *See* Fed. Fin. Insts. Examination Council, *Explanation of the Community Reinvestment Act Asset-Size Threshold Change* (2022), https://www.ffiec.gov/cra/pdf/2022_Asset_Size_Threshold.pdf.

rule. Alternatively, this proxy would underestimate the number of banks and savings associations covered by the rule if a significant number of businesses and farms that are small under the final rule take out loans that are larger than $1 million for businesses or $500,000 for farms.

Although banks and savings associations reporting under the CRA are required to report the number of originations of small loans to businesses and farms, the Bureau is not aware of any comprehensive dataset that contains originations made by banks and savings associations below the CRA reporting threshold. To fill this gap, the Bureau simulated plausible values for the annual number and dollar value of originations for each bank and savings association that falls below the CRA reporting threshold for 2017, 2018, and 2019.[919] The Bureau generated simulated originations in order to account for the uncertainty around the exact number and value of originations for these banks and savings associations. To simulate these values, the Bureau assumes that these banks have the same relationship between outstanding and originated small loans to businesses and farms as banks and savings associations above the CRA reporting threshold. First, the Bureau estimated the relationship between originated and outstanding numbers and balances of small loans to businesses and farms for CRA reporters. Then the Bureau used this estimate, together with the outstanding numbers and balances of small loans to businesses and farms of non-CRA reporters, to simulate these plausible values of originations. The Bureau has documented this methodology in more detail in its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rule* released concurrently with this final rule.[920]

Based on 2019 data from FFIEC and NCUA Call Reports and the CRA data, using the methodology described above, the Bureau estimates that the number of depository institutions

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[919] Based on FFIEC Call Report data as of December 2019, of the 5,177 banks and savings associations that existed in 2019, only about 11 percent were required to report under CRA. That is, only about 11 percent of banks and savings associations had assets below $1.284 billion, the CRA reporting threshold in 2019. *See* Fed. Fin. Insts. Examination Council, *2019 Reporting Criteria*, https://www.ffiec.gov/cra/reporter19.htm (last visited Mar. 20, 2023).

[920] This document is available at https://www.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/.

that will be required to report under the final rule is between approximately 1,800 and 2,000, as shown in Table 3 below. The Bureau estimates that between 1,700 and 1,900 banks and savings associations and about 100 credit unions will be required to report under the final rule. These ranges represent 95 percent confidence intervals over the number of credit unions, banks and savings associations that will be covered under the final rule. The Bureau presents this range to reflect the uncertainty associated with the estimates and notes that the uncertainty is driven by the lack of data on originations by banks and savings associations below the CRA reporting threshold.

Table 3: Estimated depository institution coverage (as of 2019)

Coverage Category	Estimated Coverage
Institutions Subject to 1071 Reporting	1,800 – 2,000 depository institutions (17% – 19% of all depository institutions)
Banks and Savings Associations (SAs) Subject to Reporting	1,700 – 1,900 banks and SAs (33% – 36% of all banks and SAs)
Credit Unions Subject to Reporting	100 credit unions (2% of all credit unions)
Share of Total Small Business Credit by Depository Institutions (Number of Loans Originated) Captured	94.2% – 95.1%
Share of Total Small Business Credit by Depository Institutions (Dollar Value of Loans Originated) Captured	81.0% – 83.0%

For nondepositories, the Bureau estimates that about 620 nondepository institutions will be covered by the final rule: about 140 nondepository CDFIs; about 70 merchant cash advance providers; about 30 online lenders; about 240 commercial finance companies; about 70 governmental lending entities; and 71 Farm Credit System members.[921] See part II.D above for more detail on how the Bureau arrived at these estimates.

[921] The Bureau provides estimates for the majority of nondepository institutions but knows an exact number of members of the Farm Credit System. To estimate the number of Farm Credit System members, the Bureau considers the Young, Beginning, and Small Farmers Reports for all Farm Credit System members as of December 31, 2019. The reports can be found at https://reports.fca.gov/CRS/ (last visited Mar. 20, 2023). A Farm Credit System is

Comments on the estimates of coverage of the proposed rule. In the NPRM, the Bureau sought comment on whether there are additional data sources that could provide better estimates of coverage and on the methods used to estimate coverage. Two trade associations commented that the Bureau substantially underestimates the coverage of credit unions because it does not account for small business loans under $50,000. The Bureau acknowledges this limitation of the estimation methodology, as discussed above, but did not receive any information upon which to base better coverage estimates for credit unions for purposes of the final rule.

2. Coverage Based on Tiered Compliance Dates

The final rule provides that the initial compliance date for covered financial institutions will occur in three tiers; a covered financial institution will determine its compliance date tier based on the number of covered credit transactions that it originated in each of the calendar years 2022 and 2023.[922] In this section, the Bureau presents estimates of the share of covered financial institutions that will report in each tier.

The Bureau uses the estimates of originations of covered products by depository institutions in 2017 and 2018, discussed above, to estimate how many covered depository institutions will report in each tier. A covered depository institution is expected to report in Tier 1 if it originated at least 2,500 covered credit transactions in each of 2017 and 2018. A covered depository institution is expected to report in Tier 2 if it originated at least 500 covered credit transactions in each of 2017 and 2018 and was not required to report in Tier 1. A covered depository institution is expected to report in Tier 3 if it originated at least 100 covered credit

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covered if it reported more than 100 total number of loans on its Young, Beginning, and Small Farmers Report in 2019.

[922] A covered financial institution is in Tier 1, as specified by final § 1002.114(b)(1), if it has at least 2,500 originations of covered credit transactions in each of 2022 and 2023, with a compliance date of October 1, 2024. A covered financial institution is in Tier 2, as specified by final § 1002.114(b)(2), if it has at least 500 originations in each of 2022 and 2023 (but isn't in Tier 1) with a compliance date of April 1, 2025. A covered financial institution is in Tier 3, as specified by final § 1002.114(b)(3) and (4), if it has at least 100 originations in each of 2022 and 2023 (but isn't in Tiers 1 or 2), with a compliance date of January 1, 2026. Financial institutions that do not fall into any of the compliance tiers based on 2022 and 2023 originations, but that originate 100 more covered credit transactions in subsequent years, would comply beginning January 1, 2026 at the earliest.

transactions in each of 2017 and 2018 and was not required to report in Tier 1 or Tier 2. The Bureau also estimates the percent of covered applications from 2019 that are received by depository institutions in each tier.

Table 4, below, presents estimates of percentages of covered banks and credit unions that will report in each tier. The Bureau estimates that most covered banks, savings associations, and credit unions will not be required to report until Tier 3, as seen in the first two rows of the table. However, the next two rows show that most applications to banks and savings associations (and overall) for covered products in the first reporting year will be received by the 5 percent to 6 percent of covered banks and savings associations that are expected to report in Tier 1.

Table 4: Estimated depository institution coverage by compliance tier[923]

Coverage Category	Tier 1	Tier 2	Tier 3
Percent Covered Banks and SAs Reporting in Tier	5% – 6% of covered banks and SAs	17% – 19% of covered banks and SAs	75% – 77% of covered banks and SAs
Percent Covered Credit Unions Reporting in Tier	0% of covered credit unions	13% of covered credit unions	87% of covered credit unions
Percent of Covered Small Business Credit Applications by Banks and SAs Captured in Tier	90% – 92% of covered bank and SA applications	4% – 5% of covered bank and SA applications	4% – 5% of covered bank and SA applications
Percent of Covered Small Business Credit Applications by Credit Unions Captured in Tier	0% of covered credit union applications	55% of covered credit union applications	46% of covered credit union applications

As discussed above, the Bureau is unaware of any institution-level data of originations for nondepository institutions that would allow for precise estimates of when these institutions are expected to report. Consistent with assumptions made below to generate market-level estimates, the Bureau assumes that online lenders and merchant cash advance providers each originate 2,000 covered credit transactions per year and all other nondepository institutions

[923] To estimate applications, the Bureau assumes that depository institutions with that originate 1,000 or more covered credit transactions per year receive 3 applications per origination and depository institutions that originate fewer than 1,000 covered credit transactions per year receive 2 applications per origination.

originate 200 loans per year. These assumptions imply that all online lenders and merchant cash advance providers would be required to report in Tier 2 and all other nondepository institutions would be required to report in Tier 3.

E. Methodology for Generating Cost Estimates

The Bureau used its 2015 HMDA final rule estimates as the basis for its review of 1071 data collection and reporting tasks that would impose one-time and ongoing costs. In developing its ongoing cost methodology to estimate the impacts of its 2015 HMDA final rule, the Bureau used interviews with financial institutions to understand the processes of complying with a regulation that requires collecting and reporting credit application data and to generate estimates of how changes to the reporting requirements would impact the ongoing costs of collecting and reporting mortgage application data.[924] To analyze the potential impacts of this final rule, the Bureau adapted its methodology from its 2015 HMDA rulemaking activities to the small business lending market. The methodology described below to estimate costs of the final rule is the same as the methodology used in the NPRM unless otherwise noted.

The Bureau expects that the tasks required for data collection, checking for accuracy, and reporting under the final rule will be similar to those under the 2015 HMDA final rule. The similarities in data collection and reporting tasks allowed the Bureau to leverage its previous rulemaking experience in its analysis of the impacts of this final rule. Outreach to industry, as well as feedback during the SBREFA process and in NPRM comments, validated this approach in general. The Bureau received no comments objecting to its use of the 2015 HMDA final rule impacts estimates as the basis for its methodology for the final rule implementing section 1071.

However, there are significant differences between the home mortgage and small business lending markets. For example, small business lending is generally less automated, and has a wider variety of products, smaller volumes, and smaller credit amounts. The Bureau used

[924] *Home Mortgage Disclosure (Regulation C)*, 80 FR 66128, 66269 (Oct. 28, 2015).

the SBREFA process, NPRM comments, research using publicly available information, and the Bureau's general expertise regarding the small business lending market to determine how these differences would change the tasks required for data collection, checking for accuracy, and reporting under the final rule.

During the 2015 HMDA rulemaking process, the Bureau identified seven key aspects or dimensions of compliance costs with a data collection and reporting rule: (1) the reporting system used; (2) the degree of system integration; (3) the degree of system automation; (4) the tools for geocoding; (5) the tools for performing completeness checks; (6) the tools for performing edits; and (7) the compliance program. The Bureau assumes that financial institutions will set up their section 1071 reporting in a manner similar to how HMDA reporting was implemented.[925] As discussed in more detail below, this approach was generally supported by the SBREFA process and NPRM commenters.

The Bureau found during the HMDA rulemaking process that, generally, the complexity of a financial institution's approach across key aspects or dimensions was consistent—that is, a financial institution generally would not use less complex approaches on some dimensions and more complex approaches on others.[926] This allowed the Bureau to classify financial institutions, including depository institutions and nondepository institutions, into three broad types according to the overall level of complexity of their compliance operations. Using very similar assumptions to those used in the 2015 HMDA rulemaking, the Bureau's estimation of the costs of this final rule also assumes that complexity across key aspects or dimensions of a financial institution's small business lending data collection and reporting system is consistent.

Table 5, below, summarizes the typical approach to those seven key aspects or dimensions of compliance costs across three representative types of financial institutions based

[925] For example, the Bureau assumes that financial institutions will integrate their small business data management system with their other data systems the same way that similar institutions integrated their HMDA management system.

[926] 80 FR 66128, 66269 (Oct. 28, 2015).

on level of complexity in compliance operations. Financial institutions that are Type A have the lowest level of complexity in compliance operations, while Type B and Type C have the middle and highest levels of complexity, respectively.

Table 5: Typical approach to certain aspects/dimensions of compliance costs based on level of complexity for types of financial institutions

Aspect/dimension of compliance costs	Typical approach by low complexity financial institutions (Type A FIs)	Typical approach by medium complexity financial institutions (Type B FIs)	Typical approach by high complexity financial institutions (Type C FIs)
Data storage system used	Store data in Excel	Use LOS and SBL DMS	Use multiple LOS, FI's central SoR, SBL DMS
Degree of system integration	(None)	Have forward integration (LOS to SBL DMS)	Have backward and forward integration
Degree of system automation	Highly manual process for entering and checking data	Use manual edit checks	Have high automation (only verifying edits manually)
Tools for geocoding	Use FFIEC tool (manual)	Use batch processing	Use batch processing with multiple sources
Tools for completeness checks	Conduct manual checks and rely on CFPB quality/validity checks	Use LOS, which includes completeness checks	Use multiple stages of checks
Tools for edits	Use CFPB edits only	Use CFPB and customized edits	Use CFPB and customized edits run multiple times
Compliance program	Have a joint compliance and audit office	Have basic internal and external accuracy audit	Have in-depth accuracy and fair lending audit

Note: LOS is "Loan Origination System"; SoR is "System of Record"; SBL DMS is "Small Business Lending Data Management System."[927]

During the rulemaking process for the 2015 HMDA final rule, the Bureau found that the number of loan applications received was largely correlated with overall complexity of financial institutions' compliance operations.[928] The Bureau used this observation of financial institution practices under the previous HMDA rulemaking work, in addition to early outreach to financial institutions and data from Call Reports and publicly available data from the CDFI Fund, to

[927] The Bureau expects the development of a market for small business data management systems, similar to HMDA management systems, that financial institutions will license or purchase from third parties.

[928] 80 FR 66128, 66270 (Oct. 28, 2015).

generate assumptions about the annual number of small business lending applications for covered credit transactions processed by each type of financial institution. These assumptions adapt the volume assumptions from the mortgage lending context to address the fact that financial institutions typically process fewer small business credit applications than mortgage applications. The Bureau assumes that Type A FIs receive fewer than 300 applications per year, Type B FIs receive between 300 and 2,000 applications per year, and Type C FIs receive more than 2,000 applications per year. The Bureau assumes that, for Type A and B FIs, one out of two small business applications will result in an origination. Thus, the Bureau assumes that Type A FIs originate fewer than 150 covered credit transactions per year and Type B FIs originate between 150 and 999 covered credit transactions per year. The Bureau assumes that Type C FIs originate one out of three small business applications and at least 1,000 covered credit transactions per year.[929] As described in the comment review below, these methodology assumptions were generally supported by the SBREFA process and comments on the NPRM.

The Bureau understands that costs vary by financial institution due to many factors, such as size, operational structure, and product complexity, and that this variance exists on a continuum that is impossible to fully represent. Due to data limitations, the Bureau is unable to capture many of the ways in which costs vary by institution, and therefore uses these representative financial institutions with the above assumptions for its analysis. In order to aggregate costs to a market level, the Bureau must map financial institutions onto its types using discrete volume categories.

For the hiring costs discussion in part IX.F.3.i and ongoing costs discussion in part IX.F.3.ii below, the Bureau discusses costs in the context of representative institutions for ease of

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[929] The Bureau chose the 1:2 and 1:3 application to origination ratios based on two sources of information. First see Biz2Credit, *Small Business Loan Approval Rates Rebounded in May 2020: Biz2Credit Small Business Lending Index* (May 2020), https://cdn.biz2credit.com/appfiles/biz2credit/pdf/report-may-2020.pdf, which shows that, in December of 2019, large banks approved small business loans at a rate of 27.5 percent, while small banks and credit unions had approval rates of 49.9 percent and 40.1 percent. Additionally, the Bureau's supervisory data supports a 33 percent approval rate as a conservative measure among these estimates for complex financial institutions (Type C FIs).

exposition. The Bureau assumes that a representative Type A FI receives 100 small business credit applications per year, a representative Type B FI receives 400 small business credit applications per year, and a representative Type C FI receives 6,000 small business credit applications per year. The Bureau further assumes that a representative Type A FI originates 50 covered credit transactions per year,[930] a representative Type B FI originates 200 covered credit transactions per year, and a representative Type C FI originates 2,000 covered credit transactions per year.

1. Methodology for Estimating One-time Costs of Implementation of the Final Rule

The one-time cost estimation methodology for the final rule described in this section is the same methodology that the Bureau used in the NPRM unless otherwise noted. The primary differences are the addition of hiring costs, in response to comments, and changes in the wages to reflect the most recent data.

The Bureau has identified the following nine categories of one-time costs that will likely be incurred by financial institutions to develop the infrastructure to collect and report data under the final rule:

1. Preparation/planning
2. Updating computer systems
3. Testing/validating systems
4. Developing forms/applications
5. Training staff and third parties (such as brokers)
6. Developing policies/procedures
7. Legal/compliance review
8. Post-implementation review of compliance policies and procedures

[930] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule.

9. Hiring costs[931]

Pre-NPRM outreach with financial institutions has informed the Bureau's understanding of one-time costs. Financial institutions will likely have to spend time and resources understanding the final rule, developing the required policies and procedures for their employees to follow, and engaging a legal team to review their draft policies and procedures. Additionally, financial institutions may require new equipment, such as new computer systems that can store and check the required data points; new or revised application forms or related materials to collect any data required under the final rule that they do not currently collect, including minority-owned, women-owned, and LGBTQI+-owned business statuses and the ethnicity, race, and sex of applicants' principal owners, and to provide any related disclosures required by the rule. Some financial institutions mentioned that they may store, check, and report data using third-party providers such as Fiserv, Jack Henry, LaserPro, or Fidelity Information Systems, while others may use more manual methods of data storage, checking, and reporting using software applications such as Microsoft Excel. Financial institutions will also engage in a one-time training of all small business lending staff to ensure that employees understand the new policies and procedures. After all new policies and procedures have been implemented and systems/equipment deployed, financial institutions will likely undertake a final internal review to ensure that all the requirements of the final rule have been satisfied.

The Bureau presented one-time cost categories 1 through 8 in the SBREFA Outline and during the SBREFA process in 2020.[932] The small entity representatives generally confirmed that these eight categories listed above accurately capture the components of one-time costs. Small entity representatives did not mention hiring costs during the SBREFA process. The Bureau added the hiring costs category after receiving comments in response to the NPRM.

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[931] The Bureau added this category after the NPRM and did not ask about it in the survey.

[932] SBREFA Outline at 49-52.

The Bureau also conducted a survey in 2020 regarding one-time implementation costs for section 1071 compliance targeted at financial institutions who extend small business credit.[933] The Bureau developed the survey instrument based on guidance from industry on the potential types of one-time costs institutions might incur if required to report under a rule implementing section 1071 and tested the survey instrument on a small set of financial institutions, incorporating their feedback prior to implementation. The Bureau worked with several major industry trade associations to recruit their members to respond to the survey. A total of 105 financial institutions responded to the survey.

Estimates from survey respondents form the basis of the Bureau's estimates for one-time costs in assessing the impact of this final rule. The survey was broadly designed to ask about the one-time costs of reporting data under a regime that only included mandatory data points, used a reporting structure similar to HMDA, used the Regulation B definition of an "application," and used the respondent's own internal small business definition. The survey was divided into three sections: Respondent Information, One-Time Costs, and the Cost of Credit to Small Entities.

In the Respondent Information section, the Bureau obtained basic information about the respondent, including information on the type of institution, its size, and its volume of small business lending. (The Bureau did not, however, obtain the actual name or other directly identifying information about respondents.) The One-Time Costs section of the survey measured the total hours, staff costs, and non-salary expenses associated with the different tasks comprising one-time costs. Using the reported costs of each task, the Bureau estimated the total one-time cost for each respondent. The Cost of Credit to Small Entities section dealt with the respondent's anticipated response to the increased compliance costs of being covered by a rule implementing section 1071 in order to understand the potential impacts of the rule on its small

[933] The One-Time Cost Survey was released on July 22, 2020; the response period closed on October 16, 2020. The OMB control number for this collection is 3170-0032.

business lending activity, including any anticipated potential changes to underwriting standards, volume, prices, product mix, or market participation.

To estimate one-time costs, the Bureau needs information on a financial institution's one-time costs by category and number of originations. Of the 105 total respondents, 49 answered these questions. The Bureau refers to these respondents as the "cost estimation sample." Of these respondents, 42 (86 percent) self-reported that they were a depository institution (bank, saving association, or credit union). The remaining seven (14 percent) were nondepository institutions. Table 6 presents the self-reported asset size of the 42 depository institution respondents in the cost estimation sample.[934]

Table 6: Asset sizes of depository institutions in one-time cost estimation sample

Asset Category	Count	Percent of Sample
Less than $250 million	9	21.43
$250 million to $500 million	9	21.43
$500 million to $1 billion	7	16.67
$1 billion to $10 billion	8	19.05
$10 billion to $500 billion	9	21.43

For the purposes of estimating one-time costs, the Bureau distinguishes between depository institutions and nondepository institutions. The majority of nondepository institutions are not currently subject to any similar data reporting requirements, with the notable exception of nondepository CDFIs. The Bureau anticipates that covered financial institutions that are not currently subject to data reporting requirements will need to make more changes to their existing business operations in order to comply with the requirements of the final rule. This expectation is

[934] Nondepository institutions also reported assets. The Bureau separately reports asset category for depository institutions because asset sizes are not as comparable between depositories and nondepositories. The Bureau does not report asset sizes for nondepository respondents because there were too few respondents to report separately without risking re-identification of respondents.

confirmed by the higher estimated one-time costs for nondepository institutions relative to depository institutions from the survey and discussed in part IX.F.3.i.

The Bureau categorizes depository institution respondents in the cost estimation sample into four groups according to the respondents' self-reported total originations. The first group contains the two depository institutions that reported fewer than 25 originations; the Bureau assumes these institutions would not report under the final rule. The second group contains ten depository institutions that reported between 25 and 149 originations.[935] The Bureau categorizes these as Type A DIs (that is, a DI that is a Type A FI as defined above.) The third group contains the 19 depository institutions that reported between 150 and 999 originations. The Bureau categorizes these as Type B DIs. The final group contains the 11 depository institutions that reported 1,000 or more originations. The Bureau categorizes these as Type C DIs.

There are not enough nondepository institutions in the cost estimation sample to separate nondepository institutions into Types A, B, and C and obtain meaningful estimates. Instead, the Bureau is relying on the assumption that nondepository institutions (referred to as Non-DIs for purposes of this analysis) will incur the same one-time costs regardless of the complexity of existing business operations, CDFI status, or coverage by State commercial financing laws.

The Bureau estimated the one-time costs for each of the four categories of financial institutions (Type A DI, Type B DI, Type C DI, and Non-DI) using the following methodology.

For each of the first eight categories of one-time costs, the Bureau asked financial institutions to estimate and report the total number of hours that junior, mid-level, and senior staff would spend on each task, along with any additional non-salary expenses. If a respondent did not provide estimates for any component (*i.e.*, staff hours or non-salary expenses) of any category, it is not counted as part of the cost estimation sample. If a respondent provided estimates for some components but did not provide an estimate for a particular component (*e.g.*,

[935] The Bureau acknowledges that it uses information collected from institutions that will not be covered by the final rule to estimate the costs of implementing the rule. The Bureau uses these observations to maintain a large enough sample size.

non-salary expenses for preparation/planning) then the Bureau assumed that the respondent estimated zero for that component.

The Bureau asked survey respondents to report the average hourly wage for junior, mid-level, and senior/executive staff involved in the one-time cost categories. However, for the purposes of estimating one-time costs, the Bureau assumes a constant wage across financial institutions for each level of staff. The Bureau has updated the wages for the final rule from the wages used in the NPRM. For junior staff, the Bureau uses $15.64, the 10th percentile hourly wage estimate for "loan officers" according to the 2021 Occupational Employment Statistics compiled by the Bureau of Labor Statistics.[936] For mid-level staff, the Bureau uses $38.74, the estimated mean hourly wage estimate for "loan officers." For senior staff, the Bureau used $66.50, the 90th percentile hourly wage estimate for "loan officers." To account for non-monetary compensation, the Bureau also scaled these hourly wages up by 43 percent.[937] The Bureau assumes a total hourly compensation of $22.37 for junior staff, as compared to $28.76, the mean of the junior wages reported by respondents to the survey. The Bureau assumes a total hourly compensation of $55.40 for mid-level staff, as compared to $48.94, the mean of the mid-level wages reported by respondents. The Bureau assumes a total hourly compensation of $95.10, as compared to $90.19, the mean of the senior/executive wages reported by respondents.

For each respondent in the cost estimation sample, the Bureau calculates the cost of each one-time cost category as the sum of the junior wage multiplied by the reported junior hours, the mid-level wage multiplied by the reported mid-level hours, and the senior wage multiplied by the reported senior-level hours and the reported non-salary expenses. The total cost of the first eight

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[936] *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Occupational Employment and Wage Statistics* (May 2021), https://www.bls.gov/oes/current/oes132072.htm.

[937] The June 2022 Employer Costs for Employee Compensation from the Bureau of Labor Statistics documents that wages and salaries are, on average, about 70 percent of employee compensation for private industry workers. The Bureau inflates the hourly wage to account for 100 percent of employee compensation ((100 / 70) – 1) * 100 = 43 percent). *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Employer Costs for Employee Compensation* (June 2022), https://www.bls.gov/news.release/archives/eci_07292022.pdf.

categories that the Bureau calculates for each respondent is the sum of the costs across all eight categories.

After calculating the total costs of the first eight categories for each respondent, the Bureau identifies outliers within the four groups of financial institutions (Type A DI, Type B DI, Type C DI, and Non-DI) using the interquartile range method, a standard outlier identification method. For each group of financial institutions, an observation is considered an outlier if the estimated total cost is greater than $1.5*(P_{75} – P_{25}) + P_{75}$ or less than $P_{25} – 1.5*(P_{75} – P_{25})$ where P_{75} and P_{25} are the 75th and 25th percentiles, respectively, of total costs within that group. Using this method, the Bureau identified one outlier in each Type A DI, Type B DI, and Type C DI group and no outliers in the Non-DI group.

In addition to the total estimated one-time costs, the Bureau is interested in the hours, non-salary expenses, and total costs associated with each of the different one-time cost categories. For each group, the Bureau estimates each component of one-time costs by taking the mean of the estimated component within the group, after excluding outliers. For example, the estimated number of junior hours required by Type A DIs to update computer systems is the mean number of junior hours reported by the nine Type A DIs that were in the cost estimation sample, excluding one outlier. The Bureau estimated the cost associated with each category as the sum of the junior wage multiplied by the estimated junior hours, the mid-level wage multiplied by the estimated mid-level hours, and the senior-level wage multiplied by the estimated senior hours, and the estimated non-salary expenses.

The Bureau did not include one-time hiring costs in the estimates for the NPRM. In response to comments, the Bureau estimates hiring costs for the final rule estimates. To estimate hiring costs, the Bureau assumes that, prior to implementing the final rule, current staff at a covered financial institution will not have extra capacity to take on new tasks. This assumption implies that each institution will need to hire at least one new employee. The Bureau anticipates

that institutions will rearrange tasks across new and existing employees so that the new employees alone will not conduct all work associated with the final rule.

The Bureau assumes that a covered financial institution will need to hire enough full-time equivalent workers (FTEs) to cover the estimated number of staff hours necessary to comply with the final rule on an annual, ongoing basis. In part IX.E.2 below, the Bureau describes how it estimates the ongoing costs to comply with the rule, including the number of hours of staff time an institution needs per application. The Bureau assumes that an FTE will work about 2,080 hours each year (40 hours per week x 52 weeks = 2,080). The Bureau calculates that the total number of FTEs that a covered financial institution will need to hire as the number of hours per application multiplied by the estimated number of applications received per year divided by 2,080, rounded up to the next full FTE. For example, if an institution receives 500 applications per year and spends one hour on each application, it will need to hire one FTE ((1 * 500) / 2080 = 0.24, which is round up to the next full FTE, *i.e.*, 1). In part IX.F.3.i, the Bureau also confirms that the estimated additional staff can cover the estimated staff hours required for implementing other one-time changes.

The Bureau calculates the hiring costs using the estimated cost-per-hire of $4,425, estimated by the Society for Human Resource Management.[938] This estimated cost includes advertising fees, recruiter pay and benefits, and employee referrals, among other categories. For each covered financial institution, the estimated hiring cost is $4,425 multiplied by the estimated new FTEs. The estimated total one-time costs are the sum of the estimated hiring costs and the other one-time costs for that institution discussed above.

Comments on the one-time cost methodology of the proposed rulemaking. In the NPRM, the Bureau sought comment on the methods used for estimating one-time costs of implementation. Many industry commenters provided information on the categories of costs that

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[938] *See* Soc'y for Hum. Res. Mgmt., *SHRM Customized Talent Acquisition Benchmarking Report*, at 11 (2017), https://www.shrm.org/ResourcesAndTools/business-solutions/Documents/Talent-Acquisition-Report-All-Industries-All-FTEs.pdf.

they expect to incur to develop the infrastructure to collect and report data under the proposed rule. In general, the costs these commenters discussed fall in the original eight one-time cost categories listed. Many of these commenters responded to the NPRM that they would incur costs associated with hiring new staff. The Bureau's one-time and ongoing cost methodologies account for the costs associated with paying staff to implement the final rule. The Bureau agrees, however, that the one-time cost methodology outlined in the NPRM could have more fulsomely accounted for the initial cost of hiring new staff to perform these tasks. As described above, the Bureau added hiring costs to one-time cost estimates in response to these comments. Except for hiring costs, commenters did not provide any additional one-time cost categories.

Two trade associations asserted that the Bureau's estimates of one-time costs are too low because the estimates are based on insufficient data for nondepository lenders and, in particular, merchant cash advance providers. The Bureau acknowledges that the scarcity of data for nondepositories pose a challenge when estimating the costs, benefits, and impacts of the final rule. This is particularly true for nondepositories that are not currently subject to a data reporting regime. Through outreach efforts with nondepository institutions and trade associations, the SBREFA process, and the one-time cost survey, the Bureau obtained information about the costs for nondepositories of complying with the final rule. Throughout the section 1022 discussion in the proposed rule, the Bureau also solicited feedback about data and methodologies that would enable it to more precisely estimate the costs of the proposed. The Bureau has reviewed these comments, considered the information provided by the commenters, and adjusted the methodology as described above.

2. Methodology for Estimating Ongoing Costs of Implementation of the Final Rule

The Bureau identified 15 specific data collection and reporting activities that would impose ongoing costs. Table 7 presents the full list of 15 activities. Activities 1 through 3 can broadly be described as data collection activities: these tasks are required to intake data and transfer it to the financial institution's small business data entry system. Activities 4 through 10

are related to reporting and resubmission: these tasks are required to collect required data, conduct internal checks, and report data consistent with the final rule. Activities 11 through 13 are related to compliance and internal audits: employee training, and internal and external auditing procedures required to ensure data consistency and reporting in compliance with the rule. Finally, activities 14 and 15 are related to small business lending examinations by regulators: these tasks will be undertaken to prepare for and assist during regulatory compliance examinations. For the sake of this analysis, the Bureau assumes that all covered financial institutions will be subject to regulatory compliance examinations and thus incur costs related to activities 14 and 15.

Table 7: 1071 data collection and reporting activities imposing ongoing costs

No.	Activity
1	Transcribing data
2	Resolving reportability questions
3	Transferring to Data Entry System, Loan Origination System, or other data storage system
4	Geocoding data
5	Standard annual edit and internal checks
6	Researching questions
7	Resolving question responses
8	Checking post-submission edits
9	Filing post-submission documents
10	Small business data reporting/geocoding software
11	Training
12	Internal audit
13	External audit
14	Exam preparation
15	Exam assistance

Table 8 provides an example of how the Bureau calculates ongoing compliance costs associated with each compliance task. The table shows the calculation for each activity and notes whether the task would be a "variable cost," which would depend on the number of applications the institution receives, or a "fixed cost" that does not depend on the number of applications.

Table 8 shows these calculations for a Type A FI, or the institution with the least amount of complexity. Table 9 below summarizes the activities whose calculation differs by institution complexity and shows the calculations for Type B FIs and Type C FIs (where they differ from those for a Type A FI).

Table 8: Ongoing compliance cost calculations for a Type A FI

No.	Activity	Calculation	Type[939]
1	Transcribing data	Hourly compensation x hours per app. x applications	Variable
2	Resolving reportability questions	Hourly compensation x hours per app. with question x applications with questions	Variable
3	Transfer to Data Entry System	Hourly compensation x hours per app. x applications	Variable
4	Complete geocoding data	Hourly compensation x hours per app. x applications	Variable
5	Standard annual edit and internal checks	Hourly compensation x hours spent on edits and checks	Fixed
6	Researching questions	Hourly compensation x hours per app. with question x applications with questions	Variable
7	Resolving question responses	Hourly compensation x hours per app. with question x applications with questions	Variable
8	Checking post-submission edits	Hourly compensation x hours checking post-submission edits per application	Variable
9	Filing post-submission documents	Hourly compensation x hours filing post-submission docs	Fixed
10	Small business data reporting/geocoding software	Uses free geocoding software	Fixed
11	Training	Hourly compensation x hours of training per year x number of loan officers	Fixed
12	Internal audit	No internal audit conducted by financial institution staff	Fixed
13	External audit	One external audit per year	Fixed
14	Exam preparation	Hourly compensation x hours spent on examination preparation	Fixed
15	Exam assistance	Hourly compensation x hours spent on examination assistance	Fixed

[939] In this table, the term "variable" means the compliance cost depends on the number of applications. The term "fixed" means the compliance cost does not depend on the number of applications (even if there are other factors upon which it may vary).

Many of the activities in Table 8 require time spent by loan officers and other financial institution employees. To account for time costs, the calculation uses the hourly compensation of a loan officer multiplied by the amount of time required for the activity. The Bureau uses a mean hourly wage of $38.74 for loan officers, based on data from the Bureau of Labor Statistics.[940] To account for non-monetary compensation, the Bureau scales this hourly wage by 43 percent to arrive at a total hourly compensation of $55.40 for use in these calculations.[941] The Bureau uses assumptions from its 2015 HMDA final rule analysis, updated to reflect differences between mortgage lending and small business lending, to estimate time spent on "ongoing tasks."[942] As an example of a time calculation, the Bureau estimates that transcribing the required data points would require approximately 11 minutes per application for a Type A FI. The calculation multiplied the number of minutes by the number of applications and the hourly compensation to arrive at the total cost, on an annual basis, of transcribing data. As another example, the Bureau estimates that ongoing training for loan officers to comply with a financial institution's 1071 policies and procedures would take about two hours per loan officer per year. The cost calculation multiplies the number of hours by the number of loan officers and by the hourly compensation.

To arrive at the amount of time required per application for each of the 15 tasks covered financial institutions would conduct to collect, check, and report 1071 data, the Bureau begins with the assumptions made for each task for the 35 data points under the 2015 HMDA final rule and then adjusts these required times relative to the number of data points required under the

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[940] These data reflect the mean hourly wage for "loan officers" according to the 2021 Occupational Employment Statistics compiled by the Bureau of Labor Statistics. *See* U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Occupational Employment and Wages* (May 2021), https://www.bls.gov/oes/current/oes132072.htm.

[941] The June 2022 Employer Costs for Employee Compensation from the Bureau of Labor Statistics documents that wages and salaries are, on average, about 70 percent of employee compensation for private industry workers. The Bureau inflates the hourly wage to account for 100 percent of employee compensation ((100 / 70) – 1) * 100 = 43 percent). U.S. Bureau of Labor Stat., U.S. Dep't of Labor, *Employer Costs for Employee Compensation* (June 2022), https://www.bls.gov/news.release/archives/eci_07292022.pdf.

[942] *Home Mortgage Disclosure (Regulation C)*, 80 FR 66128 (Oct. 28, 2015).Some differences, for example, are reflected in the number of applications, the number of data points per application, and the number of loan officers for the representative institutions.

final rule. The final rule requires covered financial institutions to collect 20 data points for each covered application. Several of these data points have multiple components. For example, the credit type data point has three subcomponents: the product type, the type of guarantee, and the term. The data points for pricing information and the ethnicity, race, and sex of principal owners also have multiple subcomponents.

Some activity costs in Table 8 depend on the number of applications. It is important to differentiate between these variable costs and fixed costs because the type of cost impacts whether and to what extent covered institutions might be expected to pass on their costs to small business loan applicants in the form of higher interest rates or fees (discussed in more detail in part IX.F.4 below). Data collection, reporting, and submission activities such as geocoding data, standard annual edits and internal checks, researching questions, and resolving question responses are variable costs. All other activities are fixed cost because they do not depend on the overall number of applications being processed. An example of a fixed cost calculation is exam preparation, where the hourly compensation is multiplied by the number of total hours required by loan officers to prepare for 1071-related compliance examinations.

Table 9 shows where and how the Bureau assumes Type B FIs and Type C FIs differ from Type A FIs in its ongoing cost methodology. Type B FIs and Type C FIs use more automated procedures, which result in different cost calculations. For example, for Type B FIs and Type C FIs, transferring data to the data entry system and geocoding applications are done automatically by business application data management software licensed annually by the financial institution. The relevant address is submitted for geocoding via batch processing, rather than done manually for each application. The additional ongoing geocoding costs reflect the time spent by loan officers on "problem" applications—that is, a percentage of overall applications that the geocoding software misses—rather than time spent on all applications. However, Type B FIs and Type C FIs have the additional ongoing cost of a subscription to a geocoding software or service as well as a data management software that represents an annual fixed cost of reporting

1071 data. This is an additional ongoing cost that less complex Type A FIs (that are covered financial institutions) will not incur. The Bureau expects that Type A FIs will use free geocoding software available from the FFIEC or the Bureau, which may include a new batch function that could be developed by either the FFIEC or the Bureau.

Additionally, audit procedures differ between the three representative institution types. The Bureau expects a Type A FI would not conduct an internal audit but would pay for an annual external audit. A Type B FI would be expected to conduct a simple internal audit for data checks and also pay for an external audit on an annual basis. Type C FIs would have a sophisticated internal audit process in lieu of an external audit.

Table 9: Differences in ongoing cost calculations for Type B FIs and Type C FIs versus Type A FIs

No.	Activity	Difference for a Type B FI	Difference for a Type C FI
3	Transfer to Data Entry System	No employee time cost. Automatically transferred by data management software purchased/licensed	No employee time cost. Automatically transferred by data management software purchased/licensed
4	Complete geocoding data	Cost of time per application unable to be geocoded by software	Few applications that require manual attention. Completed by third-party software vendor.
10	Small business data reporting/geocoding software	Uses geocoding software and/or data management software that requires annual subscription	Uses geocoding software and/or data management software that requires annual subscription
12	Internal Audit	Hourly compensation x hours spent on internal audit	Hourly compensation x hours spent on internal audit
13	External Audit	Yearly fixed expense on external audit	Only an extensive internal audit and no expenses on external audits

Table 10 below shows major assumptions that the Bureau makes for each activity for each type of financial institution. Table 10 provides the total number of hours the Bureau

assumes are required for each task that requires labor.[943] For example, the Bureau assumes that transcribing data for 100 applications will require 19 hours of labor. The table also shows the assumed fixed cost of software and audits, as well as areas where the Bureau assumes there will be cost savings due to technology. In several cases, the activity does not apply to financial institutions of a certain type, and are therefore not displayed.

Table 10: Major assumptions for the representative Type A FIs, Type B FIs, and Type C FIs[944]

No.	Activity	Type A FI	Type B FI	Type C FI
1	Transcribing data	19 hours total	38 hours total	571 hours total
2	Resolving reportability questions	11 hours total	23 hours total	34 hours total
3	Transfer to 1071 data management software	19 hours total	N/A	N/A
4	Complete geocoding data	7 hours total; reduction in time cost relative to HMDA for software with batch processing	10 hours total (0.5 hours per "problem" loan x 5% of loans that are "problem")	N/A
5	Standard annual edit and internal checks	18 hours total; reduction for online submission platform	357 hours total; reduction for online submission platform	741 hours total; reduction for online submission platform
6	Researching questions	6 hours total	11 hours total	17 hours total
7	Resolving question responses	1 hour total	1 hour total	1 hour total
8	Checking post-submission edits	1 hour total	5 hours total	18 hours total
9	Filing post-submission documents	<1 hour total	<1 hour total	< 1 hour total
10	1071 data management system / geocoding software	N/A	$8,000	$13,271
11	Training	24 hours total	120 hours total	800 hours total

[943] Compared to the assumptions in the Bureau's proposal, this table includes additional time assumptions due to the collection of the business's LGBTQI+-owned status.

[944] The representative Type A, Type B, and Type C FIs are assumed to receive, respectively, 100, 400 and 6,000 applications.

No.	Activity	Type A FI	Type B FI	Type C FI
12	Internal audit	N/A	8 hours total	2,304 hours total
13	External audit	$3,500	$5,000	N/A
14	Exam preparation	<1 hour total	80 hours total	480 hours total
15	Exam assistance	2 hours total	12 hours total	80 hours total

Comments on the ongoing cost methodology of the proposed rulemaking. In the NPRM, the Bureau sought comment on the Bureau's proposed methods to estimate the ongoing costs of the small business lending rule. Many industry commenters described categories of ongoing costs that fell within the categories of ongoing cost activities set forth in the NPRM. Commenters, for example, described needing to transcribe data from the application, train employees, conduct external audits, or prepare for exams. Given the volume of comments affirming these existing categories, the Bureau has retained those existing categories of ongoing cost activities.

Some commenters suggested other categories of ongoing costs not considered by the Bureau in the NPRM. A credit union and a trade association suggested that more time was needed per application to explain to customers the new collection requirements; a bank said more time was needed to explain the requirements to collect ethnicity, race, and sex information. The Bureau believes that its one-time costs categories of "developing forms and applications" and "developing policies and procedures" already account for these types of costs and any remaining ongoing cost of explaining collection requirements will be minimal. The commenters also did not provide specific estimates for these categories of ongoing costs.

A joint trade association letter described how the rule has the potential to create a new ongoing cost of retaining the records. These comments focused on the information technology infrastructure associated with the retention of records. The Bureau believes that these costs are best described as one-time costs and are captured in the "updating computer systems" category

of its one-time costs estimation. The Bureau thus has not included these as additional categories of ongoing costs.

Comments on one-time and ongoing cost estimates based on levels of financial institution complexity. The Bureau received several comments related to its approach to defining complexity and using complexity categories in its one-time and ongoing cost estimation. Several smaller banks and credit unions explained that many of their processes related to collecting, checking, and reporting data to the Bureau under the proposed rule would largely be manual. The Bureau believes that its Type A institution category already takes into account the various manual processes described by these commenters and decided against adding additional categories of complexity.

3. Methodology for Generating Market-level Estimates of One-time and Ongoing Costs

To generate market-level cost estimates, the Bureau relies on the estimates of the volume of small business lending originations described in part IX.D above. As with institutional coverage, the Bureau separates market-level cost estimates into estimates for depository institutions and for nondepository institutions. The methodology described below for the final rule is the same methodology that the Bureau used in the NPRM.

For depository institutions, the Bureau estimates which institutions of those that existed at the end of 2019 would likely be covered or not covered by the final rule. For this analysis, the Bureau uses 2019 to represent the first year of coverage. An institution would be required to report data on applications received in 2019 if it originated at least 100 covered originations in each of the preceding two years (*i.e.*, 2017 and 2018). If two depository institutions merged between the end of 2017 and the end of 2019, the Bureau assumes that those institutions would report as one entity. The Bureau then categorizes each institution as a Type A DI, Type B DI, or Type C DI based on its originations in 2019. Depository institutions with 0 to 149 covered originations in 2019 are categorized as Type A. Depository institutions with 150 to 999 covered originations are categorized as Type B. Depository institutions with 1,000 or more covered

originations are categorized as Type C. For each depository institution, the Bureau assigns the appropriate estimated one-time cost (including hiring cost as a function of estimated applications), ongoing fixed cost, ongoing variable cost per application, and applications per origination estimates associated with its institution type. The estimated number of annual applications for each institution is the estimated number of originations multiplied by the assumed number of applications per origination for that institution type. The annual ongoing cost for each institution is the ongoing fixed cost plus the ongoing variable cost per application multiplied by the estimated number of applications. The one-time hiring cost for each institution is the estimated number of applications multiplied by the annual staff hours per application divided by 2,080, rounded up to the next full FTE, multiplied by the cost-per-hire.

To generate market-level estimates, the Bureau first calculates the estimated one-time costs, including hiring costs, and annual ongoing costs for each depository institution covered by the rule based on the estimated number of originations for that institution in 2019. The Bureau then sums these costs over the covered depository institutions to find market-level statistics of total costs. As with coverage estimates, the Bureau presents a range for market-level estimates. The range reflects the uncertainty associated with the estimate of costs for banks and savings associations below the CRA reporting threshold. The Bureau has documented how it calculates these ranges in its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rulemaking*.[945]

The Bureau is unaware of institution-level data on originations by nondepository institutions that are comprehensive enough to estimate costs using the same method as that for depository institutions. Therefore, to generate market-level estimates for nondepository institutions, the Bureau relies on the estimates discussed above and several key assumptions. The Bureau assumes that online lenders and merchant cash advance providers are Type C FIs because

[945] *See* https://www.consumerfinance.gov/data-research/research-reports/supplemental-estimation-methodology-institutional-coverage-market-level-cost-estimates-small-business-lending-rulemaking/.

they generally have more automated systems and originate more loans. The Bureau assumes that the remaining nondepository institutions are Type B FIs. The Bureau assumes that each nondepository receives the same number of applications as the representative institution for each type, as described above. Hence, the Bureau assumes that online lenders and merchant cash advance providers each receive 6,000 applications per year and all other nondepository institutions receive 400 applications per year. As explained above, the Bureau also assumes that all nondepository institutions have the same one-time costs.

F. Potential Benefits and Costs to Covered Financial Institutions and Small Businesses

The benefits of the final rule to covered financial institutions and small businesses described in this section are largely the same as the benefits discussed in the NPRM. The discussions have been updated to reflect policy differences between the NPRM and final rule.

1. Benefits to Small Businesses

The final rule will benefit small businesses by collecting data that further the two statutory purposes of section 1071. Those purposes are 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. Some of the benefits to small businesses discussed below stem from the public release of the data collected under the rule. As discussed in more detail in part VIII.B.1, the Bureau intends to exercise its discretion under ECOA section 704B(e)(4) to delete or modify data collected under section 1071 which are or will be available to the public where it determines that such deletion or modification appropriately protects privacy interests. The discussion below considers the benefits of releasing unmodified data, but the Bureau acknowledges that the benefits derived from public disclosure may be lower if modifications or deletions are made.

Data collected and reported under the final rule will be the largest and most comprehensive dataset in the United States on credit availability for small businesses. These data will provide important insight into lending patterns in the small business lending market.

Visibility into those patterns should provide important benefits for facilitating fair lending enforcement and enabling identification of community development needs and opportunities.

The data could lead to a more efficient use of government resources in enforcing fair lending laws through more efficient prioritization of fair lending examinations and investigations. The public nature of the dataset will allow for members of the public to review the dataset (subject to modification and deletion decisions by the Bureau) for possible violations of antidiscrimination statutes. The increased transparency will benefit women-owned, minority-owned, and LGBTQI+-owned small businesses directly, in the form of remediation in the event that lenders ultimately are found to have violated fair lending laws, and indirectly, with increased access to credit resulting from the increased transparency as to the lending practices of financial institutions.

Important to the fair lending benefit of the small business lending dataset is the action taken data point. Existing datasets that collect transaction-level data only contain data on originated small business loans. Application-level data, including the action taken data point, will allow users to construct approval or denial rates, for example, for particular financial institutions. Such analyses could indicate whether, for example, women-owned, minority-owned, or LGBTQI+-owned small businesses are being discouraged or denied credit at higher rates than other small businesses, which would warrant further exploration.

Also important are several data fields on the pricing of covered credit transactions that are originated or approved but not accepted. Data users will be able to examine, for example, whether women-owned, minority-owned, or LGBTQI+-owned small businesses are charged higher interest rates, or face higher origination charges or initial annual charges than similarly situated businesses that are not women-owned, minority-owned, or LGBTQI+-owned. The final rule also requires information on prepayment penalties, which can be an important aspect of the

total costs of credit for small business owners.[946] Users will be able to examine whether women-owned, minority-owned, or LGBTQI+-owned small businesses are more likely to face prepayment penalties on extended credit.

Several data points included in the final rule will contribute to more accurate fair lending analyses by allowing users to compare credit products with similar characteristics. For example, differences in the risk of extending credit likely lead to differences in approval rates and prices for covered credit transactions based on credit amount applied for and approved, all three aspects of credit type (type of credit product, types of guarantees, and loan term), and credit purpose. Many creditors also consider characteristics about the small business, such as industry, gross annual revenue, or time in business, during their underwriting or pricing processes. Supply and demand for small business credit also varies over time and by location, so the inclusion of census tract, application date, and action taken date could lead to more accurate analyses. More accurate screening for fair lending risk will, for example, reduce the false positive rate observed during fair lending prioritization and increase the efficiency of fair lending reviews.

Communities may use these data to identify gaps in access to credit for small businesses. Identifying those gaps can fuel community development, in partnership with creditors and governmental entities through the development of targeted lending programs, loan funds, small business incubators, and other community-driven initiatives to support small businesses.

Creditors will likely use the data to understand small business lending market conditions more effectively and at a more granular level than is possible with existing data sources, such as Call Reports, data from public lending programs, or privately purchased data. Data collected under the final rule, combined with the institution's existing information on the small business lending market, can help creditors identify potentially profitable opportunities to extend credit. For example, creditors will be able to use census tract information to find areas of high credit

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[946] California, for example, to include prepayment policies as a required component of pricing disclosures in commercial financing (*see* Cal. S.B. 1235 (Sept. 30, 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1235).

demand into which they could consider expanding and other business opportunities for the creditor.

Governmental entities will likely use the data to develop solutions that achieve policy objectives. For example, loan guarantees provided by the SBA's 7(a) and 504 programs are designed to increase the availability of business credit for businesses that otherwise have difficulty accessing credit. Governmental entities will be able to use the comprehensive data on applications for covered credit transactions collected under the final rule to identify additional opportunities to create new—or tailor existing—programs to advance their small business lending policy objectives. Additionally, the data could help facilitate emergency governmental interventions such as disaster relief.

The data collected under the final rule will be the most extensive data on credit access for women-owned, minority-owned, and LGBTQI+-owned small businesses, and such information will help various data users in understanding the needs and opportunities of such businesses. For example, governmental entities often create programs, such as those that reserve government contracts or those that provide grants, that specifically target women-owned and minority-owned businesses. Governmental entities could use data collected under the final rule to alter existing programs or create new ones to meet the needs of these business owners. Private lenders could also use the data to find untapped markets of credit demand from women-owned, minority-owned, and LGBTQI+-owned small businesses.

As one of the premier data sources on the small business credit market, data collected under the final rule will also facilitate rigorous research by academics and advocates. HMDA data, which are similar in many ways to the data that will be collected under the final rule, have been analyzed in many scholarly publications. The data collected under section 1071 will provide public- and private-sector academics and other researchers a clearer window into potential discrimination in the small business credit market, as well as a better understanding of small business credit market trends and dynamics. As in the case of HMDA, data collected under

the final rule will be more broadly used to understand how business owners make borrowing decisions, respond to higher prices, and respond to risk.[947]

The final rule's data points will provide the above benefits in several ways. For example, the action taken and pricing information data points will allow various entities to monitor the tightness of the small business credit market and identify areas where there are high denial rates for small business credit or where it is provided only at high cost, especially to women-owned, minority-owned, or LGBTQI+-owned small businesses. Conversely, the data may also be used to identify areas of business opportunity for creditors or help assess the characteristics of successful business lending. Data on census tract, NAICS code, gross annual revenue, and number of workers will provide insight into the availability of small business credit by geography, industry, and business size. Credit type and credit purpose will provide more information on how women-owned, minority-owned, and LGBTQI+-owned small businesses use credit and whether their use differs from that of other small businesses. Time in business information will allow data users to understand the credit needs of young small businesses, and specifically young women-owned, minority-owned, and LGBTQI+-owned small businesses. Recent research has shown that women-owned and minority-owned businesses face different financing challenges early in the business lifecycle than other firms, primarily driven by less access to external financing.[948]

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[947] For examples of how HMDA data has facilitated research on the mortgage market, *see, e.g.*, CFPB, *Data Point: Asian American and Pacific Islanders in the Mortgage Market* (July 2021), https://files.consumerfinance.gov/f/documents/cfpb_aapi-mortgage-market_report_2021-07.pdf; CFPB, *Manufactured Housing Finance: New Insights from the Home Mortgage Disclosure Act Data* (May 2021), https://files.consumerfinance.gov/f/documents/cfpb_manufactured-housing-finance-new-insights-hmda_report_2021-05.pdf; Neil Bhutta & Benjamin J. Keys, *Moral Hazard during the Housing Boom: Evidence from Private Mortgage Insurance*, 35(2) Review of Fin. Studies (2021), https://academic.oup.com/rfs/advance-article/doi/10.1093/rfs/hhab060/6279755; Sumit Agarwal *et al.*, *The Effectiveness of Mandatory Mortgage Counseling: Can One Dissuade Borrowers from Choosing Risky Mortgages?* (Nat'l Bureau of Econ. Research, Working Paper No. 19920, 2014), https://www.nber.org/system/files/working_papers/w19920/w19920.pdf; Alexei Alexandrov & Sergei Koulayev, *No Shopping in the U.S. Mortgage Market: Direct and Strategic Effects of Providing Information* (CFPB, Off. of Research Working Paper No. 2017-01, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948491.

[948] *See, e.g.*, JPMorgan Chase & Co. Inst., *Small business ownership and liquid wealth* (Mar. 2021), https://www.jpmorganchase.com/institute/research/small-business/small-business-ownership-and-liquid-wealth-report.

As creditors, communities, and governmental entities use these data to identify business opportunities, gaps in existing supports and capital access for small businesses, and more targeted policy interventions to support small businesses, small businesses will benefit from increased access to credit. Small businesses will also benefit from credit offerings more closely tailored to their needs as the data are used by creditors and others to develop more targeted credit products

As described above, the Bureau believes that setting a threshold for coverage at 100 originated loans in each of the preceding two calendar years provides substantial coverage of the small business credit market. While the Bureau could theoretically have collected even more data pursuant to the final rule if it retained the 25-loan threshold proposed in the NPRM, the Bureau is not adopting this threshold in order to ensure that financial institutions with the lowest volume of small business lending experience no pressure to reduce their small business lending activity in order to avoid the fixed costs of coming into compliance with this final rule. While some commenters expressed concern that institutions with a low volume of small business lending might reduce their lending in order to stay under the threshold, the Bureau cannot quantify this risk, particularly given the paucity of data on small business lending.

Comments on the Bureau's estimation of the benefits to small businesses. The Bureau sought comment on its analysis of potential benefits to small businesses as set forth in the NPRM. Many community groups and several business owners agreed that the rule would support fair lending. A small business, a CDFI lender, and some community groups said collecting data will improve visibility and understanding of small businesses, particularly those that are minority- and women-owned. The CDFI lender and a joint letter from community groups, community oriented lenders, and business advocacy groups stated that the data from this rule could be used to identify which products and business models best meet the needs of underserved entrepreneurs. One commenter pointed to agricultural products as a particular sector that would benefit from increased transparency afforded by the rule, particularly regarding the

status of minority- and women-owned small businesses. Two community groups and a business advocacy group pointed to how data collected on ethnicity and race under HMDA preceded an increase in lending to minority borrowers, suggesting that a similar pattern may emerge in the small business lending market after the rule goes into effect. Similarly, a few commenters pointed to how data from the Paycheck Protection Program and studies and surveys surrounding the program allowed researchers, regulators, financial institutions, and others to identify disparate lending patterns on the basis of ethnicity and race.

An individual commenter said collecting the data will help improve the collective understanding of small business lending and its interaction with regulations, and noted that other countries, such as Norway, already collect small business lending data on a Federal level. An individual commenter and two community groups suggested that the data could reveal patterns of disparities that are already well-known through lived experiences within their respective communities, particularly Black communities and farming and agricultural communities. A joint letter from community and business advocacy groups pointed to how disaggregation of those identified as Asian has revealed wide variances in income and lending patterns within these diverse communities in the mortgage lending market, suggesting similar disaggregation of race data in the final rule would improve the understanding of these diverse communities in the small business lending market.

A few commenters noted potential positive spillover effects of the rule. One community group noted positive interaction effects between fair lending to small businesses and fair housing, as more people might purchase housing close to where local businesses flourish. An individual and a joint letter from community and business advocacy groups noted that investing in small businesses, particularly in historically underfunded neighborhoods, could provide pathways to economic opportunities for members of marginalized groups and even alleviate wealth gaps based on ethnicity and race. Another commenter similarly noted that the growth of

small businesses could reduce unemployment, housing insecurity, and poverty in the surrounding community.

Finally, a few minority small business owners predicted that they would benefit if the rule improved fair lending. These commenters identified the disadvantages minority-owned small businesses face when fair lending is not enforced, including business closure. One of these commenters, along with some community groups, pointed to studies that suggested fair access to credit, such as loan modifications, during the pandemic could have prevented the closure of minority-owned firms, added millions in revenue to the U.S. economy, and created millions of jobs.

A number of commenters described ways in which the final rule would provide benefits consistent with the statutory purposes of section 1071, including the establishment of a comprehensive dataset of small business lending, and the collection of detailed data points that will allow for more accurate analyses of underwriting and pricing patterns. These data, in turn, will permit for better understanding of the supply and demand of credit, and financial institutions' treatment of small business applicants and borrowers, including those that are owned by women and minorities. Commenters corroborated other benefits identified by the Bureau, such as positive spillover effects to fair housing and the local economy surrounding small businesses. Data from the final rule will help researchers (including, but not limited to, those in the government, private sector, and academia) observe and quantify these benefits, just as researchers have used data from HMDA and the Paycheck Protection Program to identify areas of potential fair lending risk.

On the other hand, many financial institutions and trade associations disagreed with the Bureau's assessment of potential benefits to small businesses. First, several commenters asserted there would be minimal or even no benefit. One bank said there would be no benefit at all. Two banks said there will be "minimal" benefit to their clients, to their communities, and to themselves.

Second, other commenters asserted the Bureau overestimated benefits. One bank said the usefulness of standardized data is undercut by the fact that small business lending by small lenders is highly specialized. Two trade associations specified this could be problematic because standardized data "could result in small business borrowers appearing to be similarly situated, when, in fact, the unique attributes of each borrower would result in different loan pricing by the bank."

Third, several commenters asserted any benefits would be outweighed by costs, *i.e.*, that there would be little benefit relative to costs. Other comments asserted the Bureau failed to adequately consider the potential benefits and costs to "consumers" and "covered persons" as required by section 1022(b)(2)(A) of the Dodd-Frank Act. While some of these arguments are discussed in detail in following sections regarding costs, we present some of the arguments here as well. Two community banks and a trade association said costs would outweigh benefits for community banks and small lenders in particular. Another trade association stated data points adopted pursuant to ECOA section 704B(e)(2)(H) in particular will only provide "minimal" benefits compared to the cost of collecting the data. Along a similar line of reasoning, three trade associations said the rule would harm the institutions that the rule is designed to benefit. Of these, two asserted that the small, women-owned, and minority-owned businesses the rule is designed to benefit in particular would be harmed.

As detailed above, the Bureau believes that the final rule will have benefits consistent with its two statutory purposes. The data collected under the final rule will be the most extensive data on credit access for women-owned, minority-owned, and LGBTQI+-owned small businesses, and such information will facilitate the enforcement of fair lending laws and help identify business and community development needs.

With respect to comments that asserted the Bureau overestimated the benefits of the rule, the Bureau acknowledges in part IX.C the difficulty of precisely estimating the benefits of the data collection but also details how it estimates the benefits to small businesses using the best

information available. With respect to commenters who described how data collected under the final rule would not have all relevant information about a credit application, the Bureau acknowledges this limitation in part IX.C above, but also describes, in part IX.F, how the data will provide significant benefits consistent with the statutory purposes of the rule despite these limitations.

With respect to comments that the costs would outweigh any benefits or that the Bureau did not adequately fulfill the requirements of section 1022(b)(2)(A) of the Dodd-Frank Act, in part IX.E, the Bureau details its methodology for estimating benefits and costs and, in part IX.F, details its estimates of benefits and costs, incorporating feedback from comments on the proposed rule. In doing so the Bureau fulfills its requirement to consider the potential benefits and costs to "consumers" and "covered persons" as required by section 1022(b)(2)(A) of the Dodd-Frank Act.

2. Benefits to Covered Financial Institutions

The final rule will provide some benefits to some covered financial institutions—*i.e.*, the financial institutions that will be required to collect and report 1071 data on small business applications for credit. The first is some reduction of the compliance burden of fair lending reviews for lower risk financial institutions, by reducing the "false positive" rates during fair lending review prioritization by regulators. Currently, financial institutions are subject to fair lending reviews by regulators to ensure that they are complying with ECOA in their small business lending. Data reported under the rule will allow regulators to prioritize fair lending reviews of financial institutions with higher risk of fair lending violations, which reduces the burden on institutions with lower fair lending risk. Covered financial institutions will also be able to use the data to monitor, identify, and address their own fair lending risks and thereby reduce the potential liability from enforcement actions and adverse exam findings requiring remedial action.

The rule's data collection will also provide an unprecedented window into the small business lending market, and such transparency may benefit financial institutions. Comprehensive information on small business credit applications and originations are currently unavailable. The data made public pursuant to this rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other covered financial institutions.

Comments on the Bureau's estimation of the benefits to covered financial institutions. The Bureau sought comment on its analysis of potential benefits to covered financial institutions as set forth in the NPRM. A broad range of commenters, including lenders, community groups, small business owners, business advocacy groups, and others, asserted that the final rule will provide an unprecedented window into the small business lending market and thereby facilitate fair lending enforcement.

However, several industry commenters suggested that the Bureau overstated the benefits of the data collection to financial institutions. To reiterate some of the comments in the previous section, a trade association stated that they do not believe the Bureau's rule to implement section 1071 would provide "any significant benefit" to financial institutions. Two banks said there will be "minimal" benefit to their clients, to their communities, and to themselves. Another trade association noted that lenders are likely already highly aware of the market in which they lend, especially considering that small business loans often require a relatively high degree of customization. Several industry commenters said the usefulness of standardized data is undercut by the fact that small business lending by small lenders is highly specialized to accommodate the highly individualized nature of each business.

The Bureau describes in detail above the potential benefits to financial institutions. The Bureau acknowledges that many lenders may have a high awareness of the local markets in which they lend but believes that the data will still shed light on additional information about areas where lenders do not currently operate and may also shed light on currently underserved

markets within the areas lenders currently operate. Comprehensive, application-level data on small business lending will provide financial institutions better understand their local markets as well as information about markets which they do not currently serve.

3. Costs to Covered Financial Institutions

i. One-time Costs to Covered Financial Institutions

Using the methodology described in part IX.E.1 above, Table 11 shows the estimated total expected one-time costs of the final rule for the first eight cost categories for financial institutions covered by the final rule as well as a breakdown by the eight component categories that comprise the one-time costs for Type A DIs, Type B DIs, Type C DIs, and Non-DIs.[949] The final cost category, hiring costs, is discussed later in this section. The Bureau notes that the estimated costs presented in Table 11 differ slightly from the estimated costs presented in the NPRM. This difference comes only from the update in wages between the two calculations due to a release of new data.

Table 12 shows the estimated number of junior, mid-level, and senior staff hours and non-salary expenses for each component activity for Type A DIs. Tables 13 through 15 show the same estimates for Type B DIs, Type C DIs and Non-DIs respectively. As discussed above, the Bureau estimates all one-time costs to covered financial institutions using the One-Time Cost Survey results.

Table 11: Estimated one-time costs by cost category and FI Type

Category	Type A DI	Type B DI	Type C DI	Non-DI
Preparation/planning	$6,500	$7,400	$20,500	$13,900
Updating computer systems	$17,000	$17,400	$6,900	$57,300
Testing/validating systems	$11,100	$3,200	$11,400	$7,600
Developing forms/applications	$4,300	$3,200	$4,600	$4,400
Training staff and third parties	$3,500	$3,900	$5,300	$3,100

[949] The estimated one-time costs by cost category for each FI type is the sum of the wages multiplied by the estimated staff hours plus the non-salary expenses. For example, the Bureau expects that for preparation and planning for the final rule, on average, a Type A DI will pay senior staff $95.10 x 38 hours (= $3,613.80), mid-level staff $55.40 x 43 hours (= $2,382.20), and junior staff $22.37 x 21 hours (= $469.77). The total estimated cost is $6,465.77, rounded to $6,500, because Type A DI is not expected to pay non-salary expenses for preparation and planning.

Category	Type A DI	Type B DI	Type C DI	Non-DI
Developing policies/procedures	$4,200	$2,500	$3,600	$4,300
Legal/compliance review	$7,700	$3,000	$7,300	$3,900
Post-implementation review	$5,000	$4,300	$18,000	$1,700
Total	$59,400	$44,800	$77,800	$96,400

Table 12: Estimated staff hours and non-salary expenses by cost category for Type A DIs

Category	Senior Hours	Mid-Level Hours	Junior Hours	Non-Salary Expenses
Preparation/planning	38	43	21	0
Updating computer systems	34	52	41	$10,000
Testing/validating systems	18	52	41	$5,600
Developing forms/applications	14	34	51	0
Training staff and third parties	18	26	16	0
Developing policies/procedures	24	30	11	0
Legal/compliance review	28	26	15	$3,300
Post-implementation review	26	38	19	0
Total	200	301	215	$18,900

Table 13: Estimated staff hours and non-salary expenses by cost category for Type B DIs

Category	Senior Hours	Mid-Level Hours	Junior Hours	Non-Salary Expenses
Preparation/planning	50	35	21	$200
Updating computer systems	25	20	12	$13,600
Testing/validating systems	18	19	12	$100
Developing forms/applications	21	14	7	$200
Training staff and third parties	23	29	20	$400
Developing policies/procedures	16	13	7	$100
Legal/compliance review	14	16	5	$700
Post-implementation review	15	22	27	$1,100
Total	182	168	111	$16,400

Table 14: Estimated staff hours and non-salary expenses by cost category for Type C DIs

Category	Senior Hours	Mid-Level Hours	Junior Hours	Non-Salary Expenses
Preparation/planning	92	190	37	$500
Updating computer systems	6	46	35	$3,000
Testing/validating systems	34	110	50	$1,000
Developing forms/applications	13	46	34	$100
Training staff and third parties	11	61	36	$100
Developing policies/procedures	14	30	14	$300
Legal/compliance review	9	56	44	$2,300
Post-implementation review	3	246	103	$1,800
Total	182	785	353	$9,100

Table 15: Estimated staff hours and non-salary expenses by cost category for Non-DIs

Category	Senior Hours	Mid-Level Hours	Junior Hours	Non-Salary Expenses
Preparation/planning	38	47	29	$7,100
Updating computer systems	27	147	39	$45,700
Testing/validating systems	26	24	39	$2,900
Developing forms/applications	30	15	19	$300
Training staff and third parties	14	18	17	$400
Developing policies/procedures	32	15	14	$200
Legal/compliance review	26	18	11	$200
Post-implementation review	16	2	1	$100
Total	209	286	169	$56,900

The Bureau estimates that updating computer systems will be the biggest driver of one-time costs for Type A DIs, Type B DIs, and Non-DIs. Type A DIs and Type B DIs are expected to spend similar amounts on updating computer systems, but Type A DIs would rely somewhat more on staff.

The Bureau expects that Non-DIs will have the highest one-time costs and the highest costs to update computer systems. To update computer systems, Non-DIs will rely on mid-level staff and third-party vendors. Non-DIs will also spend relatively more on preparation and

planning than Type A DIs or Type B DIs. These estimates are consistent with the expectation that Non-DIs will incur higher costs because they are less likely to already report data to regulators.

The Bureau estimates that the biggest drivers of one-time costs for Type C DIs will be preparation and planning and post-implementation review. These depository institutions will generally rely on mid-level staff to implement the required one-time changes and, in particular, will rely on mid-level staff for these two key activities. The Bureau estimates that Type C DIs will spend the most of all financial institution types on staff hours to implement one-time changes and the least on non-salary expenses.

The Bureau estimates that one-time costs will be higher for Type A DIs than for Type B DIs. These two types of depository institutions have similar estimated costs for most activities, but Type A DIs are expected to spend more on testing/validating systems and legal/compliance review.

In addition to these one-time costs, the Bureau estimates the one-time hiring costs for the additional FTEs a financial institution expects to hire based on the number of applications the institution expects to receive each year. In the ongoing cost discussion in part IX.F.3.ii below, the Bureau explains how it estimates the number of staff hours per application required to comply with the final rule on an ongoing basis. The Bureau estimates that a Type A FI requires 1.1 hours per application, a Type B FI requires 1.6 hours per application, and a Type C FI requires 0.83 hours per application.

For the purposes of exposition, the Bureau presents the estimated number of FTEs for representative financial institutions. For the market-level estimates, the Bureau estimates the number of staff hours required based on the estimated number of applications each depository institution receives.

The representative Type A FI receives 100 applications annually, requiring 110 hours to comply with the final rule.[950] Under the assumptions described in part IX.E.1 above, the representative Type A FI will need to hire one additional FTE at a one-time cost of $4,425 to cover the expected annual staff hours required to comply with the rule on an ongoing basis. This additional staff will also be able to cover the staff hours required to implement one-time changes because, on average, a Type A DI will require 716 staff hours for one-time changes (see Table 12). The Bureau estimates that the representative Type A DI will incur total one-time costs of $63,825 to implement the final rule.

The representative Type B FI receives 400 applications annually, requiring 654 hours to comply with the final rule. This FI will need to hire one additional FTE at a one-time cost of $4,425. This additional staff will also be able to cover the 461 staff hours, on average, required to implement one-time changes for a Type B DI. The Bureau estimates that the representative Type B DI will incur total one-time costs of $49,225 to implement the final rule.

The representative Type C FI receives 6,000 applications annually, requiring 5,009 hours to comply with the final rule. This FI will need to hire 3 additional FTE at a one-time cost of $13,275. This additional staff will also be able to cover the 1,320 staff hours, on average, required to implement one-time changes for a Type C DI. The Bureau estimates that the representative Type C DI will incur total one-time costs of $91,075 to implement the final rule.

The Bureau assumes that most nondepository institutions are primarily Type B and Type C FIs, so the estimated staff hours to cover ongoing tasks discussed above apply here. For one-time tasks, the Bureau estimates that a nondepository institution will require about 664 staff hours, on average, to implement one-time changes. One additional FTE would be sufficient to cover these hours if the institution reallocates some tasks across staff. The Bureau estimates that the representative Non-DI will incur total one-time costs of $100,825 to implement the final rule.

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[950] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule.

As mentioned above, the Bureau realizes that one-time costs vary by institution due to many factors, and that this variance exists on a continuum that is impossible to fully represent. The Bureau focuses on representative types of financial institutions in order to generate practical and meaningful estimates of costs. As a result, the Bureau expects that individual financial institutions will have slightly different one-time costs than the average estimates presented here.

The One-Time Cost Survey instructed respondents to assume that covered institutions would be required to report data at the application level on small business financing that constitutes "credit" for purposes of ECOA for the 13 statutorily mandated data points one time per year, and be responsible for validating the accuracy of all data. Respondents were further instructed to use their own institution's internal definition of small business, assume the Regulation B definition of an application, and assume a reporting structure similar to that under HMDA. Finally, respondents were instructed to not include any costs associated with creating a firewall (that is, shielding applicants' protected demographic information from certain employees). As such, respondents estimated one-time costs assuming that the final rule would be different in some ways from what the Bureau described as the requirements in the survey. One small entity representative provided feedback during the SBREFA Panel that it was hard to estimate one-time costs in the survey without knowing all the details of the rule. The Bureau sought comment on the one-time costs associated with the additional data points it proposed but did not receive any information on which to base estimates. The Bureau expects that accounting for the additional data points would only increase the one-time cost estimates by a small amount because most of the one-time costs come from a financial institution moving from not reporting 1071 data to being required to report such data.

The Bureau estimates that the overall market impact of one-time costs for depository institutions will be between $147,000,000 and $159,000,000.[951] These estimates include between

[951] The Bureau notes that the variation in this range comes primarily from the uncertainty in the number of originations made by small banks and savings associations. The range does not fully account for the uncertainty associated with estimates of the one-time costs for each type of institution.

$47,700,000 and $49,700,000 that depository institutions are estimated to spend on hiring additional staff.[952] Using a 7 percent discount rate and a five-year amortization window, the annualized one-time costs for depository institutions will be $35,700,000 to $38,600,000. The Bureau estimates that the overall market impact of one-time costs for nondepository institutions will be $59,800,000. This estimate includes the $3,630,000 that nondepository institutions are estimated to spend on hiring additional staff. Using a 7 percent discount rate and a five-year amortization window, the annualized one-time costs for nondepository institutions will be $15,500,000. As a frame of reference for these market-level one-time cost estimates, the estimated total non-interest expenses from the FFIEC and NCUA Call Reports for depository institutions that the Bureau estimates would be covered under the proposed rule was between $407 billion and $410 billion in 2019.[953] The upper bound estimate of total one-time costs is approximately 0.04 percent of the total annual non-interest expenses.

The Bureau estimated that the overall market impact of one-time costs from the NPRM would have been between $218,000,000 and $229,000,000 for depository institutions and $94,400,000 for nondepository institutions. The estimated market impacts for the final rule are lower than the estimated impacts from the NPRM because, based on changes made to the thresholds for the coverage of financial institutions in the final rule, the Bureau estimates that fewer financial institutions will be covered by the final rule. The estimates are also different because in the estimates for the final rule, the Bureau updated wages and included hiring costs.

Comments on the one-time cost estimates of the proposed rulemaking. In the NPRM, the Bureau sought comment on its analysis of one-time costs. A few industry commenters expressed the difficulty in estimating these costs. Several other industry comments provided an overall

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[952] The Bureau notes that the estimated hiring costs for the largest depository institutions may be an upper bound on the eventual realized costs and may be inflating the total hiring costs for depository institutions. The Bureau's methodology for estimating hiring costs implies that financial institutions with the most applications will need to hire several hundred employees to comply with the final rule. However, the Bureau anticipates that the largest institutions will likely save on these costs by automating some processes instead of hiring staff.

[953] The Bureau estimates this number by summing non-interest expenses over DIs that it estimates will be covered by the final rule.

estimate of what they believed the overall one-time costs would be for their institution. These estimates ranged from slightly less than to considerably higher than the Bureau's estimates from the NPRM. For example, a bank with about 300 small business originations per year (a Type B DI in the Bureau's framework) estimated that the one-time implementation costs would be about $36,000. Another bank commenter estimated that it would cost well over $100,000 to implement changes.

A few industry commenters provided estimates of the costs associated with the individual cost categories used by the Bureau to estimate one-time costs. A few commenters provided estimates of the costs associated with updating computer systems in terms of staff hours or software (non-salary) expenses. For example, a State bankers association conveyed an estimate by a member of $5,000 for 1071 data submission software. A credit union commented that it anticipates initial costs of up to $100,000 to reconfigure or replace current reporting systems. A few other commenters provided estimates for other categories. For example, one credit union that originates about 150 small business loans per year estimated that staff would require 200 hours of training to prepare for the rule. A bank commented that it would require 30 to 80 hours to develop policies and procedures.

The Bureau has reviewed these estimates and considered the information reported by the commenters, together with the existing evidence provided in the one-time cost survey. The Bureau reiterates that the costs of implementing the rule are all institution-specific. As discussed above, the one-time cost estimates should be considered the average expected costs for an institution based on the complexity of the institution's operations. In addition, the Bureau expects that financial institutions will use a variety of methods to prepare for the rule. Some institutions will update systems using staff, while other institutions will purchase updates from third-party vendors. For example, one institution might use 50 staff hours to update computer systems and another institution might pay $10,000 for an updated system. In this case, the Bureau would estimate that, on average, an institution would use 25 staff hours and $5,000 to

update computer systems. For another example, a group of trade associations estimated, based on a survey of their members, that it would cost about $40,000 on average for small institutions to update commercial loan software. However, they also estimate that only a third of small institutions would need to update the software. This implies that the average cost associated with updating computer systems, including financial institutions that spend $0, is about $13,000, much closer to the Bureau's non-salary costs of updating computer systems for Type A DIs of $10,000. Overall, the trade association presented estimates only moderately higher than the Bureau's, after accounting for DIs that do not need to update computer systems. The Bureau considers most estimates provided by commenters as broadly consistent with the Bureau's one-time cost estimates.

A few industry commenters asserted that the firewall would be very costly to implement. However, the Bureau believes that, based on comments made on the firewall provision, it would not be feasible for many financial institutions to implement the firewall. In that case, the financial institution would be permitted to determine that one or more employees or officers should have access to protected demographic information and provide a notice to applicants informing them that employees and officers involved in making determinations regarding their applications may have access to protected demographic information. As a result, the Bureau has not changed its one-time cost estimates based on the cost of implementing the firewall.

Many industry commenters specifically stated that the Bureau underestimated one-time costs. Most of these commenters considered the training costs as too low and a few others thought that the technology costs were too low. Some commenters stated that staff would require multiple follow up training sessions to prepare for implementing the rule. However, none of the commenters provided specific information on how much training or technology would cost. The Bureau has not changed the training or technology cost estimates, preferring to rely on the evidence provided through the One-Time Cost Survey.

Many industry commenters expressed concern about being unable to implement the necessary one-time changes in the proposed 18-month implementation time. Several commenters noted the trial and error nature of implementing a new regulation and that this process could take a long time. Several other industry commenters said that third-party software providers would require significant time to develop new technology to comply with the proposed rule and financial institutions would still need to test the technology, conduct due diligence, and develop policies and procedures. A few others commented that small financial institutions, and particularly those unfamiliar with Federal reporting regimes like HMDA, would find it more difficult to implement one-time changes in time to comply with the proposed 18-month timeline. On the one-time costs survey, the Bureau did not ask about the time to make changes to prepare to comply with the eventual rule, nor did it specify an assumed time-frame. The Bureau interprets the survey responses as realistic estimates conditional on having enough time to implement changes. The comments received suggest that most financial institutions, particularly those that receive relatively fewer small business credit applications, would not have had enough time to implement changes in the proposed 18 months. The Bureau expects that the adoption of tiered compliance dates in the final rule, giving most lenders 24 or 33 months to comply with the rule, will give most financial institutions enough time to implement one-time changes in a manner consistent with the Bureau's estimates.

Several industry commenters asserted that the cost of complying with the proposed rule for small entities would be relatively higher than for larger entities. For example, a trade association commented that smaller banks will not be able to exploit the economies of scale necessary to mitigate costs. The Bureau has tried to account for some of these differences by estimating the costs for the different representative types of institutions. The Bureau in its final rule increased the reporting activity threshold from the proposed 25 covered originations in each of the two preceding calendar years to 100 covered originations in each of the two preceding calendar years. The Bureau estimates that many small financial institutions will no longer be

required to report 1071 data because of this change in the coverage of financial institutions in the final rule.

ii. Ongoing Costs to Covered Financial Institutions

Using the methodology described in part IX.E.2 above, Table 16 shows the total expected annual ongoing costs of the final rule as well as a breakdown by the component 15 activities that comprise the ongoing costs for Type A FIs, Type B FIs, and Type C FIs. The bottom of the table shows the total estimated annual section 1071 ongoing compliance cost for each type of institution, along with the total cost per application the financial institution processes. To produce the estimates in Table 16, the Bureau used the calculations described in Tables 8 and 9 above and the assumptions for each activity in Table 10. In the following analysis, the Bureau provides examples of these cost calculations for the largest drivers of ongoing costs.

Compared to the NPRM, these estimated ongoing costs account for several changes. The first is a change in the assumed compensation for an hour of employee time, which was discussed in IX.E.2. The second is the inclusion of an additional data point, the LGBTQI+-owned indicator. Lastly, the new estimates account for an increased estimate of ongoing training costs in response to comments received, which is discussed in more detail in the comment review below. Besides these changes, the methodology for estimating ongoing costs remains the same as with respect to the proposed rule, unless explicitly stated otherwise.

Table 16: Estimated ongoing costs per compliance task and FI Type

No.	Activity	Type A FI	Type B FI	Type C FI
1	Transcribing data	1,108	2,110	31,657
2	Resolving reportability questions	222	443	665
3	Transfer to 1071 data management software	1,108	0	0
4	Complete geocoding data	139	554	300
5	Standard annual edit and internal checks	510	11,126	27,972
6	Researching questions	275	551	826
7	Resolving question responses	0	0	0
8	Checking post-submission edits	7	26	105
9	Filing post-submission documents	14	14	14

No.	Activity	Type A FI	Type B FI	Type C FI
10	1071 data management software / geocoding software	0	8,000	13,650
11	Training	1,336	6,681	44,542
12	Internal audit	0	443	127,642
13	External audit	3,500	5,000	0
14	Exam preparation	14	4,432	26,592
15	Exam assistance	116	698	4,654
	Total	**$ 8,349**	**$ 40,079**	**$ 278,618**
	Per application	$83	$100	$46

The Bureau estimates that a representative low complexity institution (*i.e.*, a Type A FI) would incur around $8,349 in total annual ongoing costs, or about $83 in total cost per application processed (assuming a representative 100 applications per year). For financial institutions of this type, the largest driver of ongoing costs is the fixed cost of the external audit, $3,500. Besides the audit cost, the largest drivers of the ongoing costs are activities that require employee time to complete. Activities like transcribing data, transferring data to the data management software, standard edits and internal checks, and training all require loan officer time. The Bureau expects training (activity number 11) to cost approximately $1,336 annually for six representative loan officers and an equivalent number of other staff to engage in two hours of training. The Bureau expects other time-dependent activities to cost around $1,000 each. For example, the Bureau assumes that Type A FIs will spend around 19 hours transferring data to 1071 data management software (activity number 3) based on estimates of the required time to transfer data to HMDA data management software. At the assumed hourly compensation, our estimate is around $1,108 for the Type A FI institutions to transfer data. An assumption of around 18 total hours to conduct standard annual editing checks (activity number 5) with some savings assumed due to an online submission platform that automatically checks for errors, results in an estimated annual ongoing cost of $510.

The Bureau estimates that a representative middle complexity institution (*i.e.*, a Type B FI), which is somewhat automated, would incur approximately $40,079 in additional ongoing costs per year, or around $100 per application (assuming a representative 400 applications per year). The largest components of this ongoing cost are the expenses of the small business application management software and geocoding software (activity number 10) in the form of an annual software subscription fee, and the external audit of the data (activity number 13). Using interviews of financial institutions conducted to determine compliance costs with HMDA, the Bureau found mid-range HMDA data management systems to be approximately $8,000 in annual costs; the Bureau believes that cost would be comparable in the small business lending context and thus applies that estimate here. This analysis assumes that the subscription purchase would be separate from HMDA management systems, but the development of a software to jointly manage HMDA and small business lending-related data would likely result in cost savings for both products. The Bureau also estimates that a Type B FI would spend around $5,000 on external audits of their small business loan application data. The Type B FI incurs employee time-related fixed costs conducting internal checks ($11,126), training ($6,681), and prepping for examinations ($4,432) but saves time and expense on data entry and geocoding by using data management software. As an example, the Bureau expects Type B FIs to have two full-time employees spend 40 hours each to prepare for an examination (activity number 14) resulting in a cost of $4,432, and have employees spend around 12 hours assisting with an examination (activity number 15) costing $698 annually.

The Bureau estimates a representative high complexity institution (*i.e.*, a Type C FI), would incur $278,618 of annual ongoing costs, or $46 per application (assuming a representative 6,000 applications per year). The largest driver of costs for a Type C FI is the employee time required to conduct an internal audit. The assumed 2,304 hours of employee time results in nearly $127,642 of ongoing costs annually. Exam preparation, training, and standard annual and internal checks would be expected to cost $26,592, $44,542, and $26,592 each year, respectively.

The Bureau also assumes that a Type C institution would need a subscription to a small business data management software near the upper bound of the range found in interviews with financial institutions during the 2015 HMDA rulemaking, of $13,650.

The Bureau estimates that the total annual ongoing costs for depository institutions will be between about $297,000,000 and $313,000,000 per year, about $190,000,000 to $199,000,000 of which will be annual variable costs. The Bureau estimates that the total annual ongoing costs for nondepository institutions would be about $48,700,000, about $9,900,000 of which would be annual variable costs.

The Bureau estimated that the total annual ongoing costs from the NPRM would have been between $310,000,000 and $330,000,000 for depository institutions and $62,300,000 for nondepository institutions. The estimated total ongoing costs decreased between the proposal and the final rule because the Bureau raised the financial institution coverage threshold from 25 to 100 covered originations in each of the two preceding calendar years. However, the cost estimates per institution increased because the Bureau, taking into account comments received on the proposed rule, raised the ongoing costs per application by changing training costs. These changes almost offset each other because, while the final rule covers about 2,200 fewer institutions relative to the proposal due to the change in the financial institution coverage threshold, these institutions that are no longer covered had the fewest number of applications, and ongoing costs are commensurate with the number of applications.

To understand the impacts of these cost estimates on the profits of depository institutions, the Bureau estimates the average total net income across all products per small business origination for all DIs by type.[954] There is no comprehensive published source of data on profits earned on small business credit transactions. The Bureau presents estimates of total net income

[954] There are no broadly available data on profit per application for nondepository institutions. The Bureau uses the FFIEC Bank and NCUA Credit Union Call Report data from December 31, 2019, accessed on June 25, 2021. The Bureau uses the same internal estimates of small business loan originations as discussed in part VI.B above and total net income across all products. For estimates of net income per origination and per application, the Bureau uses only net income per origination for depository institutions with over 25 originations in 2019.

per origination as an indication of a financial institution's ability to cover the additional expenses associated with the final rule. The Bureau relies on its estimates of originations for each depository institution, described in part IX.D. and its *Supplemental estimation methodology for institutional coverage and market-level cost estimates in the small business lending rulemaking.* The Bureau estimates that banks and savings associations of Type A that will be covered by the final rule have an average net income per origination between $134,000 and $167,000. Credit unions of Type A that will be covered by the final rule have an average net income per origination of $144,000. Assuming two applications per origination, a covered bank or savings association of Type A has a net income per application of approximately $67,000 to $83,000 and a covered credit union of the same type has a net income per application of about $72,000. The Bureau estimates that covered banks and savings associations of Type B have an average net income per origination between $65,000 and $75,000 or a net income per application between $33,000 and $38,000. The Bureau estimates that covered credit unions of Type B have an average net income per origination of $229,000 or an average net income per application of $115,000. The Bureau estimates that covered banks and savings associations of Type C have a net income per origination between $252,000 and $278,000, or, assuming three applications per origination, a net income per application between $84,000 and $93,000. The Bureau estimates that covered credit unions of Type C have an average net income per origination of $8,000, and average net income per application of about $4,000. The Bureau notes that these estimates are slightly higher than reported in the proposal due to the higher financial institution coverage threshold in the final rule.

With the publicly disclosed data, users would be able to assess fair lending risks at the institution and market level, furthering section 1071's fair lending purpose. Several commenters to the Bureau's 2017 request for information expressed concerns, however, about costs related to

these analyses.[955] During the SBREFA process, some small entity representatives were concerned that published 1071 data could be used against financial institutions in class action litigation or to harm their public reputations.[956] Depending on the extent of publicly disclosed data, the Bureau expects that some financial institutions could incur ongoing costs responding to reports of disparities in their small business lending practices. Some financial institutions could also experience reputational risks associated with high profile reports of existing disparities where more complete analysis of its business practices would conclude that the disparities do not support a finding of discrimination on a prohibited basis. In anticipation of needing to respond to outside analysis and potential reputational risks, it is possible that some financial institutions may choose to change their product offerings available to small businesses, underwriting or pricing practices, or overall participation in the small business lending market. Several commenters expressed similar concerns that fair lending analyses on incomplete data could lead to false positives (*i.e.*, determinations of fair lending violations where none have occurred), that false positives could lead to reputational risk, and that lenders could change their lending behavior to avoid the potential for false positives. These costs associated with reputational risks are difficult to quantify, and commenters on the proposed rule did not provide any specific estimates of these costs.

The Bureau also received feedback that financial institutions could face potential costs with the publication of a public dataset under the final rule either because potential clients would be concerned about their data being collected or because of the additional competitive pressure brought by a publicly available dataset. The costs associated with customer privacy, reputational risk to financial institutions, and additional competitive pressure for financial institutions are

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[955] 82 FR 22318 (May 15, 2017).

[956] For example, one small entity representative was concerned that published 1071 data could lead to increased litigation and thus a higher cost of credit for small businesses. Another expressed concern that pricing information could be misinterpreted by users of 1071 data (for example, according to the small entity representative, higher pricing for one race might be used to infer discrimination when the pricing was in fact unrelated to the race of the applicant). Such a misinterpretation may cause reputational damage and consequently decrease applications.

difficult to quantify, and commenters on the proposed rule did not provide any specific estimates of these costs.

Comments on the ongoing cost estimates of the proposed rulemaking. Several industry commenters provided estimates of what they believed the overall ongoing costs would be for their institution. These estimates ranged from estimates that were quite similar to the Bureau's estimate for institutions of similar small business credit volume to estimates that were considerably higher than the Bureau's estimates. For example, a group of trade associations estimated that institutions under $500 million in assets, that on average originate 276 small business loans annually, would incur $145 per origination in ongoing cost. The Bureau's estimate in the proposal, for institutions of a similar size was $178 per origination ($89 per application). At the high end, a lender suggested over $1,000 per origination. The Bureau has reviewed these estimates and considered the information provided by the commenters.

The most voluminous category of comments was with respect to future staffing needs in response to the proposed rule. While not specific to any individual category of ongoing cost activity, a number of banks, credit unions, and Farm Credit System lenders, and several trade associations, described the need to hire additional staff to perform several of the ongoing cost activities that require staff time. Many provided estimates of the additional FTEs that the institution would have to hire to comply with the proposed rule. These estimates ranged from one additional FTE to up to 10 additional FTEs. A survey of community banks by a national trade association found that 88 percent of respondents would need to hire an additional FTE and, on average, institutions would have to hire 2-3 FTEs. Several commenters asserted that the hiring of additional staff alone showed that the Bureau's ongoing cost estimates in the proposal were inadequate.

In the ongoing cost estimates of the Bureau's proposal, the Bureau calculated the number of hours required to be spent on section 1071-related tasks, without distinguishing between existing or newly-hired staff. The Bureau assumes that the time spent on section 1071-related

tasks necessarily takes time away from otherwise profitable activity to which the hours would be put in the rule's absence. Since the Bureau is accounting for time spent in this way, the Bureau believes that its estimates account for the additional staff activity required to be spent to collect, check, and report data under the final rule. For this reason, the Bureau did not change any staffing time estimates, with the below exceptions.

However, hiring additional FTEs would lead some institutions to incur one-time costs of hiring, including search and administrative burden, that they would not have incurred in the absence of the final rule. The Bureau categorizes this type of cost as a one-time cost, where the institution staffs up to be able to comply with the final rule. The Bureau is therefore incorporating the fixed cost of hiring new staff in the manner described in part IX.E.1.

Several commenters also suggested that the specific ongoing costs for training staff were too low in the proposal. As described in the proposal, the Bureau received similar comments during the SBREFA process, but wished to learn additional information through comments on the proposed rule to better estimate the cost of training. Several institutions provided specific annual costs of training employees or estimates of the overall employee time. Others more generally described the need to train more staff than just loan officers, but also administrative and other staff.

The Bureau's ongoing costs estimates only reflected the assumed training time required to train loan officers that directly handle the underwriting process. Based on the comments, the estimates in this final rule reflect a doubling of the number of assumed training hours required on an annual basis in order to account for the additional staff that would have to be trained on an annual basis besides simply the loan officers.

Lastly, the Bureau received several comments specifically about the ongoing cost of 1071 data management software. In addition to confirming this as an appropriate category of ongoing cost activity, several commenters provided specific estimates of the ongoing costs. One commenter's estimate was similar to the estimates the Bureau provided in its proposal, while

others provided significantly larger estimates. A survey by a national trade organization found ongoing software cost estimates that were quite similar to the estimates the Bureau provided in its proposal for institutions of Types B and C. As an example, the survey average for institutions similar to Type B institutions in the Bureau's proposal was around $7,000 per year, while the Bureau's estimate in the proposal was $8,000. Taking this information into account, the Bureau has not adjusted its ongoing cost estimates of the annual cost of 1071 data management or geocoding software.

4. Costs to Small Businesses

The Bureau expects that any direct costs of the final rule on small businesses will stem from additional fields that the applicant may have to complete on credit applications due to the final rule compared to a financial institution's existing application process. This could include information such as the race, ethnicity, and sex of the principal owners or number of workers were not previously required on business credit applications. However, the Bureau expects the cost of completing the new section 1071 fields on applications to be negligible. Therefore, the Bureau focuses the rest of the discussion on the costs of small businesses to whether and how the Bureau expects financial institutions to pass on the costs of compliance with the final rule to small businesses and any possible effects on the availability of small business credit.

Three types of costs (one-time, fixed ongoing, and variable ongoing) have the potential to influence the price and availability of credit to small businesses. In a competitive marketplace, standard microeconomics suggests that lenders will extend loans up to the point at which the revenue from granting an additional loan is equal to the additional cost associated with the financial institution providing the loan. One-time costs and fixed ongoing costs affect the overall profitability of a lender's loan portfolio but do not affect the added profit from extending an additional loan. Variable ongoing costs, however, affect the profitability of each additional loan and will influence the number of loans a lender provides. Based on the Bureau's available evidence, it expects that the variable ongoing costs will be passed on in full to small business

credit applicants in the form of higher prices or fees and does not expect there to be a significant reduction in small businesses' ability to access credit.

One-time and fixed ongoing costs affect the overall profitability of the loan portfolio and will be considered in the lender's decision to continue supplying small business credit at their current levels. The Bureau believes that a financial institution would find it worthwhile to incur the one-time costs associated with complying with the final rule if it expects to generate enough profit over multiple years to cover those costs. Each year, a financial institution would find it worthwhile to continue extending credit if the total expected revenue from its chosen quantity of loans is greater than the sum of its ongoing fixed and variable costs. As such, the Bureau believes a financial institution would find it worthwhile to reduce their supply of small business credit, even if it had already incurred the one-time costs, if the total expected revenue from that year were less than the total expected ongoing costs.[957] As discussed in detail below, the Bureau believes that a significant disruption in small business credit supply is unlikely.

In the One-Time Cost Survey, the Bureau asked respondents to rank a list of potential actions they may take in response to the compliance costs of implementing section 1071. Respondents ranked the following list: "Raise rates or fees on small business products"; "Raise rates/fees on other credit products"; "Accept lower profits"; "Exit some geographic markets"; "Tighten underwriting standards"; "Offer fewer or less complex products"; "No longer offer small business credit products"; or "Other" with two write-in options. Respondents ranked these options from "1" to "9" indicating their most to least likely responses, where "1" was the most likely.

In order to analyze these responses, the Bureau pooled data only from respondents that answered both the ranking question and the number of originations question. The Bureau implemented these restrictions to the pool to eliminate responses from institutions that would not

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[957] SBREFA Outline at 50-52.

The small entity representative feedback discussed herein can be found in the SBREFA Panel Report at 40.

be required to report under the final rule. Of the 105 total respondents to the One-Time Cost Survey, 44 ranked every option and reported more than 25 originations in the last year.[958] The Bureau will henceforth refer to these respondents as the "impacts of implementation" sample.

Table 17 presents the potential responses to implementing section 1071 and the average ranking assigned by respondents in the impacts of implementation sample. The responses are listed in order of most to least likely on average, where a lower average ranking number means that respondents ranked that response most likely. These ranked responses shed light on potential disruptions to small business credit supply as a result of the final rule's implementation. Notably, respondents were least likely to report that they would reduce their small business lending activity, with respondents on average indicating that they would be more likely to accept lower profits than to reduce their small business lending activity.

Table 17: One-Time Cost Survey responses to impacts of implementation

Response	Average Ranking
Raise rates or fees on small business products	1.77
Raise rates/fees on other credit products	2.93
Tighten underwriting standards	3.73
Accept lower profits	3.82
Offer fewer or less complex products	4.59
Exit some geographic markets	5.75
No longer offer small business credit products	6.57

Consistent with economic theory, respondents reported that they would be most likely to raise rates or fees on small business products and other credit products. The Bureau expects that the variable ongoing costs would be passed on in full to small business credit applicants in the form of higher prices or fees. Per application, the variable costs are approximately $32, $26, and $7.5 for Type A FIs, Type B FIs, and Type C FIs, respectively. Even if the variable costs were

[958] The Bureau discusses a representative Type A FI that will not be covered by the final rule to make the final estimates easier to compare with those in the NPRM and to highlight what the costs of the rule would have been for a financial institution that is not covered by the final rule. The Bureau includes survey respondents with originations below the origination threshold to ensure a large enough sample size for analysis.

passed on in full to small business applicants in the form of higher interest rates or fees associated with a loan or line of credit, the Bureau expects that this would comprise a small portion of the total cost of the average loan to the small business applicant. Therefore, the Bureau expects this increase in cost to have limited impact on the availability or affordability of small business credit. The Bureau estimates that the total market impact of these costs for small businesses will be between $200,000,000 and $208,000,000.

The relative ranking of other survey response options provides additional insight into the potential for small business credit supply disruptions. In Table 17, financial institutions ranked "tighten[ing] credit standards," on average, in the middle of their potential responses. The lowest three responses were "offer fewer or less complex products," "exit some geographic markets," and "no longer offer small business credit products." For these reasons, the Bureau believes the survey responses indicate limited likelihood of significant small business credit supply disruptions.

The Bureau's total estimated one-time and ongoing costs are non-negligible and could potentially affect the supply of small business credit by financial institutions that do not regularly originate many covered credit transactions. The Bureau's final institutional coverage threshold of 100 covered credit transactions in two consecutive years could prevent some low-volume financial institutions from reducing small business lending activity in response to the compliance costs of the final rule. For example, the Bureau estimates that a Type A DI would incur one-time costs of $63,825 and fixed ongoing costs of $5,195. A depository institution that originates very few covered transactions every year may reduce its small business lending activity if it does not expect that profits, even over several years, would cover that one-time cost or if it does not expect annual revenues to exceed the annual ongoing costs. However, based on the net income per application estimates discussed above, and the responses to the One-Time Cost Survey, the Bureau believes that institutions that are covered under the final rule are unlikely to find either the one-time costs of implementation or the ongoing costs of compliance a meaningful influence

in their business decision regarding small business lending activity. It is possible that some lenders just above the coverage threshold might reduce their small business lending to below the threshold to avoid reporting but, even if this does occur, the Bureau does not anticipate that this will significantly decrease aggregate credit supply. Furthermore, the Bureau's findings from the respondents to the One-Time Cost Survey (discussed above) additionally support the Bureau's conclusion that the increase in compliance costs will likely be passed through to customers in the form of higher prices or fees, rather than a significant reduction in financial institutions' willingness to supply small business credit.[959]

If the Bureau were to release the data in unmodified form, the Bureau acknowledges there would be an ongoing risk of re-identification, which may bring with it reputational risk for covered financial institutions and more significant privacy risks for small business applicants and related natural persons. Examples of such scenarios and their potential risks are detailed in part VIII.B.4.ii. See part VIII generally for more about how the Bureau's modification and deletion decisions will mitigate these risks.

Comments on the Bureau's estimation of the costs to small businesses. The Bureau sought comment on other potential costs to small businesses not discussed above, and on its analysis of costs to small businesses as described herein. Several trade associations conducted their own surveys, which largely provided support for the Bureau's estimations, specifically that price increases would be the most likely response, and showed limited support for significant market exit.

A number of commenters, mainly lenders and trade associations, described how they expected costs would be passed on to borrowers, namely through higher interest rates or fees, though one lender said they would not raise fees or restrict access to credit. Two trade associations asserted the price of motor vehicles could increase because of the rule's effect on

[959] As stated in the SBREFA Panel Report at 40, "[g]enerally, [small entity representatives] did not suggest that they would leave the small business lending market in response to increased costs under the eventual 1071 rule."

automobile financing. Several industry commenters who cited potential price increases also noted they might have to reduce their overall volume of small business lending. Others who cited potential price increases noted they might reduce the number of product offerings, such as small dollar lending products or insurance premium financing transactions.

Consistent with results from the Bureau's One-Time Cost Survey, comments also provided little evidence to indicate that lenders would exit the small business credit market. While some lenders and trade associations cited business exit as a potential consequence, only one lender stated they themselves might consider exiting. A group of trade associations noted that in the survey it administered to its own members, there seemed to be little evidence that any of its own members would exit. A few lenders and trade associations asserted that some smaller lenders could exit the market due to increased regulatory burdens and costs. A group of trade associations asserted lenders could even close altogether or merge with other institutions.

One bank estimated how much of its portfolio would be affected by compliance costs; if it were to stop offering loans of less than $50,000 because it decided they were no longer profitable, it would lose up to 59 percent of its agricultural and commercial customers, or 13 percent of its total lending volume. If the bank were to stop offering loans of less than $10,000, it would lose 20 percent of its agricultural and commercial loans, or 1 percent of its total lending volume. The bank observed that because the percentage of customers affected would be greater than the percentage of lending volume affected, these estimates show that borrowers of small loan amounts would be negatively impacted by the rule.

A few lenders noted that, other than price increases, decreased competition from market exit could impact small businesses, namely a lower degree of customization in loan processing and underwriting. Several industry commenters claimed that processing times will increase because of the collection of data fields required by the rule but not otherwise collected in the normal course of business.

The Bureau believes that the comments generally supported the Bureau's expectation that the most likely response to the compliance costs of the final rule will be an increase in interest rates or fees to pass on financial institutions' ongoing variable costs to small business credit applicants. While the Bureau acknowledges the potential for other effects, such as changes in product offerings, changes in loan sizes, increased processing time, tightening of credit standards, or a reduction in market participation by financial institutions, the Bureau does not expect these effects to be large enough to significantly impact the availability of small business credit. Additionally, the Bureau expects that its increased coverage threshold of one hundred loans for each of the two preceding years should reduce the likelihood of reduced small business credit supply by financial institutions who originate few loans per year.

5. Alternatives Considered

This section discusses two categories of alternatives considered: other methods for defining a covered financial institution and limiting the data points to those mandated by section 1071. The Bureau uses the methodologies discussed in parts IX.D and IX.E to estimate the impacts of these alternatives.

First, the Bureau considered multiple reporting thresholds for purposes of defining a covered financial institution. In particular, the Bureau considered whether to exempt financial institutions with fewer than 25, 50, 200, or 500 originations in each of the two preceding calendar years instead of 100 originations, as finalized in the rule. The Bureau also considered whether to exempt depository institutions with assets under $100 million or $200 million from section 1071's data collection and reporting requirements.

Under a 25-origination threshold, which was proposed in the NPRM, the Bureau estimates that about 4,000 to 4,200 depository institutions would report, which is approximately 2,200 more depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 3,600 to 3,800 banks and savings associations and about 400 credit unions would be covered under a 25-origination threshold. The Bureau estimates that about 98 percent

of small business loans originated by depository institutions would be covered under a 25-origination threshold, an increase of about 4 percentage points relative to the final rule. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would report under this alternative threshold. The Bureau estimates that the total one-time costs across all financial institutions associated with a 25-origination threshold would be about $338,000,000 to $350,000,000, an increase of about $132,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with the 25-origination threshold would be about $392,000,000 to $413,000,000, an increase of between $47,000,000 and $52,000,000 per year relative to the 100-origination threshold.

Under a 50-origination threshold, the Bureau estimates that about 2,900 to 3,100 depository institutions would report, which is approximately 1,100 more depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 2,700 to 2,900 banks and savings associations and about 200 credit unions would be covered under a 50-origination threshold. The Bureau estimates that about 97 percent of small business loans originated by depository institutions would be covered under a 50-origination threshold, an increase of about 3 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 50-origination threshold would be about $272,000,000 to $285,000,000, an increase of about $66,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $373,000,000 to $393,000,000, an increase of about $28,000,000 to $32,000,000 per year relative to the 100-origination threshold. Again, the Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

Under a 200-origination threshold, the Bureau estimates that about 1,000 to 1,100 depository institutions would report, which is approximately 800 fewer depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 900 to 1,100

banks and savings associations and fewer than 100 credit unions would be covered under a 200-origination threshold. The Bureau estimates that about 91 percent of small business loans originated by depository institutions would be covered under a 200-origination threshold, a decrease of about 3 to 4 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 200-origination threshold would be about $159,000,000 to $167,000,000, a decrease of about $47,000,000 to $51,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $314,000,000 to $328,000,000, a decrease of about $31,000,000 to $33,000,000 per year relative to the 100-origination threshold. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

Under a 500-origination threshold, the Bureau estimates that about 400 to 500 depository institutions would report, which is approximately 1,500 fewer depository institutions relative to the final threshold of 100 originations. The Bureau estimates that about 400 to 500 banks and savings associations and fewer than 20 credit unions would be covered under a 500-origination threshold. The Bureau estimates that about 88 percent of small business loans originated by depository institutions would be covered under a 500-origination threshold, a decrease of about 3 to 6 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with a 500-origination threshold would be about $128,000,000 to $131,000,000, a decrease of about $78,000,000 to $87,000,000 relative to the 100-origination threshold. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $281,000,000 to $290,000,000, a decrease of about $64,000,000 to $71,000,000 per year relative to the 100-origination threshold. The Bureau does not have sufficient information to precisely estimate how many more nondepository institutions would be required to report under this alternative.

The Bureau's NPRM discussed the possibility of exempting depository institutions with assets under $100 million or $200 million assets from the final rule. For the purposes of considering these alternatives, the Bureau estimates how institutional coverage and costs would be different if the Bureau required a 25-origination threshold in addition to an asset-based threshold for depository institutions. The Bureau assumes that the alternative proposal would have been that a depository institution would be required to report its small business lending activity for 2019 if it had more than 25 originations in 2017 and 2018 and had assets over the asset-based threshold on December 31, 2018. The Bureau further assumes that if two institutions merged in 2019 then the resulting institution would be required to report if the sum of the separate institutions' assets on December 31, 2018, exceeded the asset-based threshold.

Under a $100 million asset-based and 25-origination threshold, the Bureau estimates that between 3,500 and 3,600 depository institutions would report, approximately 1,600 to 1,700 more depository institutions relative to a 100-origination threshold with no asset-based threshold. The Bureau estimates that about 3,100 to 3,300 banks and savings associations and about 300 credit unions would be covered under a 25-origination and $100 million asset-based threshold. The Bureau estimates that about 98 percent of small business loans originated by depository institutions would be covered under a 25-origination and $100 million asset-based threshold, an increase of about 4 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with the addition of a $100 million asset-based threshold would be about $307,000,000 to $314,000,000, an increase of between $101,000,000 and $104,000,000 relative to the final rule. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $383,000,000 to $403,000,000, an increase of about $38,000,000 to $42,000,000 per year relative to the 100-origination threshold with no asset-based threshold.

Under a $200 million asset-based and 25-origination threshold, the Bureau estimates that about 2,700 depository institutions would report, approximately between 700 and 900 fewer

depository institutions relative to a 100-origination threshold with no asset-based threshold. The Bureau estimates that about 2,400 banks and savings associations and about 300 credit unions would be covered under a 25-origination and $200 million asset-based threshold. The Bureau estimates that about 96 percent of small business loans originated by depository institutions would be covered under a 25-origination and $100 million asset-based threshold, an increase of about 2 percentage points relative to the final rule. The Bureau estimates that the total one-time costs across all financial institutions associated with the addition of a $200 million asset-based threshold would be about $259,000,000 to $264,000,000, an increase of between $46,000,000 and $53,000,000 relative to the final rule. The Bureau estimates that the total annual ongoing costs associated with this threshold would be about $364,000,000 to $380,000,000, an increase of about $19,000,000 per year relative to the 100-origination threshold with no asset-based threshold.

Second, the Bureau considered the costs and benefits for limiting its data collection to the data points specifically enumerated in ECOA section 704B(e)(2)(A) through (G). In addition to those data points, the statute also requires financial institutions to collect and report any additional data that the Bureau determines would aid in fulfilling the purposes of section 1071. The final rule includes several additional data points that rely solely on that latter authority in section 704B(e)(2)(H). Specifically, the final rule requires that financial institutions collect and report data on application method, application recipient, denial reasons (for denied applications only), pricing information (for applications that are originated or approved but not accepted), NAICS code, number of workers, time in business, and number of principal owners, all of which are adopted based on the Bureau's authority pursuant to section 704B(e)(2)(H). The Bureau has considered the impact of instead finalizing only the collection of those data points enumerated in section 704B(e)(2)(A) through (G).

Requiring the collection and reporting of only the data points enumerated in ECOA section 704B(e)(2)(A) through (G) would result in a reduction in the fair lending benefit of the

data compared to the final rule. For example, not collecting pricing information would obscure possible fair lending risk by covered financial institutions. Potential discriminatory behavior is not limited to the action taken on an application, but rather includes the terms and conditions under which applicants can access credit. If the Bureau did not collect pricing information, it would not be able to evaluate potential discriminatory lending practices. As mentioned in part IX.F.1 above, several of the data points the Bureau is finalizing under its ECOA section 704B(e)(2)(H) authority are critical to conducting more accurate and complete fair lending analyses. A reduction in the rule's ability to facilitate the enforcement of fair lending laws would negatively impact small businesses and small business owners and thus run counter to that statutory purpose of section 1071.

Limiting the rule's data collection to only the data points required under the statute would also reduce the ability of the rule to support the business and community development needs and opportunities of small businesses, which is the other statutory purpose of section 1071. For example, not including pricing information would significantly reduce the ability of communities, governmental entities, and creditors to understand credit conditions available to small businesses. Not including NAICS code or time in business would also reduce the ability of governmental entities to tailor programs that can specifically benefit young businesses or businesses in certain industries.

Only requiring the collection and reporting of the data points enumerated in ECOA section 704B(e)(2)(A) through (G) would have reduced the annual ongoing cost of complying with the final rule. Under this alternative, the estimated total annual ongoing costs for Type A FIs, Type B FIs, and Type C FIs would be $7,644; $38,296 and $265,809, respectively. Per application, the estimated ongoing cost would be $76, $96, and $44 for Type A FIs, Type B FIs, and Type C FIs, respectively. Under this alternative, the estimated total ongoing costs for Type A FIs would be $705 less per year and $7 less per application than the final rule; the estimated total ongoing costs for Type B FIs would be $1,783 less per year and $4 less per application than the

final rule; and the estimated total ongoing costs for Type C FIs would be $12,809 per year and $2 per application than the final rule. The estimated total annual market-level ongoing cost of reporting would be between $326,000,000 and $340,000,000, or between about $19,000,000 to $21,000,000 per year less than under the final rule. As discussed above, respondents to the One-Time Cost Survey were instructed to assume that they would only report the statutorily mandated data fields. Hence, the Bureau can only estimate how ongoing costs would be different under this alternative.

G. Potential Impact on Depository Institutions and Credit Unions with $10 Billion or Less in Total Assets

As discussed above, the final rule will exclude financial institutions with fewer than 100 originated covered credit transactions in both of the two preceding calendar years. The Bureau believes that the benefits of the final rule to banks, savings associations, and credit unions with $10 billion or less in total assets will be similar to the benefits to covered financial institutions as a whole, discussed above. Regarding costs, other than as noted here, the Bureau also believes that the impact of the final rule on banks, savings associations, and credit unions with $10 billion or less in total assets will be similar to the impact for covered financial institutions as a whole. The primary difference in the impact on these institutions is likely to come from differences in the level of complexity of operations, compliance systems, and software, as well as number of product offerings and volume of originations of these institutions, all of which the Bureau has incorporated into the cost estimates using the three representative financial institution types.

Based on FFIEC and NCUA Call Report data for December 2019, 10,375 of 10,525 banks, savings associations, and credit unions had $10 billion or less in total assets. The Bureau estimates that between 1,700 and 1,900 of such institutions would be subject to the final rule. The Bureau estimates that the market-level impact of the final rule on annual ongoing costs for banks, savings associations, and credit unions with $10 billion or less in assets would be between $124,000,000 and $140,000,000. Regarding one-time costs, the Bureau estimates that the

market-level impact of the final rule for banks, savings associations, and credit unions with $10 billion or less in assets would be between $102,000,000 and $114,000,000. Using a 7 percent discount rate and a five-year amortization window, the estimated annualized one-time costs would be between $25,000,000 and $28,000,000.

H. Potential Impact on Small Businesses in Rural Areas

The Bureau expects that small businesses in rural areas will directly experience many of the benefits of the rule described above in IX.F.1. Small businesses in rural areas will directly benefit from facilitating the enforcement of fair lending laws and the enabling of communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. As with all small businesses, small businesses in rural areas may bear some indirect costs of the rule. This would occur if financial institutions serving rural areas are covered by the final rule and if those institutions pass on some or all of their cost of complying with the final rule to small businesses.

The source data from CRA submissions that the Bureau uses to estimate institutional coverage and market estimates provide information on the county in which small business borrowers are located. However, approximately 89 percent of all banks did not report CRA data in 2019, and as a result the Bureau does not believe the reported data are robust enough to estimate the locations of the small business borrowers for the banks that do not report CRA data. The NCUA Call Report data do not provide any information on the location of credit union borrowers. Nonetheless, the Bureau is able to provide some geographical estimates of institutional coverage based on depository institution branch locations.

The Bureau used the FDIC's Summary of Deposits to identify the location of all brick and mortar bank and savings association branches and the NCUA Credit Union Branch Information to identify the location of all credit union branch and corporate offices.[960] A bank,

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[960] *See* Fed. Deposit Ins. Corp., *Summary of Deposits (SOD)—Annual Survey of Branch Office Deposits* (last updated June 1, 2022), https://www.fdic.gov/regulations/resources/call/sod.html. The NCUA provides data on credit

savings association, or credit union branch was defined as rural if it is in a rural county, as specified by the USDA's Urban Influence Codes.[961] A branch is considered covered by the final rule if it belongs to a bank, savings association, or credit union that the Bureau estimated would be included if they exceed 100 originations in 2017 and 2018. Using the estimation methodology discussed in part IX.D above, the Bureau estimates that about 65 to 70 percent of rural bank and savings association branches and about 95 percent of non-rural bank and savings association branches would be covered under the final rule. The Bureau estimates that about 14 percent of rural credit union branches and about 11 percent of non-rural credit union branches would be covered under the final rule.[962]

In a competitive framework in which financial institutions are profit maximizers, financial institutions would pass on variable costs to future small business applicants, but absorb one-time costs and increased fixed costs in the short run.[963] Based on previous HMDA rulemaking efforts, the following seven operational steps affect variable costs: transcribing data, resolving reportability questions, transferring data to a data entry system, geocoding, researching questions, resolving question responses, and checking post-submission edits. Overall, the Bureau estimates that the impact of the final rule on variable costs per application is $32 for Type A FIs, $26 for Type B FIs, and $7.50 for Type C FIs. The Bureau believes that the covered financial institutions that serve rural areas will attempt to pass these variable costs on to future small

union branches in the quarterly Call Report Data files. *See* Nat'l Credit Union Admin., *Call Report Quarterly Data*, https://www.ncua.gov/analysis/credit-union-corporate-call-report-data/quarterly-data (last visited Mar. 20, 2023).

[961] This is a similar methodology as used in the Bureau's rural counties list. *See* CFPB, *Rural and underserved counties list*, https://www.consumerfinance.gov/compliance/compliance-resources/mortgage-resources/rural-and-underserved-counties-list/ (last visited Mar. 20, 2023).

[962] The Bureau notes that most credit union branches do not belong to covered credit unions because most credit unions did not report any small business loans in the NCUA Call Report data. Of the 5,437 credit unions that existed in December 2019, 4,359 (or 81.5 percent) reported no small business originations in 2017 or 2018.

[963] If markets are not perfectly competitive or financial institutions are not profit maximizers, then what financial institutions pass on may differ. For example, they may attempt to pass on one-time costs and increases in fixed costs, or they may not be able to pass on variable costs. Furthermore, some financial institutions may exit the market in the long run. However, other financial institutions may also enter the market in the long run.

business applicants. Amortized over the life of the loan, this expense would represent a negligible increase in the overall cost of a covered credit transaction.

The One-Time Cost Survey can shed light on how financial institutions that serve rural communities will respond to the final rule. The Bureau asked respondents to the survey to report whether their institution primarily served rural or urban communities or an even mix. All respondents in the impacts of implementation sample answered this question. Of the 44 respondents in the impacts of implementation sample, 13 primarily serve rural communities, 15 primarily serve urban communities, and 16 serve an even mix. Table 18 presents the potential responses to implementing section 1071 and the average ranking assigned by respondents that serve rural communities, urban communities, an even mix, and all of the respondents in the impacts of implementation sample. The responses are listed in order of most to least likely on average across all respondents, where a lower average ranking number means that respondents ranked that response most likely. Respondents that primarily serve rural communities or an even mix rank raising rates or fees on small business or other credit products as the most likely response. These institutions also rank exiting some geographic markets and no longer offering small business credit products as the least likely response to a rule implementing section 1071.

Table 18: One-Time Cost Survey responses to impacts of implementation by type of community served

Response	Rural (n = 13)	Urban (n = 15)	Even Mix (n = 16)	All (n = 44)
Raise rates or fees on small business products	1.62	1.6	2.06	1.77
Raise rates/fees on other credit products	2.54	2.73	3.44	2.93
Tighten underwriting standards	3.46	4.27	3.44	3.73
Accept lower profits	3.77	4.2	3.5	3.82
Offer fewer or less complex products	4.62	4.07	5.06	4.59
Exit some geographic markets	5.69	5.13	6.38	5.75
No longer offer small business credit products	6.62	6.13	6.94	6.57

The Bureau thus does not anticipate any material adverse effect on credit access in the long or short term to rural small businesses.

X. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (RFA)[964] generally requires an agency to conduct an initial regulatory flexibility analysis (IRFA) and a final regulatory flexibility analysis (FRFA) of any rule subject to notice-and-comment rulemaking requirements. These analyses must "describe the impact of the proposed rule on small entities."[965] An IRFA or FRFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.[966] The Bureau also is subject to certain additional procedures under the RFA involving the convening of a panel to consult with small business representatives prior to proposing a rule for which an IRFA is required.[967]

In the proposal, the Bureau did not certify that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. Accordingly, the Bureau convened and chaired a Small Business Review Panel under SBREFA to consider the impact of the proposals under consideration on small entities that would be subject to the rule implementing section 1071 and to obtain feedback from representatives of such small entities. The proposal preamble included detailed information on the Small Business Review Panel. The Panel's advice and recommendations are found in the Small Business Review Panel Final Report[968] and were discussed in the section-by-section analysis of the proposed

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[964] 5 U.S.C. 601 *et seq.*

[965] 5 U.S.C. 603(a). For purposes of assessing the impacts of the proposed rule on small entities, "small entities" is defined in the RFA to include small businesses, small not-for-profit organizations, and small government jurisdictions. 5 U.S.C. 601(6). A "small business" is determined by application of SBA regulations and reference to the NAICS classifications and size standards. 5 U.S.C. 601(3). A "small organization" is any "not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). A "small governmental jurisdiction" is the government of a city, county, town, township, village, school district, or special district with a population of less than 50,000. 5 U.S.C. 601(5).

[966] 5 U.S.C. 605(b).

[967] 5 U.S.C. 609.

[968] CFPB, *Final Report of the Small Business Review Panel on the CFPB's Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking* (Dec. 14, 2020), https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa-report.pdf.

rule.[969] The proposal also contained an IRFA pursuant to section 603 of the RFA. In this IRFA, the Bureau solicited comment on any costs, recordkeeping requirements, compliance requirements, or changes in operating procedures arising from the application of the proposed rule to small businesses; comment regarding any Federal rules that would duplicate, overlap or conflict with the proposed rule; and comment on alternative means of compliance for small entities. Comments addressing individual provisions of the proposed rule are addressed in the section-by-section analysis above. Comments addressing the impact on small entities are discussed below. Many of these comments implicated individual provisions of the final rule or the Bureau's Dodd-Frank Act section 1022 discussion and are also addressed in those parts.

Based on the comments received, and for the reasons stated below, the Bureau believes the final rule will have a significant economic impact on a substantial number of small entities. Accordingly, the Bureau has prepared the following final regulatory flexibility analysis pursuant to section 604 of the RFA.

Final Regulatory Flexibility Analysis

Under RFA section 604(a), when promulgating a final rule under 5 U.S.C. 553, after publishing a notice of proposed rulemaking, the Bureau must prepare a FRFA. Section 603(a) of the RFA also sets forth the required elements of the FRFA. Section 604(a)(1) requires the FRFA to contain a statement of the need for, and objectives of, the rule. Section 604(a)(2) requires the FRFA to contain a statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments. Section 604(a)(3) requires the Bureau to respond to any comments filed by the Chief Counsel for Advocacy of the SBA in response to the proposed rule and provide a detailed statement of any change made to the proposed rule in the final rule as a result of the comments.

[969] 86 FR 56356, 56378-510 (Oct. 8, 2021).

The FRFA further must contain a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.[970] Section 603(b)(5) requires a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record. In addition, the Bureau must describe any steps it has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. Finally, as amended by the Dodd-Frank Act, RFA section 604(a)(6) requires that the FRFA include a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

A. Statement of the need for, and objectives of, the rule

As discussed in part I above, section 1071 of the Dodd-Frank Act amended ECOA to require that financial institutions collect and report to the Bureau certain data regarding applications for credit for women-owned, minority-owned, and small businesses.[971] Section 1071's statutory purposes are (1) to facilitate enforcement of fair lending laws, and (2) to enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Section 1071 specifies a number of data points that financial institutions are required to collect and report, and also provides authority for the Bureau to require any additional data that the Bureau determines would aid in fulfilling 1071's statutory purposes. Section 1071 also contains a number of other requirements, including those that address restricting the access of

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[970] 5 U.S.C. 603(a)(4).

[971] ECOA section 704B.

underwriters and other persons to certain data, publication of data, and the Bureau's discretion to modify or delete data prior to publication in order to advance a privacy interest.

As discussed throughout this document, Congress amended ECOA by adding section 1071, which directs the Bureau to adopt regulations governing the collection and reporting of small business lending data. Section 1071 directs the Bureau to prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to section 1071, and permits the Bureau to adopt exceptions to any requirement or to exempt financial institutions from the requirements of section 1071 as the Bureau deems necessary or appropriate to carry out the purposes of section 1071.

In addition, as discussed in part II above, currently available data on small business lending are fragmented, incomplete, and not standardized, making it difficult to make meaningful comparisons across products, financial institutions, and over time. This hinders attempts by policymakers and other stakeholders to understand the size, composition, and dynamics of the small business lending marketplace, including the interaction of supply and demand, as well as potentially problematic lending practices, gaps, or trends in funding that may be holding back some communities.[972]

Data collected under the final rule will constitute the largest and most comprehensive data in the United States on credit availability for small businesses. The data collection will also provide an unprecedented window into the small business lending market, and such transparency will benefit financial institutions covered by the rule. The public data published under the final rule will allow financial institutions to better understand the demand for small business credit products and the conditions under which they are being supplied by other lenders. Lenders will likely use the data to understand small business lending market conditions more effectively and at a more granular level than is possible with existing data sources, such as Call Reports, data

[972] While Call Report and CRA data provide some indication of the level of supply of small business credit, the lack of data on small business credit applications makes demand for credit by small businesses more difficult to assess, including with respect to local markets or protected classes.

from public lending programs, or privately purchased data. Data collected under the final rule will enable lenders to identify promising opportunities to extend credit to small businesses.

The final rule will also provide some reduction of the compliance burden of fair lending reviews for lower risk financial institutions by reducing the "false positive" rates during fair lending review prioritization by regulators. Currently, financial institutions are subject to fair lending reviews by regulators to ensure that they are complying with ECOA in their small business lending. Data reported under the final rule will allow regulators to prioritize fair lending reviews of lenders with higher risk of potential fair lending violations, which reduces the burden on institutions with lower fair lending risk.

The final rule effectuates Congress's specific mandate to the Bureau to adopt rules to implement section 1071. For a further description of the reasons why agency action is being considered, see the background discussion for the final rule in part II above.

This rulemaking has multiple objectives. The final rule is intended to advance the two statutory purposes of section 1071, which are (1) facilitating enforcement of fair lending laws and (2) enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses. To achieve these objectives, the rule will require covered financial institutions to collect and report certain data on applications for covered credit transactions for small businesses, including minority-owned, women-owned, and LGBTQI+-owned small businesses. The data to be collected and reported will include a number of statutorily required data fields regarding small business applications, as well as several additional data fields that the Bureau determined will help fulfill the purposes of section 1071. The Bureau will make available to the public, annually on the Bureau's website, the data submitted to it by financial institutions, subject to deletions or modifications made by the Bureau if the Bureau determines that such deletions or modifications would advance a privacy interest.

B. Statement of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a statement of the assessment of the agency of such issues, and a statement of any changes made to the proposed rule in the final rule as a result of such comments

In accordance with section 603(a) of the RFA, the Bureau prepared an IRFA. In the IRFA, the Bureau estimated the possible compliance cost for small entities with respect to a pre-statute baseline. Additionally, the IRFA discussed possible impacts on small entities, such as small businesses to whom lenders provide credit.

Very few commenters specifically address the IRFA included in the proposal. Comments made by the SBA Office of Advocacy related to the estimates included in the IRFA are addressed below in part X.B.3. A comprehensive discussion of comments that relate to parts of the regulatory flexibility analysis can be found throughout part IX above. This section addresses specific significant comments that affects the FRFA analysis.

Commenters provided feedback on the overall magnitudes of the one-time and ongoing cost estimates, which form a core part of the IRFA analysis. Some industry commenters provided their own estimates of either their institution's specific one-time or ongoing costs. With respect to one-time costs, the Bureau has reviewed estimates and considered the information provided by the commenters, together with the existing evidence provided in the One-Time Cost Survey. The Bureau considers most estimates provided by commenters as broadly consistent with the Bureau's one-time cost estimates. With respect to ongoing costs, industry commenters' estimates ranged from estimates that were quite similar to the Bureau's estimate for institutions of similar small business credit volume to estimates that were considerably higher than the Bureau's estimates. The Bureau has reviewed these estimates and considered the information provided by the commenters.

Many industry commenters claimed a need to hire additional staff, both with respect to the one-time cost of implementing the rule and the ongoing cost of reporting 1071 data annually.

Many provided estimates of the additional FTEs that the institution would have to hire to comply with the proposed rule. These estimates ranged from one additional FTE to up to 10 additional FTEs. A survey of community banks by a national trade association found that 88 percent of respondents would need to hire an additional FTE and, on average, institutions would have to hire 2-3 FTEs. Several commenters asserted that the hiring of additional staff alone showed that the Bureau's one-time and ongoing cost estimates in the proposal were inadequate. In the ongoing costs estimates of the Bureau's proposal, the Bureau calculated the number of hours required to be spent on 1071-related tasks, without distinguishing between existing or newly-hired staff. The Bureau assumes that the time spent on 1071-related tasks necessarily takes time away from otherwise profitable activity to which the hours would be put in the rule's absence. Since the Bureau is accounting for time spent in this way, the Bureau believes that its estimates account for the additional staff activity required to be spent to collect, check, and report data under the final rule. For this reason, the Bureau did not change any staffing time estimates, with exceptions mentioned below.

However, hiring additional FTEs would lead some institutions to incur fixed one-time costs of hiring, including search, administrative burden, and additional training, that they would not have incurred in the absence of the final rule. The Bureau categorizes this type of cost as a one-time cost, where the institution staffs up to be able to comply with the rule. So, while the Bureau has not changed ongoing costs estimates with respect to staff hours, it is incorporating the fixed cost of hiring new staff in its estimation of one-time costs.

Several commenters also suggested that the specific ongoing costs for training staff were too low in the proposal. As described in the proposal, the Bureau received similar comments during the SBREFA process, but wished to learn additional information through comments on the proposed rule to better estimate the cost of training. Several institutions provided specific annual costs of training employees or estimates of the overall employee time expected to be

required to comply with the final rule. Others more generally described the need to train more staff than just loan officers, but also administrative and other staff.

The Bureau's ongoing cost estimates only reflected the assumed training time required to train loan officers that directly handle the underwriting process. The Bureau decided, based on the comments to the proposed rule, to double the amount of assumed training hours required on an annual basis to account for the additional staff that would have to be trained on an annual basis besides simply the loan officers. The estimates in this final rule reflect the doubling of annual training hours.

C. Response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments

SBA Office of Advocacy provided a formal comment letter to the Bureau in response to the proposed rule. This letter expressed concerns that the Bureau underestimated the costs of the proposed rule, that the Bureau did not adequately consider the scope of coverage, and that the Bureau additionally underestimated the effect of the proposed rule on the cost of credit to small entities. Additionally, SBA Office of Advocacy provided specific feedback related to certain provisions of the proposed rule, which are addressed below.

Comments related to the Bureau's cost estimates. SBA Office of Advocacy asserted that the Bureau's estimated costs of compliance in the proposal were too low, arguing, specifically, that training costs were too low and stated that the Bureau had acknowledged that small entity representatives, during the SBREFA process, had noted that the Bureau's training costs might be low because they did not account for enough staff being trained. Regarding these training costs, the Bureau notes that, as SBA Office of Advocacy observed, the proposal identified the feedback from small entity representatives that the training costs might be underestimated. In part VIII.F.3 of the proposal the Bureau sought comments on the training and other estimates to inform the ongoing cost estimation. As noted in part IX.F above, the Bureau has increased its estimates of

training costs in response to SBA Office of Advocacy and other comments to account for additional staff that would need to be trained on an ongoing basis.

SBA Office of Advocacy expressed concerns that the Bureau has underestimated the one-time costs, specifically with regard to training costs. As noted in the above methods (part IX.E) and estimations (part IX.F) discussions, the Bureau estimated one-time costs from the Bureau's One-Time Cost Survey, which was conducted of industry participants potentially subject to the Bureau's rule implementing section 1071. The Bureau's Tables 14 through 16 provide averages of survey responses. To obtain final estimates, the Bureau combined this information with relevant information from comments on the proposal. The Bureau reviewed and considered comments on the cost estimates included in its proposal.

SBA Office of Advocacy also asserted that the Bureau underestimated the pass through of compliance costs to small businesses in the form of rates and fees. SBA Office of Advocacy also asserted that, because institutions could charge an application fee, the fee may be a disincentive for small businesses to shop for a better priced loan, and therefore the overall cost of credit may be higher than indicated.

Regarding these comments on the pass through of costs, the Bureau notes in part IX.F.4 above that it expects the variable portion of ongoing costs to be passed on to small business credit borrowers in the form of higher interest rates and fees. It made this determination from the results to its One-Time Cost Survey, economic theory, and comments on the proposed rule. Additionally, lenders presently have the ability to charge applicants application fees, something that the potential increase in fees from compliance costs associated with this final rule does not change.

Comments related to other aspects of the proposed rule. In the section-by-section analysis of the final rule in part V above, the Bureau has responded to the SBA Office of Advocacy's comments concerning a number of topics in the proposed rule, including the definition of financial institution, the small business definition, the coverage of automobile

dealers, the data points generally, the proposed visual observation and surname requirement related to applicants' demographic information, data points adopted pursuant to ECOA section 704B(e)(2)(H), and the compliance date of the rule. SBA Office of Advocacy's comments and the Bureau's responses on these topics are summarized below.

Scope of coverage/definition of financial institution. Initially, SBA Office of Advocacy expressed concern about the scope of coverage, particularly as related to who would be a covered financial institution required to collect and report 1071 data. SBA Office of Advocacy argued that the proposed 25-origination threshold may be too low, and that the Bureau has not analyzed the data fully to determine whether a higher threshold would garner an appropriate amount of information to fulfill the purposes of section 1071. SBA Office of Advocacy further urged the Bureau to consider additional alternative thresholds, and supplement its analysis, including 50-, 100-, 200- and 500- origination threshold alternatives. In the final rule, the Bureau has increased the institutional coverage threshold from 25 to 100 originations annually to address industry concerns regarding the impact on the smallest financial institutions. Smaller lenders play an integral role in lending to parts of the small business sector and the Bureau does not want to risk disruption to this sector, which would run contrary to the business and community development purpose of section 1071. The Bureau also considered higher thresholds, but believes that raising the threshold further would undermine the purposes of section 1071.

Definition of small business. Next, SBA Office of Advocacy commended the Bureau for proposing an alternative size standard to SBA's approach to defining a small business, noting prior feedback concerning the need for a simpler definition that is easy for small business applicants to understand and financial institutions to implement. However, SBA Office of Advocacy noted concern from stakeholders that the $5 million gross annual revenue threshold may be too high for small financial institutions to implement and may cause some of those entities to forgo making business loans. SBA Office of Advocacy urged the Bureau to analyze other possible thresholds at a lower amount that would garner sufficient data, without the risk of

smaller banks discontinuing business loans. Although the Bureau considered different threshold amounts and different size standards, it believes that a $5 million gross annual revenue threshold strikes the right balance in terms of broadly covering the small business credit market to fulfill section 1071's statutory purposes while meeting the SBA's criteria for an alternative size standard. The final rule also anticipates updates to this threshold every five years to account for inflation.

Data points—collection of ethnicity and race via visual observation or surname, and data points adopted pursuant to ECOA section 704B(e)(2)(H). SBA Office of Advocacy raised two concerns related to data points required to be collected under section 1071. First, SBA Office of Advocacy argued that the requirement in the proposed rule to collect ethnicity and race information based on visual observation or surname should be removed. SBA Office of Advocacy reiterated concerns expressed during the SBREFA panel about a visual observation requirement. SBA Office of Advocacy further argued that data collected through visual observation or surname could be corrupted by bias or other forms of discrimination, and would therefore be in opposition to the intent of section 1071. They further stated that even well trained and well-motivated financial institutions could make wrong assumptions and taint the quality of the data. After considering the issue further as explained in the section-by-section analysis of § 1002.107(a)(19) above, the final rule does not include a requirement to collect applicant demographic information based on visual observation or surname.

Second, SBA Office of Advocacy urged the Bureau to remove from the rule all data points proposed pursuant to its statutory authority set forth in ECOA section 704B(e)(2)(H), arguing that such data points are not required by section 1071, are costly, and potentially raise privacy concerns. SBA Office of Advocacy noted that these data points could be reverse engineered to determine what businesses were denied credit, particularly in small communities. They focused particularly on pricing data, asserting that these data would be costly and could damage the reputation of the institution by creating unjustified inferences that pricing disparities

are due to fair lending violations. The Bureau believes that pricing and the other data points provide valuable information that furthers the dual purposes of section 1071. The Bureau believes that any risks to privacy interests can be addressed through modifications or deletions to public, application-level data, as appropriate.

Next, SBA Office of Advocacy urged the Bureau to work with small automobile dealers to make the direct and indirect impacts of the rulemaking as least burdensome as possible. SBA Office of Advocacy stated that dealers may either directly issue credit or, as noted by a trade association, in many cases, act as intermediaries between buyers and financial institutions, and in those roles may be asked to support financial institutions' compliance with the rule. The Bureau's rule does not apply to motor vehicle dealers.[973] The Bureau has also made revisions to the rule's provisions addressing reporting obligations when multiple financial institutions are involved in originating a single covered credit transaction, which the Bureau believes will provide greater clarity to motor vehicle dealers and the covered financial institutions that work with them, as well as to other covered financial institutions that originate covered credit transactions for small businesses through third parties. In addition, the Bureau has sought to reduce burden on small covered financial institutions through many provisions in the final rule, including, for example, by issuing a sample data collection form that institutions can use to collect protected demographic data from applicants. Finally, SBA Office of Advocacy encouraged the Bureau to consider an implementation period of three years or longer for the rule, rather than 18 months as proposed. SBA Office of Advocacy reiterated feedback from a roundtable session it held that an 18-month compliance period would not be sufficient, and it may take up to three years for small financial institutions to comply. They noted that unlike HMDA, financial institutions are not building off a system already in place, and instead need to develop new systems. SBA Office of Advocacy also reiterated feedback during the SBREFA

[973] The Bureau's rules, including this final rule to implement section 1071, generally do not apply to motor vehicle dealers, as defined in section 1029(f)(2) of the Dodd-Frank Act, that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both. 12 U.S.C. 5519.

process that supported a two- to three-year implementation period. The Bureau is adopting a tiered compliance date schedule because it believes that smaller and mid-sized lenders would have particular difficulties complying within the single 18-month compliance period proposed in the NPRM. Compliance with the rule beginning October 1, 2024 is required for financial institutions that originate the most covered credit transactions for small businesses. However, institutions with a moderate transaction volume have until April 1, 2025 to begin complying with the rule, and those with the lowest volume have until January 1, 2026.[974] The Bureau believes that approximately 90 percent of all covered financial institutions that are themselves "small" under the SBA's size standards will fall under the latest compliance date, giving them nearly three years to prepare for compliance with the Bureau's final rule.

D. Description of and an estimate of the number of small entities to which the rule will apply

For the purposes of assessing the impacts of the final rule on small entities, "small entities" is defined in the RFA to include small businesses, small nonprofit organizations, and small government jurisdictions.[975] A "small business" is determined by application of SBA regulations in reference to the North American Industry Classification System (NAICS) classification and size standards.[976] Under such standards, the Bureau identified several categories of small entities that may be subject to the proposed provisions: depository institutions; online lenders and merchant cash advance providers; commercial finance companies; nondepository CDFIs; Farm Credit System members; and governmental lending entities. The NAICS codes covered by these categories are described below.

The following table provides the Bureau's estimate of the number and types of entities that may be affected by the proposed rule:

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[974] The Bureau estimates that most small depository institutions will fall into Tier 3 and will be required to begin complying with the final rule in 2026.

[975] 5 U.S.C. 601(6).

[976] The current SBA size standards are found on the SBA's website, Small Bus. Admin., *Table of size standards* (Mar. 17, 2023), https://www.sba.gov/document/support-table-size-standards.

Table 19: Estimated number of affected entities and small entities by category

Category	NAICS	Small Entity Threshold	Est. Total Covered Financial Institutions	Est. Number of Small Financial Institutions
Depository Institutions	522110, 522180, 522130, 522210	$850 million in assets	1,900	1,000
Online Lenders and Merchant Cash Advance Providers	522299, 522291, 522320, 518210	$40 million (NAICS 518210); $47 million (NAICS 522299, 522291, 522320)	100	90
Commercial Finance Companies	513210, 532411, 532490, 522220, 522291	$47 million (NAICS 513210, 522220, 522291); $40 million (NAICS 532490); $45.5 million (NAICS 532411)	240	216
Nondepository CDFIs	522390, 523910, 813410, 522310	$9.5 million (NAICS 813410); $15 million (NAICS 522310); $47 million (NAICS 523910, 522390)	139	132
Farm Credit System members	522299	$47 million	71	31
Governmental Lending Entities	NA	Population below 50,000	70	0

The following paragraphs describe the categories of entities that the Bureau expects would be affected by the final rule.

Depository institutions (banks and credit unions): The Bureau estimates that there are about 1,900 banks, savings associations, and credit unions engaged in small business lending that originate enough covered transactions to be covered by the final rule.[977] These companies potentially fall into four different industry categories, including "Commercial Banking" (NAICS 522110), "Savings Institutions" (NAICS 522120), "Credit Unions" (NAICS 522130), and "Credit Card Issuing" (NAICS 522210). All of these industries have a size standard threshold of $850 million in assets. The Bureau estimates that about 1,000 of these institutions are small

[977] The Bureau notes that the category of depository institutions also includes CDFIs that are also depository institutions.

entities according to this threshold. See part IX.D above for more detail on how the Bureau arrived at these estimates.

Online lenders and merchant cash advance providers: As discussed in more detail in part II.D above, the Bureau estimates that there are about 100 fintech lenders and merchant cash advance providers engaged in small business lending that originate enough covered transactions to be covered by the final rule. These companies span multiple industries, including "All Other Nondepository Credit Intermediation" (NAICS 522298), "Consumer Lending" (NAICS 522291), "Financial Transactions, Processing, Reserve, and Clearinghouse Activities" (NAICS 522320), and "Data Processing, Housing and Related Services" (NAICS 518210). All of these industries have a size standard threshold of $40 million in sales (NAICS 518210) or $47 million in sales (all other NAICS). The Bureau assumes that about 90 percent, or 90, of these entities are small according to these size standards.

Commercial finance companies: As discussed in more detail in part II.D above, the Bureau estimates that there are about 240 commercial finance companies, including captive and independent financing, engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. These companies span multiple industries, including "Software Publishers" (NAICS 513210), "Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing" (NAICS 532411), "Other Commercial and Industrial Machinery and Equipment Rental and Leasing" (NAICS 532490), "Sales financing" (NAICS 522220) and "Consumer Lending" (NAICS 522291). These industries have size standard thresholds of $47 million in sales (NAICS 513210, 522220, 522291), $45.5 million in sales (NAICS 532411), or $40 million in sales (NAICS 532490). The Bureau assumes that about 90 percent, or 216, commercial finance companies are small according to these size standards.

Nondepository CDFIs: As discussed in more detail in part II.D above, the Bureau estimates that there are 139 nondepository CDFIs engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. CDFIs generally fall

into "Activities Related to Credit Intermediation (Including Loan Brokers)" (NAICS 522390), "Miscellaneous Intermediation" (NAICS 523910), "Civic and Social Organizations" (NAICS 813410), and "Mortgage and Nonmortgage Loan Brokers" (NAICS 522310). These industries have size standard thresholds of $9.5 million in sales (NAICS 813410), $15 million in sales (NAICS 522310), and $47 million in sales (NAICS 522390, 523910). The Bureau assumes that about 95 percent, or 132, nondepository CDFIs are small entities.

Farm Credit System members: The Bureau estimates that there are 71 members of the Farm Credit System (banks and associations) that are engaged in small business lending and that originate enough covered credit transactions to be covered by the final rule.[978] These institutions are in the "International, Secondary Market, and All Other Credit Intermediation" (NAICS 522299) industry. The size standard for this industry is $47 million in sales. The Bureau estimates that 18 members of the Farm Credit System are small entities.

Governmental lending entities: As discussed in more detail in part II.D above, the Bureau estimates that there are about 70 governmental lending entities engaged in small business lending that originate enough covered credit transactions to be covered by the final rule. "Small governmental jurisdictions" are the governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand. The Bureau assumes that none of the governmental lending entities covered by the final rule are considered small.

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[978] Fed. Farm Credit Banks Funding Corp., *Farm Credit 2019 Annual Information Statement of the Farm Credit System*, at 7 (Feb. 28, 2020), https://www.farmcreditfunding.com/ffcb_live/serve/public/pressre/finin/report.pdf?assetId=395570. The Bureau notes that Farm Credit System banks do not report FFIEC Call Reports and are thus not counted in the number of banks and savings associations discussed above. To estimate the number of small Farm Credit System members, the Bureau considered FCA Call Reports and Young, Beginning, and Small Farmers Reports for all Farm Credit System members as of December 31, 2019. The reports can be found at https://reports.fca.gov/CRS/. A Farm Credit System is covered if it reported more than 100 total number of loans on its Young, Beginning, and Small Farmers Report in 2019. A Farm Credit System member is considered small if its net interest income plus total non-interest income is less than $41.5 million.

E. Projected reporting, recordkeeping, and other compliance requirements of the final rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record

Reporting requirements. ECOA section 704B(f)(1) provides that "[t]he data required to be compiled and maintained under [section 1071] by any financial institution shall be submitted annually to the Bureau." Section 1071 requires financial institutions to collect and report information regarding any application for "credit" made by women-owned, minority-owned, and small businesses. In its rule to implement section 1071, the Bureau is not covering the following transactions: leases, factoring, consumer-designated credit used for business purposes, HMDA-reportable transactions, insurance premium financing, trade credit, public utilities credit, securities credit, and incidental credit.

Under the final rule, financial institutions would be required to report data on small business credit applications if they originated at least 100 covered transactions in each of the previous two calendar years. The Bureau is requiring that data collection occur on a calendar-year basis and submitted to the Bureau by the following June 1. Under the final rule, covered financial institutions are required to collect and report the following data points: (1) a unique identifier, (2) application date, (3) application method, (4) application recipient, (5) credit type, (6) credit purpose, (7) amount applied for, (8) amount approved or originated, (9) action taken, (10) action taken date, (11) denial reasons, (12) pricing information, (13) census tract, (14) gross annual revenue, (15) NAICS code, (16) number of workers, (17) time in business, (18) minority-owned business status, women-owned business status, and LGBTQI+-owned business status, (19) ethnicity, race, and sex of principal owners, and (20) the number of principal owners. The section-by-section analyses in part V above discuss the required data points and the scope of the final rule in greater detail.

Recordkeeping requirements. ECOA section 704B(f)(2)(A) requires that information compiled and maintained under section 1071 be "retained for not less than 3 years after the date

of preparation." The Bureau is requiring that financial institutions retain 1071 data for at least three years after it is submitted to the Bureau. In accordance with 704B(e)(3), the Bureau is also instituting a prohibition on including certain personally identifiable information about any individuals associated with small business applicants in the data that a financial institution is required to compile, maintain, and report to the Bureau, other than information specifically required to be collected and reported (such as the ethnicity, race, and sex of principal owners and whether the business is women-owned, minority-owned, or LGBTQI+-owned). Financial institutions must, unless subject to an exception, limit the access of certain officers and employees to applicants' responses to the inquiries regarding women-owned, minority-owned, and LGBTQI+-owned business status, as well as the ethnicity, race, and sex of principal owners. In addition, applicants' responses to the inquiries regarding women-owned, minority-owned, and LGBTQI+-owned business status, as well as the ethnicity, race, and sex of principal owners, must be maintained separately from the application and accompanying information.

Costs to small entities. The Bureau expects that the proposed rule may impose one-time and ongoing costs on small-entity providers of credit to small businesses. The Bureau has identified eight categories of one-time costs that make up the components necessary for a financial institution to develop the infrastructure to collect and report data required by the rule. Those categories are preparation/planning; updating computer systems; testing/validating systems; developing forms/applications; training staff and third parties (such as dealers and brokers); developing policies/procedures; legal/compliance review; and post-implementation review of compliance policies and procedures. The Bureau conducted a survey regarding potential one-time implementation costs for section 1071 compliance targeted at financial institutions who extend small business credit. The Bureau used the results of this survey to estimate the one-time costs for financial institutions covered by the proposed rule using the methodology described in part VIII.E.1 above. The Bureau estimates that depository institutions with the lowest level of complexity in compliance operations (*i.e.*, Type A DIs) would incur one-

time costs of $63,825, including expected hiring costs. The Bureau estimates that depository institutions with a middle level of complexity in compliance operations (*i.e.*, Type B DIs) would incur one-time costs of $49,225, including expected hiring costs. The Bureau estimates that depository institutions with the highest level of complexity in compliance operations (*i.e.*, Type C DIs) would incur one-time costs of $91,075, including expected hiring costs. Finally, the Bureau estimates that Non-DIs would incur one-time costs of $105,250, including the costs of hiring two additional staff.

The Bureau estimates that the overall market impact of one-time costs for small depository institutions will be between $56,000,000 and $67,000,000.[979] The Bureau estimates that the overall market impact of one-time costs for Non-DIs will be about $45,000,000.

Adapting ongoing cost methodology from previous HMDA rulemaking efforts, the Bureau identified 15 specific data collection and reporting activities that would impose ongoing costs to financial institutions covered by the rule.[980] The Bureau estimates that representative financial institutions with the lowest level of complexity in compliance operations (*i.e.*, Type A FIs) would incur around $8,349 in total annual ongoing costs, or about $83 in total cost per application processed (assuming a representative 100 applications per year). For financial institutions of this type, the largest drivers of the ongoing costs are activities that require employee time to complete. Activities like transcribing data, transferring data to the data management software, standard edits and internal checks, and training all require loan officer time. The Bureau estimates that financial institutions with a middle level of complexity in compliance operations (*i.e.*, Type B FIs), which are somewhat automated, would incur approximately $40,079 in additional ongoing costs per year, or around $100 per application (assuming a representative 400 applications per year). The largest components of this ongoing

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[979] The Bureau notes that the variation in this range comes primarily from the uncertainty in the number of originations made by small banks and savings associations. The range does not fully account for the uncertainty associated with estimates of the one-time costs for each type of institution.

[980] The Bureau applied the same methodology for the ongoing costs for small entities as that found in part IX.E.2 above.

cost are the expenses of the small business application management software and geocoding software (in the form of an annual software subscription fee) and the external audit of the data. The Bureau estimates that financial institutions with the highest level of complexity in compliance operations (*i.e.*, Type C FIs), which are significantly automated, would incur approximately $278,618 in additional ongoing costs per year, or around $46 per application (assuming a representative 6,000 applications per year). The largest components of this ongoing cost are the cost of an internal audit, transcribing data, and annual edits and internal checks.

The Bureau estimates that the overall market impact of ongoing costs for small entities will be between $83,000,000 and $96,000,000 per year.

Estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for the preparation of the report or record. Section 603(b)(4) of the RFA also requires an estimate of the type of professional skills necessary for the preparation of the reports or records. The recordkeeping and compliance requirements of the final rule that would affect small entities are summarized above. Based on outreach with financial institutions, vendors, and governmental agency representatives, the Bureau classified the operational activities that financial institutions would likely use for section 1071 data collection and reporting into 15 operational "tasks" which can be further grouped into four "primary tasks." These are:

1. Data collection: Transcribing data, resolving reportability questions, and transferring data to a 1071 data management system.

2. Reporting and resubmission: Geocoding, standard annual edit and internal checks, researching questions, resolving question responses, checking post-submission edits, filing post-submission documents, and using vendor data management software.

3. Compliance and internal audits: Training, internal audits, and external audits.

4. Section 1071-related exams: Exam preparation and exam assistance.

All these tasks are related to the preparation of reports or records and most of them are performed by compliance personnel in the compliance department of financial institutions. For some financial institutions, however, the data intake and transcribing stage could involve loan officers or processors whose primary function is to evaluate or process loan applications. For example, at some financial institutions the loan officers would take in information from the applicant to complete the application and input that information into the reporting system. However, the Bureau believes that such roles generally do not require any additional professional skills related for the recordkeeping or other compliance requirements of this final rule that are not otherwise required during the ordinary course of business for small entities. The Bureau also notes that small nondepository institutions might not be subject to fair lending exams and might, therefore, have reduced costs.

The type of professional skills required for compliance varies depending on the particular task involved. For example, data transcribing requires data entry skills. Transferring data to a data entry system and using vendor data management software requires knowledge of computer systems and the ability to use them. Researching and resolving reportability questions requires a more complex understanding of the regulatory requirements and the details of the relevant line of business. Geocoding requires skills in using the geocoding software, web systems, or, in cases where geocoding is difficult, knowledge of the local area in which the property is located. Standard annual editing, internal checks, and post-submission editing require knowledge of the relevant data systems, data formats, and section 1071 regulatory requirements in addition to skills in quality control and assurance. Filing post-submission documents requires skills in information creation, dissemination, and communication. Training, internal audits, and external audits require communications skills, educational skills, and regulatory knowledge. Section 1071-related exam preparation and exam assistance involve knowledge of regulatory requirements, the relevant line of business, and the relevant data systems.

The Standard Occupational Classification code has compliance officers listed under code 13–1041. The Bureau believes that most of the skills required for preparation of the reports or records related to this rule are the skills required for job functions performed in this occupation. However, the Bureau recognizes that under this general occupational code there is a high level of heterogeneity in the type of skills required as well as the corresponding labor costs incurred by the financial institutions performing these functions. During the SBREFA process, some small entity representatives noted that, for instance, high-level corporate officers such as CEOs and senior vice presidents could be directly involved in some regulatory tasks. The Bureau acknowledges the possibility that certain aspects of the final rule may require some small entities to hire additional compliance staff. The Bureau received many comments on its proposal that asserted that industry participants would have to hire additional employees to comply with the rule. The Bureau made changes to its estimates of one-time costs to reflect the additional one-time cost of hiring new staff. Compliance with the final rule may emphasize certain skills. For example, new data points may increase demand for skills involved in researching questions, standard annual editing, and post- submission editing. Nevertheless, the Bureau believes that compliance would still involve the general set of skills identified above. The recordkeeping and reporting requirements associated with the final rule would also involve skills for information technology system development, integration, and maintenance. Financial institutions required to report data under HMDA often use data management systems called HMDA Management Systems for existing regulatory purposes. A similar software for reporting the data required under the final rule could be developed by the institution internally or purchased from a third-party vendor. It is possible that other systems used by financial institutions, such as loan origination systems, might also need to be upgraded to capture new data fields required to be collected and reported under the final rule. The professional skills required for this one-time upgrade would be related to software development, testing, system engineering, information technology project management, budgeting and operation.

F. Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected; and for a covered agency, as defined in section 609(d)(2), a description of the steps the agency has taken to minimize any additional cost of credit for small entities.

In drafting this final rule, the Bureau considered multiple financial institution reporting thresholds. In particular, the Bureau considered whether to exempt financial institutions with fewer than 25, 50, 200, or 500 originations of covered credit transactions for small businesses in each of the two preceding calendar years, instead of 100 originations as finalized. The Bureau also considered whether to exempt depository institutions with assets under $100 million or $200 million from section 1071's data collection and reporting requirements. The Bureau expects that some burden reduction will result from the higher threshold of 100 loans.

The following table shows the estimated impact that different reporting thresholds the Bureau considered would have had on financial institution coverage. For the purposes of considering the asset-based threshold alternatives, the Bureau estimates how institutional coverage and costs would be different if the Bureau required a 25-origination threshold in addition to an asset-based threshold for depository institutions. For the asset-based threshold alternatives, the Bureau assumes that the alternative proposal would have been that a depository institution would be required to report its small business lending activity for 2019 if it had more than 25 originations in both 2017 and 2018 and had assets over the asset-based threshold on December 31, 2018. The Bureau further assumes that if two institutions merged in 2019 then the resulting institution would be required to report if the sum of the separate institutions' assets on December 31, 2018 exceeded the asset-based threshold.

Table 20: Estimated impact of different reporting thresholds on the number and percentage of small depository institutions covered

Threshold considered	# of small depository institutions covered	% of small depository institutions covered
25 originations	2,900 – 3,000	32% – 33%
50 originations	1,900 – 2,100	21% – 23%
100 originations	1,000 – 1,100	11% – 12%
200 originations	400 – 500	4% – 6%
500 originations	50 – 100	0.6% – 1%
25 originations AND $100 million in assets	2,400 – 2,500	26% – 28%
25 originations AND $200 million in assets	1,600 – 1,700	18% – 19%

Further, the Bureau is finalizing several data points pursuant to its authority under ECOA section 704B(e)(2)(H) that is has concluded would help the data collection fulfill the purposes of section 1071: application method, application recipient, pricing, number of principal owners, NAICS code, number of workers, and time in business.

During the SBREFA process, small entity representatives provided detailed feedback on the data points that the Bureau was considering proposing pursuant to ECOA section 704B(e)(2)(H).[981] One small entity representative stated that the cost of collecting and reporting such data points under consideration would be significant, and another stated that the Bureau should include as few data points as possible to avoid unnecessary costs. Another small entity representative stated that the Bureau should finalize a rule with just the data points enumerated in 704B(e)(2)(A) through (G) and avoid adding any additional data points. Other small entity representatives favored or opposed the inclusion of some or all of the individual data points under consideration during the SBREFA process. Many industry commenters and SBA Office of Advocacy opposed the collection of any data points pursuant to section 704B(e)(2)(H). These

[981] The small entity representative feedback discussed herein can be found in the SBREFA Panel Report at 30-32.

commenters stated that such data points would be burdensome to collect and report, while some, particularly the pricing data point, could be subject to misinterpretation by data users.

The Bureau understands that certain data points may introduce additional burden to small entities. However, the Bureau has determined that these data points would aid in fulfilling the statutory purposes of section 1071—facilitating enforcement of fair lending laws and enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

Three types of costs (one-time, fixed ongoing, and variable ongoing) have the potential to influence the price and availability of credit to small businesses. In a competitive marketplace, standard microeconomics suggests that lenders will extend loans up to the point at which the value of granting an additional loan is equal to the additional cost associated with the financial institution providing the loan. One-time costs and fixed ongoing costs affect the overall profitability of a lender's loan portfolio but do not affect the profitability of extending an additional loan. Variable ongoing costs, however, affect the profitability of each additional loan and will influence the number of loans a lender provides. Based on the Bureau's available evidence, it expects that the variable ongoing costs to comply with the proposed rule will be passed on in full to small business credit applicants in the form of higher prices or fees to small businesses.

In the One-Time Cost Survey, the Bureau asked respondents to rank a list of potential actions they may take in response to the compliance costs of implementing section 1071.[982] Respondents ranked the following list: "Raise rates or fees on small business products"; "Raise rates/fees on other credit products"; "Accept lower profits"; "Exit some geographic markets"; "Tighten underwriting standards"; "Offer fewer or less complex products"; "No longer offer small business credit products"; or "Other" with two write-in options. Respondents ranked these

[982] *See* One-Time Cost Survey at 11.

options from "1" to "9" indicating their most to least likely responses. Respondents also had the opportunity to write in their own responses. Consistent with economic theory, respondents reported that they would be most likely to raise rates or fees on small business products and other credit products. On average, respondents reported that they would be least likely to exit some geographic markets or cease offering small business credit products. Accordingly, the Bureau expects the likely impact of the rule on the cost of credit to small entities to be higher rates and fees because financial institutions pass on the variable ongoing costs of the required data collection. The Bureau estimates that $32, $26, and $7.50 in variable costs would be passed through per application to Type A, B, and C FIs, respectively. To put these values in context, the Bureau estimates that the per application net income is in a range of $66,000-$83,000; $33,000-$38,000; and $83,000-$92,000 for covered banks and savings associations of Types A, B, and C, respectively.

The Bureau also carefully considered the rule's potential impact on small entities in its decision related to transactional scope. For example, the Bureau is not covering trade credit in its 1071 final rule because it believes that trade credit is categorically different from products like loans, lines of credit, credit cards, and merchant cash advances and that there are several reasons to exclude it from coverage. As discussed in the section-by-section analysis of § 1002.104(b)(1), one such reason is that the Bureau understands that trade credit can be offered by entities that are themselves very small businesses; these entities, in particular, may incur large costs relative to their size to collect and report 1071 data in an accurate and consistent manner.[983] The Bureau is also adding new § 1002.104(b)(5) to exclude all HMDA reportable transactions (*i.e.*, covered loans as defined by Regulation C, 12 CFR 1003.2(e)). The Bureau is finalizing this exclusion of HMDA-reportable transactions in order to alleviate concerns from a broad range of industry

[983] *See* Leora Klapper *et al.*, *Trade Credit Contracts*, 25(3) Review of Fin. Studies 838-67 (2012), https://academic.oup.com/rfs/article/25/3/838/1616515, and Justin Murfin & Ken Njoroge, *The Implicit Costs of Trade Credit Borrowing by Large Firms*, 28(1) Review of Fin. Studies 112-45 (2015) https://academic.oup.com/rfs/article/28/1/112/1681329.

commenters, including small entities, about the difficulties associated with dual reporting, particularly in light of potential inconsistences related to demographic data collection and recordkeeping. Moreover, the final rule makes clear that the term covered credit transaction does not include consumer-designated credit used for business or agricultural purposes, because such transactions are not business credit. The Bureau believes that this interpretation will reduce burden for financial institutions (including smaller ones) that offer only consumer-designated credit.

In response to the suggestion to exempt agricultural lending because of the impact on small local community financial institutions, such as credit unions, the Bureau is not defining a "covered credit transaction" in a way that would exclude agricultural credit from the final rule. As detailed in the section-by-section analysis of § 1002.104(a), the Bureau believes that covering agricultural credit in this rulemaking is important for both of section 1071's statutory purposes. The Bureau does note, however, that it is increasing its institutional coverage threshold, as discussed above, to minimize compliance costs for smaller financial institutions with lower lending volumes.

The Bureau believes that its adoption of a simplified small business definition better meets the needs of small entities. The final rule provides that a business is a small business if its gross annual revenue for its preceding fiscal year is $5 million or less. As discussed in the section-by-section analysis of § 1002.106(b)(1), the Bureau believes that this approach addresses the concerns that the Bureau has heard (during the SBREFA process and in response to the NPRM) with respect to determining whether applicants are small businesses for purposes of complying with section 1071, particularly with respect to the concerns regarding determining the applicant's NAICS code.

XI. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA),[984] Federal agencies are generally required to seek approval from the Office of Management and Budget (OMB) for information collection requirements prior to implementation. Under the PRA, the Bureau may not conduct nor sponsor, and, notwithstanding any other provision of law, a person is not required to respond to, an information collection unless the information collection displays a valid control number assigned by OMB.

As part of its continuing effort to reduce paperwork and respondent burden, the Bureau conducted a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the information collection requirements in accordance with the PRA. This helps ensure that the public understands the Bureau's requirements or instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, information collection instruments are clearly understood, and the Bureau can properly assess the impact of information collection requirements on respondents. The Bureau conducted several rounds of message, form, and user testing that were approved under OMB control number 3170-0022 after appropriate public notice and a 30-day comment period.

The final rule amends 12 CFR part 1002 (Regulation B), which implements ECOA. The Bureau's OMB control number for Regulation B is 3170-0013. This final rule will revise the information collection requirements contained in Regulation B that OMB has approved under that OMB control number.

Under the rule, the Bureau adds four information collection requirements to Regulation B:

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[984] 44 U.S.C. 3501 *et seq.*

1. Compilation of reportable data (§ 1002.107), including a notice requirement (in § 1002.107(a)(18) and (19)).

2. Reporting data to the Bureau (§ 1002.109).

3. Firewall notice requirement (§ 1002.108(d)).

4. Recordkeeping (§ 1002.111).

The information collection requirements in this final rule are mandatory. Certain data fields will be modified or deleted by the Bureau, in its discretion, to advance a privacy interest before the 1071 data are made available to the public (as permitted by section 1071 and the Bureau's final rule). The data that are not modified or deleted will be made available to the public. The rest of the data will be considered confidential if the information:

- Identifies any applicants or natural persons who might not be applicants (*e.g.*, owners of a business where a legal entity is the applicant); or
- Implicates the relevant privacy interests of applicants, related natural persons, or financial institutions.

The collections of information contained in this rule, and identified as such, have been submitted to OMB for review under section 3507(d) of the PRA. A complete description of the information collection requirements (including the burden estimate methods) is provided in the information collection request that the Bureau has submitted to OMB under the requirements of the PRA. The information collection request submitted to OMB requesting approval under the PRA for the information collection requirements contained herein is available at *www.regulations.gov* as well as on OMB's public-facing docket at *www.reginfo.gov*.

Title of Collection: Regulation B: Equal Credit Opportunity Act.

OMB Control Number: 3170-0013.

Type of Review: Revision of a currently approved collection.

Affected Public: Private Sector; Federal and State Governments.

Estimated Number of Respondents: 2,470 (subpart B only).

Estimated Total Annual Burden Hours: 8,302,000 (subpart B only).

The Bureau will publish a separate *Federal Register* notice once OMB concludes its review announcing OMB approval of the information collections contained in this final rule.

In the NPRM, the Bureau invited comments on: (a) Whether the collection of information is necessary for the proper performance of the functions of the Bureau, including whether the information will have practical utility; (b) the accuracy of the Bureau's estimate of the burden of the collection of information, including the validity of the methods and the assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

No comments pertaining specifically to this section were received. The other comments on the rule generally are summarized above.

XII. Congressional Review Act

Pursuant to the Congressional Review Act,[985] the Bureau will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States at least 60 days prior to the rule's published effective date. The Office of Information and Regulatory Affairs has designated this rule as a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 12 CFR Part 1002

Banks, banking, Civil rights, Consumer protection, Credit, Credit unions, Marital status discrimination, National banks, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau amends Regulation B, 12 CFR part 1002, as set forth below:

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[985] 5 U.S.C. 801 *et seq.*

PART 1002—EQUAL CREDIT OPPORTUNITY ACT (REGULATION B)

1. The authority citation for part 1002 is revised to read as follows:

Authority: 12 U.S.C. 5512, 5581; 15 U.S.C. 1691b. Subpart B is also issued under 15 U.S.C. 1691c-2.

2. Designate §§ 1002.1 through 1002.16 as subpart A under the following heading:

SUBPART A—GENERAL

§ 1002.1 [Amended]

3. In § 1002.1 amend the second sentence of paragraph (a) by removing the phrase "this part applies" and adding in its place "this subpart applies" .

4. Section 1002.2 is amended by revising the introductory text to read as follows:

§ 1002.2 Definitions.

For the purposes of this part, unless the context indicates otherwise or as otherwise defined in subpart B, the following definitions apply:

* * * * *

5. Section 1002.5 is amended by revising the introductory text of paragraph (a)(4) and adding paragraphs (a)(4)(vii) through (x) to read as follows:

§ 1002.5 Rules concerning requests for information.

(a) * * *

(4) *Other permissible collection of information*. Notwithstanding paragraph (b) of this section, a creditor may collect information under the following circumstances provided that the creditor collects the information in compliance with § 1002.107(a)(18) and (19) and accompanying commentary, or appendix B to 12 CFR part 1003, as applicable:

* * * * *

(vii) A creditor that was required to report small business lending data pursuant to § 1002.109 for any of the preceding five calendar years but is not currently a covered financial institution under § 1002.105(b) may collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding

whether an applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that application. Such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B of this part if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

(viii) A creditor that exceeded the loan-volume threshold in the first year of the two-year threshold period provided in § 1002.105(b) may, in the second year, collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107(a)(18) and (19), 1002.108, 1002.111, and 1002.112 for that application. Such a creditor is permitted, but not required, to report data to the Bureau collected pursuant to subpart B of this part if it complies with the requirements of subpart B as otherwise required for covered financial institutions pursuant to §§ 1002.109 and 1002.110.

(ix) A creditor that is not currently a covered financial institution under § 1002.105(b), and is not otherwise a creditor to which § 1002.5(a)(4)(vii) or (viii) applies, may collect information pursuant to subpart B of this part for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners for a transaction if it complies with the requirements for covered financial institutions pursuant to §§ 1002.107 through 1002.112 for that application.

(x) A creditor that is collecting information pursuant to subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section for covered applications from small businesses as defined in §§ 1002.103 and 1002.106(b) regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners may also collect that same information for any co-applicants provided that it also complies with the relevant requirements of subpart B of this part or as described in paragraphs (a)(4)(vii) through (ix) of this section with respect to those co-applicants.

* * * * *

6. Section 1002.12 is amended by revising paragraphs (b)(1) introductory text, (b)(2) introductory text, (b)(3), (4), and (5), and paragraph (b)(7) introductory text to read as follows:

§ 1002.12 Record retention.

* * * * *

(b) * * * (1) *Applications.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor notifies an applicant of action taken on an application or of incompleteness, the creditor shall retain in original form or a copy thereof:

* * * * *

(2) *Existing accounts.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor notifies an applicant of adverse action regarding an existing account, the creditor shall retain as to that account, in original form or a copy thereof:

* * * * *

(3) *Other applications.* For 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B of this part) after the date that a creditor receives an application for which the creditor is not required to comply with

the notification requirements of § 1002.9, the creditor shall retain all written or recorded information in its possession concerning the applicant, including any notation of action taken.

(4) *Enforcement proceedings and investigations.* A creditor shall retain the information beyond 25 months (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B) if the creditor has actual notice that it is under investigation or is subject to an enforcement proceeding for an alleged violation of the Act or this part, by the Attorney General of the United States or by an enforcement agency charged with monitoring that creditor's compliance with the Act and this part, or if it has been served with notice of an action filed pursuant to section 706 of the Act and § 1002.16 of this part. The creditor shall retain the information until final disposition of the matter, unless an earlier time is allowed by order of the agency or court.

(5) *Special rule for certain business credit applications.* With regard to a business that had gross revenues in excess of $1 million in its preceding fiscal year, or an extension of trade credit, credit incident to a factoring agreement, or other similar types of business credit, the creditor shall retain records for at least 60 days, except as otherwise provided for in subpart B, after notifying the applicant of the action taken. If within that time period the applicant requests in writing the reasons for adverse action or that records be retained, the creditor shall retain records for 12 months.

* * * * *

(7) *Prescreened solicitations.* For 25 months after the date on which an offer of credit is made to potential customers (12 months for business credit, except as provided in paragraph (b)(5) of this section or otherwise provided for in subpart B), the creditor shall retain in original form or a copy thereof:

* * * * *

7. Subpart B is added to read as follows:

SUBPART B—SMALL BUSINESS LENDING DATA COLLECTION

§ 1002.101 Authority, purpose, and scope.
§ 1002.102 Definitions.
§ 1002.103 Covered applications.
§ 1002.104 Covered credit transactions and excluded transactions.
§ 1002.105 Covered financial institutions and exempt institutions.
§ 1002.106 Business and small business.
§ 1002.107 Compilation of reportable data.
§ 1002.108 Firewall.
§ 1002.109 Reporting of data to the Bureau.
§ 1002.110 Publication of data and other disclosures.
§ 1002.111 Recordkeeping.
§ 1002.112 Enforcement.
§ 1002.113 Severability.
§ 1002.114 Effective date, compliance date, and special transitional rules.

SUBPART B—SMALL BUSINESS LENDING DATA COLLECTION

§ 1002.101 Authority, purpose, and scope.

(a) *Authority and scope.* This subpart to Regulation B is issued by the Bureau pursuant to section 704B of the Equal Credit Opportunity Act (15 U.S.C. 1691c-2). Except as otherwise provided herein, this subpart applies to covered financial institutions, as defined in § 1002.105(b), other than a person excluded from coverage of this part by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 2004 (2010).

(b) *Purpose.* This subpart implements section 704B of the Equal Credit Opportunity Act, which Congress intended:

(1) To facilitate enforcement of fair lending laws; and

(2) To enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.

§ 1002.102 Definitions.

In this subpart:

(a) *Affiliate* means, with respect to a financial institution, any company that controls, is controlled by, or is under common control with, another company, as set forth in the Bank

Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*). With respect to a business or an applicant, *affiliate* shall have the same meaning as in 13 CFR 121.103.

(b) *Applicant* means any person who requests or who has received an extension of business credit from a financial institution.

(c) *Business* is defined in § 1002.106(a).

(d) *Business credit* shall have the same meaning as in § 1002.2(g).

(e) *Closed-end credit transaction* means an extension of business credit that is not an open-end credit transaction under paragraph (n) of this section.

(f) *Covered application* is defined in § 1002.103.

(g) *Covered credit transaction* is defined in § 1002.104.

(h) *Covered financial institution* is defined in § 1002.105(b).

(i) *Credit* shall have the same meaning as in § 1002.2(j).

(j) *Financial institution* is defined in § 1002.105(a).

(k) *LGBTQI+ individual* includes an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex.

(l) *LGBTQI+-owned business* means a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.

(m) *Minority-owned business* means a business for which one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.

(n) *Open-end credit transaction* means an open-end credit plan as defined in Regulation Z, 12 CFR 1026.2(a)(20), but without regard to whether the credit is consumer credit, as defined in § 1026.2(a)(12), is extended by a creditor, as defined in § 1026.2(a)(17), or is extended to a consumer, as defined in § 1026.2(a)(11).

(o) *Principal owner* means an individual who directly owns 25 percent or more of the equity interests of a business.

(p) *Small business* is defined in § 1002.106(b).

(q) *Small business lending application register* or *register* means the data reported, or required to be reported, annually pursuant to § 1002.109.

(r) *State* shall have the same meaning as in § 1002.2(aa).

(s) *Women-owned business* means a business for which more than 50 percent of its ownership or control is held by one or more women, and more than 50 percent of its net profits or losses accrue to one or more women.

§ 1002.103 Covered applications.

(a) *Covered application*. Except as provided in paragraph (b) of this section, covered application means an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested.

(b) *Circumstances that are not covered applications*. A covered application does not include:

(1) Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts.

(2) Inquiries and prequalification requests.

§ 1002.104 Covered credit transactions and excluded transactions.

(a) *Covered credit transaction* means an extension of business credit that is not an excluded transaction under paragraph (b) of this section.

(b) *Excluded transactions*. The requirements of this subpart do not apply to:

(1) *Trade credit*. A financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services.

(2) *Home Mortgage* Disclosure *Act (HMDA)-reportable transactions*. A covered loan, or application therefor, as defined by Regulation C, 12 CFR 1003.2(e).

(3) *Insurance premium financing*. A financing arrangement wherein a business agrees to pay to a financial institution, in installments, the principal amount advanced by the financial institution to an insurer or insurance producer in payment of premium on the business's insurance contract or contracts, plus charges, and, as security for repayment, the business assigns to the financial institution certain rights, obligations, and/or considerations (such as the unearned premiums, accrued dividends, or loss payments) in its insurance contract or contracts. Insurance premium financing does not include the financing of insurance policy premiums obtained in connection with the financing of goods and services.

(4) *Public utilities credit*. Public utilities credit as defined in § 1002.3(a)(1).

(5) *Securities credit*. Securities credit as defined in § 1002.3(b)(1).

(6) *Incidental credit*. Incidental credit as defined in § 1002.3(c)(1), but without regard to whether the credit is consumer credit, as defined in § 1002.2(h).

§ 1002.105 Covered financial institutions and exempt institutions.

(a) *Financial institution* means any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.

(b) *Covered financial institution* means a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years.

§ 1002.106 Business and small business.

(a) *Business* has the same meaning as the term "business concern or concern" in 13 CFR 121.105.

(b) *Small business definition*—(1) *Small business* has 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 its gross annual revenue, as defined in § 1002.107(a)(14), for its preceding fiscal year is $5 million or less.

(2) *Inflation adjustment*. Every 5 years after January 1, 2025, the gross annual revenue threshold set forth in paragraph (b)(1) of this section shall adjust based on changes to the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics. Any adjustment that takes effect under this paragraph shall be rounded to the nearest multiple of $500,000. If an adjustment is to take effect, it will do so on January 1 of the following calendar year.

§ 1002.107 Compilation of reportable data.

(a) *Data format and itemization.* A covered financial institution shall compile and maintain data regarding covered applications from small businesses. The data shall be compiled in the manner prescribed herein and the Filing Instructions Guide for this subpart for the appropriate year. The data compiled shall include the items described in paragraphs (a)(1) through (20) of this section.

(1) *Unique identifier*. An alphanumeric identifier, starting with the legal entity identifier of the financial institution, unique within the financial institution to the specific covered application, and which can be used to identify and retrieve the specific file or files corresponding to the application for or extension of credit.

(2) *Application date*. The date the covered application was received or the date shown on a paper or electronic application form.

(3) *Application method*. The means by which the applicant submitted the covered application directly or indirectly to the financial institution.

(4) *Application recipient*. Whether the applicant submitted the covered application directly to the financial institution or its affiliate, or whether the applicant submitted the covered application indirectly to the financial institution via a third party.

(5) *Credit type*. The following information regarding the type of credit applied for or originated:

(i) *Credit product*. The credit product.

(ii) *Guarantees*. The type or types of guarantees that were obtained for an extension of credit, or that would have been obtained if the covered credit transaction were originated.

(iii) *Loan term*. The length of the loan term, in months, if applicable.

(6) *Credit purpose*. The purpose or purposes of the credit applied for or originated.

(7) *Amount applied for*. The initial amount of credit or the initial credit limit requested by the applicant.

(8) *Amount approved or originated*. (i) For an application for a closed-end credit transaction that is approved but not accepted, the amount approved by the financial institution; or

(ii) For a closed-end credit transaction that is originated, the amount of credit originated; or

(iii) For an application for an open-end credit transaction that is originated or approved but not accepted, the amount of the credit limit approved.

(9) *Action taken*. The action taken by the financial institution on the covered application, reported as originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete.

(10) *Action taken date*. The date of the action taken by the financial institution.

(11) *Denial reasons*. For denied applications, the principal reason or reasons the financial institution denied the covered application.

(12) *Pricing information*. The following information regarding the pricing of a covered credit transaction that is originated or approved but not accepted, as applicable:

(i) *Interest rate*. (A) If the interest rate is fixed, the interest rate that is or would be applicable to the covered credit transaction; or

(B) If the interest rate is adjustable, the margin, index value, initial rate period expressed in months (if applicable), and index name that is or would be applicable to the covered credit transaction;

(ii) *Total origination charges*. The total amount of all charges payable directly or indirectly by the applicant and imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit, expressed in dollars;

(iii) *Broker fees*. The total amount of all charges included in paragraph (a)(12)(ii) of this section that are fees paid by the applicant directly to a broker or to the financial institution for delivery to a broker, expressed in dollars;

(iv) *Initial annual charges*. The total amount of all non-interest charges that are scheduled to be imposed over the first annual period of the covered credit transaction, expressed in dollars;

(v) *Additional cost for merchant cash advances or other sales-based financing*. For a merchant cash advance or other sales-based financing transaction, the difference between the amount advanced and the amount to be repaid, expressed in dollars; and

(vi) *Prepayment penalties*. (A) Notwithstanding whether such a provision was in fact included, whether the financial institution could have included a charge to be imposed for paying all or part of the transaction's principal before the date on which the principal is due under the policies and procedures applicable to the covered credit transaction; and

(B) Notwithstanding the response to paragraph (a)(12)(vi)(A) of this section, whether the terms of the covered credit transaction do in fact include a charge imposed for paying all or part of the transaction's principal before the date on which the principal is due.

(13) *Census tract*. The census tract in which is located:

(i) The address or location where the proceeds of the credit applied for or originated will be or would have been principally applied; or

(ii) If the information in paragraph (a)(13)(i) of this section is unknown, the address or location of the main office or headquarters of the applicant; or

(iii) If the information in both paragraphs (a)(13)(i) and (ii) of this section is unknown, another address or location associated with the applicant.

(iv) The financial institution shall also indicate which one of the three types of addresses or locations listed in paragraphs (a)(13)(i), (ii), or (iii) of this section the census tract is based on.

(14) *Gross annual revenue*. The applicant's gross annual revenue for its preceding fiscal year.

(15) *NAICS code*. A 3-digit North American Industry Classification System (NAICS) code for the applicant.

(16) *Number of workers*. The number of non-owners working for the applicant.

(17) *Time in business*. The time the applicant has been in business.

(18) *Minority-owned, women-owned, and LGBTQI+-owned business statuses*. Whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides this information.

(19) *Ethnicity, race, and sex of principal owners*. The ethnicity, race, and sex of the applicant's principal owners. When requesting ethnicity, race, and sex information from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information.

(20) *Number of principal owners*. The number of the applicant's principal owners.

(b) *Reliance on and verification of applicant-provided data*. Unless otherwise provided in this subpart, the financial institution may rely on information from the applicant, or appropriate

third-party sources, when compiling data. If the financial institution verifies applicant-provided data, however, it shall report the verified data.

(c) *Time and manner of collection*—(1) *In general*. A covered financial institution shall not discourage an applicant from responding to requests for applicant-provided data under paragraph (a) of this section and shall otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response.

(2) *Applicant-provided data collected directly from the applicant*. For data collected directly from the applicant, procedures that are reasonably designed to obtain a response shall include provisions for the following:

(i) The initial request for applicant-provided data occurs prior to notifying an applicant of final action taken on a covered application;

(ii) The request for applicant-provided data is prominently displayed or presented;

(iii) The collection does not have the effect of discouraging an applicant from responding to a request for applicant-provided data; and

(iv) Applicants can easily respond to a request for applicant-provided data.

(3) *Procedures to monitor compliance*. A covered financial institution shall maintain procedures to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data.

(4) *Low response rates*. A low response rate for applicant-provided data may indicate discouragement or other failure by a covered financial institution to maintain procedures to collect applicant-provided data that are reasonably designed to obtain a response.

(d) *Previously collected data*. A covered financial institution is permitted, but not required, to reuse previously collected data to satisfy paragraphs (a)(13) through (20) of this section if:

(1) To satisfy paragraphs (a)(13) and (a)(15) through (20) of this section, the data were collected within the 36 months preceding the current covered application, or to satisfy paragraph

(a)(14) of this section, the data were collected within the same calendar year as the current covered application; and

(2) The financial institution has no reason to believe the data are inaccurate.

§ 1002.108 Firewall.

(a) *Definitions*. For purposes of this section, the following terms shall have the following meanings:

(1) *Involved in making any determination concerning a covered application from a small business* means participating in a decision regarding the evaluation of a covered application from a small business or the creditworthiness of a small business applicant for a covered credit transaction.

(2) *Should have access* means that an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform that employee's or officer's assigned job duties.

(b) *Prohibition on access to certain information*. Unless the exception under paragraph (c) of this section applies, an employee or officer of a covered financial institution or a covered financial institution's affiliate shall not have access to an applicant's responses to inquiries that the financial institution makes pursuant to this subpart regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19), if that employee or officer is involved in making any determination concerning that applicant's covered application.

(c) *Exception to the prohibition on access to certain information*. The prohibition in paragraph (b) of this section shall not apply to an employee or officer if the financial institution determines that it is not feasible to limit that employee's or officer's access to an applicant's responses to the financial institution's inquiries under § 1002.107(a)(18) or (19) and the financial institution provides the notice required under paragraph (d) of this section to the applicant. It is

not feasible to limit access as required pursuant to paragraph (b) of this section if the financial institution determines that an employee or officer involved in making any determination concerning a covered application from a small business should have access to one or more applicants' responses to the financial institution's inquiries under § 1002.107(a)(18) or (19).

(d) *Notice*. In order to satisfy the exception set forth in paragraph (c) of this section, a financial institution shall provide a notice to each applicant whose responses will be accessed, informing the applicant that one or more employees or officers involved in making determinations concerning the covered application may have access to the applicant's responses to the financial institution's inquiries regarding whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and regarding the ethnicity, race, and sex of the applicant's principal owners. The financial institution shall provide the notice required by this paragraph (d) when making the inquiries required under § 1002.107(a)(18) and (19) and together with the notices required pursuant to § 1002.107(a)(18) and (19).

§ 1002.109 Reporting of data to the Bureau.

(a) *Reporting to the Bureau*—(1) *Annual reporting*. (i) On or before June 1 following the calendar year for which data are compiled and maintained as required by § 1002.107, a covered financial institution shall submit its small business lending application register in the format prescribed by the Bureau.

(ii) An authorized representative of the covered financial institution with knowledge of the data shall certify to the accuracy and completeness of the data reported pursuant to this paragraph (a).

(iii) When the last day for submission of data prescribed under paragraph (a)(1) of this section falls on a Saturday or Sunday, a submission shall be considered timely if it is submitted on the next succeeding Monday.

(2) *Reporting by subsidiaries*. A covered financial institution that is a subsidiary of another covered financial institution shall complete a separate small business lending application register. The subsidiary shall submit its small business lending application register, directly or through its parent, to the Bureau.

(3) *Reporting obligations where multiple financial institutions are involved in a covered credit transaction*. Where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction, only the last covered financial institution with authority to set the material terms of the covered credit transaction is required to report the application. Financial institutions report the actions of their agents.

(b) *Financial institution identifying information*. A financial institution shall provide each of the following with its submission:

(1) Its name.

(2) Its headquarters address.

(3) The name and business contact information of a person that the Bureau or other regulators may contact about the financial institution's submission.

(4) Its Federal prudential regulator, if applicable.

(5) Its Federal Taxpayer Identification Number (TIN).

(6) Its Legal Entity Identifier (LEI).

(7) Its Research, Statistics, Supervision, and Discount identification (RSSD ID) number, if applicable.

(8) Parent entity information, if applicable, including:

(i) The name of the immediate parent entity;

(ii) The LEI of the immediate parent entity, if available;

(iii) The RSSD ID number of the immediate parent entity, if available;

(iv) The name of the top-holding parent entity;

(v) The LEI of the top-holding parent entity, if available; and

(vi) The RSSD ID number of the top-holding parent entity, if available.

(9) The type of financial institution that it is, indicated by selecting the appropriate type or types of institution from the list provided.

(10) Whether the financial institution is voluntarily reporting covered applications from small businesses.

(c) *Procedures for the submission of data to the Bureau*. The Bureau shall 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, at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/*.

§ 1002.110 Publication of data and other disclosures.

(a) *Publication of small business lending application registers and associated financial institution information*. The Bureau shall make available to the public generally the data reported to it by financial institutions pursuant to § 1002.109, subject to deletions or modifications made by the Bureau if the Bureau determines that the deletion or modification of the data would advance a privacy interest. The Bureau shall make such data available on an annual basis.

(b) *Publication of aggregate data*. The Bureau may compile and aggregate data submitted by financial institutions pursuant to § 1002.109, and make any compilations or aggregations of such data publicly available as the Bureau deems appropriate.

(c) *Statement of financial institution's small business lending data available on the Bureau's website*. A covered financial institution shall make available to the public on its website, or otherwise upon request, a statement that the covered financial institution's small business lending application register, as modified by the Bureau pursuant to § 1002.110(a), is or will be available from the Bureau. A financial institution shall use language provided by the Bureau, or substantially similar language, to satisfy the requirement to provide a statement pursuant to this paragraph (c).

(d) *Availability of statements.* A covered financial institution shall make the notice required by paragraph (c) of this section available to the public on its website when it submits a small business lending application register to the Bureau pursuant to § 1002.109(a)(1), and shall maintain the notice for as long as it has an obligation to retain its small business lending application registers pursuant to § 1002.111(a).

(e) *Further disclosure prohibited*—(1) *Disclosure by a financial institution*. A financial institution shall not disclose or provide to a third party the information it collects pursuant to § 1002.107(a)(18) and (19) except to further compliance with the Act or this part or as required by law.

(2) *Disclosure by a third party*. A third party that obtains information collected pursuant to § 1002.107(a)(18) and (19) for the purpose of furthering compliance with the Act or this part is prohibited from any further disclosure of such information except to further compliance with the Act or this part or as required by law.

§ 1002.111 Recordkeeping.

(a) *Record retention.* A covered financial institution shall retain evidence of compliance with this subpart, which includes a copy of its small business lending application register, for at least three years after the register is required to be submitted to the Bureau pursuant to § 1002.109.

(b) *Certain information kept separate from the rest of the application*. A financial institution shall maintain, separately from the rest of the application and accompanying information, an applicant's responses to the financial institution's inquiries pursuant to this subpart regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19).

(c) *Limitation on personally identifiable information in certain records retained under this section.* In reporting a small business lending application register pursuant to § 1002.109, maintaining the register pursuant to paragraph (a) of this section, and maintaining a separate record of information pursuant to paragraph (b) of this section, a financial institution shall not include any name, specific address, telephone number, email address, or any other personally identifiable information concerning any individual who is, or is connected with, an applicant, other than as required pursuant to § 1002.107 or paragraph (b) of this section.

§ 1002.112 Enforcement.

(a) *Administrative enforcement and civil liability.* A violation of section 704B of the Act or this subpart is subject to administrative sanctions and civil liability as provided in sections 704 (15 U.S.C. 1691c) and 706 (15 U.S.C. 1691e) of the Act, where applicable.

(b) *Bona fide errors.* A bona fide error in compiling, maintaining, or reporting data with respect to a covered application is one that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error. A bona fide error is not a violation of the Act or this subpart. A financial institution is presumed to maintain procedures reasonably adapted to avoid such errors with respect to a given data field if the number of errors found in a random sample of the financial institution's submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose in appendix F to this part. However, an error is not a bona fide error if either there is a reasonable basis to believe the error was intentional or there is evidence that the financial institution does not or has not maintained procedures reasonably adapted to avoid such errors.

(c) *Safe harbors*—(1) *Incorrect entry for application date*. A financial institution does not violate the Act or this subpart if it reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to § 1002.107(a)(2).

(2) *Incorrect entry for census tract*. An incorrect entry for census tract is not a violation of the Act or this subpart if the financial institution obtained the census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau.

(3) *Incorrect entry for NAICS code.* An incorrect entry for a 3-digit NAICS code is not a violation of the Act or this subpart, provided that the financial institution obtained the 3-digit NAICS code by:

(i) Relying on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code; or

(ii) Identifying the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

(4) *Incorrect determination of small business status, covered credit transaction, or covered application*. A financial institution that initially collects data regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners pursuant to § 1002.107(a)(18) and (19) but later concludes that it should not have collected such data does not violate the Act or this regulation if the financial institution, at the time it collected this data, had a reasonable basis for believing that the application was a covered application for a covered credit transaction from a small business pursuant to §§ 1002.103, 1002.104, and 1002.106, respectively. A financial institution seeking to avail itself of this safe harbor shall comply with the requirements of this subpart as otherwise required pursuant to §§ 1002.107, 1002.108, and 1002.111 with respect to the collected data.

§ 1002.113 Severability.

If any provision of this subpart, or any application of a provision, is stayed or determined to be invalid, the remaining provisions or applications are severable and shall continue in effect.

§ 1002.114 Effective date, compliance date, and special transitional rules.

(a) *Effective date*. The effective date for this subpart is **[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*]**.

(b) *Compliance date.* The dates by which covered financial institutions are initially required to comply with the requirements of this subpart are as follows:

(1) A covered financial institution that originated at least 2,500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning October 1, 2024.

(2) A covered financial institution that is not subject to paragraph (b)(1) of this section and that originated at least 500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning April 1, 2025.

(3) A covered financial institution that is not subject to paragraphs (b)(1) or (2) of this section and that originated at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 shall comply with the requirements of this subpart beginning January 1, 2026.

(4) A financial institution that did not originate at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 but subsequently originates at least 100 such transactions in two consecutive calendar years shall comply with the requirements of this subpart in accordance with § 1002.105(b), but in any case no earlier than January 1, 2026.

(c) *Special transitional rules*—(1) *Collection of certain information prior to a financial institution's compliance date*. A financial institution as described in paragraphs (b)(1), (2), or (3) of this section is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(19) beginning 12 months prior

to its applicable compliance date as set forth in paragraphs (b)(1), (2), or (3) of this section. A financial institution collecting such information pursuant to this paragraph (c)(1) must do so in accordance with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c).

(2) *Determining which compliance date applies to a financial institution that does not collect information sufficient to determine small business status*. A financial institution that is unable to determine the number of covered credit transactions it originated for small businesses in each of calendar years 2022 and 2023 for purposes of determining its compliance date pursuant to paragraph (b) of this section, because for some or all of this period it does not have readily accessible the information needed to determine whether its covered credit transactions were originated for small businesses as defined in § 1002.106(b), is permitted to use any reasonable method to estimate its originations to small businesses for either or both of the calendar years 2022 and 2023.

7. Appendices E and F are added to read as follows:

APPENDIX E TO PART 1002— SAMPLE FORM FOR COLLECTING CERTAIN APPLICANT-PROVIDED DATA UNDER SUBPART B

Sample data collection form

Federal law requires that we request the following information to help ensure that all small businesses applying for loans and other kinds of credit are treated fairly and that communities' small business credit needs are met.

One or more employees or officers involved in making a determination concerning your application may have access to the information provided on this form. However, **FEDERAL LAW PROHIBITS DISCRIMINATION** on the basis of your answers on this form. Additionally, we cannot discriminate on the basis of whether you provide this information.

While you are not required to provide this information, we encourage you to do so. Importantly, our staff are not permitted to discourage you in any way from responding to these questions. **Filling out this form will help to ensure that ALL small business owners are treated fairly.**

Business ownership status

Please indicate the business ownership status of your small business. For the purposes of this form, your business is a minority-owned, women-owned, or LGBTQI+-owned business if one or more minorities,* women, or LGBTQI+ individuals (i) directly or indirectly own or control more than 50 percent of the business AND (ii) receive more than 50 percent of the net profits/losses of the business.

What is your business ownership status?

(Check one or more of the options below)

- ☐ **Minority-owned business**
- ☐ **Women-owned business**
- ☐ **LGBTQI+-owned business**

  – or –
- ☐ **None of these apply**

  – or –
- ☐ **I do not wish to provide this information**

*Minority means Hispanic or Latino, American Indian or Alaska Native, Asian, Black or African American, or Native Hawaiian or Other Pacific Islander. A multi-racial or multi-ethnic individual is a minority for this purpose.

Number of principal owners

For purposes of this form, a principal owner is any individual who owns 25 percent or more of the equity interest of a business. A business might not have any principal owners if, for example, it is not directly owned by any individuals (i.e., if it is owned by another entity or entities) or if no individual directly owns at least 25 percent of the business.

How many principal owners does your business have? *(Check one)*

- ☐ **0**
- ☐ **1**
- ☐ **2**
- ☐ **3**
- ☐ **4**

Demographic information about principal owners

As a reminder, applicants are not required to provide this information but are encouraged to do so. We cannot discriminate on the basis of any person's ethnicity, race, or sex/gender. Additionally, we cannot discriminate on the basis of whether you provide this information.

Please fill out one sheet for each principal owner.

1 Are you Hispanic or Latino?

i.e., What's your ethnicity? (Check one or more)

☐ **Hispanic or Latino**

- ☐ Cuban
- ☐ Mexican
- ☐ Puerto Rican
- ☐ Other Hispanic or Latino *(Please specify your origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on):*

☐ **Not Hispanic or Latino**

– or –

☐ **I do not wish to provide my ethnicity**

2 What is your sex/gender?

(Please specify):

– or –

☐ **I do not wish to provide my sex/gender**

3 What is your race?

(Check one or more)

☐ **American Indian or Alaska Native** *(Please specify the name of your enrolled or principal tribe):*

☐ **Asian**

- ☐ Asian Indian
- ☐ Chinese
- ☐ Filipino
- ☐ Japanese
- ☐ Korean
- ☐ Vietnamese
- ☐ Other Asian *(Please specify your race, for example, Cambodian, Hmong, Laotian, Pakistani, Thai, and so on):*

☐ **Black or African American**

- ☐ African American
- ☐ Ethiopian
- ☐ Haitian
- ☐ Jamaican
- ☐ Nigerian
- ☐ Somali
- ☐ Other Black or African American *(Please specify your race, for example, Barbadian, Ghanaian, South African, and so on):*

☐ **Native Hawaiian or Other Pacific Islander**

- ☐ Guamanian or Chamorro
- ☐ Native Hawaiian
- ☐ Samoan
- ☐ Other Pacific Islander *(Please specify your race, for example, Fijian, Tongan, and so on):*

☐ **White**

– or –

☐ **I do not wish to provide my race**

APPENDIX F TO PART 1002—TOLERANCES FOR BONA FIDE ERRORS IN DATA REPORTED UNDER SUBPART B

As set out in § 1002.112(b) and in comment 112(b)-1, a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of a financial institution's data submission for a given data field do not equal or exceed the threshold in column C of the following table (Table 1, Tolerance Thresholds for Bona Fide Errors):

Table 1 to Appendix F—Tolerance Thresholds for Bona Fide Errors

Small Business Lending Application Register Count (A)	Random Sample Size[986] (B)	Threshold (#) (C)	Threshold (%) (D)
100 – 130	47	3	6.4
131 – 190	56	3	5.4
191 – 500	59	3	5.1
501 – 100,000	79	4	5.1
100,001+	159	4	2.5

The size of the random sample, under column B, shall depend on the size of the financial institution's small business lending application register, as shown in column A of the Threshold Table.

The thresholds in column C of the Threshold Table reflect the number of unintentional errors a financial institution may make within a particular data field (*e.g.*, the credit product data field within the credit type data point or the ethnicity data field for a particular principal owner within the ethnicity, race, and sex of principal owners data point) in a small business lending application register that would be deemed bona fide errors for purposes of § 1002.112(b).

[986] For a financial institution with fewer than 30 entries in its small business lending application register, the full sample size is the financial institution's total number of entries. The threshold number for such financial institutions remains three. Accordingly, the threshold percentage will be higher for financial institutions with fewer than 30 entries in their registers.

For instance, a financial institution that submitted a small business lending application register containing 105 applications would be subject to a threshold of three errors per data field. If the financial institution had made two errors in reporting loan amount and two errors reporting gross annual income, all of these errors would be covered by the bona fide error provision of § 1002.112(b) and would not constitute a violation of the Act or this part. If the same financial institution had made four errors in reporting loan amount and two errors reporting gross annual income, the bona fide error provision of § 1002.112(b) would not apply to the four loan amount errors but would still apply to the two gross annual income errors.

Even when the number of errors in a particular data field do not equal or exceed the threshold in column C, if either there is a reasonable basis to believe that errors in that field were intentional or there is evidence that the financial institution did not maintain procedures reasonably adapted to avoid such errors, then the errors are not bona fide errors under § 1002.112(b).

For purposes of determining bona fide errors under § 1002.112(b), the term "data field" generally refers to individual fields. Some data fields may allow for more than one response. For example, with respect to information on the ethnicity or race of an applicant's principal owners, a data field may identify more than one race or more than one ethnicity for a given person. If one or more of the ethnicities or races identified in a data field are erroneous, they count as one (and only one) error for that data field.

8. In Supplement I to part 1002:

a. Under *Section 1002.5—Rules Concerning Requests for Information*, revise *Paragraph 5(a)(2)* and *Paragraph 5(a)(4)*;

b. Under *Section 1002.12—Record Retention*, revise *12(b)(7) Preapplication marketing information*;

c. Under *Section 1002.13—Information for Monitoring Purposes*, revise *13(b) Obtaining of information*; and

d. Add: *Section 1002.102—Definitions*; *Section 1002.103—Covered Applications*; *Section 1002.104—Covered Credit Transactions and Excluded Transactions*; *Section 1002.105—Covered Financial Institutions and Exempt Institutions*; *Section 1002.106—Business and Small Business*; *Section 1002.107—Compilation of Reportable Data*; *Section 1002.108—Firewall*; *Section 1002.109—Reporting of Data to the Bureau*; *Section 1002.110—Publication of Data and Other Disclosures*; *Section 1002.111—Recordkeeping; Section 1002.112—Enforcement*; and *Section 1002.114—Effective Date, Compliance Date, and Special Transition Rules*.

The revisions and additions read as follows:

Supplement I to Part 1002—Official Interpretations

* * * * *

Section 1002.5—Rules Concerning Requests for Information

* * * * *

5(a)(2) Required collection of information.

1. *Local laws*. Information that a creditor is allowed to collect pursuant to a "state" statute or regulation includes information required by a local statute, regulation, or ordinance.

2. *Information required by Regulation C*. Regulation C, 12 CFR part 1003, generally requires creditors covered by the Home Mortgage Disclosure Act (HMDA) to collect and report information about the race, ethnicity, and sex of applicants for certain dwelling-secured loans, including some types of loans not covered by § 1002.13.

3. *Collecting information on behalf of creditors.* Persons such as loan brokers and correspondents do not violate the ECOA or Regulation B if they collect information that they are otherwise prohibited from collecting, where the purpose of collecting the information is to provide it to a creditor that is subject to subpart B of this part, the Home Mortgage Disclosure Act, or another Federal or State statute or regulation requiring data collection.

4. *Information required by subpart B*. Subpart B of this part generally requires creditors that are covered financial institutions as defined in § 1002.105(b) to collect and report information about the ethnicity, race, and sex of the principal owners of applicants for certain small business credit, as well as whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business, as defined in § 1002.102(m), (s), and (*l*), respectively.

5(a)(4) Other permissible collection of information.

1. *Other permissible collection of information*. Information regarding ethnicity, race, and sex that is not required to be collected pursuant to Regulation C, 12 CFR part 1003, or subpart B of this part, may nevertheless be collected under the circumstances set forth in § 1002.5(a)(4) without violating § 1002.5(b). The information collected pursuant to 12 CFR part 1003 must be retained pursuant to the requirements of § 1002.12. The information collected pursuant to subpart B of this part must be retained pursuant to the requirements set forth in § 1002.111.

* * * * *

Section 1002.12—Record Retention

* * * * *

12(b) Preservation of records.

* * * * *

12(b)(7) Preapplication marketing information.

1. *Prescreened credit solicitations.* The rule requires creditors to retain copies of prescreened credit solicitations. For purposes of this part, a prescreened solicitation is an "offer of credit" as described in 15 U.S.C. 1681a(1) of the Fair Credit Reporting Act. A creditor complies with § 1002.12(b)(7) if it retains a copy of each solicitation mailing that contains different terms, such as the amount of credit offered, annual percentage rate, or annual fee.

2. *List of criteria*. A creditor must retain the list of criteria used to select potential recipients. This includes the criteria used by the creditor both to determine the potential recipients of the particular solicitation and to determine who will actually be offered credit.

3. *Correspondence*. A creditor may retain correspondence relating to consumers' complaints about prescreened solicitations in any manner that is reasonably accessible and is understandable to examiners. There is no requirement to establish a separate database or set of files for such correspondence, or to match consumer complaints with specific solicitation programs.

* * * * *

Section 1002.13—Information for Monitoring Purposes

* * * * *

13(b) Obtaining of information.

1. *Forms for collecting data*. A creditor may collect the information specified in § 1002.13(a) either on an application form or on a separate form referring to the application. Appendix B to this part provides for two alternative data collection model forms for use in complying with the requirements of § 1002.13(a)(1)(i) and (ii) to collect information concerning an applicant's ethnicity, race, and sex. When a creditor collects ethnicity and race information pursuant to § 1002.13(a)(1)(i)(A), the applicant must be offered the option to select more than one racial designation. When a creditor collects ethnicity and race information pursuant to § 1002.13(a)(1)(i)(B), the applicant must be offered the option to select more than one ethnicity designation and more than one racial designation.

2. *Written applications*. The regulation requires written applications for the types of credit covered by § 1002.13. A creditor can satisfy this requirement by recording on paper or by means of computer the information that the applicant provides orally and that the creditor normally considers in a credit decision.

3. *Telephone, mail applications*. i. A creditor that accepts an application by telephone or mail must request the monitoring information.

ii. A creditor that accepts an application by mail need not make a special request for the monitoring information if the applicant has failed to provide it on the application form returned to the creditor.

iii. If it is not evident on the face of an application that it was received by mail, telephone, or via an electronic medium, the creditor should indicate on the form or other application record how the application was received.

4. *Video and other electronic-application processes*. i. If a creditor takes an application through an electronic medium that allows the creditor to see the applicant, the creditor must treat the application as taken in person. The creditor must note the monitoring information on the basis of visual observation or surname, if the applicant chooses not to provide the information.

ii. If an applicant applies through an electronic medium without video capability, the creditor treats the application as if it were received by mail.

5. *Applications through loan-shopping services.* When a creditor receives an application through an unaffiliated loan-shopping service, it does not have to request the monitoring information for purposes of the ECOA or subpart A of this Regulation B. Creditors subject to the Home Mortgage Disclosure Act should be aware, however, that data collection may be called for under Regulation C (12 CFR part 1003), which generally requires creditors to report, among other things, the sex and race of an applicant on brokered applications or applications received through a correspondent. Similarly, creditors that are covered financial institutions under subpart B of this Regulation may also be required to collect, report, and maintain certain data, as set forth in subpart B of this Regulation.

6. *Inadvertent notation*. If a creditor inadvertently obtains the monitoring information in a dwelling-related transaction not covered by § 1002.13, the creditor may process and retain the application without violating the regulation.

* * * * *

Section 1002.102—Definitions

102(b) Applicant.

1. *General*. In no way are the limitations to the term applicant in § 1002.102(b) of subpart B intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term applicant in § 1002.2(e) as applicable to subpart A.

102(l) LGBTQI+-owned business.

1. *General*. In order to be an LGBTQI+-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of LGBTQI+-owned business. First, one or more LGBTQI+ individuals must own or control more than 50 percent of the business. However, it is not necessary that one or more LGBTQI+ individuals both own and control more than 50 percent of the business. For example, a business that is owned entirely by one or more LGBTQI+ individuals but is not controlled by any one or more such individuals satisfies the first prong of the definition. Similarly, a business that is controlled by an LGBTQI+ individual satisfies this first prong of the definition, even if none of the individuals with ownership in the business are LGBTQI+ individuals. If a business does not satisfy this first prong of the definition, it is not an LGBTQI+-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more LGBTQI+ individuals. If a business does not satisfy this second prong of the definition, it is not an LGBTQI+-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition*. The definition of LGBTQI+-owned business is used only when an applicant determines if it is an LGBTQI+-owned business for purposes of § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of LGBTQI+-owned business when asking the applicant to provide its LGBTQI+-owned business status pursuant to § 1002.107(a)(18). A financial institution satisfies this requirement if it provides the definition as set forth in the sample data collection form in appendix E. The financial institution must provide

additional clarification by referencing the definition of LGBTQI+ individual as set forth in § 1002.102(k) if asked by the applicant. The financial institution is neither permitted nor required to make its own determination regarding the applicant's LGBTQI+-owned business status.

3. *Further clarifications of terms used in the definition of LGBTQI+-owned business*. In order to assist an applicant when determining whether it is an LGBTQI+-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(*l*)-4 through -6. A financial institution may assist an applicant when the applicant is determining its LGBTQI+-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership*. For purposes of determining if a business is an LGBTQI+-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship, directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(*l*) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example, assume that the applicant is company A. If company B owns 60 percent of applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of applicant company A. Similarly, if an individual directly owns 20 percent of applicant company A and is an equal partner in partnership B that owns the remaining 80 percent of applicant company A, the individual owns 60 percent of applicant company A (*i.e.*, 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of

the trust. Thus, if a trust owns a business and the trust has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control*. An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.*, a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more LGBTQI+ individuals if those individuals collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses*. A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

102(m) Minority-owned business.

1. *General*. In order to be a minority-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of minority-owned business. First, one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals must own or control more than 50 percent of the business. However, it is not necessary that one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals both own and control more than 50 percent of the business. For example, a business that is owned entirely, but is not controlled by, individuals belonging to one of these groups satisfies the first prong of the definition. Similarly, a business that is controlled by an American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individual satisfies this first prong of the definition,

even if none of the individuals with ownership in the business are American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino. If a business does not satisfy this first prong of the definition, it is not a minority-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more individuals belonging to these groups. If a business does not satisfy this second prong of the definition, it is not a minority-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition*. The definition of minority-owned business is used only when an applicant determines if it is a minority-owned business for purposes of § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of minority-owned business when asking the applicant to provide its minority-owned business status pursuant to § 1002.107(a)(18), but the financial institution is neither permitted nor required to make its own determination regarding the applicant's minority-owned business status.

3. *Further clarifications of terms used in the definition of minority-owned business*. In order to assist an applicant when determining whether it is a minority-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(m)-4 through -6. A financial institution may assist an applicant when the applicant is determining its minority-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership*. For purposes of determining if a business is a minority-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship, directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having

a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(m) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example, assume that the applicant is company A. If company B owns 60 percent of applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of applicant company A. Similarly, if an individual directly owns 20 percent of applicant company A and is an equal partner in partnership B that owns the remaining 80 percent of applicant company A, the individual owns 60 percent of applicant company A (*i.e.*, 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of the trust. Thus, if a trust owns a business and the trust has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control*. An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.*, a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals if those individuals collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses*. A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

7. *Multi-racial and multi-ethnic individuals.* For purposes of subpart B of this part, an individual who is multi-racial or multi-ethnic constitutes an individual for whom the definition of minority-owned business may apply, depending on whether the individual meets the other requirements of the definition. For example, an individual who is both Asian and White is an individual for whom the definition of minority-owned business shall apply if the individual meets the other requirements of the definition related to ownership or control and accrual of profits or losses.

8. *Relationship to disaggregated subcategories used to determine ethnicity and race of principal owners*. The ethnicity and race categories used in this section are aggregate ethnicity (Hispanic or Latino) and race (American Indian or Alaska Native, Asian, Black or African American, and Native Hawaiian or Other Pacific Islander) categories. Those ethnicity and race categories are the same aggregate categories used (along with Not Hispanic or Latino for ethnicity, and White for race) to collect an applicant's principal owners' ethnicity and race pursuant to § 1002.107(a)(19).

102(o) Principal owner.

1. *Individual.* Only an individual can be a principal owner of a business for purposes of subpart B of this part. Entities, such as trusts, partnerships, limited liability companies, and corporations, are not principal owners for this purpose. Additionally, an individual must directly own an equity share of 25 percent or more in the business in order to be a principal owner. Unlike the determination of ownership for purposes of collecting and reporting minority-owned business status, women-owned business status, and LGBTQI+-owned business status, indirect ownership is not considered when determining if someone is a principal owner for purposes of collecting and reporting principal owners' ethnicity, race, and sex or the number of principal owners. Thus, when determining who is a principal owner, ownership is not traced through multiple corporate structures to determine if an individual owns 25 percent or more of the equity interests. For example, if individual A directly owns 20 percent of a business, individual B

directly owns 20 percent, and partnership C owns 60 percent, the business does not have any owners who satisfy the definition of principal owner set forth in § 1002.102(o), even if individual A and individual B are the only partners in the partnership C. Similarly, if individual A directly owns 30 percent of a business, individual B directly owns 20 percent, and trust D owns 50 percent, individual A is the only principal owner as defined in § 1002.102(o), even if individual B is the sole trustee of trust D.

2. *Trustee*. Although a trust is not considered a principal owner of a business for the purposes of subpart B, if the applicant for a covered credit transaction is a trust, a trustee is considered the owner of the trust. Thus, if a trust is an applicant for a covered credit transaction and the trust has two co-trustees, each co-trustee is considered to own 50 percent of the business and would each be a principal owner as defined in § 1002.102(o). In contrast, if the trust has five co-trustees, each co-trustee is considered to own 20 percent of the business and would not meet the definition of principal owner under § 1002.102(o).

3. *Purpose of definition.* A financial institution shall provide an applicant with the definition of principal owner when asking the applicant to provide the number of its principal owners pursuant to § 1002.107(a)(20) and the ethnicity, race, and sex of its principal owners pursuant to § 1002.107(a)(19). See comments 107(a)(19)-2 and 107(a)(20)-1.

102(s) Women-owned business.

1. *General*. In order to be a women-owned business for purposes of subpart B of this part, a business must satisfy both prongs of the definition of women-owned business. First, one or more women must own or control more than 50 percent of the business. However, it is not necessary that one or more women both own and control more than 50 percent of the business. For example, a business that is owned entirely by women but is not controlled by any women satisfies the first prong of the definition. Similarly, a business that is controlled by a woman satisfies this first prong of the definition, even if none of the individuals with ownership in the business are women. If a business does not satisfy this first prong of the definition, it is not a

women-owned business. Second, 50 percent or more of the net profits or losses must accrue to one or more women. If a business does not satisfy this second prong of the definition, it is not a women-owned business, regardless of whether it satisfies the first prong of the definition.

2. *Purpose of definition*. The definition of women-owned business is used only when an applicant determines if it is a women-owned business pursuant to § 1002.107(a)(18). A financial institution shall provide an applicant with the definition of women-owned business when asking the applicant to provide its women-owned business status pursuant to § 1002.107(a)(18), but the financial institution is neither permitted nor required to make its own determination regarding the applicant's women-owned business status.

3. *Further clarifications of terms used in the definition of women-owned business*. In order to assist an applicant when determining whether it is a women-owned business, a financial institution may provide the applicant with the definitions of ownership, control, and accrual of net profits or losses and related concepts set forth in comments 102(s)-4 through -6. A financial institution may assist an applicant when the applicant is determining its women-owned business status but is not required to do so. For purposes of reporting an applicant's status, a financial institution relies on the applicant's determinations of its ownership, control, and accrual of net profits and losses.

4. *Ownership*. For purposes of determining if a business is a women-owned business, an individual owns a business if that individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has an equity interest in the business. Examples of ownership include being the sole proprietor of a sole proprietorship, directly or indirectly owning or holding the stock of a corporation or company, directly or indirectly having a partnership interest in a business, or directly or indirectly having a membership interest in a limited liability company. Indirect as well as direct ownership are used when determining ownership for purposes of §§ 1002.102(s) and 1002.107(a)(18). Thus, where applicable, ownership must be traced through corporate or other indirect ownership structures. For example,

assume that the applicant is company A. If company B owns 60 percent of the applicant company A and an individual owns 100 percent of company B, the individual owns 60 percent of the applicant company A. Similarly, if an individual directly owns 20 percent of the applicant company A and is an equal partner in a partnership B that owns the remaining 80 percent of the applicant company A, the individual owns 60 percent of applicant company A (*i.e.*, 20 percent due through direct ownership and 40 percent indirectly through partnership B). A trustee is considered the owner of the trust. Thus, if a trust owns a business and the trust has two co-trustees, each co-trustee owns 50 percent of the business.

5. *Control*. An individual controls a business if that individual has significant responsibility to manage or direct the business. An individual controls a business if the individual is an executive officer or senior manager (*e.g.*, a chief executive officer, chief financial officer, chief operating officer, managing member, general partner, president, vice president, or treasurer) or regularly performs similar functions. Additionally, a business may be controlled by two or more women if those women collectively control the business, such as constituting a majority of the board of directors or a majority of the partners of a partnership.

6. *Accrual of net profits or losses*. A business's net profits and losses accrue to an individual if that individual receives the net profits or losses, is legally entitled or required to receive the net profits or losses, or is legally entitled or required to recognize the net profits or losses for tax purposes.

Section 1002.103—Covered Applications

103(a) Covered application.

1. *General*. Subject to the requirements of subpart B of this part, a financial institution has latitude to establish its own application procedures, including designating the type and amount of information it will require from applicants.

2. *Procedures used*. The term "procedures" refers to the actual practices followed by a financial institution as well as its stated application procedures. For example, if a financial

institution's stated policy is to require all applications to be in writing on the financial institution's application form, but the financial institution also makes credit decisions based on oral requests, the financial institution's procedures are to accept both oral and written applications.

3. *Consistency with subpart A.* Bureau interpretations that appear in this supplement I in connection with §§ 1002.2(f) and 1002.9 are generally applicable to the definition of a covered application in § 1002.103. However, the definition of a covered application in § 1002.103 does not include inquiries and prequalification requests. The definition of a covered application also does not include reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts. See § 1002.103(b).

4. *Solicitations and firm offers of credit*. For purposes of subpart B of this part, the term covered application does not include solicitations, firm offers of credit, or other evaluations initiated by the financial institution because in these situations the business has not made a request for credit. For example, if a financial institution sends a firm offer of credit to a business for a $10,000 line of credit, and the business does not respond, it is not a covered application because the business never made a request for credit. However, using the same example, if the business seeks to obtain the credit offered, assuming the requirements of a covered application are otherwise met, the business's request constitutes a covered application for purposes of subpart B of this part. See also comment 103(b)-4.

5. *Requests for multiple covered credit transactions at one time*. Assuming the requirements of a covered application are met, if an applicant makes a request for two or more covered credit transactions at the same time, the financial institution reports each request as a separate covered application. For example, if an applicant is seeking both a term loan and a line of credit and requests them both on the same application form, the financial institution reports the requests as two separate covered applications, one for a term loan and another for a line of credit. See § 1002.107(d) for the requirements for reusing data so that a financial institution need

only ask once for certain data required under § 1002.107(a). If, on the other hand, the applicant is only requesting a single covered credit transaction, but has not decided on which particular product, the financial institution reports the request as a single covered application. For example, if the applicant indicates interest in either a term loan or a line of credit, but not both, the financial institution reports the request as a single covered application. See comment 107(a)(5)-1 for instructions on reporting credit product in this situation.

6. *Initial request for a single covered credit transaction that would result in the origination of multiple covered credit transactions*. Assuming the requirements of a covered application are met, if an applicant initially makes a request for one covered credit transaction, but over the course of the application process requests multiple covered credit transactions, each covered credit transaction must be reported as a separate covered application. See § 1002.107(d) for the requirements for reusing data so that a financial institution need only ask once for certain data required under § 1002.107(a).

7. *Requests for multiple lines of credit at one time*. Assuming the requirements of a covered application are met, if an applicant requests multiple lines of credit on a single credit account, it is reported as one or more covered applications based on the procedures used by the financial institution for the type of credit account. For example, if a financial institution treats a request for multiple lines of credit at one time as sub-components of a single account, the financial institution reports the request as a single covered application. If, on the other hand, the financial institution treats each line of credit as a separate account, then the financial institution reports each request for a line of credit as a separate covered application, as set forth in comment 103(a)-5.

8. *Duplicate applications*. If a financial institution receives two or more duplicate covered applications (*i.e.*, from the same applicant, for the same credit product, for the same amount, at or around the same time), the financial institution may treat the request as a single covered application for purposes of subpart B, so long as for purposes of determining whether to

extend credit, it would also treat one or more of the applications as a duplicate under its procedures.

9. *Changes in whether there is a covered credit transaction*. In certain circumstances, an applicant may change the type of product requested during the course of the application process. Assuming other requirements of a covered application are met, if an applicant initially requests a product that is not a covered credit transaction, but prior to final action taken decides to seek instead a product that is a covered credit transaction, the application is a covered application and must be reported pursuant to § 1002.109. In this circumstance, the financial institution shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. If, on the other hand, an applicant initially requests a product that is a covered credit transaction, but prior to final action taken decides instead to seek a product that is not a covered credit transaction, the application is not a covered application and thus is not reported. See also § 1002.112(c)(4), which provides a safe harbor for incorrect collection of certain data if, at the time of collection, the financial institution had a reasonable basis for believing that the application was a covered application. Assuming other requirements of a covered application are met, if an applicant initially requests a product that is a covered credit transaction, the financial institution counteroffers with a product that is not a covered credit transaction, and the applicant declines to proceed or fails to respond, the application is reported as a covered application. For example, if an applicant initially applies for a term loan, but then, after consultation with the financial institution, decides that a lease would better meet its needs and decides to proceed with that product, the application is not a covered application and thus is not reported. However, if an applicant initially applies for a term loan, the financial institution offers to consider the applicant only for a lease, and the applicant refuses, the transaction is a covered application that must be reported.

10. *Multiple unaffiliated co-applicants.* If a covered financial institution receives a covered application from multiple businesses that are not affiliates, as defined by § 1002.102(a),

it shall compile, maintain, and report data pursuant to §§ 1002.107 through 1002.109 for only a single applicant that is a small business, as defined in § 1002.106(b). A covered financial institution shall establish consistent procedures for designating a single small business for purposes of collecting and reporting data under subpart B in situations where there is more than one small business co-applicant, such as reporting on the first small business listed on an application form. For example, if three businesses jointly apply as co-applicants for a term loan to purchase a piece of equipment, but only one of the businesses is a small business, as defined in § 1002.106(b), the financial institution reports on the single small business. If, however, two of the businesses are small businesses, as defined in § 1002.106(b), the financial institution must have a procedure for designating which small business among multiple small business co-applicants it will report information on, such as consistently reporting on the first small business listed on an application form. See also § 1002.5(a)(4)(x), which permits a creditor to collect certain protected information about co-applicants under certain circumstances.

11. *Refinancings and evaluation, extension, or renewal requests that request additional credit amounts*. As discussed in comments 103(b)-2 and -3, assuming other requirements of a covered application are met, an applicant's request to refinance and an applicant's request for additional credit amounts on an existing account both constitute covered applications.

103(b) Circumstances that are not covered applications.

1. *In general.* The circumstances set forth in § 1002.103(b) are not covered applications for purposes of subpart B of this part, even if considered applications under subpart A of this part. However, in no way are the exclusions in § 1002.103(b) intended to repeal, abrogate, annul, impair, change, or interfere with the scope of the term application in § 1002.2(f) as applicable to subpart A.

2. *Reevaluation, extension, or renewal requests that do not request additional credit amounts*. An applicant's request to change one or more terms of an existing account does not constitute a covered application, unless the applicant is requesting additional credit amounts on

the account. For example, an applicant's request to extend the duration on a line of credit or to remove a guarantor would not be a covered application. However, assuming other requirements of a covered application are met, an applicant's request to refinance would be reportable. A refinancing occurs when an existing obligation is satisfied and replaced by a new obligation undertaken by the same borrower.

3. *Reevaluation, extension, or renewal requests that request additional credit amounts*. A Assuming other requirements of a covered application are met, an applicant's request for additional credit amounts on an existing account constitutes a covered application. For example, an applicant's request for a line increase on an existing line of credit, made in accordance with a financial institution's procedures for the type of credit requested, would be a covered application. As discussed in comment 107(a)(7)-4, when reporting a covered application that seeks additional credit amounts on an existing account, the financial institution need only report the additional credit amount sought, and not the entire credit amount. For example, if an applicant currently has a line of credit account for $100,000, and seeks to increase the line to $150,000, the financial institution reports the amount applied for as $50,000.

4. *Reviews or evaluations initiated by the financial institution*. For purposes of subpart B of this part, the term covered application does not include evaluations or reviews of existing accounts initiated by the financial institution because the business has not made a request for credit. For example, if a financial institution conducts periodic reviews of its existing lines of credit and decides to increase the business's line by $10,000, it is not a covered application because the business never made a request for the additional credit amounts. However, if such an evaluation or review of an existing account by a financial institution results in the financial institution inviting the business to apply for additional credit amounts on an existing account and the business does so, the business's request constitutes a covered application for purposes of subpart B of this part, assuming other requirements of a covered application are met. Similarly,

as noted in comment 103(a)-4, the term covered application also does not include solicitations and firm offers of credit.

5. *Inquiries and prequalification requests*. An inquiry is a request by a prospective applicant for information about credit terms offered by the financial institution. A prequalification request is a request by a prospective applicant for a preliminary determination on whether the prospective applicant would likely qualify for credit under a financial institution's standards or for a determination on the amount of credit for which the prospective applicant would likely qualify. Inquiries and prequalification requests are not covered applications under subpart B of this part, even though in certain circumstances inquiries and prequalification requests may constitute applications under subpart A. For example, while an inquiry or prequalification request may become an "application" under subpart A if the creditor evaluates information about the business, decides to decline the request, and communicates this to the business, such inquiries or prequalifications would not be "covered applications" under subpart B of this part. Whether a particular request is a covered application, or whether instead it is an inquiry or prequalification request that is not reportable under subpart B, may turn, for instance, on how a financial institution structures and processes such requests: does the financial institution require or encourage a preliminary review in order for a business to be considered for a covered credit transaction, or does the business voluntarily seek preliminary feedback as a tool to explore its options before it decides whether to apply for credit with the financial institution? The name used by the financial institution for such a request is not determinative. For example, under subpart B, a review is a reportable covered application if the financial institution requires the business, before it may apply for credit, to pass through a mandatory screening process that considers particular information about the business and denies or turns away the business if it is ineligible or unlikely to qualify for credit. In contrast, a business that requests a financial institution to identify credit products for which the business might qualify based on limited or

self-described characteristics, and without any commitment from the financial institution to extend credit, may not have submitted a covered application for purposes of subpart B.

Section 1002.104—Covered Credit Transactions and Excluded Transactions

104(a) Covered credit transaction.

1. *General*. The term "covered credit transaction" includes all business credit (including loans, lines of credit, credit cards, and merchant cash advances) unless otherwise excluded under § 1002.104(b).

104(b) Excluded transactions.

1. *Factoring*. The term "covered credit transaction" does not cover factoring as described herein. For the purpose of this subpart, factoring is an accounts receivable purchase transaction between businesses that includes an agreement to purchase, transfer, or sell a legally enforceable claim for payment for goods that the recipient has supplied or services that the recipient has rendered but for which payment in full has not yet been made. The name used by the financial institution for a product is not determinative of whether or not it is a "covered credit transaction." This description of factoring is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to comment 9(a)(3)-3. A financial institution shall report an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction as "Other sales-based financing transaction" under § 1002.107(a)(5).

2. *Leases*. The term "covered credit transaction" does not cover leases as described herein. A lease, for the purpose of this subpart, is a transfer from one business to another of the right to possession and use of goods for a term, and for primarily business or commercial (including agricultural) purposes, in return for consideration. A lease does not include a sale, including a sale on approval or a sale or return, or a transaction resulting in the retention or creation of a security interest. The name used by the financial institution for a product is not determinative of whether or not it is a "covered credit transaction."

3. *Consumer-designated credit.* The term "covered credit transaction" does not include consumer-designated credit that is used for business or agricultural purposes. A transaction qualifies as consumer-designated credit if the financial institution offers or extends the credit primarily for personal, family, or household purposes. For example, an open-end credit account used for both personal and business/agricultural purposes is not business credit for the purpose of subpart B of this part unless the financial institution designated or intended for the primary purpose of the account to be business/agricultural-related.

4. *Credit transaction purchases, purchases of an interest in a pool of credit transactions, and purchases of a partial interest in a credit transaction*. The term "covered credit transaction" does not cover the purchase of an originated credit transaction, the purchase of an interest in a pool of credit transactions, or the purchase of a partial interest in a credit transaction such as through a loan participation agreement. Such purchases do not, in themselves, constitute an application for credit. See also comment 109(a)(3)-2.i.

104(b)(1) Trade credit.

1. *General.* Trade credit, as defined in § 1002.104(b)(1), is excluded from the definition of a covered credit transaction. An example of trade credit involves a supplier that finances the sale of equipment, supplies, or inventory. However, an extension of business credit by a financial institution other than the supplier for the financing of such items is not trade credit. Also, credit extended by a business providing goods or services to another business is not trade credit for the purposes of this subpart where the supplying business intends to sell or transfer its rights as a creditor to a third party.

2. *Trade credit under subpart A*. The definition of trade credit under comment 9(a)(3)-2 applies to relevant provisions under subpart A, and § 1002.104(b)(1) is not intended to repeal, abrogate, annul, impair, or interfere with any existing interpretations, orders, agreements, ordinances, rules, or regulations adopted or issued pursuant to comment 9(a)(3)-2.

Section 1002.105—Covered Financial Institutions and Exempt Institutions

105(a) Financial institution.

1. *Examples*. Section 1002.105(a) defines a financial institution as any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. This definition includes, but is not limited to, banks, savings associations, credit unions, online lenders, platform lenders, community development financial institutions, Farm Credit System lenders, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, organizations exempt from taxation pursuant to 26 U.S.C. 501(c), and governments or governmental subdivisions or agencies.

2. *Motor vehicle dealers*. Pursuant to § 1002.101(a), subpart B of this part excludes from coverage persons defined by section 1029 of the Consumer Financial Protection Act of 2010, title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376, 2004 (2010).

105(b) Covered financial institution.

1. *Preceding calendar year*. The definition of covered financial institution refers to preceding calendar years. For example, in 2029, the two preceding calendar years are 2027 and 2028. Accordingly, in 2029, Financial Institution A does not meet the loan-volume threshold in § 1002.105(b) if did not originate at least 100 covered credit transactions for small businesses both during 2027 and during 2028.

2. *Origination threshold*. A financial institution qualifies as a covered financial institution based on total covered credit transactions originated for small businesses, rather than covered applications received from small businesses. For example, if in both 2024 and 2025, Financial Institution B received 105 covered applications from small businesses and originated 95 covered credit transactions for small businesses, then for 2026, Financial Institution B is not a covered financial institution.

3. *Counting originations when multiple financial institutions are involved in originating a covered credit transaction*. For the purpose of counting originations to determine whether a financial institution is a covered financial institution under § 1002.105(b), in a situation where multiple financial institutions are involved in originating a single covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to count the origination.

4. *Counting originations after adjustments to the gross annual revenue threshold due to inflation*. Pursuant to § 1002.106(b)(2), every five years, the gross annual revenue threshold used to define a small business in § 1002.106(b)(1) shall be adjusted, if necessary, to account for inflation. The first time such an adjustment could occur is in 2030, with an effective date of January 1, 2031. A financial institution seeking to determine whether it is a covered financial institution applies the gross annual revenue threshold that is in effect for each year it is evaluating. For example, a financial institution seeking to determine whether it is a covered financial institution in 2032 counts its originations of covered credit transactions for small businesses in calendar years 2030 and 2031. The financial institution applies the initial $5 million threshold to evaluate whether its originations were to small businesses in 2030. In this example, if the small business threshold were increased to $5.5 million effective January 1, 2031, the financial institution applies the $5.5 million threshold to count its originations for small businesses in 2031.

5. *Reevaluation, extension, or renewal requests, as well as credit line increases and other requests for additional credit amounts*. While requests for additional credit amounts on an existing account can constitute a "covered application" pursuant to § 1002.103(b)(1), such requests are not counted as originations for the purpose of determining whether a financial institution is a covered financial institution pursuant to § 1002.105(b). In addition, transactions that extend, renew, or otherwise amend a transaction are not counted as originations. For example, if a financial institution originates 50 term loans and 30 lines of credit for small

businesses in each of the preceding two calendar years, along with 25 line increases for small businesses in each of those years, the financial institution is not a covered financial institution because it has not originated at least 100 covered credit transactions in each of the two preceding calendar years.

6. *Annual consideration*. Whether a financial institution is a covered financial institution for a particular year depends on its small business lending activity in the preceding two calendar years. Therefore, whether a financial institution is a covered financial institution is an annual consideration for each year that data may be compiled and maintained for purposes of subpart B of this part. A financial institution may be a covered financial institution for a given year of data collection (and the obligations arising from qualifying as a covered financial institution shall continue into subsequent years, pursuant to §§ 1002.110 and 1002.111), but the same financial institution may not be a covered financial institution for the following year of data collection. For example, Financial Institution C originated 105 covered transactions for small businesses in both 2024 and 2025. In 2026, Financial Institution C is a covered financial institution and therefore is obligated to compile and maintain applicable 2026 small business lending data under § 1002.107(a). During 2026, Financial Institution C originates 95 covered transactions for small businesses. In 2027, Financial Institution C is not a covered financial institution with respect to 2027 small business lending data, and is not obligated to compile and maintain 2027 data under § 1002.107(a) (although Financial Institution C may volunteer to collect and maintain 2027 data pursuant to § 1002.5(a)(4)(vii) and as explained in comment 105(b)-10). Pursuant to § 1002.109(a), Financial Institution C shall submit its small business lending application register for 2026 data in the format prescribed by the Bureau by June 1, 2027 because Financial Institution C is a covered financial institution with respect to 2026 data, and the data submission deadline of June 1, 2027 applies to 2026 data.

7. *Merger or acquisition—coverage of surviving or newly formed institution*. After a merger or acquisition, the surviving or newly formed financial institution is a covered financial

institution under § 1002.105(b) if it, considering the combined lending activity of the surviving or newly formed institution and the merged or acquired financial institutions (or acquired branches or locations), satisfies the criteria included in § 1002.105(b). For example, Financial Institutions A and B merge. The surviving or newly formed financial institution meets the threshold in § 1002.105(b) if the combined previous components of the surviving or newly formed financial institution (A plus B) would have originated at least 100 covered credit transactions for small businesses for each of the two preceding calendar years. Similarly, if the combined previous components and the surviving or newly formed financial institution would have reported at least 100 covered transactions for small businesses for the year previous to the merger as well as 100 covered transactions for small businesses for the year of the merger, the threshold described in § 1002.105(b) would be met and the surviving or newly formed financial institution would be a covered institution under § 1002.105(b) for the year following the merger. Comment 105(b)-8 discusses a financial institution's responsibilities with respect to compiling and maintaining (and subsequently reporting) data during the calendar year of a merger.

8. *Merger or acquisition—coverage specific to the calendar year of the merger or acquisition*. The scenarios described below illustrate a financial institution's responsibilities specifically for data from the calendar year of a merger or acquisition. For purposes of these illustrations, an "institution that is not covered" means either an institution that is not a financial institution, as defined in § 1002.105(a), or a financial institution that is not a covered financial institution, as defined in § 1002.105(b).

i. Two institutions that are not covered financial institutions merge. The surviving or newly formed institution meets all of the requirements necessary to be a covered financial institution. No data are required to be compiled, maintained, or reported for the calendar year of the merger (even though the merger creates an institution that meets all of the requirements necessary to be a covered financial institution).

ii. A covered financial institution and an institution that is not covered merge. The covered financial institution is the surviving institution, or a new covered financial institution is formed. For the calendar year of the merger, data are required to be compiled, maintained, and reported for covered applications from the covered financial institution and is optional for covered applications from the financial institution that was previously not covered.

iii. A covered financial institution and an institution that is not covered merge. The institution that is not covered is the surviving institution and remains not covered after the merger, or a new institution that is not covered is formed. For the calendar year of the merger, data are required to be compiled and maintained (and subsequently reported) for covered applications from the previously covered financial institution that took place prior to the merger. After the merger date, compiling, maintaining, and reporting data is optional for applications from the institution that was previously covered for the remainder of the calendar year of the merger.

iv. Two covered financial institutions merge. The surviving or newly formed financial institution is a covered financial institution. Data are required to be compiled and maintained (and subsequently reported) for the entire calendar year of the merger. The surviving or newly formed financial institution files either a consolidated submission or separate submissions for that calendar year.

9. *Foreign applicability*. As discussed in comment 1(a)-2, Regulation B (including subpart B) generally does not apply to lending activities that occur outside the United States.

10. *Voluntary collection and reporting*. Section 1002.5(a)(4)(vii) through (x) permits a creditor that is not a covered financial institution under § 1002.105(b) to voluntarily collect and report information regarding covered applications from small businesses in certain circumstances. If a creditor is voluntarily collecting information for covered applications regarding whether the applicant is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business under § 1002.107(a)(18), and regarding the ethnicity, race, and

sex of the applicant's principal owners under § 1002.107(a)(19), it shall do so in compliance with §§ 1002.107, 1002.108, 1002.111, 1002.112 as though it were a covered financial institution. If a creditor is reporting those covered applications from small businesses to the Bureau, it shall do so in compliance with §§ 1002.109 and 1002.110 as though it were a covered financial institution.

Section 1002.106—Business and Small Business

106(b) Small business definition.

106(b)(1) Small business.

1. *Change in determination of small business status—business is ultimately not a small business*. If a financial institution initially determines an applicant is a small business as defined in § 1002.106 based on available information and collects data required by § 1002.107(a)(18) and (19) but later concludes that the applicant is not a small business, the financial institution does not violate the Act or this regulation if it meets the requirements of § 1002.112(c)(4). The financial institution shall not report the application on its small business lending application register pursuant to § 1002.109.

2. *Change in determination of small business status—business is ultimately a small business.* Consistent with comment 107(a)(14)-1, a financial institution need not independently verify gross annual revenue. If a financial institution initially determines that the applicant is not a small business as defined in § 1002.106(b), but later concludes the applicant is a small business prior to taking final action on the application, the financial institution must report the covered application pursuant to § 1002.109. In this situation, the financial institution shall endeavor to compile, maintain, and report the data required under § 1002.107(a) in a manner that is reasonable under the circumstances. For example, if the applicant initially provides a gross annual revenue of $5.5 million (that is, above the threshold for a small business as initially defined in § 1002.106(b)(1)), but during the course of underwriting the financial institution discovers the applicant's gross annual revenue was in fact $4.75 million (meaning that the

applicant is within the definition of a small business under § 1002.106(b)), the financial institution is required to report the covered application pursuant to § 1002.109. In this situation, the financial institution shall take reasonable steps upon discovery to compile, maintain, and report the data necessary under § 1002.107(a) to comply with subpart B of this part for that covered application. Thus, in this example, even if the financial institution's procedure is typically to request applicant-provided data together with the application form, in this circumstance, the financial institution shall seek to collect the data during the application process necessary to comply with subpart B in a manner that is reasonable under the circumstances.

3. *Applicant's representations regarding gross annual revenue; inclusion of affiliate revenue; updated or verified information*. A financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include any affiliate's revenue) for purposes of determining small business status under § 1002.106(b). However, if the applicant provides updated gross annual revenue information or the financial institution verifies the gross annual revenue information (see comment 107(b)-1), the financial institution must use the updated or verified information in determining small business status.

4. *Multiple unaffiliated co-applicants—size determination.* The financial institution shall not aggregate unaffiliated co-applicants' gross annual revenues for purposes of determining small business status under § 1002.106(b). If a covered financial institution receives a covered application from multiple businesses who are not affiliates, as defined by § 1002.102(a), where at least one business is a small business under § 1002.106(b), the financial institution shall compile, maintain, and report data pursuant to §§ 1002.107 through 1002.109 regarding the covered application for only a single applicant that is a small business. See comment 103(a)-10 for additional details.

106(b)(2) Inflation adjustment.

1. *Inflation adjustment methodology*. The small business gross annual revenue threshold set forth in § 1002.106(b)(1) will be adjusted upward or downward to reflect changes, if any, in

the Consumer Price Index for All Urban Consumers (U.S. city average series for all items, not seasonally adjusted), as published by the United States Bureau of Labor Statistics ("CPI-U"). The base for computing each adjustment is the January 2025 CPI-U; this base value shall be compared to the CPI-U value in January 2030 and every five years thereafter. For example, after the January 2030 CPI-U is made available, the adjustment is calculated by determining the percentage change in the CPI-U between January 2025 and January 2030, applying this change to the $5 million gross annual revenue threshold, and rounding to the nearest $500,000. If, as a result of this rounding, there is no change in the gross annual revenue threshold, there will be no adjustment. For example, if in January 2030 the adjusted value were $4.9 million (reflecting a $100,000 decrease from January 2025 CPI-U), then the threshold would not adjust because $4.9 million would be rounded up to $5 million. If on the other hand, the adjusted value were $5.7 million, then the threshold would adjust to $5.5 million. Where the adjusted value is a multiple of $250,000 (*e.g.*, $5,250,000), then the threshold adjusts upward (in this example, to $5,500,000).

2. *Substitute for CPI-U*. If publication of the CPI-U ceases, or if the CPI-U otherwise becomes unavailable or is altered in such a way as to be unusable, then the Bureau shall substitute another reliable cost of living indicator from the United States Government for the purpose of calculating adjustments pursuant to § 1002.106(b)(2).

Section 1002.107—Compilation of Reportable Data

107(a) Data format and itemization.

1. *General.* Section 1002.107(a) describes a covered financial institution's obligation to compile and maintain data regarding the covered applications it receives from small businesses.

i. A covered financial institution reports these data even if the credit originated pursuant to the reported application was subsequently sold by the institution.

ii. A covered financial institution annually reports data for covered applications for which final action was taken in the previous calendar year.

iii. A covered financial institution reports data for a covered application on its small business lending application register for the calendar year during which final action was taken on the application, even if the institution received the application in a previous calendar year.

2. *Free-form text fields*. A covered financial institution may use technology such as autocorrect and predictive text when requesting applicant-provided data under subpart B of this part that the financial institution reports via free-form text fields, provided that such technology does not restrict the applicant's ability to write in its own response instead of using text suggested by the technology.

3. *Filing Instructions Guide*. Additional details and procedures for compiling data pursuant to § 1002.107 are included in the Filing Instructions Guide, which is available at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/*.

4. *Additional data point response options*. The Bureau may add additional response options to the lists of responses contained in the commentary that follows for certain of the data points set forth in § 1002.107(a), via the Filing Instructions Guide. Refer to the Filing Instructions Guide for any updates for each reporting year.

107(a)(1) Unique identifier.

1. *Unique within the financial institution.* A financial institution complies with § 1002.107(a)(1) by compiling and reporting an alphanumeric application or loan identifier unique within the financial institution to the specific application. The identifier must not exceed 45 characters, and must begin with the financial institution's Legal Entity Identifier (LEI), as defined in comment 109(b)(6)-1. Separate applications for the same applicant must have separate identifiers. The identifier may only include standard numerical and/or upper-case alphabetical characters and cannot include dashes, other special characters, or characters with diacritics. The financial institution may assign the unique identifier at any time prior to reporting the application. Refinancings or applications for refinancing must be assigned a different identifier

than the transaction that is being refinanced. A financial institution with multiple branches must ensure that its branches do not use the same identifiers to refer to multiple applications.

2. *Does not include directly identifying information*. The unique identifier must not include any directly identifying information, such as a whole or partial Social Security number or employer identification number, about the applicant or persons (natural or legal) associated with the applicant. See also § 1002.111(c) and related commentary.

107(a)(2) Application date.

1. *Consistency.* Section 1002.107(a)(2) requires that, in reporting the date of covered application, a financial institution shall report the date the covered application was received or the date shown on a paper or electronic application form. Although a financial institution need not choose the same approach for its entire small business lending application register, it should generally be consistent in its approach by, for example, establishing procedures for how to report this date within particular scenarios, products, or divisions. If the financial institution chooses to report the date shown on an application form and the institution retains multiple versions of the application form, the institution reports the date shown on the first application form satisfying the definition of covered application pursuant to § 1002.103.

2. *Application received*. For an application submitted directly to the financial institution or its affiliate (as described in § 1002.107(a)(4)), the financial institution shall report the date it received the covered application, as defined under § 1002.103, or the date shown on a paper or electronic application form. For an application initially submitted to a third party, see comment 107(a)(2)-3.

3. *Indirect applications.* For an application that was not submitted directly to the financial institution or its affiliate (as described in § 1002.107(a)(4)), the financial institution shall report the date the application was received by the party that initially received the application, the date the application was received by the financial institution, or the date shown on the application form. Although a financial institution need not choose the same approach for its entire small

business lending application register, it should generally be consistent in its approach by, for example, establishing procedures for how to report this date within particular scenarios, products, or divisions.

4. *Safe harbor*. Pursuant to § 1002.112(c)(1), a financial institution that reports on its small business lending application register an application date that is within three business days of the actual application date pursuant to § 1002.107(a)(2) does not violate the Act or subpart B of this part. For purposes of this paragraph, a business day means any day the financial institution is open for business.

107(a)(3) Application method.

1. *General.* A financial institution complies with § 1002.107(a)(3) by reporting the means by which the applicant submitted the application from one of the following options: in-person, telephone, online, or mail. If the financial institution retains multiple versions of the application form, the institution reports the means by which the first application form satisfying the definition of covered application pursuant to § 1002.103 was submitted.

i. *In-person.* A financial institution reports the application method as "in-person" if the applicant submitted the application to the financial institution, or to another party acting on the financial institution's behalf, in person. The in-person application method applies, for example, to applications submitted at a branch office (including applications hand delivered by the applicant), at the applicant's place of business, or via electronic media with a video component).

ii. *Telephone.* A financial institution reports the application method as "telephone" if the applicant submitted the application to the financial institution, or another party acting on the financial institution's behalf, by telephone call or via audio-based electronic media without a video component.

iii. *Online.* A financial institution reports the application method as "online" if the applicant submitted the application to the financial institution, or another party acting on the

financial institution's behalf, through a website, mobile application (app), fax transmission, electronic mail, text message, or some other form of text-based electronic communication.

iv. *Mail.* A financial institution reports the application method as "mail" if the applicant submitted the application to the financial institution, or another party acting on the financial institution's behalf, via United States mail, courier or overnight service, or an overnight drop box.

107(a)(4) Application recipient.

1. *Agents.* When a financial institution is reporting actions taken by its agent consistent with comment 109(a)(3)-3, the agent is considered the financial institution for the purposes of § 1002.107(a)(4). For example, assume that an applicant submitted an application to Financial Institution B, and Financial Institution B made the credit decision acting as Financial Institution A's agent under State law. Financial Institution A reports the application and indicates that the application was submitted directly to Financial Institution A.

107(a)(5) Credit type.

1. *Reporting credit product—in general*. A financial institution complies with § 1002.107(a)(5)(i) by selecting the credit product applied for or originated, from the list below. If the credit product applied for or originated is not included on this list, the financial institution selects "other," and reports the credit product via free-form text field. If an applicant requested more than one credit product at the same time, the financial institution reports each credit product requested as a separate application. However, if the applicant only requested a single covered credit transaction, but had not decided on which particular product, the financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product originated (if originated), or the credit product denied (if denied), or the credit product of greater interest to the applicant, if readily determinable. If the credit product of greater interest to the applicant is not readily determinable, the financial institution complies with § 1002.107(a)(5)(i) by reporting one of the credit products requested as part of the request for a single covered credit transaction, in its

discretion. See comment 103(a)-5 for instructions on reporting requests for multiple covered credit transactions at one time.

i. Term loan—unsecured.

ii. Term loan—secured.

iii. Line of credit—unsecured.

iv. Line of credit—secured.

v. Credit card account, not private-label.

vi. Private-label credit card account.

vii. Merchant cash advance.

viii. Other sales-based financing transaction.

ix. Other.

x. Not provided by applicant and otherwise undetermined.

2. *Credit card account, not private-label.* A financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product as a "credit card account, not private-label" when the product is a business-purpose open-end credit account that is not private label and that may be accessed from time to time by a card, plate, or other single credit device to obtain credit, except that accounts or lines of credit secured by real property and overdraft lines of credit accessed by debit cards are not credit card accounts. The term credit card account does not include debit card accounts or closed-end credit that may be accessed by a card, plate, or single credit device. The term credit card account does include charge card accounts that are generally paid in full each billing period, as well as hybrid prepaid-credit cards. A financial institution reports multiple credit card account, not private-label applications requested at one time using the guidance in comment 103(a)-7.

3. *Private-label credit card account.* A financial institution complies with § 1002.107(a)(5)(i) by reporting the credit product as a "private-label credit card account" when the product is a business-purpose open-end private-label credit account that otherwise meets the

description of a credit card account in comment 107(a)(5)-2. A private-label credit card account is a credit card account that can only be used to acquire goods or services provided by one business (for example, a specific merchant, retailer, independent dealer, or manufacturer) or a small group of related businesses. A co-branded or other card that can also be used for purchases at unrelated businesses is not a private-label credit card. A financial institution reports multiple private-label credit card account applications requested at one time in the same manner as credit card account, not private-label applications, using the guidance in comment 103(a)-7.

4. *Credit product not provided by the applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution is required to maintain procedures reasonably designed to collect applicant-provided data, which includes credit product. However, if a financial institution is nonetheless unable to collect or otherwise determine credit product information because the applicant does not indicate what credit product it seeks and the application is denied, withdrawn, or closed for incompleteness before a credit product is identified, the financial institution reports that the credit product is "not provided by applicant and otherwise undetermined."

5. *Reporting credit product involving counteroffers.* If a financial institution presents a counteroffer for a different credit product than the product the applicant had initially requested, and the applicant does not agree to proceed with the counteroffer, the financial institution reports the application for the original credit product as denied pursuant to § 1002.107(a)(9). If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the disposition of the application based on the credit product that was offered and does not report the original credit product applied for. See comment 107(a)(9)-2.

6. *Other sales-based financing transaction*. For an extension of business credit incident to a factoring arrangement that is otherwise a covered credit transaction, a financial institution selects "other sales-based financing transaction" as the credit product. See comment 104(b)-1.

7. *Guarantees.* A financial institution complies with § 1002.107(a)(5)(ii) by selecting the type or types of guarantees that were obtained for an originated covered credit transaction, or that

would have been obtained if the covered credit transaction was originated, from the list below. The financial institution selects, if applicable, up to a maximum of five guarantees for a single application. If the type of guarantee does not appear on the list, the financial institution selects "other" and reports the type of guarantee via free-form text field. If no guarantee is obtained or would have been obtained if the covered credit transaction was originated, the financial institution selects "no guarantee." If an application is denied, withdrawn, or closed for incompleteness before any guarantee has been identified, the financial institution selects "no guarantee." The financial institution chooses State government guarantee or local government guarantee, as applicable, based on the entity directly administering the program, not the source of funding.

i. Personal guarantee—owner(s).

ii. Personal guarantee—non-owner(s).

iii. SBA guarantee—7(a) program.

iv. SBA guarantee—504 program.

v. SBA guarantee—other.

vi. USDA guarantee.

vii. FHA insurance.

viii. Bureau of Indian Affairs guarantee.

ix. Other Federal guarantee.

x. State government guarantee.

xi. Local government guarantee.

xii. Other.

xiii. No guarantee.

8. *Loan term.* A financial institution complies with § 1002.107(a)(5)(iii) by reporting the number of months in the loan term for the covered credit transaction. The loan term is the number of months after which the legal obligation will mature or terminate, measured from the

date of origination. For transactions involving real property, the financial institution may instead measure the loan term from the date of the first payment period and disregard the time that elapses, if any, between the settlement of the transaction and the first payment period. For example, if a loan closes on April 12, but the first payment is not due until June 1 and includes the interest accrued in May (but not April), the financial institution may choose not to include the month of April in the loan term. In addition, the financial institution may round the loan term to the nearest full month or may count only full months and ignore partial months, as it so chooses. If a credit product, such as a credit card, does not have a loan term, the financial institution reports that the loan term is "not applicable." The financial institution also reports that the loan term is "not applicable" if the credit product is reported as "not provided by applicant and otherwise undetermined." For a credit product that generally has a loan term, the financial institution reports "not provided by applicant and otherwise undetermined" if the application is denied, withdrawn, or determined to be incomplete before a loan term has been identified. For merchant cash advances and other sales-based financing transactions, the financial institution complies with § 1002.107(a)(5)(iii) by reporting the loan term, if any, that the financial institution estimated or specified in processing, underwriting or providing disclosures for the application or transaction. If more than one such loan term is estimated or specified, the financial institution reports the one it considers to be most accurate, in its discretion. For merchant cash advances and other sales-based financing transactions that do not have a loan term, the financial institution reports "not provided by applicant and otherwise undetermined."

107(a)(6) Credit purpose.

1. *General.* A financial institution complies with § 1002.107(a)(6) by selecting the purpose or purposes of the covered credit transaction applied for or originated from the list below.

i. Purchase, construction/improvement, or refinance of non-owner-occupied real property.

ii. Purchase, construction/improvement, or refinance of owner-occupied real property.

iii. Purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks).

iv. Purchase, refinance, or rehabilitation/repair of equipment.

v. Working capital (includes inventory or floor planning).

vi. Business start-up.

vii. Business expansion.

viii. Business acquisition.

ix. Refinance existing debt (other than refinancings listed above).

x. Line increase.

xi. Overdraft.

xii. Other.

xiii. Not provided by applicant and otherwise undetermined.

xiv. Not applicable.

2. *More than one purpose.* If the applicant indicates or the financial institution is otherwise aware of more than one purpose for the credit applied for or originated, the financial institution reports those purposes, up to a maximum of three, using the list provided, in any order it chooses. For example, if an applicant refinances a commercial building it owns and uses the funds to purchase a motor vehicle and expand the business it runs in a part of that building, the financial institution reports that the three purposes of the credit are purchase, construction/improvement, or refinance of owner-occupied real property; purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks); and business expansion. If an application has more than three purposes, the financial institution reports any three of those purposes. In the example above, if the funds were also used to purchase equipment, the financial institution would select only three of the relevant purposes to report.

3. *"Other" credit purpose.* If a purpose of an application does not appear on the list of purposes provided, the financial institution reports "other" as the credit purpose and reports the

credit purpose via free-form text field. If the application has more than one "other" purpose, the financial institution chooses the most significant "other" purpose, in its discretion, and reports that "other" purpose. The financial institution reports a maximum of three credit purposes, including any "other" purpose.

4. *Credit purpose not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes credit purpose. However, if a financial institution is nonetheless unable to collect or determine credit purpose information, the financial institution reports that the credit purpose is "not provided by applicant and otherwise undetermined."

5. *Not applicable.* If the application is for a credit product that generally has indeterminate or numerous potential purposes, such as a credit card, the financial institution may report credit purpose as "not applicable."

6. *Collecting credit purpose.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, including credit purpose. The financial institution is permitted, but not required, to present the list of credit purposes provided in comment 107(a)(6)-1 to the applicant. The financial institution is also permitted to ask about purposes not included on the list provided in comment 107(a)(6)-1. If the applicant chooses a purpose or purposes not included on the provided list, the financial institution follows the instructions in comment 107(a)(6)-3 regarding reporting of "other" as the credit purpose. If an applicant chooses a purpose or purposes that are similar to purposes on the list provided, but uses different language, the financial institution reports the purpose or purposes from the list provided.

7. *Owner-occupied real property.* Real property is owner-occupied if any physical portion of the property is used by the owner for any activity, including storage.

8. *Overdraft.* When overdraft is provided as an aspect of the covered credit transaction applied for or originated, the financial institution reports "Overdraft" as a purpose of the credit.

The financial institution reports credit type pursuant to § 1002.107(a)(5)(i) as appropriate for the underlying covered credit transaction, such as "Line of credit—unsecured." Providing occasional overdraft services as part of a deposit account offering would not be reported for the purpose of subpart B.

107(a)(7) Amount applied for.

1. *Initial amount requested.* A financial institution complies with § 1002.107(a)(7) by reporting the initial amount of credit or the initial credit limit requested by the applicant. The financial institution is not required to report credit amounts or limits discussed before an application is made, but must capture the initial amount requested at the application stage. If the applicant requests an amount as a range of numbers, the financial institution reports the midpoint of that range.

2. *No amount requested.* If the applicant does not request a specific amount at the application stage, but the financial institution underwrites the application for a specific amount, the financial institution complies with § 1002.107(a)(7) by reporting the amount considered for underwriting as the amount applied for. If the particular type of credit product applied for does not involve a specific amount requested, the financial institution reports that the requirement is "not applicable."

3. *Firm offers.* When an applicant responds to a "firm offer" that specifies an amount or limit, which may occur in conjunction with a pre-approved credit solicitation, the financial institution reports the amount of the firm offer as the amount applied for, unless the applicant requests a different amount. If the firm offer does not specify an amount or limit and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution. If the firm offer specifies an amount or limit as a range and the applicant does not request a specific amount, the amount applied for is the amount underwritten by the financial institution.

4. *Additional amounts on an existing account.* When reporting a covered application that seeks additional credit amounts on an existing account, the financial institution reports only the additional credit amount sought, and not any previous amounts extended. See comment 103(b)-3.

5. *Initial amount otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the credit amount initially requested by the applicant (other than for products that do not involve a specific amount requested). However, if a financial institution is nonetheless unable to collect or otherwise determine the amount initially requested, the financial institution reports that the amount applied for is "not provided by applicant and otherwise undetermined." But see comment 107(a)(7)-2 for how to report the credit amount initially requested by the applicant for particular types of credit products that do not involve a specific amount requested.

107(a)(8) Amount approved or originated.

1. *General.* A financial institution complies with § 1002.107(a)(8) by reporting the amount approved or originated for credit that is originated or approved but not accepted. For applications that the financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that the amount approved or originated is "not applicable."

2. *Multiple approval amounts.* A financial institution may sometimes approve an applicant for more than one credit amount, allowing the applicant to choose which amount the applicant prefers for the extension or line of credit. When multiple approval amounts are offered for a closed-end credit transaction for which the action taken is approved but not accepted, and the applicant does not accept the approved offer of credit in any amount, the financial institution reports the highest amount approved. If the applicant accepts the offer of closed-end credit, the financial institution reports the amount originated. When multiple approval amounts are offered for an open-end credit transaction for which the action taken is approved but not accepted, and the applicant does not accept the approved offer of credit in any amount, the financial institution

reports the highest amount approved. If the applicant accepts the offer of open-end credit, the financial institution reports the actual credit limit established.

3. *Amount approved or originated—closed-end credit transaction.* For an originated closed-end credit transaction, the financial institution reports the principal amount to be repaid. This amount will generally be disclosed on the legal obligation.

4. *Amount approved or originated—refinancing.* For a refinancing, the financial institution reports the amount of credit approved or originated under the terms of the new debt obligation.

5. *Amount approved or originated—counteroffer.* If an applicant agrees to proceed with consideration of a counteroffer for an amount or limit different from the amount for which the applicant applied, and the covered credit transaction is approved and originated, the financial institution reports the amount granted. If an applicant does not agree to proceed with consideration of a counteroffer or fails to respond, the institution reports the application as denied and reports "not applicable" for the amount approved or originated. See comment 107(a)(9)-2.

6. *Amount approved or originated—existing accounts*. For additional credit amounts that were approved for or originated on an existing account, the financial institution reports only the additional credit amount approved or originated, and not any previous amounts extended.

107(a)(9) Action taken.

1. *General*. A financial institution complies with § 1002.107(a)(9) by selecting the action taken by the financial institution on the application from the following list: originated, approved but not accepted, denied, withdrawn by the applicant, or incomplete. A financial institution identifies the applicable action taken code based on final action taken on the covered application.

i. *Originated.* A financial institution reports that the application was originated if the financial institution made a credit decision approving the application and that credit decision resulted in an extension of credit.

ii. *Approved but not accepted.* A financial institution reports that the application was approved but not accepted if the financial institution made a credit decision approving the application, but the applicant or the party that initially received the application failed to respond to the financial institution's approval within the specified time, or the covered credit transaction was not otherwise consummated or the account was not otherwise opened.

iii. *Denied.* A financial institution reports that the application was denied if it made a credit decision denying the application before an applicant withdrew the application, before the application was closed for incompleteness, or before the application was denied on the basis of incompleteness.

iv. *Withdrawn by the applicant.* A financial institution reports that the application was withdrawn if the application was expressly withdrawn by the applicant before the financial institution made a credit decision approving or denying the application, before the application was closed for incompleteness, or before the application was denied on the basis of incompleteness.

v. *Incomplete.* A financial institution reports that the application was incomplete if the financial institution took adverse action on the basis of incompleteness under § 1002.9(a)(1)(ii) and (c)(1)(i) or provided a written notice of incompleteness under § 1002.9(c)(1)(ii) and (2), and the applicant did not respond to the request for additional information within the period of time specified in the notice.

2. *Treatment of counteroffers.* If a financial institution makes a counteroffer to grant credit on terms other than those originally requested by the applicant (for example, for a shorter loan maturity, with a different interest rate, or in a different amount) and the applicant declines the counteroffer or fails to respond, the institution reports the action taken as a denial on the original terms requested by the applicant. If the applicant agrees to proceed with consideration of the financial institution's counteroffer, the financial institution reports the action taken as the disposition of the application based on the terms of the counteroffer. For example, assume an

applicant applies for a term loan and the financial institution makes a counteroffer to proceed with consideration of a line of credit. If the applicant declines to be considered for a line of credit, the financial institution reports the application as a denied request for a term loan. If, on the other hand, the applicant agrees to be considered for a line of credit, then the financial institution reports the action taken as the disposition of the application for the line of credit. For instance, using the same example, if the financial institution makes a credit decision approving the line of credit, but the applicant fails to respond to the financial institution's approval within the specified time by accepting the credit offer, the financial institution reports the application on the line of credit as approved but not accepted.

3. *Treatment of rescinded transactions.* If a borrower successfully rescinds a transaction after closing but before a financial institution is required to submit its small business lending application register containing the information for the application under § 1002.109, the institution reports the application as approved but not accepted.

4. *Treatment of pending applications.* A financial institution does not report any application still pending at the end of the calendar year; it reports such applications on its small business lending application register for the year in which final action is taken.

5. *Treatment of conditional approvals.* If a financial institution issues an approval that is subject to the applicant meeting certain conditions prior to closing, the financial institution reports the action taken as provided below dependent on whether the conditions are solely customary commitment or closing conditions or if the conditions include any underwriting or creditworthiness conditions. Customary commitment or closing conditions may include, for example, a clear-title requirement, proof of insurance policies, or a subordination agreement from another lienholder. Underwriting or creditworthiness conditions may include, for example, conditions that constitute a counteroffer (such as a demand for a higher down-payment), satisfactory loan-to-value ratios, or verification or confirmation, in whatever form the institution

requires, that the applicant meets underwriting conditions concerning applicant creditworthiness, including documentation or verification of revenue, income or assets.

i. *Conditional approval—denial.* If the approval is conditioned on satisfying underwriting or creditworthiness conditions, those conditions are not met, and the financial institution takes adverse action on some basis other than incompleteness, the financial institution reports the action taken as denied.

ii. *Conditional approval—incompleteness*. If the approval is conditioned on satisfying underwriting or creditworthiness conditions that the financial institution needs to make the credit decision, and the financial institution takes adverse action on the basis of incompleteness under § 1002.9(a)(1)(ii) and (c)(1)(i), or has sent a written notice of incompleteness under § 1002.9(c)(1)(ii) and (2), and the applicant did not respond within the period of time specified in the notice, the financial institution reports the action taken as incomplete.

iii. *Conditional approval—approved but not accepted.* If the approval is conditioned on satisfying conditions that are solely customary commitment or closing conditions and the conditions are not met, the financial institution reports the action taken as approved but not accepted. If all the conditions (underwriting, creditworthiness, or customary commitment or closing conditions) are satisfied and the financial institution agrees to extend credit but the covered credit transaction is not originated (for example, because the applicant withdraws), the financial institution reports the action taken as approved but not accepted.

iv. *Conditional approval—withdrawn by the applicant.* If the applicant expressly withdraws before satisfying all underwriting or creditworthiness conditions and before the institution denies the application or before the institution closes the file for incompleteness, the financial institution reports the action taken as withdrawn.

107(a)(10) Action taken date.

1. *Reporting action taken date for denied applications.* For applications that are denied, a financial institution reports either the date the application was denied or the date the denial notice was sent to the applicant.

2. *Reporting action taken date for applications withdrawn by applicant*. For applications that are withdrawn by the applicant, the financial institution reports the date the express withdrawal was received, or the date shown on the notification form in the case of a written withdrawal.

3. *Reporting action taken date for applications that are approved but not accepted*. For applications approved by a financial institution but not accepted by the applicant, the financial institution reports any reasonable date, such as the approval date, the deadline for accepting the offer, or the date the file was closed. A financial institution should generally be consistent in its approach to reporting by, for example, establishing procedures for how to report this date for particular scenarios, products, or divisions.

4. *Reporting action taken date for originated applications*. For applications that result in an extension of credit, a financial institution generally reports the closing or account opening date. If the disbursement of funds takes place on a date later than the closing or account opening date, the institution may, alternatively, use the date of initial disbursement. A financial institution should generally be consistent in its approach to reporting by, for example, establishing procedures for how to report this date for particular scenarios, products, or divisions.

5. *Reporting action taken date for incomplete applications*. For applications closed for incompleteness or denied for incompleteness, the financial institution reports either the date the action was taken or the date the denial or incompleteness notice was sent to the applicant.

107(a)(11) Denial reasons.

1. *Reason for denial—in general*. A financial institution complies with § 1002.107(a)(11) by reporting the principal reason or reasons it denied the application, indicating up to four

reasons. The financial institution reports only the principal reason or reasons it denied the application. For example, if a financial institution denies an application due to insufficient cashflow, unacceptable collateral, and unverifiable business information, the financial institution is required to report these three reasons. The reasons reported must accurately describe the principal reason or reasons the financial institution denied the application. A financial institution reports denial reasons by selecting its principal reason or reasons for denying the application from the following list:

i. *Credit characteristics of the business*. A financial institution reports the denial reason as "credit characteristics of the business" if it denies the application based on an assessment of the business's ability to meet its current or future credit obligations. Examples include business credit score, history of business bankruptcy or delinquency, and/or a high number of recent business credit inquiries.

ii. *Credit characteristics of the principal owner(s) or guarantor(s).* A financial institution reports the denial reason as "credit characteristics of the principal owner(s) or guarantor(s)" if it denies the application based on an assessment of the principal owner(s) or guarantor(s)'s ability to meet its current or future credit obligations. Examples include principal owner(s) or guarantor(s)'s credit score, history of charge offs, bankruptcy or delinquency, low net worth, limited or insufficient credit history, or history of excessive overdraft.

iii. *Use of credit proceeds.* A financial institution reports the denial reason as "use of credit proceeds" if it denies an application because, as a matter of policy or practice, it places limits on lending to certain kinds of businesses, products, or activities it has identified as high risk.

iv. *Cashflow*. A financial institution reports the denial reason as "cashflow" when it denies an application due to insufficient or inconsistent cashflow.

v. *Collateral.* A financial institution reports the denial reason as "collateral" when it denies an application due to collateral that it deems insufficient or otherwise unacceptable.

vi. *Time in business*. A financial institution reports the denial reason as "time in business" when it denies an application due to insufficient time or experience in a line of business.

vii. *Government loan program criteria*. Certain loan programs are backed by government agencies that have specific eligibility requirements. When those requirements are not met by an applicant, and the financial institution denies the application, the financial institution reports the denial reason as "government loan program criteria." For example, if an applicant cannot meet a government-guaranteed loan program's requirement to provide a guarantor or proof of insurance, the financial institution reports the reason for the denial as "government loan program criteria."

viii. *Aggregate exposure*. Aggregate exposure is a measure of the total exposure or level of indebtedness of the business and its principal owner(s) associated with an application. A financial institution reports the denial reason as "aggregate exposure" where the total debt associated with the application is deemed high or exceeds certain debt thresholds set by the financial institution. For example, if an application for unsecured credit exceeds the maximum amount a financial institution is permitted to approve per applicant, as stated in its credit guidelines, and the financial institution denies the application for this reason, the financial institution reports the reason for denial as "aggregate exposure."

ix. *Unverifiable information*. A financial institution reports the denial reason as "unverifiable information" when it is unable to verify information provided as part of the application, and denies the application for that reason. The unverifiable information must be necessary for the financial institution to make a credit decision based on its procedures for the type of credit requested. Examples include unverifiable assets or collateral, unavailable business credit report, and unverifiable business ownership composition.

x. *Other*. A financial institution reports the denial reason as "other" where none of the enumerated denial reasons adequately describe the principal reason or reasons it denied the application, and the institution reports the denial reason or reasons via free-form text field.

2. *Reason for denial—not applicable*. A financial institution complies with § 1002.107(a)(11) by reporting that the requirement is not applicable if the action taken on the application, pursuant to § 1002.107(a)(9), is not a denial. For example, if the application resulted in an originated covered credit transaction, or the application was approved but not accepted, the financial institution complies with § 1002.107(a)(11) by reporting not applicable.

107(a)(12) Pricing information.

1. *General*. For applications that a financial institution, pursuant to § 1002.107(a)(9), reports as denied, withdrawn by the applicant, or incomplete, the financial institution reports that pricing information is "not applicable."

107(a)(12)(i) Interest rate.

1. *General*. A financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated as reported pursuant to § 1002.107(a)(8).

2. *Interest rate—initial period*. If a covered credit transaction includes an initial period with an introductory interest rate of 12 months or less, after which the interest rate adjusts upwards or shifts from a fixed to variable rate, a financial institution complies with § 1002.107(a)(12)(i) by reporting information about the interest rate applicable after the initial period. If a covered transaction includes an initial period with an interest rate of more than 12 months after which the interest rate resets, a financial institution complies with § 1002.107(a)(12)(i) by reporting information about the interest rate applicable prior to the reset period. For example, if a financial institution originates a covered credit transaction with a fixed, initial interest rate of 0 percent for six months following origination, after which the interest rate will adjust according to a Prime index rate plus a 3 percent margin, the financial institution reports the 3 percent margin, Prime as the name of the index used to adjust the interest rate, the number 6 for the length of the initial period, and "not applicable" for the index value. As another example, in a 10/1 adjustable-rate mortgage transaction, where the first 10 years of the

repayment period has a fixed rate of 3 percent and after year 10 the interest rate will adjust according to a Prime index rate plus a 3 percent margin, a financial institution complies with § 1002.107(a)(12)(i) by reporting the fixed rate of 3 percent, the number 120 for the initial period, and "not applicable" in the fields for the index, margin, and index value.

3. *Multiple interest rates*. If a covered credit transaction includes multiple interest rates applicable to different credit features, a financial institution complies with § 1002.107(a)(12)(i) by reporting the interest rate applicable to the amount of credit approved or originated reported pursuant to § 1002.107(a)(8). For example, if a financial institution originates a credit card with different interest rates for purchases, balance transfers, cash advances, and overdraft advances, the financial institution reports the interest rate applicable for purchases.

4. *Index names*. A financial institution complies with § 1002.107(a)(12)(i) by selecting the index used from the following list: Wall Street Journal Prime, 6-month CD rate, 1-year T-Bill, 3-year T-Bill, 5-year T-Note, 12-month average of 10-year T-Bill, Cost of Funds Index (COFI)-National, Cost of Funds Index (COFI)-11th District, Constant Maturity Treasury (CMT). If the index used is internal to the financial institution, the financial institution reports "internal index" via the list of indices provided. If the index used does not appear on the list of indices provided (and is not internal to the financial institution), the financial institution reports "other" and reports the name of the index via free-form text field.

5. *Index value*. For covered transactions with an adjustable interest rate, a financial institution complies with § 1002.107(a)(12)(i)(B) by reporting the index value used to set the rate that is or would be applicable to the covered transaction.

107(a)(12)(ii) Total origination charges.

1. *Charges in comparable cash transactions*. Charges imposed uniformly in cash and credit transactions are not reportable under § 1002.107(a)(12)(ii). In determining whether an item is part of the total origination charges, a financial institution should compare the covered credit transaction in question with a similar cash transaction. A financial institution financing the sale

of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service.

2. *Charges by third parties*. A financial institution includes fees and amounts charged by someone other than the financial institution in the total charges reported if the financial institution:

i. Requires the use of a third party as a condition of or an incident to the extension of credit, even if the applicant can choose the third party; or

ii. Retains a portion of the third-party charge, to the extent of the portion retained.

3. *Special rule; broker fees*. A financial institution complies with § 1002.107(a)(12)(ii) by including fees charged by a broker (including fees paid by the applicant directly to the broker or to the financial institution for delivery to the broker) in the total origination charges reported even if the financial institution does not require the applicant to use a broker and even if the financial institution does not retain any portion of the charge. For more information on broker fees, see commentary for § 1002.107(a)(12)(iii).

4. *Bundled services*. Total origination charges include all charges imposed directly or indirectly by the financial institution at or before origination as an incident to or a condition of the extension of credit. Accordingly, a financial institution complies with § 1002.107(a)(12)(ii) by including charges for other products or services paid at or before origination in the total origination charges reported if the financial institution requires the purchase of such other product or service as a condition of or an incident to the extension of credit.

5. *Origination charges—examples.* Examples of origination charges may include application fees, credit report fees, points, appraisal fees, and other similar charges.

6. *Net lender credit*. If a financial institution provides a credit to an applicant that is greater than the total origination charges the applicant would have paid, the financial institution complies with § 1002.107(a)(12)(ii) by reporting the net lender credit as a negative amount. For example, if a covered transaction has $500 provided to the applicant at origination to offset

closing costs, and the financial institution does not charge any origination charges, the financial institution complies with § 1002.107(a)(12)(ii) by reporting negative $500 as the total origination charges.

107(a)(12)(iii) Broker fees.

1. *Amount*. A financial institution complies with § 1002.107(a)(12)(iii) by including the fees reported in § 1002.107(a)(12)(ii) that are fees paid by the applicant directly to the broker or to the financial institution for delivery to the broker. For example, a covered transaction has $3000 of total origination charges. Of that $3000, $250 are fees paid by the applicant directly to a broker and an additional $300 are fees paid to the financial institution for delivery to the broker. The financial institution complies with § 1002.107(a)(12)(iii) by reporting $550 in the broker fees reported.

2. *Fees paid directly to a broker by an applicant.* A financial institution complies with § 1002.107(a)(12)(iii) by relying on the best information readily available to the financial institution at the time final action is taken. Information readily available could include, for example, information provided by an applicant or broker that the financial institution reasonably believes regarding the amount of fees paid by the applicant directly to the broker.

107(a)(12)(iv) Initial annual charges.

1. *Charges during the initial annual period.* The total initial annual charges include all charges scheduled to be imposed during the initial annual period following origination. For example, if a financial institution originates a covered credit transaction with a $50 monthly fee and a $100 annual fee, the financial institution complies with § 1002.107(a)(12)(iv) by reporting $700 in the initial annual charges reported. If there will be a charge in the initial annual period following origination but the amount of that charge is uncertain at the time of origination, a financial institution complies with § 1002.107(a)(12)(iv) by not reporting that charge as scheduled to be imposed during the initial annual period following origination.

2. *Interest excluded*. A financial institution complies with § 1002.107(a)(12)(iv) by excluding any interest expense from the initial annual charges reported.

3. *Avoidable charges*. A financial institution complies with § 1002.107(a)(12)(iv) by only including scheduled charges and excluding any charges for events that are avoidable by the applicant from the initial annual charges reported. Examples of avoidable charges include charges for late payment, for exceeding a credit limit, for delinquency or default, or for paying items that overdraw an account.

4. *Initial annual charges—examples.* Examples of charges scheduled to be imposed during the initial annual period may include monthly fees, annual fees, and other similar charges.

5. *Scheduled charges with variable amounts.* A financial institution complies with § 1002.107(a)(12)(iv) by reporting as the default the highest amount for a charge scheduled to be imposed. For example, if a covered credit transaction has a $75 monthly fee, but the fee is reduced to $0 if the applicant maintains an account at the financial institution originating the covered credit transaction, the financial institution complies with § 1002.107(a)(12)(iv) by reporting $900 ($75x12) in the initial annual charges reported.

6. *Transactions with a term of less than one year.* For a transaction with a term of less than one year, a financial institution complies with § 1002.107(a)(12)(iv) by reporting all charges scheduled to be imposed during the term of the transaction.

107(a)(12)(v) Additional cost for merchant cash advances or other sales-based financing.

1. *Merchant cash advances.* Section 1002.107(a)(12)(v) requires a financial institution to report the difference between the amount advanced and the amount to be repaid for a merchant cash advance or other sales-based financing transaction. Thus, in a merchant cash advance, a financial institution reports the difference between the amount advanced and the amount to be repaid, using the amounts (expressed in dollars) provided in the contract between the financial institution and the applicant.

107(a)(12)(vi) Prepayment penalties.

1. *Policies and procedures applicable to the covered credit transaction.* The policies and procedures applicable to the covered credit transaction include the practices that the financial institution follows when evaluating applications for the specific credit type and credit purpose requested. For example, assume that a financial institution's written procedures permit it to include prepayment penalties in the loan agreement for its term loans secured by non-owner occupied commercial real estate. For such transactions, the financial institution includes prepayment penalties in some loan agreements but not others. For an application for, or origination of, a term loan secured by non-owner occupied commercial real estate, the financial institution reports under § 1002.107(a)(12)(vi)(A) that a prepayment penalty could have been included under the policies and procedures applicable to the transaction, regardless of whether the term loan secured by non-owner occupied commercial real estate actually includes a prepayment penalty.

2. *Balloon finance charges.* A financial institution complies with § 1002.107(a)(12)(vi) by reporting as a prepayment penalty any balloon finance charge that may be imposed for paying all or part of the transaction's principal before the date on which the principal is due. For example, under the terms of a transaction, the amount of funds advanced is $12,000, the amount to be repaid is $24,000 (which includes $12,000 in principal and $12,000 in interest and fees), the length of the transaction is 12 months, and the applicant must repay $2,000 per month. The terms of the transaction state that if the applicant prepays the principal before the 12-month period is over, the applicant is responsible for paying the difference between $24,000 and the amount the applicant has already repaid prior to initiating prepayment. The difference between the $24,000 to be repaid and what the applicant has already repaid prior to initiating prepayment is a balloon finance charge and should be reported as a prepayment penalty.

107(a)(13) Census tract.

1. *General.* A financial institution complies with § 1002.107(a)(13) by reporting a census tract number as defined by the U.S. Census Bureau, which includes State and county numerical codes. A financial institution complies with § 1002.107(a)(13) if it uses the boundaries and codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting. The financial institution reports census tract based on the following:

i. *Proceeds address*. A financial institution complies with § 1002.107(a)(13) by reporting a census tract based on the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied, if known. For example, a financial institution would report a census tract based on the address or location of the site where the proceeds of a construction loan will be applied.

ii. *Main office or headquarters address*. If the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied is unknown, a financial institution complies with § 1002.107(a)(13) by reporting a census tract number based on the address or location of the main office or headquarters of the applicant, if known. For example, the address or location of the main office or headquarters of the applicant may be the home address of a sole proprietor or the office address of a sole proprietor or other applicant.

iii. *Another address or location*. If neither the address or location where the proceeds of the credit applied for or originated will be or would have been principally applied nor the address or location of the main office or headquarters of the applicant are known, a financial institution complies with § 1002.107(a)(13) by reporting a census tract number based on another address or location associated with the applicant.

iv. *Type of address used*. In addition to reporting the census tract, pursuant to § 1002.107(a)(13)(iv) a financial institution must report which one of the three types of addresses or locations listed in § 1002.107(a)(13)(i) through (iii) and described in comments 107(a)(13)-1.i through iii that the census tract is determined from.

2. *Financial institution discretion.* A financial institution complies with § 1002.107(a)(13) by identifying the appropriate address or location and the type of that address or location in good faith, using appropriate information from the applicant's credit file or otherwise known by the financial institution. A financial institution is not required to make inquiries beyond its standard procedures as to the nature of the addresses or locations it collects.

3. *Address or location not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes at least one address or location for an applicant for census tract reporting. However, if a financial institution is nonetheless unable to collect or otherwise determine any address or location for an application, the financial institution reports that the census tract information is "not provided by applicant and otherwise undetermined."

4. *Safe harbor*. As described in § 1002.112(c)(2) and comment 112(c)-1, a financial institution that obtains an incorrect census tract by correctly using a geocoding tool provided by the FFIEC or the Bureau does not violate the Act or subpart B of this part.

107(a)(14) Gross annual revenue.

1. *Collecting gross annual revenue*. A financial institution reports the applicant's gross annual revenue, expressed in dollars, for its fiscal year preceding when the information was collected. A financial institution may rely on the applicant's statements or on information provided by the applicant in collecting and reporting gross annual revenue, even if the applicant's statement or information is based on estimation or extrapolation. However, pursuant to § 1002.107(b), if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. Also, pursuant to comment 107(c)(1)-5, a financial institution reports updated gross annual revenue data if it obtains more current data from the applicant during the application process. If a financial institution has already verified gross annual revenue data and then the applicant updates it, the financial institution reports the information it believes to be more accurate, in its discretion. The financial institution may use the

following language to ask about gross annual revenue and may rely on the applicant's answer (unless subsequently verified or updated):

What was the gross annual revenue of the business applying for credit in its last full fiscal year? Gross annual revenue is the amount of money the business earned before subtracting taxes and other expenses. You may provide gross annual revenue calculated using any reasonable method.

2. *Gross annual revenue not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the gross annual revenue of the applicant. However, if a financial institution is nonetheless unable to collect or determine the gross annual revenue of the applicant, the financial institution reports that the gross annual revenue is "not provided by applicant and otherwise undetermined."

3. *Affiliate revenue*. 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. Likewise, as explained in comment 106(b)(1)-3, in determining whether the applicant is a small business under § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include affiliates' revenue.

4. *Gross annual revenue for a startup business*. In a typical startup business situation where the applicant has no gross annual revenue for its fiscal year preceding when the information is collected, the financial institution reports that the applicant's gross annual revenue in the preceding fiscal year is "zero." The financial institution shall not report pro forma projected revenue figures because these figures do not reflect actual gross revenue.

107(a)(15) NAICS code.

1. *General*. NAICS stands for North American Industry Classification System. The Office of Management and Budget has charged the Economic Classification Policy Committee with the maintenance and review of NAICS. A financial institution complies with

§ 1002.107(a)(15) if it uses the 3-digit NAICS subsector codes in effect on January 1 of the calendar year covered by the small business lending application register that it is reporting.

2. *NAICS not provided by applicant and otherwise undetermined*. Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes NAICS code. However, if a financial institution is nonetheless unable to collect or otherwise determine a NAICS code for the applicant, the financial institution reports that the NAICS code is "not provided by applicant and otherwise undetermined."

3. *Safe harbor*. As described in § 1002.112(c)(3) and comment 112(c)-2, a financial institution that obtains an incorrect NAICS code does not violate the Act or subpart B of this part if it either relies on an applicant's representations or on an appropriate third-party source, in accordance with § 1002.107(b), regarding the NAICS code, or identifies the NAICS code itself, provided that the financial institution maintains procedures reasonably adapted to correctly identify a 3-digit NAICS code.

107(a)(16) Number of workers.

1. *General.* A financial institution complies with § 1002.107(a)(16) by reporting the number of people who work for the applicant, using the ranges prescribed in the Filing Instructions Guide.

2. *Collecting number of workers.* A financial institution may collect number of workers from an applicant using the ranges for reporting as specified by the Bureau (see comment 107(a)(16)-1) or as a numerical value. When asking for the number of workers from an applicant, a financial institution shall explain that full-time, part-time and seasonal employees, as well as contractors who work primarily for the applicant, would be counted as workers, but principal owners of the applicant would not. If asked, the financial institution shall explain that volunteers are not counted as workers, and workers for affiliates of the applicant are counted if the financial institution were also collecting the affiliates' gross annual revenue. The financial

institution may use the following language to ask about the number of workers and may rely on the applicant's answer (unless subsequently verified or updated):

Counting full-time, part-time and seasonal workers, as well as contractors who work primarily for the business applying for credit, but not counting principal owners of the business, how many people work for the business applying for credit?

3. *Number of workers not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of workers of the applicant. However, if a financial institution is nonetheless unable to collect or determine the number of workers of the applicant, the financial institution reports that the number of workers is "not provided by applicant and otherwise undetermined."

107(a)(17) Time in business.

1. *Collecting time in business.* A financial institution complies with § 1002.107(a)(17) by reporting the time the applicant has been in business.

i. If a financial institution collects or otherwise obtains the number of years an applicant has been in business as part of its procedures for evaluating an application for credit, it reports the time in business in whole years, rounded down to the nearest whole year.

ii. If a financial institution does not collect time in business as described in comment 107(a)(17)-1.i, but as part of its procedures determines whether or not the applicant's time in business is less than two years, it reports the applicant's time in business as either less than two years or two or more years in business.

iii. If a financial institution does not collect time in business as part of its procedures for evaluating an application for credit as described in comments 107(a)(17)-1.i or .ii, the financial institution complies with § 1002.107(a)(17) by asking the applicant whether it has been in

existence for less than two years or two or more years and reporting the information provided by the applicant accordingly.

2. *Time in business collected as part of the financial institution's procedures for evaluating an application for credit.* A financial institution that collects or obtains an applicant's time in business as part of its procedures for evaluating an application for credit is not required to collect or obtain time in business pursuant to any particular definition of time in business for this purpose. For example, if the financial institution collects the number of years the applicant has existed (such as by asking the applicant when its business was started, or by obtaining the applicant's date of incorporation from a Secretary of State or other State or Federal agency that registers or licenses businesses) as the time in business, the financial institution reports that information accordingly pursuant to comment 107(a)(17)-1.i. Similarly, if the financial institution collects the number of years of experience the applicant's owners have in the current line of business, the financial institution reports that information accordingly pursuant to comment 107(a)(17)-1.i. If, however, the financial institution collects both the number of years the applicant has existed as well as some other measure of time in business (such as the number of years of experience the applicant's owners have in the current line of business), the financial institution reports the number of years the applicant has existed as the time in business pursuant to comment 107(a)(17)-1.i.

3. *Time in business not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the applicant's time in business. However, if a financial institution is nonetheless unable to collect or determine the applicant's time in business, the financial institution reports that the time in business is "not provided by applicant and otherwise undetermined."

107(a)(18) Minority-owned, women-owned, and LGBTQI+-owned business statuses.

1. *General.* A financial institution must ask an applicant whether it is a minority-owned, women-owned, and/or LGBTQI+-owned business. The financial institution must permit an applicant to refuse (*i.e.*, decline) to answer the financial institution's inquiry regarding business status and must inform the applicant that the applicant is not required to provide the information. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. The financial institution must report the applicant's substantive response regarding each business status, that the applicant declined to answer the inquiry (that is, selected an answer option of "I do not wish to provide this information" or similar), or its failure to respond to the inquiry (that is, "not provided by applicant"), as applicable.

2. *Definitions*. When inquiring about minority-owned, women-owned, and LGBTQI+-owned business statuses (regardless of whether the request is made on a paper form, electronically, or orally), the financial institution also must provide the applicant with definitions of the terms "minority-owned business," "women-owned business," and "LGBTQI+-owned business" as set forth in § 1002.102 (m), (s) and (*l*), respectively. The financial institution satisfies this requirement if it provides the definitions as set forth in the sample data collection form in appendix E.

3. *Combining questions*. A financial institution may combine on the same paper or electronic data collection form the questions regarding minority-owned, women-owned, and LGBTQI+-owned business status pursuant to § 1002.107(a)(18) with principal owners' ethnicity, race, and sex pursuant to § 1002.107(a)(19) and the applicant's number of principal owners pursuant to § 1002.107(a)(20). See the sample data collection form in appendix E.

4. *Notices*. When requesting minority-owned, women-owned, and LGBTQI+-owned business statuses from an applicant, a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of the applicant's minority-owned, women-owned, or LGBTQI+-owned business statuses, or on whether the applicant provides its minority-

owned, women-owned, or LGBTQI+-owned business statuses. A financial institution must also inform the applicant that Federal law requires it to ask for an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. A financial institution may combine these notices regarding minority-owned, women-owned, and LGBTQI+-owned business statuses with the notices that a financial institution is required to provide when requesting principal owners' ethnicity, race, and sex if a financial institution requests information pursuant to § 1002.107(a)(18) and (19) in the same data collection form or at the same time. See the sample data collection form in appendix E for sample language that a financial institution may use for these notices.

5. *Maintaining the record of an applicant's response regarding minority-owned, women-owned, and LGBTQI+-owned business statuses separate from the application*. A financial institution must maintain the record of an applicant's responses to the financial institution's inquiry pursuant to § 1002.107(a)(18) separate from the application and accompanying information. See § 1002.111(b) and comment 111(b)-1. If the financial institution provides a paper or electronic data collection form, the data collection form must not be part of the application form or any other document that the financial institution uses to provide or collect any information other than minority-owned business status, women-owned business status, LGBTQI+-owned business status, principal owners' ethnicity, race, and sex, and the number of the applicant's principal owners. See the sample data collection form in appendix E. For example, if the financial institution sends the data collection form via email, the data collection form should be a separate attachment to the email or accessed through a separate link in the email. If the financial institution uses a web-based data collection form, the form should be on its own page.

6. *Minority-owned, women-owned, and/or LGBTQI+-owned business statuses not provided by applicant.* Pursuant to § 1002.107(c), a financial institution shall maintain

procedures reasonably designed to collect applicant-provided data, which includes the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses. However, if a financial institution does not receive a response to the financial institution's inquiry pursuant to § 1002.107(a)(18), the financial institution reports that the applicant's business statuses were "not provided by applicant."

7. *Applicant declines to provide information about minority-owned, women-owned, and/or LGBTQI+-owned business statuses*. A financial institution reports that the applicant responded that it did not wish to provide the information about an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, if the applicant declines to provide the information by selecting such a response option on a paper or electronic form (*e.g.*, by selecting an answer option of "I do not wish to provide this information" or similar). The financial institution also reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

8. *Conflicting responses provided by applicants.* If the applicant both provides a substantive response to the financial institution's inquiry regarding business status (that is, indicates that it is a minority-owned, women-owned, and/or LGBTQI+-owned business, or checks "none apply" or similar) and also checks the box indicating "I do not wish to provide this information" or similar, the financial institution reports the substantive response(s) provided by the applicant (rather than reporting that the applicant declined to provide the information).

9. *No verification of business statuses*. Notwithstanding § 1002.107(b), a financial institution must report the applicant's substantive response(s), that the applicant declined to answer the inquiry (that is, selected an answer option of "I do not wish to provide this information" or similar), or the applicant's failure to respond to the inquiry (that is, that the information was "not provided by applicant") pursuant to § 1002.107(a)(18), even if the financial institution verifies or otherwise obtains an applicant's minority-owned, women-owned, and/or

LGBTQI+-owned business statuses for other purposes. For example, if a financial institution uses a paper data collection form to ask an applicant if it is a minority-owned business, a women-owned business, and/or an LGBTQI+-owned business and the applicant does not indicate that it is a minority-owned business, the financial institution must not report that the applicant is a minority-owned business, even if the applicant indicates that it is a minority-owned business for other purposes, such as for a special purpose credit program or a Small Business Administration program.

107(a)(19) Ethnicity, race, and sex of principal owners.

1. *General.* A financial institution must ask an applicant to provide its principal owners' ethnicity, race, and sex. The financial institution must permit an applicant to refuse (*i.e.*, decline) to answer the financial institution's inquiry and must inform the applicant that it is not required to provide the information. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. The financial institution must report the applicant's substantive responses regarding principal owners' ethnicity, race, and sex, that the applicant declined to answer an inquiry (that is, selected an answer option of "I do not wish to provide this information" or similar), or its failure to respond to an inquiry (that is, "not provided by applicant"), as applicable. The financial institution must report an applicant's responses about its principal owners' ethnicity, race, and sex, regardless of whether an applicant declines or fails to answer an inquiry about the number of its principal owners under § 1002.107(a)(20). If an applicant provides some, but not all, of the requested information about the ethnicity, race, and sex of a principal owner, the financial institution reports the information that was provided by the applicant and reports that the applicant declined to provide or did not provide (as applicable) the remainder of the information. See comments 107(a)(19)-6 and-7.

2. *Definition of principal owner*. When requesting a principal owner's ethnicity, race, and sex, the financial institution must also provide the applicant with the definition of the term "principal owner" as set forth in § 1002.102(o). The financial institution satisfies this

requirement if it provides the definition of principal owner as set forth in the sample data collection form in appendix E.

3. *Combining questions.* A financial institution may combine on the same paper or electronic data collection form the questions regarding the principal owners' ethnicity, race, and sex pursuant to § 1002.107(a)(19) with the applicant's number of principal owners pursuant to § 1002.107(a)(20) and the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses pursuant to § 1002.107(a)(18). See the sample data collection form in appendix E.

4. *Notices.* When requesting a principal owner's ethnicity, race, and sex from an applicant, a financial institution must inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex/gender, or on whether the applicant provides the information. A financial institution must also inform the applicant that Federal law requires it to ask for the principal owners' ethnicity, race, and sex/gender to help ensure that all small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. A financial institution may combine these notices with the similar notices that a financial institution is required to provide when requesting minority-owned business status, women-owned business status, and LGBTQI+-owned business status, if a financial institution requests information pursuant to § 1002.107(a)(18) and (19) in the same data collection form or at the same time. See the sample data collection form in appendix E for sample language that a financial institution may use for these notices.

5. *Maintaining the record of an applicant's responses regarding principal owners' ethnicity, race, and sex separate from the application*. A financial institution must maintain the record of an applicant's response to the financial institution's inquiries pursuant to § 1002.107(a)(19) separate from the application and accompanying information. *See* § 1002.111(b) and comment 111(b)-1. If the financial institution provides a paper or electronic data collection form, the data collection form must not be part of the application form or any

other document that the financial institution uses to provide or collect any information other than minority-owned business status, women-owned business status, LGBTQI+-owned business status, principal owners' ethnicity, race, and sex, and the number of the applicant's principal owners. See the sample data collection form in appendix E for sample language. For example, if the financial institution sends the data collection form via email, the data collection form should be a separate attachment to the email or accessed through a separate link in the email. If the financial institution uses a web-based data collection form, the form should be on its own page.

6. *Ethnicity, race, or sex of principal owners not provided by applicant.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the ethnicity, race, and sex of an applicant's principal owners. However, if an applicant does not provide the information, such as in response to a request for a principal owner's ethnicity, race, or sex on a paper or electronic data collection form, the financial institution reports the ethnicity, race, or sex (as applicable) as "not provided by applicant" for that principal owner. For example, if the financial institution provides a paper data collection form to an applicant with two principal owners, and asks the applicant to complete and return the form but the applicant does not do so, the financial institution reports that the two principal owners' ethnicity, race, and sex were "not provided by applicant." Similarly, if the financial institution provides an electronic data collection form, the applicant indicates that it has two principal owners, the applicant provides ethnicity, race, and sex for the first principal owner, and the applicant does not make any selections for the second principal owner's ethnicity, race, and sex, the financial institution reports the ethnicity, race, and sex that the applicant provided for the first principal owner and reports that each of the ethnicity, race, and sex for the second principal owner was "not provided by applicant." Additionally, if the financial institution provides an electronic or paper data collection form, the applicant indicates that it has one principal owner, provides the principal owner's ethnicity and sex information, but does not provide information about the principal owner's race and also does not select a response

of "I do not wish to provide this information" with regard to race, the financial institution reports the ethnicity and sex provided by the applicant and reports that the race of the principal owner was "not provided by applicant."

7. *Applicant declines to provide information about a principal owner's ethnicity, race, or sex.* A financial institution reports that the applicant responded that it did not wish to provide the information about a principal owner's ethnicity, race, or sex (as applicable), if the applicant declines to provide the information by selecting such a response option on a paper or electronic form (*e.g.*, by selecting an answer option of "I do not wish to provide this information" or similar). The financial institution also reports an applicant's refusal to provide such information in this way, if the applicant orally declines to provide such information for a covered application taken by telephone or another medium that does not involve providing any paper or electronic documents.

8. *Conflicting responses provided by applicant.* If the applicant both provides a substantive response to a request for a principal owner's ethnicity, race, or sex (that is, identifies a principal owner's race, ethnicity, or sex) and also checks the box indicating "I do not wish to provide this information" or similar, the financial institution reports the information on ethnicity, race, or sex that was provided by the applicant (rather than reporting that the applicant declined provide the information). For example, if an applicant is completing a paper data collection form and writes in a response that a principal owner's sex is female and also indicates on the form that the applicant does not wish to provide information regarding that principal owner's sex, the financial institution reports the principal owner's sex as female.

9. *No verification of ethnicity, race, and sex of principal owners.* Notwithstanding § 1002.107(b), a financial institution must report the applicant's substantive responses as to its principal owners' ethnicity, race, and sex (that is, the applicant's identification of its principal owners' race, ethnicity, and sex), that the applicant declined to answer the inquiry (that is, selected an answer option of "I do not wish to provide this information" or similar), or the

applicant's failure to respond to the inquiry (that is, the information was "not provided by applicant") pursuant to § 1002.107(a)(19), even if the financial institution verifies or otherwise obtains the ethnicity, race, or sex of the applicant's principal owners for other purposes.

10. *Reporting for fewer than four principal owners.* If an applicant has fewer than four principal owners, the financial institution reports ethnicity, race, and sex information for the number of principal owners that the applicant has and reports the ethnicity, race, and sex fields for additional principal owners as "not applicable." For example, if an applicant has only one principal owner, the financial institution reports ethnicity, race, and sex information for the first principal owner and reports as "not applicable" the ethnicity, race, and sex data fields for principal owners two through four.

11. *Previously collected ethnicity, race, and sex information*. If a financial institution reports one or more principal owners' ethnicity, race, or sex information based on previously collected data under § 1002.107(d), the financial institution does not need to collect any additional ethnicity, race, or sex information for other principal owners (if any). See also comment 107(d)-9.

12. *Guarantors*. A financial institution does not collect or report a guarantor's ethnicity, race, and sex unless the guarantor is also a principal owner of the applicant, as defined in § 1002.102(o).

13. *Ethnicity*. i. *Aggregate categories*. A financial institution must permit an applicant to provide each principal owner's ethnicity for purposes of § 1002.107(a)(19) using one or more of the following aggregate categories:

A. Hispanic or Latino.

B. Not Hispanic or Latino.

ii. *Disaggregated subcategories*. A financial institution must permit an applicant to provide each principal owner's ethnicity for purposes of § 1002.107(a)(19) using one or more of the following disaggregated subcategories, regardless of whether the applicant has indicated that

the relevant principal owner is Hispanic or Latino and regardless of whether the applicant selects any aggregate categories: Cuban; Mexican; Puerto Rican; or Other Hispanic or Latino. If an applicant indicates that a principal owner is Other Hispanic or Latino, the financial institution must permit the applicant to provide additional information regarding the principal owner's ethnicity, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, or Spaniard. See the sample data collection form in appendix E for sample language. If an applicant chooses to provide additional information regarding a principal owner's ethnicity, such as by indicating that a principal owner is Argentinean orally or in writing on a paper or electronic form, a financial institution must report that additional information via free-form text. If the applicant provides such additional information but does not also indicate that the principal owner is Other Hispanic or Latino (*e.g.*, by selecting Other Hispanic or Latino on a paper or electronic form), a financial institution is permitted, but not required, to report Other Hispanic or Latino as well.

iii. *Selecting multiple categories*. The financial institution must permit the applicant to select one, both, or none of the aggregate categories and as many disaggregated subcategories as the applicant chooses. A financial institution must permit an applicant to select a disaggregated subcategory even if the applicant does not select the corresponding aggregate category. For example, an applicant must be permitted to select the Mexican disaggregated subcategory for a principal owner without being required to select the Hispanic or Latino aggregate category. If an applicant provides ethnicity information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant. For example, if an applicant selects both aggregate categories and four disaggregated subcategories

for a principal owner, the financial institution reports the two aggregate categories that the applicant selected and all four of the disaggregated subcategories that the applicant selected. Additionally, if an applicant selects only the Mexican disaggregated subcategory for a principal owner and no aggregate categories, the financial institution reports Mexican for the ethnicity of the applicant's principal owner but does not also report Hispanic or Latino. Further, if the applicant selects an aggregate category (*e.g.*, Not Hispanic or Latino) and a disaggregated subcategory that does not correspond to the aggregate category (*e.g.*, Puerto Rican), the financial institution reports the information as provided by the applicant (*e.g.*, Not Hispanic or Latino, and Puerto Rican).

14. *Race*. i. *Aggregate categories*. A financial institution must permit an applicant to provide each principal owner's race for purposes of § 1002.107(a)(19) using one or more of the following aggregate categories:

A. American Indian or Alaska Native.

B. Asian.

C. Black or African American.

D. Native Hawaiian or Other Pacific Islander.

E. White.

ii. *Disaggregated subcategories*. The financial institution must permit an applicant to provide a principal owner's race for purposes of § 1002.107(a)(19) using one or more of the disaggregated subcategories as listed in this comment 107(a)(19)-14.ii, regardless of whether the applicant has selected the corresponding aggregate category.

A. The Asian aggregate category includes the following disaggregated subcategories: Asian Indian; Chinese; Filipino; Japanese; Korean; Vietnamese; and Other Asian. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant indicates that the principal owner is Asian and regardless of whether the applicant selects any aggregate categories.

Additionally, if an applicant indicates that a principal owner is Other Asian, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Cambodian, Hmong, Laotian, Pakistani, or Thai. See the sample data collection form in appendix E for sample language.

B. The Black or African American aggregate category includes the following disaggregated subcategories: African American; Ethiopian; Haitian; Jamaican; Nigerian; Somali; or Other Black or African American. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant indicates that the principal owner is Black or African American and regardless of whether the applicant selects any aggregate categories. Additionally, if an applicant indicates that a principal owner is Other Black or African American, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Barbadian, Ghanaian, or South African. See the sample data collection form in appendix E for sample language.

C. The Native Hawaiian or Other Pacific Islander aggregate category includes the following disaggregated subcategories: Guamanian or Chamorro; Native Hawaiian; Samoan; and Other Pacific Islander. An applicant must also be permitted to provide the principal owner's race using one or more of these disaggregated subcategories regardless of whether the applicant

indicates that the principal owner is Native Hawaiian or Other Pacific Islander and regardless of whether the applicant selects any aggregate categories. Additionally, if an applicant indicates that a principal owner is Other Pacific Islander, the financial institution must permit the applicant to provide additional information about the principal owner's race, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. The financial institution must permit the applicant to provide additional information indicating, for example, that the principal owner is Fijian or Tongan. See the sample data collection form in appendix E for sample language.

D. If an applicant chooses to provide additional information regarding a principal owner's race, such as indicating that a principal owner is Cambodian, Barbadian, or Fijian orally or in writing on a paper or electronic form, a financial institution must report that additional information via free-form text in the appropriate data reporting field. If the applicant provides such additional information but does not also indicate that the principal owner is Other Asian, Other Black or African American, or Other Pacific Islander, as applicable (*e.g.*, by selecting Other Asian on a paper or electronic form), a financial institution is permitted, but not required, to report the corresponding "Other" race disaggregated subcategory (*i.e.*, Other Asian, Other Black or African American, or Other Pacific Islander).

E. In addition to permitting an applicant to indicate that a principal owner is American Indian or Alaska Native, a financial institution must permit an applicant to provide the name of an enrolled or principal tribe, by using free-form text on a paper or electronic data collection form or using language that informs the applicant of the opportunity to self-identify when taking the application by means other than a paper or electronic data collection form, such as by telephone. If an applicant chooses to provide the name of an enrolled or principal tribe, a financial institution must report that information via free-form text in the appropriate data reporting field. If the applicant provides the name of an enrolled or principal tribe but does not

also indicate that the principal owner is American Indian or Alaska Native (*e.g.*, by selecting American Indian or Alaska Native on a paper or electronic form), a financial institution is permitted, but not required, to report American Indian or Alaska Native as well.

iii. *Selecting multiple categories*. The financial institution must permit the applicant to select as many aggregate categories and disaggregated subcategories as the applicant chooses. A financial institution must permit an applicant to select one or more disaggregated subcategories even if the applicant does not select an aggregate category. For example, an applicant must be permitted to select the Chinese disaggregated subcategory for a principal owner without being required to select the Asian aggregate category. If an applicant provides race information for a principal owner, the financial institution reports all of the aggregate categories and disaggregated subcategories provided by the applicant. For example, if an applicant selects two aggregate categories and five disaggregated subcategories for a principal owner, the financial institution reports the two aggregate categories that the applicant selected and the five disaggregated subcategories that the applicant selected. Additionally, if an applicant selects only the Chinese disaggregated subcategory for a principal owner, the financial institution reports Chinese for the race of the principal owner but does not also report that the principal owner is Asian. Similarly, if the applicant selects an aggregate category (*e.g.*, Asian) and a disaggregated subcategory that does not correspond to the aggregate category (*e.g.*, Native Hawaiian), the financial institution reports the information as provided by the applicant (*e.g.*, Asian and Native Hawaiian).

15. *Sex*. Generally, a financial institution must permit an applicant to provide each principal owner's sex for purposes of § 1002.107(a)(19). When requesting information about a principal owner's sex, a financial institution shall use the term "sex/gender." If the financial institution uses a paper or electronic data collection form to collect the information, the financial institution must allow the applicant to provide each principal owner's sex/gender using free-form text. When a financial institution collects the information orally, such as by telephone, the financial institution must inform the applicant of the opportunity to provide each principal

owner's sex/gender and record the applicant's response. A financial institution reports the substantive information provided by the applicant (reported via free-form text in the appropriate data reporting field), or reports that the applicant declined to provide the information.

16. *Ethnicity and race information requested orally.* As described in comments 107(a)(19)-13 and -14, when collecting principal owners' ethnicity and race pursuant to § 1002.107(a)(19), a financial institution must present the applicant with the specified aggregate categories and disaggregated subcategories. When collecting ethnicity and race information orally, such as by telephone, a financial institution may not present the applicant with the option to decline to provide the information without also presenting the applicant with the specified aggregate categories and disaggregated subcategories.

i. *Ethnicity and race categories.* Notwithstanding comments 107(a)(19)-13 and -14, a financial institution is not required to read aloud every disaggregated subcategory when collecting ethnicity and race information orally, such as by telephone. Rather, the financial institution must orally present the lists of aggregate ethnicity and race categories, followed by the disaggregated subcategories (if any) associated with the aggregate categories selected by the applicant or which the applicant requests to be presented. After the applicant makes any disaggregated category selections associated with the aggregate ethnicity or race category, the financial institution must also ask if the applicant wishes to hear the lists of disaggregated subcategories for any aggregate categories not selected by the applicant. The financial institution must record any aggregate categories selected by the applicant, as well as any disaggregated subcategories regardless of whether such subcategories were selected based on the disaggregated subcategories read by the financial institution or were otherwise provided by the applicant.

ii. *More than one principal owner.* If an applicant has more than one principal owner, the financial institution is permitted to ask about ethnicity and race in a manner that reduces repetition when collecting ethnicity and race information orally, such as by telephone. For example, if an applicant has two principal owners, the financial institution may ask for both

principal owners' ethnicity at the same time, rather than asking about ethnicity, race, and sex for the first principal owner followed by ethnicity, race, and sex for the second principal owner.

107(a)(20) Number of principal owners.

1. *General.* If the financial institution asks the applicant to provide the number of its principal owners pursuant to § 1002.107(a)(20), a financial institution must provide the definition of principal owner set forth in § 1002.102(o). The financial institution satisfies this requirement if it provides the definition of principal owner as set forth in the sample data collection form in appendix E.

2. *Number of principal owners provided by applicant; verification of number of principal owners*. The financial institution may rely on statements or information provided by the applicant in collecting and reporting the number of the applicant's principal owners. However, pursuant to § 1002.107(b), if the financial institution verifies the number of principal owners provided by the applicant, it must report the verified information.

3. *Number of principal owners not provided by applicant and otherwise undetermined.* Pursuant to § 1002.107(c), a financial institution shall maintain procedures reasonably designed to collect applicant-provided data, which includes the number of principal owners of the applicant. However, if a financial institution is nonetheless unable to collect or otherwise determine the applicant's number of principal owners, the financial institution reports that the number of principal owners is "not provided by applicant and otherwise undetermined."

107(b) Reliance on and verification of applicant-provided data.

1. *Reliance on information provided by an applicant or appropriate third-party sources.* 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 subpart B of this part for applicant-provided data; the financial institution is not required to verify those statements or that information. However, if the financial institution does verify applicant statements or information for its own business purposes, such as statements relating to

gross annual revenue or time in business, the financial institution reports the verified information. Depending on the circumstances and the financial institution's procedures, certain applicant-provided data can be collected from appropriate third-party sources without a specific request from the applicant, and such information may also be relied on. For example, gross annual revenue or NAICS code may be collected from tax return documents; a financial institution may also collect an applicant's NAICS code using third-party sources such as business information products. Applicant-provided data are the data that are or could be provided by the applicant, including § 1002.107(a)(5) through (7) and (13) through (20). See comment 107(c)(1)-3. In regard to restrictions on verification of minority-owned, women-owned, and LGBTQI+-owned business statuses, and principal owners' ethnicity, race, and sex, see comments 107(a)(18)-9 and 107(a)(19)-9.

107(c) Time and manner of collection.

107(c)(1) In general.

1. *Procedures.* The term "procedures" refers to the actual practices followed by a financial institution as well as its stated procedures. For example, if a financial institution's stated procedure is to collect applicant-provided data on or with a paper application form, but employees encourage applicants to skip the page that asks whether the applicant is a minority-owned business, a women-owned business, or an LGBTQI+-owned business under § 1002.107(a)(18), the financial institution's procedures are not reasonably designed to obtain a response.

2. Latitude to design procedures. A financial institution has flexibility to establish procedures concerning the timing and manner in which it collects applicant-provided data that work best for its particular lending model and product offerings, provided those procedures are reasonably designed to collect the applicant-provided data in § 1002.107(a), as required pursuant to § 1002.107(c)(1), and where applicable comply with the minimum requirements set forth in § 1002.107(c)(2).

3. *Applicant-provided data*. Applicant-provided data are the data that are or could be provided by the applicant, including § 1002.107(a)(5) (credit type), § 1002.107(a)(6) (credit purpose), § 1002.107(a)(7) (amount applied for), § 1002.107(a)(13) (address or location for purposes of determining census tract), § 1002.107(a)(14) (gross annual revenue), § 1002.107(a)(15) (NAICS code, or information about the business such that the financial institution can determine the applicant's NAICS code), § 1002.107(a)(16) (number of workers), § 1002.107(a)(17) (time in business), § 1002.107(a)(18) (minority-owned business status, women-owned business status, and LGBTQI+-owned business status), § 1002.107(a)(19) (ethnicity, race, and sex of the applicant's principal owners), and § 1002.107(a)(20) (number of principal owners). Applicant-provided data do not include data that are generated or supplied only by the financial institution, including § 1002.107(a)(1) (unique identifier), § 1002.107(a)(2) (application date), § 1002.107(a)(3) (application method), § 1002.107(a)(4) (application recipient), § 1002.107(a)(8) (amount approved or originated), § 1002.107(a)(9) (action taken), § 1002.107(a)(10) (action taken date), § 1002.107(a)(11) (denial reasons), § 1002.107(a)(12) (pricing information), and § 1002.107(a)(13) (census tract, based on address or location provided by the applicant).

4. *Collecting applicant-provided data without a direct request to the applicant*. Depending on the circumstances and the financial institution's procedures, certain applicant-provided data can be collected without a direct request to the applicant. For example, credit type may be collected based on the type of product chosen by the applicant. Similarly, a financial institution may rely on appropriate third-party sources to collect certain applicant-provided data. See § 1002.107(b) concerning the use of third-party sources.

5. *Data updated by the applicant*. A financial institution reports updated data if it obtains more current data from the applicant during the application process. For example, if an applicant states its gross annual revenue for the preceding fiscal year was $3 million, but then the applicant notifies the financial institution that its revenue in the preceding fiscal year was actually $3.2

million, the financial institution reports gross annual revenue of $3.2 million. For reporting verified applicant-provided data, see § 1002.107(b) and comment 107(b)-1. If a financial institution has already verified data and then the applicant updates it, the financial institution reports the information it believes to be more accurate, in its discretion. If a financial institution receives updates from the applicant after the application process has closed (for example, after closing or account opening), the financial institution may, at its discretion, update the data at any time prior to reporting the covered application to the Bureau.

107(c)(2) Applicant-provided data collected directly from the applicant.

1. *In general*. Whether a financial institution's procedures are reasonably designed to collect applicant-provided data is a fact-based determination and may depend on the financial institution's particular lending model, product offerings, and other circumstances; procedures that are reasonably designed to obtain a response may therefore require additional provisions beyond the minimum criteria set forth in § 1002.107(c)(2). In general, reasonably designed procedures will seek to maximize collection of applicant-provided data and minimize missing or erroneous data. While the requirements of § 1002.107(c)(2) do not apply to applicant-provided data that a financial institution obtains without a direct request to the applicant, as explained in comment 107(c)(1)-4, in such instances, a covered financial institution must still comply with § 1002.107(c)(1).

2. *Specific components*. i. *Timing of initial collection attempt.* While a financial institution has some flexibility concerning when applicant-provided data is are collected, under no circumstances may the initial request for applicant-provided data occur simultaneous with or after notifying an applicant of final action taken on a covered application. Generally, the earlier in the application process the financial institution initially seeks to collect applicant-provided data, the more likely the timing of collection is reasonably designed to obtain a response.

ii. *The request for applicant-provided data is prominently displayed or presented*. Pursuant to § 1002.107(c)(2)(ii), a financial institution must ensure an applicant actually sees,

hears, or is otherwise presented with the request for applicant-provided data. If an applicant is likely to overlook or miss a request for applicant-provided data, the financial institution does not have reasonably designed procedures. Similarly, a financial institution also does not have reasonably designed procedures if it obscures, prevents, or inhibits an applicant from accessing or reviewing a request for applicant-provided data.

iii. *The collection does not have the effect of discouraging an applicant from responding to a request for applicant-provided data*. A. A covered financial institution avoids discouraging a response by, for example, communicating to the applicant that the collection of applicant-provided data is worthy of the applicant's attention or is as important as information collected in connection with the financial institution's creditworthiness determination. In contrast, a covered financial institution that collects applicant-provided data in a time or manner that directly or indirectly discourages or obstructs an applicant from responding or providing a particular response violates § 1002.107(c)(2)(iii). For example, a financial institution may not discourage a response to inquiries regarding the demographic data pursuant to § 1002.107(a)(18) and (19) by communicating to the applicant that the request is unimportant, encouraging the applicant to bypass the form altogether, or attempting to influence or alter the applicant's preferred response.

B. A covered financial institution also avoids discouraging a response by requiring an applicant to provide a response to one or more requests for applicant-provided data in order to proceed with a covered application, including, as applicable, a response of "I do not wish to provide this information" or similar. (As described in comments 107(a)(18)-1 and 107(a)(19)-1, a financial institution must permit an applicant to decline to provide the demographic data required by § 1002.107(a)(18) and (19), which can be satisfied by providing a response option of "I do not wish to provide this information" or similar.) For example, in an electronic application, a financial institution may require the applicant to either make a substantive selection about a principal owner's ethnicity, race, or sex, select an option of "I do not wish to provide this

information" or similar, or indicate there are no principal owners before allowing the applicant to proceed to the next page of requested information.

iv. *The applicant can easily provide a response*. Pursuant to § 1002.107(c)(2)(iv), a financial institution must structure the request for information in a manner that makes it easy for the applicant to provide a response. For example, a financial institution requests applicant-provided data in the same format as other information required for the covered application, provides applicants multiple methods to provide or return applicant-provided data (for example, on a written form, through a web portal, or through other means), or provides the applicant some other type of straightforward and seamless method to provide a response. Conversely, a financial institution must avoid imposing unnecessary burden on an applicant to provide the information requested or requiring the applicant to take steps that are inconsistent with the rest of its application process. For example, a financial institution does not have reasonably designed procedures if it collects application information related to its own creditworthiness determination in electronic form, but mails a paper form to the applicant initially seeking the data required under § 1002.107(a) that the financial institution does not otherwise need for its creditworthiness determination and requiring the applicant to mail it back. On the other hand, a financial institution complies with § 1002.107(c)(2)(iv) if, at its discretion, it requests the applicant to respond to inquiries made pursuant to § 1002.107(a)(18) and (19) through a reasonable method intended to keep the applicant's responses discrete and protected from view.

v. *Multiple requests for applicant-provided data.* A financial institution is permitted, but not required, to make more than one attempt to obtain applicant-provided data if the applicant does not respond to an initial request. For example, if an applicant initially does not respond when asked early in the application process (before notifying the applicant of final action taken on the application, pursuant to § 1002.107(c)(2)(i)) to inquiries made pursuant to § 1002.107(a)(18) and (19), a financial institution may request this information again, for

example, during a subsequent in-person meeting with the applicant or after notifying the applicant of final action taken on the covered application.

107(c)(3) Procedures to monitor compliance.

1. *Procedures to identify and respond to indicia of potential discouragement, including low response rates*. Section 1002.107(c)(3) requires a covered financial institution to maintain procedures designed to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data. In general, these include monitoring for low response rates (*i.e.*, the percentage of covered applications for which the financial institution has obtained some type of response to requests for applicant-provided data, including, as applicable, an applicant response of "I do not wish to provide this information" or similar); monitoring for significant irregularities in any particular response that may indicate steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses; monitoring response rates and responses by division, location, loan officer, or other factors to ensure that no discouragement or improper conduct is occurring in some parts of a financial institution, even if the financial institution maintains adequate response rates and responses overall; providing adequate training to loan officers and other persons involved in collecting applicant-provided data; promptly investigating any indicia of potential discouragement; and taking prompt remedial action if discouragement or other improper conduct is identified.

107(c)(4) Low response rates.

1. *In general*. A low response rate for applicant-provided data may indicate that the financial institution has engaged in discouragement or otherwise failed to maintain reasonably designed procedures. Response rate generally refers to whether the financial institution has obtained some type of response to requests for applicant-provided data (including, as applicable, an applicant response of "I do not wish to provide this information" or similar). A response rate may be measured, as appropriate, as compared to financial institutions of a similar size, type, and/or geographic reach, or other factors, as appropriate. Similarly, significant irregularities in a

particular response (for example, very high rates of an applicant response of "I do not wish to provide this information" or similar) may also indicate that a financial institution does not have reasonably designed procedures, for example, because of steering, improper interference, or other potential discouragement or obstruction of applicants' preferred responses. Response rates may be relevant across all applicant-provided data, though are particularly relevant for the collection of the demographic data pursuant to § 1002.107(a)(18) and (19) given the heightened sensitivity of these inquiries and the importance of those data to the purposes of subpart B.

107(d) Previously collected data.

1. *In general*. A financial institution may, for the purpose of reporting such data pursuant to § 1002.109, reuse certain previously collected data if the requirements of § 1002.107(d) are met. In that circumstance, a financial institution need not seek to collect the data anew in connection with a subsequent covered application to satisfy the requirements of this subpart. For example, if an applicant applies for and is granted a term loan, and then subsequently applies for a credit card in the same calendar year, the financial institution need not request again the data specified in § 1002.107(d). Similarly, if an applicant applies for more than one covered credit transaction at one time, a financial institution need only ask once for the data specified in § 1002.107(d).

2. *Data that can be reused*. Subject to the requirements of § 1002.107(d), a financial institution may reuse the following data: § 1002.107(a)(13) (address or location for purposes of determining census tract), § 1002.107(a)(14) (gross annual revenue) (subject to comment 107(d)-7), § 1002.107(a)(15) (NAICS code), § 1002.107(a)(16) (number of workers), § 1002.107(a)(17) (time in business) (subject to comment 107(d)-8), § 1002.107(a)(18) (minority-owned business status, women-owned business status, and LGBTQI+-owned business status) (subject to comment 107(d)-9), § 1002.107(a)(19) (ethnicity, race, and sex of applicant's principal owners) (subject to comment 107(d)-9), and § 1002.107(a)(20) (number of principal owners). A financial

institution is not, however, permitted to reuse other data, such as § 1002.107(a)(6) (credit purpose).

3. *Previously reported data without a substantive response.* Data have not been "previously collected" within the meaning of § 1002.107(d) if the applicant did not provide a substantive response to the financial institution's request for that data and the financial institution was not otherwise able to obtain the requested data (for example, from the applicant's credit report, or tax returns).

4. *Updated data*. If, after the application process has closed on a prior covered application, a financial institution obtains updated information relevant to the data required to be collected and reported pursuant to § 1002.107(a)(13) through (20), and the applicant subsequently submits a new covered application, the financial institution must use the updated information in connection with the new covered application (if the requirements of § 1002.107(d) are otherwise met) or seek to collect the data again. For example, if a business notifies a financial institution of a change of address of its sole business location, and subsequently submits a covered application within the time period specified in § 1002.107(d)(1) for reusing previously collected data, the financial institution must report census tract based on the updated information. In that circumstance, the financial institution may still reuse other previously collected data to satisfy § 1002.107(a)(14) through (20) if the requirements of § 1002.107(d) are met.

5. *Collection within the preceding 36 months*. Pursuant to § 1002.107(d)(1), data can be reused to satisfy § 1002.107(a)(13) and (15) through (20) if they are collected within the preceding 36 months. A financial institution may measure the 36-month period from the date of final action taken (§ 1002.107(a)(9)) on a prior application to the application date (§ 1002.107(a)(2)) on a subsequent application. For example, if a financial institution takes final action on an application on February 1, 2025, it may reuse certain previously collected data

pursuant to § 1002.107(d)(1) for subsequent covered applications dated or received by the financial institution through January 31, 2028.

6. *Reason to believe data are inaccurate*. Whether a financial institution has reason to believe data are inaccurate pursuant to § 1002.107(d)(2) depends on the particular facts and circumstances. For example, a financial institution may have reason to believe data on the applicant's minority-owned business status, women-owned business status, and LGBTQI+-owned business status may be inaccurate if it knows that the applicant has had a change in ownership or a change in an owner's percentage of ownership.

7. *Collection of gross annual revenue in the same calendar year*. Pursuant to § 1002.107(d)(1), gross annual revenue information can be reused to satisfy § 1002.107(a)(14) provided it is collected in the same calendar year as the current covered application, as measured from the application date. For example, if an application is received and gross annual revenue is collected in connection with a covered application in one calendar year, but then final action was taken on the application in the following calendar year, the data may only be reused for the calendar year in which it was collected and not the calendar year in which final action was taken on the application. However, if an application is received and gross annual revenue is collected in connection with a covered application in one calendar year, a financial institution may reuse that data pursuant to § 1002.107(d) in a subsequent application initiated in the same calendar year, even if final action was taken on the subsequent application in the following calendar year.

8. *Time in business.* A financial institution that decides to reuse previously collected data to satisfy § 1002.107(a)(17) (time in business) must update the data to reflect the passage of time since the data were collected. If a financial institution only knows that the applicant had been in business less than two years at the time the data was initially collected, as described in comment 107(a)(17)-1.ii or iii, it updates the data based on the assumption that the applicant had been in business for 12 months at the time of the prior collection. For example:

i. If a financial institution previously collected data on a prior covered application that the applicant has been in business for four years, and then seeks to reuse that data for a subsequent covered application submitted one year later, it must update the data to reflect that the applicant has been in business for five years.

ii. If a financial institution previously collected data on a prior covered application that the applicant had been in business less than two years (and was not aware of the business's actual length of time in business at the time), and then seeks to reuse that data for a subsequent covered application submitted 18 months later, the financial institution reports time in business on the subsequent covered application as over two years in business.

9. *Minority-owned business status, women-owned business status, LGBTQI+-owned business status, and principal owners' ethnicity, race, and sex*. A financial institution may not reuse data to satisfy § 1002.107(a)(18) and (19) unless the data were collected in connection with a prior covered application pursuant to this subpart B. If the financial institution previously asked the applicant to provide its minority-owned business status, women-owned business status, and LGBTQI+-owned business status, and principal owners' ethnicity, race, and sex for purposes of § 1002.107(a)(18) and (19), and the applicant declined to provide the information (such as by selecting "I do not wish to provide this information" or similar on a data collection form or by telling the financial institution that it did not wish to provide the information), the financial institution may use that response when reporting data for a subsequent application pursuant to § 1002.107(d). However, if the applicant failed to respond (such as by leaving the response to the question blank or by failing to return a data collection form), the financial institution must inquire about the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and principal owners' ethnicity, race, or sex, as applicable, in connection with a subsequent application because the data were not previously obtained. See also comment 107(a)(19)-11 concerning previously collected ethnicity, race, and sex information.

Section 1002.108—Firewall

108(a) Definitions.

1. *Involved in making any determination concerning a covered application from a small business*. i. *General*. An employee or officer is involved in making a determination concerning a covered application from a small business for purposes of § 1002.108 if the employee or officer makes, or otherwise participates in, a decision regarding the evaluation of a covered application from a small business or the creditworthiness of a small business applicant for a covered credit transaction. This includes, but is not limited to, employees and officers serving as underwriters. The decision that an employee or officer makes or participates in must be about a specific covered application or about the creditworthiness of a specific applicant. An employee or officer is not involved in making a determination concerning a covered application if the employee or officer is only involved in making a decision that affects covered applications generally, or if the employee or officer only interacts with small businesses prior to them becoming applicants or submitting an application. An employee or officer may be participating in a determination concerning a covered application even if the employee or officer is not the ultimate decision maker or the sole decision maker. For example, an employee participates in a determination concerning a covered application if the employee recommends that another employee or officer approve or deny the application. Similarly, an employee or officer participates in a determination concerning a covered application if the employee or officer is part of a larger group, such as a committee, that makes a determination concerning a covered application. For example, an employee participates in a decision if the employee is a member of a committee that approves the terms offered to an applicant for a covered application. This is true even if the employee does not support the committee's ultimate decision regarding the terms offered. Conversely, an employee or officer does not participate in a determination concerning a covered application if the employee or officer only performs ministerial functions for the committee, such as recording the

minutes, or if the committee does not make a determination concerning a specific covered application.

ii. *Examples of activities that do not constitute being involved in making a determination concerning a covered application from a small business*. The following are examples of activities that do not constitute being involved in making a determination concerning a covered application:

A. Developing policies and procedures, designing or programming computer or other systems, or conducting marketing.

B. Discussing credit products, loan terms, or loan requirements with a small business before it submits a covered application.

C. Making or participating in a decision after the financial institution has taken final action on the covered application, such as a decision about servicing or collecting a covered credit transaction.

D. Using a check box form to confirm whether an applicant has submitted all necessary documents or handling a minor or clerical matter during the application process, such as suggesting or selecting a time for an appointment with an applicant.

E. Gathering information (including information collected pursuant to § 1002.107(a)(18) or (19)) and forwarding the information or a covered application to other individuals or entities.

F. Reviewing previously collected data to determine if it can be reused for a later covered application pursuant to § 1002.107(d).

iii. *Examples of activities that constitute being involved in making a determination concerning a covered application from a small business*. The following are examples of activities (done individually or as part of a group) that constitute being involved in making a determination concerning a covered application:

A. Making or participating in a decision to approve or deny a specific covered application. This includes, but is not limited to, making or participating in a decision that an

applicant does not satisfy one or more of the requirements for the covered credit transaction for which it has applied.

B. Making or participating in a decision regarding the reason(s) for denial of a covered application.

C. Making or participating in a decision that a guarantor or collateral is required in order to approve a specific covered application.

D. Making or participating in a decision regarding the credit amount or credit limit that will be approved for a specific covered application.

E. Making or participating in a decision to set one or more of the other terms that will be offered for a specific covered credit transaction. This includes, but is not limited to, making or participating in a decision regarding the interest rate, the loan term, or the payment schedule that will be offered for a specific covered credit transaction.

F. Making or participating in a decision regarding a counteroffer made to a specific applicant, including a decision regarding the terms of such a counteroffer.

G. Recommending that another decision maker approve or deny a specific covered application, provide a specific reason for denying a covered application, require a guarantor or collateral in order to approve a covered application, approve a credit amount or credit limit for a covered credit transaction, set one or more other terms for a covered credit transaction, make a counteroffer regarding a covered application, or set a specific term for such a counteroffer.

2. *Should have access*. i. *General*. A financial institution may determine that an employee or officer who is involved in making a determination concerning a covered application from a small business should have access to information otherwise subject to the prohibition in § 1002.108(b) if that employee or officer is assigned one or more job duties that may require the employee or officer to collect, see, consider, refer to, or otherwise use information subject to the prohibition in § 1002.108(b). If the employee or officer might need to collect, see, consider, refer to, or use such information to perform the employee's or officer's assigned job duties, the

financial institution may determine that the employee or officer should have access. For example, if a loan officer is involved in making a determination concerning a covered application and that loan officer's job description or the financial institution's policies and procedures state that the loan officer may need to collect information pursuant to § 1002.107(a)(18) or (19), the financial institution may determine that the loan officer should have access.

ii. *When a group of employees or officers should have access.* A financial institution may determine that all employees or officers with the same job description or assigned duties should have access for purposes of § 1002.108. For example, if a job description, a policy, a procedure, or another document states that a loan officer may have to collect or explain any part of a data collection form that includes the inquiries described in § 1002.107(a)(18) and (19), the financial institution may determine that all employees and officers who have been assigned the position of loan officer should have access for purposes of § 1002.108.

iii. *Making a determination regarding who should have access*. A financial institution is permitted to choose what lawful factors it will consider when determining whether an employee or officer should have access. A financial institution's determination that an employee or officer should have access may take into account relevant operational factors and lawful business practices. For example, a financial institution may consider its size, the number of employees and officers within the relevant line of business or at a particular branch or office location, and/or the number of covered applications the financial institution has received or expects to receive. Additionally, a financial institution may consider its current or its reasonably anticipated staffing levels, operations, systems, processes, policies, and procedures. A financial institution is not required to hire additional staff, upgrade its systems, change its lending or operational processes, or revise its policies or procedures for the sole purpose of limiting who should have access.

108(b) Prohibition on access to certain information.

1. *Scope of persons subject to the prohibition*. The prohibition in § 1002.108(b) applies to an employee or officer of a covered financial institution or its affiliate if the employee or officer is involved in making any determination concerning a covered application from a small business. For example, if a financial institution is affiliated with company B and an employee of company B is involved in making a determination concerning a covered application on behalf of the financial institution, then the financial institution must comply with § 1002.108 with regard to company B's employee. Section 1002.108 does not require a financial institution to limit the access of employees and officers of third parties who are not affiliates of the financial institution.

2. *Scope of information that cannot be accessed when the prohibition applies to an employee or officer*. i. *Information that cannot be accessed when the prohibition applies*. If a particular employee or officer is involved in making a determination concerning a covered application from a small business, the prohibition in § 1002.108(b) only limits that employee's or officer's access to that small business applicant's responses to the inquiries that the covered financial institution makes to satisfy § 1002.107(a)(18) and (19). For example, if a financial institution uses a paper data collection form to request information pursuant to § 1002.107(a)(18) and (19), an employee or officer that is subject to the prohibition is not permitted access to the paper data collection form that contains the applicant's responses to the inquiries made pursuant to pursuant to § 1002.107(a)(18) and (19), or to any other record that identifies how the particular applicant responded to those inquires. Similarly, if a financial institution makes the inquiries required pursuant to § 1002.107(a)(18) and (19) during a telephone call, the prohibition applies to the applicant's responses to those inquiries provided during that telephone call and to any record that identifies how the particular applicant responded to those inquiries.

ii. *Information that can be accessed when the prohibition applies*. If a particular employee or officer is involved in making a determination concerning a covered application, the prohibition in § 1002.108(b) does not limit that employee's or officer's access to an applicant's

responses to inquiries regarding whether the applicant is a minority-owned, women-owned, or LGBTQI+-owned business, or principal owners' ethnicity, race, or sex, made for purposes other than compliance with § 1002.107(a)(18) or (19). Thus, for example, an employee or officer who is subject to the prohibition in § 1002.108(b) may have access to information regarding whether an applicant is eligible for a Small Business Administration program for women-owned businesses without regard to whether the exception in § 1002.108(c) is satisfied. Additionally, an employee or officer who knows that an applicant is a minority-owned business, women-owned business, or LGBTQI+-owned business, or who knows the ethnicity, race, or sex of any of the applicant's principal owners due to activities unrelated to the inquiries made to satisfy the financial institution's obligations under § 1002.107(a)(18) and (19) is not prohibited from making a determination concerning the applicant's covered application. Thus, an employee or officer who knows, for example, that an applicant is a minority-owned business due to a social relationship or another professional relationship with the applicant or any of its principal owners may make determinations concerning the applicant's covered application. Furthermore, an employee or officer that is involved in making a determination concerning a covered application may see, consider, refer to, or use data collected to satisfy aspects of § 1002.107 other than § 1002.107(a)(18) or (19), such as gross annual revenue, number of workers, and time in business.

108(c) Exception to the prohibition on access to certain information.

1. *General*. A financial institution is not required to limit the access of an employee or officer who is involved in making determinations concerning a covered application from a small business if the financial institution determines that the particular employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) or (19), and the financial institution provides the notice required by § 1002.108(d). A financial institution is not required to perform a separate analysis of the feasibility of maintaining a firewall. A determination that an employee or officer should have access means that it is not feasible to maintain a firewall as to

that particular employee or officer, and the exception applies to that employee or officer if the financial institution provides the notice required by § 1002.108(d). However, the fact that a financial institution has made a determination that an employee or officer should have access does not mean that the financial institution can permit other employees and officers who are involved in making determinations concerning a covered application to have access to the information collected pursuant to § 1002.107(a)(18) and (19). A financial institution may only permit an employee or officer who is involved in making a determination concerning a covered application to have access to information collected pursuant to § 1002.107(a)(18) and (19) if it has determined that employee or officer or a group of which the employee or officer is a member should have access to the information.

2. *Applying the exception to a specific employee or officer or group of similarly situated employees or officers*. The exception applies to an employee or officer if the financial institution determines that the employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) or (19), and the financial institution provides the notice required by § 1002.108(d). A financial institution can also determine that several employees and officers should have access, that all of a group of similarly situated employees or officers should have access, and that multiple groups of similarly situated employees or officers should have access to information collected pursuant to § 1002.107(a)(18) or (19). See also comment 108(a)-2. For example, a financial institution could determine that all its small business loan officers, small business loan processors, compliance officers, and legal officers should have access. If the financial institution provides the notice required in § 1002.108(d), the financial institution may permit all of its small business loan officers, small business loan processors, compliance officers, and legal officers to have access. However, the financial institution cannot permit other employees and officers to have access simply because it has determined that the small business loan officers, loan processors, compliance officers, and legal officers should have access. For example, in this case, the financial institution may not permit its underwriters or chief executive

officer to have access to the information collected from the applicant pursuant to § 1002.107(a)(18) or (19) if they are involved in making any determination concerning a covered application, unless the financial institution also determines that they should have access. This would be true even if the chief executive officer or underwriter had some of the same assigned duties as a loan officer, such as being a member of a credit committee, but has not been assigned the task(s) that may require access to one or more applicants' responses to the financial institution's inquiries under § 1002.107(a)(18) or (19). If the financial institution separately determines that underwriters and the chief executive officer should have access, then the underwriters and chief executive officer may also have access.

108(d) Notice.

1. *General*. If a financial institution determines that one or more employees or officers should have access pursuant to § 1002.108(c), the financial institution must provide the required notice to, at a minimum, the applicant or applicants whose responses will be accessed by an employee or officer involved in making determinations concerning the applicant's or applicants' covered applications. Alternatively, a financial institution may also provide the required notice to applicants whose responses will not or might not be accessed. For example, a financial institution could provide the notice to all applicants for covered credit transactions or all applicants for a specific type of product.

2. *Content of the required notice*. The notice must inform the applicant that one or more employees and officers involved in making determinations concerning the applicant's covered application may have access to the applicant's responses regarding the applicant's minority-owned business status, women-owned business status, LGBTQI+-owned business status, and its principal owners' ethnicity, race, and sex. See the sample data collection form in appendix E to this part for sample language for providing this notice to applicants. If a financial institution establishes and maintains a firewall and chooses to use the sample data collection form, the financial institution can delete this sample language from the form.

3. *Timing for providing the notice*. If the financial institution is providing the notice orally, it must provide the notice required by § 1002.108(d) prior to asking the applicant if it is a minority-owned business, women-owned business, or LGBTQI+-owned business and prior to asking for a principal owner's ethnicity, race, or sex. If the notice is provided on the same paper or electronic data collection form as the inquiries about minority-owned business status, women-owned business status, LGBTQI+-owned business status and the principal owners' ethnicity, race, or sex, the notice must appear before the inquiries. If the notice is provided in an electronic or paper document that is separate from the data collection form, the notice must be provided at the same time as the data collection form or prior to providing the data collection form. Additionally, the notice must be provided with the non-discrimination notices required pursuant to § 1002.107(a)(18) and (19). See appendix E for sample language.

Section 1002.109—Reporting of Data to the Bureau

109(a) Reporting to the Bureau.

109(a)(2) Reporting by subsidiaries.

1. *Subsidiaries*. A covered financial institution is considered a subsidiary of another covered financial institution for purposes of reporting data pursuant to § 1002.109 if more than 50 percent of the ownership or control of the first covered financial institution is held by the second covered financial institution.

109(a)(3) Reporting obligations where multiple financial institutions are involved in a covered credit transaction.

1. *General*. The following clarifies how to report applications involving more than one financial institution. The discussion below assumes that all parties involved with the covered credit transaction are covered financial institutions. However, the same principles apply if any party is not a covered financial institution.

i. A financial institution shall report the action that it takes on a covered application, whether or not the covered credit transaction closed in the financial institution's name and even

if the financial institution used underwriting criteria supplied by another financial institution. However, where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction, only the last financial institution with authority to set the material terms of the covered credit transaction is required to report. Setting the material terms of the covered credit transaction include, for example, selecting among competing offers, or modifying pricing information, amount approved or originated, or repayment duration. In this situation, the determinative factor is not which financial institution actually made the last credit decision prior to closing, but rather which financial institution last had the authority for setting the material terms of the covered credit transaction prior to closing. Whether a financial institution has taken action for purposes of § 1002.109(a)(3) and comment 109(a)(3)-1 is not relevant to, and is not intended to repeal, abrogate, annul, impair, or interfere with, section 701(d) (15 U.S.C. 1691(d)) of the Act, § 1002.9, or any other provision within subpart A of this Regulation.

ii. A financial institution takes action on a covered application for purposes of § 1002.109(a)(3) if it denies the application, originates the application, approves the application but the applicant did not accept the transaction, or closes the file or denies for incompleteness. The financial institution must also report the application if it was withdrawn. For reporting purposes, it is not relevant whether the financial institution receives the application directly from the applicant or indirectly through another party, such as a broker, or (except as otherwise provided in comment 109(a)(3)-1.i) whether another financial institution also reviews and reports an action taken on a covered application involving the same credit transaction.

iii. Where it is necessary for more than one financial institution to make a credit decision in order to approve a single covered credit transaction and where more than one financial institution denies the application or otherwise does not approve the application, the reporting financial institution (the last financial institution with authority to set the material terms of the covered credit transaction) shall have a consistent procedure for determining how it reports

inconsistent or differing data points for purposes of subpart B. For example, Financial Institution A is the reporting entity because it has the last authority to set the material credit terms. Financial Institution A sends the application to Financial Institution B and Financial Institution C for review, but both Financial Institution B and Financial Institution C deny the application, with different denial reasons. Based on these denials, Financial Institution A follows suit and denies the application. Financial Institution A must have a consistent procedure for what denial reason(s) to report, such as reporting the denial reason(s) from the first financial institution that denied the covered application.

2. *Examples*. The following scenarios illustrate how a financial institution reports a particular covered application. The illustrations assume that all parties involved with the covered credit transaction are covered financial institutions. However, the same principles apply if any party is not a covered financial institution. Examples i through iv involve a single financial institution with responsibility for making a credit decision without the involvement of an intermediary. Example v describes a financial institution intermediary with only passive involvement in the covered credit transaction. Example vi describes a transaction where multiple financial institutions independently decision and take action on a covered application. Examples vii and viii describe situations where more than one financial institution must make a credit decision in order to approve the covered credit transaction. Examples ix and x describe situations involving pooled and participation interests.

i. Financial Institution A received a covered application from an applicant and approved the application before closing the covered credit transaction in its name. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution B later purchased the covered credit transaction from Financial Institution A. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A reports the application. Financial Institution B has no reporting obligation for this transaction.

ii. Financial Institution A received a covered application from an applicant. If approved, the covered credit transaction would have closed in Financial Institution B's name. Financial Institution A denied the application without sending it to Financial Institution B for approval. Financial Institution A was not acting as Financial Institution B's agent. Since Financial Institution A took action on the application, Financial Institution A reports the application as denied. Financial Institution B does not report the application.

iii. Financial Institution A reviewed a covered application and made a credit decision to approve it using the underwriting criteria provided by a Financial Institution B. Financial Institution B did not review the application and did not make a credit decision prior to closing. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A reports the application. Financial Institution B has no reporting obligation for this application.

iv. Financial Institution A reviewed and made the credit decision on a covered application based on the criteria of a third-party insurer or guarantor (for example, a government or private insurer or guarantor). Financial Institution A reports the action taken on the application.

v. Financial Institution A received a covered application from an applicant and forwarded that application to Financial Institution B. Financial Institution B reviewed the application and made a credit decision approving the application prior to closing. The covered credit transaction closed in Financial Institution A's name. Financial Institution B purchased the covered credit transaction from Financial Institution A after closing. Financial Institution B was not acting as Financial Institution A's agent. Since Financial Institution B made the credit decision prior to closing, and Financial Institution A's approval was not necessary for the credit transaction, Financial Institution B reports the origination. Financial Institution A does not report the application. Assume the same facts, except that Financial Institution B reviewed the application before the covered credit transaction would have closed, but Financial Institution B denied the application. Financial Institution B reports the application as denied. Financial Institution A does not report the application because it did not take an action on the application. If, under the same

facts, the application was withdrawn before Financial Institution B made a credit decision, Financial Institution B would report the application as withdrawn and Financial Institution A would not report the application for the same reason.

vi. Financial Institution A received a covered application and forwarded it to Financial Institutions B and C. Financial Institution A made a credit decision, acting as Financial Institution D's agent, and approved the application. Financial Institutions B and C are not working together with Financial Institutions A or D, or with each other, and are solely responsible for setting the terms of their own credit transactions. Financial Institution B made a credit decision approving the application, and Financial Institution C made a credit decision denying the application. The applicant did not accept the covered credit transaction from Financial Institution D. Financial Institution D reports the application as approved but not accepted. Financial Institution A does not report the application, because it was acting as Financial Institution D's agent. The applicant accepted the offer of credit from Financial Institution B, and credit was extended. Financial Institution B reports the application as originated. Financial Institution C reports the application as denied.

vii. Financial Institution A received a covered application and made a credit decision to approve it using the underwriting criteria provided by Financial Institution B. Financial Institution A was not acting as Financial Institution B's agent. Financial Institution A forwarded the application to Financial Institution B. Financial Institution B reviewed the application and made a credit decision approving the application prior to closing. Financial Institution A makes a credit decision on the application and modifies the credit terms (the interest rate and repayment term) offered by Financial Institution B. The covered credit transaction reflecting the modified terms closes in Financial Institution A's name. Financial Institution B purchases the covered credit transaction from Financial Institution A after closing. As the last financial institution with the authority for setting the material terms of the covered credit transaction, Financial Institution A reports the application as originated. Financial Institution B does not report the origination

because it was not the last financial institution with the authority to set the material terms on the application. If, under the same facts, Financial Institution A did not modify the credit terms offered by Financial Institution B, Financial Institution A still reports the application as originated because it was still the last financial institution with the authority for setting the material terms, even if it chose not to so do in a particular instance. Financial Institution B does not report the origination.

viii. Financial Institution A received a covered application and forwarded it to Financial Institutions B, C, and D. Financial Institution A was not acting as anyone's agent. Financial Institution B and C reviewed the application and made a credit decision approving the application and Financial Institution D reviewed the application and made a credit decision denying the application. Prior to closing, Financial Institution A makes a credit decision on the application by deciding to offer to the applicant the credit terms offered by Financial Institution B and does not convey to the applicant the credit terms offered by Financial Institution C. The applicant does not accept the covered credit transaction. As the last financial institution with the authority for setting the material terms of the covered credit transaction, Financial Institution A reports the application as approved but not accepted. Financial Institutions B, C, and D do not report the application because they were not the last financial institution with the authority for setting the material terms of the covered credit transaction. Assume the same facts, except the applicant accepts the terms of the covered credit transaction from Financial Institution B as offered by Financial Institution A. The covered credit transaction closes in Financial Institution A's name. Financial Institution B purchases the transaction after closing. Here, Financial Institution A reports the application as originated. Financial Institutions B, C, and D do not report the application because they were not the last financial institution responsible for setting the material terms of the covered credit transaction.

ix. Financial Institution A receives a covered application and approves it, and then Financial Institution A elects to organize a loan participation agreement where Financial

Institutions B and C agree to purchase a partial interest in the covered credit transaction. Financial Institution A reports the application. Financial Institutions B and C have no reporting obligation for this application.

x. Financial Institution A purchases an interest in a pool of covered credit transactions, such as credit-backed securities or real estate investment conduits. Financial Institution A does not report this purchase.

3. *Agents.* If a covered financial institution takes action on a covered application through its agent, the financial institution reports the application. For example, acting as Financial Institution A's agent, Financial Institution B approved an application prior to closing and a covered credit transaction was originated. Financial Institution A reports the covered credit transaction as an origination. State law determines whether one party is the agent of another.

109(b) Financial institution identifying information.

1. *Changes to financial institution identifying information*. If a financial institution's information required pursuant to § 1002.109(b) changes, the financial institution shall provide the new information with the data submission for the collection year of the change. For example, assume two financial institutions that previously reported data under subpart B of this part merge and the surviving institution retained its Legal Entity Identifier but obtained a new TIN in February 2026. The surviving institution must report the new TIN with its data submission for its 2026 data (which is due by June 1, 2027) pursuant to § 1002.109(b)(5). Likewise, if that financial institution's Federal prudential regulator changes in February 2026 as a result of the merger, it must identify its new Federal prudential regulator in its annual submission for its 2026 data.

Paragraph 109(b)(4).

1. *Federal prudential regulator*. For purposes of § 1002.109(b)(4), *Federal prudential regulator* means, if applicable, the Federal prudential regulator for a financial institution that is a depository institution as determined pursuant to section 3q of the Federal Deposit Insurance Act

(12 U.S.C. 1813(q)), including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System; or the National Credit Union Administration Board for financial institutions that are Federal credit unions.

Paragraph 109(b)(6).

1. *Legal Entity Identifier (LEI).* A Legal Entity Identifier is a utility endorsed by the LEI Regulatory oversight committee, or a utility endorsed or otherwise governed by the Global LEI Foundation (GLEIF) (or any successor of the GLEIF) after the GLEIF assumes operational governance of the global LEI system. A financial institution complies with § 1002.109(b)(6) by reporting its current LEI number. A financial institution that does not currently possess an LEI number must obtain an LEI number, and has an ongoing obligation to maintain the LEI number. The GLEIF website provides a list of LEI issuing organizations. A financial institution may obtain an LEI, for purposes of complying with § 1002.109(b)(6), from any one of the issuing organizations listed on the GLEIF website.

Paragraph 109(b)(7).

1. *RSSD ID number.* The RSSD ID is a unique identifying number assigned to institutions, including main offices and branches, by the Board of Governors of the Federal Reserve System. A financial institution's RSSD ID may be found on the website of the National Information Center, which provides comprehensive financial and structure information on banks and other institutions for which the Federal Reserve Board has a supervisory, regulatory, or research interest including both domestic and foreign banking organizations that operate in the United States. If a financial institution does not have an RSSD ID, it reports that this information is not applicable.

Paragraph 109(b)(8).

1. *Immediate parent entity.* An entity is the immediate parent of a financial institution for purposes of § 1002.109(b)(8)(i) through (iii) if it is a separate entity that directly owns more than 50 percent of the financial institution.

2. *Top-holding parent entity.* An entity is the top-holding parent of a financial institution for purposes of § 1002.109(b)(8)(iv) through (vi) if it ultimately owns more than 50 percent of the financial institution, and the entity itself is not controlled by any other entity. If the immediate parent entity and the top-holding parent entity are the same, the financial institution reports that § 1002.109(b)(8)(iv) through (vi) are not applicable.

3. *LEI.* For purposes of § 1002.109(b)(8)(ii) and (v), a financial institution shall report the LEI of a parent entity if the parent entity has an LEI number. If a financial institution's parent entity does not have an LEI, the financial institution reports that this information is not applicable.

4. *RSSD ID numbers.* For purposes of § 1002.109(b)(8)(iii) and § 1002.109(b)(8)(vi), a financial institution shall report the RSSD ID number of a parent entity if the entity has an RSSD ID number. If a financial institution's parent entity does not have an RSSD ID, the financial institution reports that this information is not applicable.

Paragraph 109(b)(9).

1. *Type of financial institution*. A financial institution complies with § 1002.109(b)(9) by selecting the applicable type or types of financial institution from the list below. A financial institution shall select all applicable types.

i. Bank or savings association.

ii. Minority depository institution.

iii. Credit union.

iv. Nondepository institution.

v. Community development financial institution (CDFI).

vi. Other nonprofit financial institution.

vii. Farm Credit System institution.

viii. Government lender.

ix. Commercial finance company.

x. Equipment finance company.

xi. Industrial loan company.

xii. Online lender.

xiii. Other.

2. *Use of "other" for type of financial institution*. A financial institution reports type of financial institution as "other" where none of the enumerated types of financial institution appropriately describe the applicable type of financial institution, and the institution reports the type of financial institution via free-form text field. A financial institution that selects at least one type from the list is permitted, but not required, to also report "other" (with appropriate free-form text) if there is an additional aspect of its business that is not one of the enumerated types set out in comment 109(b)(9)-1.

3. *Additional types of financial institution.* The Bureau may add additional types of financial institutions via the Filing Instructions Guide and related materials. Refer to the Filing Instructions Guide for any updates for each reporting year.

Paragraph 109(b)(10).

1. *Financial institutions that voluntarily report covered applications under subpart B of this part*. A financial institution that is not a covered financial institution pursuant to § 1002.105(b) but that elects to voluntarily compile, maintain, and report data under §§ 1002.107 through 1002.109 (see comment 105(b)-10) complies with § 1002.109(b)(10) by selecting "voluntary reporter."

Section 1002.110—Publication of Data and Other Disclosures

110(c) Statement of financial institution's small business lending data available on the Bureau's website.

1. *Statement*. A financial institution shall provide the statement required by § 1002.110(c) using the following, or substantially similar, language:

Small Business Lending Data Notice

Data about our small business lending are available online for review at the Consumer Financial Protection Bureau's (CFPB's) website at https://www.consumerfinance.gov/data-research/small-business-lending/. The data show the geographic distribution of our small business lending applications; information about our loan approvals and denials; and demographic information about the principal owners of our small business applicants. The CFPB may delete or modify portions of our data prior to posting it if doing so would advance a privacy interest. Small business lending data for many other financial institutions are also available at this website.

2. *Website.* A financial institution without a website complies with § 1002.110(c) by making a written statement using the language in comment 110(c)-1, or substantially similar language, available upon request.

3. *Revised location for publicly available data*. The Bureau may modify the location specified in comment 110(c)-1 at which small business lending data are available via the Filing Instructions Guide and related materials. Refer to the Filing Instructions Guide for any updates for each reporting year.

Section 1002.111—Recordkeeping

111(a) Record retention.

1. *Evidence of compliance*. Section 1002.111(a) requires a financial institution to retain evidence of compliance with subpart B of this part for at least three years after its small business

lending application register is required to be submitted to the Bureau pursuant to § 1002.109. In addition to the financial institution's small business lending application register, such evidence of compliance is likely to include, but is not limited to, the applications for credit from which information in the register is drawn, as well as the files or documents that, under § 1002.111(b), are kept separate from the applications for credit. This three-year record retention requirement applies to any records covered by § 1002.111(a), notwithstanding the more general 12-month retention period for records related to business credit specified in § 1002.12(b).

2. *Record retention for creditors under § 1002.5(a)(4)(vii) and (viii).* A creditor that is voluntarily, under § 1002.5(a)(4)(vii) and (viii), collecting information pursuant to subpart B of this part complies with § 1002.111(a) by retaining evidence of compliance with subpart B for at least three years after June 1 of the year following the year that data was collected.

111(b) Certain information kept separate from the rest of the application.

1. *Separate from the application.* A financial institution may satisfy the requirement in § 1002.111(b) by keeping an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19) in a file or document that is discrete or distinct from the application and its accompanying information. For example, such information could be collected on a piece of paper that is separate from the rest of the application form. In order to satisfy the requirement in § 1002.111(b), an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19) need not be maintained in a separate electronic system, nor need they be removed from the physical files containing the application so long as there is some separation between the demographic information and the rest of the application and its accompanying information. However, the financial institution may nonetheless need to keep this information in a different electronic or physical file in order to satisfy the prohibition in § 1002.108(b).

2. *Number of principal owners*. A financial institution is permitted to maintain information regarding the applicant's number of principal owners pursuant to § 1002.107(a)(20)

with an applicant's responses to the financial institution's request pursuant to § 1002.107(a)(18) and (19).

111(c) Limitation on personally identifiable information in certain records retained under this section.

1. *Small business lending application register*. The prohibition in § 1002.111(c) applies to data in the small business lending application register submitted by the financial institution to the Bureau under § 1002.109, the version of the register that the financial institution maintains under § 1002.111(a), and the separate record of certain information created pursuant to § 1002.111(b).

2. *Examples*. Section 1002.111(c) prohibits a financial institution from including any name, specific address (other than the census tract required under § 1002.107(a)(13)), telephone number, or email address of any individual who is, or is connected with, an applicant in the small business lending application register it reports pursuant to § 1002.109, in the copy of the register the financial institution retains under § 1002.111(a), and in the records of certain information it must retain separately from the application pursuant to § 1002.111(b). It likewise prohibits a financial institution from including any other personally identifiable information concerning any individual who is, or is connected with, an applicant, except as required pursuant to § 1002.107 or § 1002.111(b). Examples of such personally identifiable information that a financial institution may not include in its small business lending application register include, but are not limited to, the following: date of birth, Social Security number, official government-issued driver's license or identification number, alien registration number, government passport number, or employer or taxpayer identification number.

3. *Other records*. The prohibition in § 1002.111(c) does not extend to an application for credit, or any other records that the financial institution maintains that are not specifically enumerated in § 1002.111(c).

4. *Name and business contact information for submission*. The prohibition in § 1002.111(c) does not bar financial institutions from providing to the Bureau, pursuant to § 1002.109(b)(3), the name and business contact information of the person who may be contacted by the Bureau or other regulators with questions about the financial institution's submission under § 1002.109.

Section 1002.112—Enforcement

112(b) Bona fide errors.

1. *Tolerances for bona fide errors*. Section 1002.112(b) provides that a financial institution is presumed to maintain procedures reasonably adapted to avoid errors with respect to a given data field if the number of errors found in a random sample of the financial institution's data submission for the data field does not equal or exceed a threshold specified by the Bureau for this purpose. The Bureau's thresholds appear in column C of the table in appendix F. The size of the random sample, set out in column B, shall depend on the size of the financial institution's small business lending application register, as shown in column A of the table in appendix F. A financial institution has not maintained procedures reasonably adapted to avoid errors if either there is a reasonable basis to believe the error was intentional or there is evidence that the financial institution has not maintained procedures reasonably adapted to avoid errors.

2. *Tolerances and data fields*. For purposes of determining whether an error is bona fide under § 1002.112(b), the term "data field" generally refers to individual fields. All required data fields, and valid response options for those fields, are set forth in the Bureau's Filing Instructions Guide, available at *https://www.consumerfinance.gov/data-research/small-business-lending/filing-instructions-guide/*. Some data fields may allow for more than one response. For example, with respect to information on the ethnicity and race of an applicant's principal owner, a data field may identify more than one race or ethnicity. If there are one or more errors within an ethnicity data field, or within a race data field, for a particular principal owner, they would count as one (and only one) error for that data field. For instance, in the ethnicity data field, if an

applicant indicates that one of its principal owners is Cuban, but the financial institution reports that the principal owner is Mexican and Puerto Rican, the financial institution has made one error in the ethnicity data field for that principal owner. For purposes of the error threshold table in appendix F, the financial institution is deemed to have made one error, not two.

3. *Tolerances and safe harbors*. An error that meets the criteria for one of the four safe harbor provisions in § 1002.112(c) is not counted as an error for purposes of determining whether a financial institution has exceeded the relevant error threshold in appendix F for a given data field.

112(c) Safe harbors.

1. *Information from a Federal agency—census tract.* Section 1002.112(c)(2) provides that an incorrect entry for census tract is not a violation of the Act or subpart B of this part, if the financial institution obtained the census tract using a geocoding tool provided by the FFIEC or the Bureau. However, this safe harbor provision does not extend to a financial institution's failure to provide the correct census tract number for a covered application on its small business lending application register, as required by § 1002.107(a)(13), because the FFIEC or Bureau geocoding tool did not return a census tract for the address provided by the financial institution. In addition, this safe harbor provision does not extend to a census tract error that results from a financial institution entering an inaccurate address into the FFIEC or Bureau geocoding tool.

2. *Applicability of NAICS code safe harbor.* The safe harbor in § 1002.112(c)(3) applies to an incorrect entry for the 3-digit NAICS code that financial institutions must collect and report pursuant to § 1002.107(a)(15), provided certain conditions are met. For purposes of § 1002.112(c)(3)(i), a financial institution is permitted to rely on statements made by the applicant, information provided by the applicant, or on other information obtained through its use of appropriate third-party sources, including business information products. See also comments 107(a)(15)- 4 and 107(b)-1.

3. *Incorrect determination of small business status, covered credit transaction, or covered application—examples.* Section 1002.112(c)(4) provides a safe harbor from violations of the Act or this regulation for a financial institution that initially collects data under § 1002.107(a)(18) and (19) regarding whether an applicant for a covered credit transaction is a minority-owned, a women-owned, or LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners, but later concludes that it should not have collected this data, if certain conditions are met. Specifically, to qualify for this safe harbor, § 1002.112(c)(4) requires that the financial institution have had a reasonable basis at the time it collected data under § 1002.107(a)(18) and (19) for believing that the application was a covered application for a covered credit transaction from a small business pursuant to §§ 1002.103, 1002.104, and 1002.106, respectively. For example, Financial Institution A collected data under § 1002.107(a)(18) and (19) from an applicant for a covered credit transaction that had self-reported its gross annual revenue as $4.8 million. Sometime after Financial Institution A had collected this data from the applicant, the financial institution reviewed the applicant's tax returns, which indicated the applicant's gross annual revenue was in fact $5.2 million. Financial Institution A is permitted to rely on representations made by the applicant regarding gross annual revenue in determining whether an applicant is a small business (see § 1002.107(b) and comments 106(b)(1)-3 and 107(a)(14)-1). Thus, Financial Institution A may have had a reasonable basis to believe, at the time it collected data under § 1002.107(a)(18) and (19), that the applicant was a small business pursuant to § 1002.106, in which case Financial Institution A's collection of such data would not violate the Act or this regulation.

Section 1002.114—Effective Date, Compliance Date, and Special Transition Rules

114(b) Compliance date.

1. *Application of compliance date*. The applicable compliance date in § 1002.114(b) is the date by which the covered financial institution must begin to compile data as specified in § 1002.107, comply with the firewall requirements of § 1002.108, and begin to maintain records

as specified in § 1002.111. In addition, the covered financial institution must comply with § 1002.110(c) and (d) no later than June 1 of the year after the applicable compliance date. For instance, if § 1002.114(b)(2) applies to a financial institution, it must comply with §§ 1002.107 and 1002.108, and portions of § 1002.111, beginning April 1, 2025, and it must comply with § 1002.110(c) and (d), and portions of § 1002.111, no later than June 1, 2026.

2. *Initial partial year collections pursuant to § 1002.114(b).* i. When the compliance date of October 1, 2024 specified in § 1002.114(b)(1) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from October 1, 2024 to December 31, 2024. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirements of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2025.

ii. When the compliance date of April 1, 2025 specified in § 1002.114(b)(2) applies to a covered financial institution, the financial institution is required to collect data for covered applications during the period from April 1, 2025 to December 31, 2025. The financial institution must compile data for this period pursuant to § 1002.107, comply with the firewall requirements of § 1002.108, and maintain records as specified in § 1002.111. In addition, for data collected during this period, the covered financial institution must comply with §§ 1002.109 and 1002.110(c) and (d) by June 1, 2026.

3. *Informal names for compliance date provisions*. To facilitate discussion of the compliance dates specified in § 1002.114(b)(1), (2), and (3), in the official commentary and any other documents referring to these compliance dates, the Bureau adopts the following informal simplified names. Tier 1 refers to the cohort of covered financial institutions that have a compliance date of October 1, 2024 pursuant to § 1002.114(b)(1). Tier 2 refers to the cohort of covered financial institutions that have a compliance date of April 1, 2025 pursuant to

§ 1002.114(b)(2). Tier 3 refers to the cohort of covered financial institutions that have a compliance date of January 1, 2026 pursuant to § 1002.114(b)(3).

4. *Examples*. The following scenarios illustrate how to determine whether a financial institution is a covered financial institution and which compliance date specified in § 1002.114(b) applies.

i. Financial Institution A originated 3,000 covered credit transactions for small businesses in calendar year 2022, and 3,000 in calendar year 2023. Financial Institution A is in Tier 1 and has a compliance date of October 1, 2024.

ii. Financial Institution B originated 2,000 covered credit transactions for small businesses in calendar year 2022, and 3,000 in calendar year 2023. Because Financial Institution B did not originate at least 2,500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1. Because Financial Institution B did originate at least 500 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 2 and has a compliance date of April 1, 2025.

iii. Financial Institution C originated 400 covered credit transactions to small businesses in calendar year 2022, and 1,000 in calendar year 2023. Because Financial Institution C did not originate at least 2,500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, and because it did not originate at least 500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 2. Because Financial Institution C did originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 3 and has a compliance date of January 1, 2026.

iv. Financial Institution D originated 90 covered credit transactions to small businesses in calendar year 2022, 120 in calendar year 2023, and 90 in both of the calendar years 2024 and 2025. Because Financial Institution D did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution D did not originate at least 100 covered credit transactions for small

businesses in subsequent consecutive calendar years, it is not a covered financial institution under § 1002.105(b) and is not required to comply with the rule in 2024, 2025, or 2026.

v. Financial Institution E originated 120 covered credit transactions for small businesses in each of calendar years 2022, 2023, and 2024, and 90 in 2025. Because Financial Institution E did not originate at least 2,500 or 500 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1 or Tier 2. Because Financial Institution E originated at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is in Tier 3 and has a compliance date of January 1, 2026. However, because Financial Institution E did not originate at least 100 covered credit transactions for small businesses in each of 2024 and 2025, it no longer satisfies the definition of a covered financial institution in § 1002.105(b) at the time of the compliance date for Tier 3 institutions and thus is not required to comply with the rule in 2026.

vi. Financial Institution F originated 90 covered credit transactions for small businesses in calendar year 2022, and 120 in 2023, 2024, and 2025. Because Financial Institution F did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution F originated at least 100 covered credit transactions for small businesses in subsequent calendar years, § 1002.114(b)(4), which cross-references § 1002.105(b), applies to Financial Institution F. Because Financial Institution F originated at least 100 covered credit transactions for small businesses in each of 2024 and 2025, it is a covered financial institution under § 1002.105(b) and is required to comply with the rule beginning January 1, 2026.

vii. Financial Institution G originated 90 covered credit transactions for small businesses in each of calendar years 2022, 2023, 2024, and 2025, and 120 in each of 2026 and 2027. Because Financial Institution F did not originate at least 100 covered credit transactions for small businesses in each of 2022 and 2023, it is not in Tier 1, Tier 2, or Tier 3. Because Financial Institution G originated at least 100 covered credit transactions for small businesses in

subsequent calendar years, § 1002.114(b)(4), which cross-references § 1002.105(b), applies to Financial Institution G. Because Financial Institution G originated at least 100 covered credit transactions for small businesses in each of 2026 and 2027, it is a covered financial institution under § 1002.105(b) and is required to comply with the rule beginning January 1, 2028.

114(c) Special transition rules.

1. *Collection of certain information prior to a financial institution's compliance date*. Notwithstanding § 1002.5(a)(4)(ix), a financial institution that chooses to collect information on covered applications as permitted by § 1002.114(c)(1) in the 12 months prior to its initial compliance date as specified in § 1002.114(b)(1), (2) or (3) need comply only with the requirements set out in §§ 1002.107(a)(18) and (19), 1002.108, and 1002.111(b) and (c) with respect to the information collected. During this 12-month period, a covered financial institution need not comply with the provisions of § 1002.107 (other than §§ 1002.107(a)(18) and (19)), 1002.109, 1002.110, 1002.111(a), or 1002.114.

2. *Transition rule for applications received prior to a compliance date but final action is taken after a compliance date*. If a covered financial institution receives a covered application from a small business prior to its initial compliance date specified in § 1002.114(b), but takes final action on or after that date, the financial institution is not required to collect data regarding that application pursuant to § 1002.107 nor to report the application pursuant to § 1002.109. For example, if a financial institution is subject to a compliance date of October 1, 2024, and it receives an application on September 15, 2024 but does not take final action on the application until October 5, 2024, the financial institution is not required to collect data pursuant to § 1002.107 nor to report data to the Bureau pursuant to § 1002.109 regarding that application.

3. *Has readily accessible the information needed to determine small business status*. A financial institution has readily accessible the information needed to determine whether its originations of covered credit transactions were for small businesses as defined in § 1002.106 if, for instance, it in the ordinary course of business collects data on the precise gross annual

revenue of the businesses for which it originates loans, it obtains information sufficient to determine whether an applicant for business credit had gross annual revenues of $5 million or less, or if it collects and reports similar data to Federal or State government agencies pursuant to other laws or regulations.

4. *Does not have readily accessible the information needed to determine small business status*. A financial institution does not have readily accessible the information needed to determine whether its originations of covered credit transactions were for small businesses as defined in § 1002.106 if it did not in the ordinary course of business collect either precise or approximate information on whether the businesses to which it originated covered credit had gross annual revenue of $5 million or less. In addition, even if precise or approximate information on gross annual revenue was initially collected, a financial institution does not have readily accessible this information if, to retrieve this information, for example, it must review paper loan files, recall such information from either archived paper records or scanned records in digital archives, or obtain such information from third parties that initially obtained this information but did not transmit such information to the financial institution.

5. *Reasonable method to estimate the number of originations*. The reasonable methods that financial institutions may use to estimate originations for 2022 and 2023 include, but are not limited to, the following:

i. A financial institution may comply with § 1002.114(c)(2) by determining the small business status of covered credit transactions by asking every applicant, prior to the closing of approved transactions, to self-report whether it had gross annual revenue for its preceding fiscal year of $5 million or less, during the period October 1 through December 31, 2023. The financial institution may annualize the number of covered credit transactions it originates to small businesses from October 1 through December 31, 2023 by quadrupling the originations for this period, and apply the annualized number of originations to both calendar years 2022 and 2023.

ii. A financial institution may comply with § 1002.114(c)(2) by assuming that every covered credit transaction it originates for business customers in calendar years 2022 and 2023 is to a small business.

iii. A financial institution may comply with § 1002.114(c)(2) by using another methodology provided that such methodology is reasonable and documented in writing.

6. *Examples*. The following scenarios illustrate the potential application of § 1002.114(c)(2) to a financial institution's compliance date under § 1002.114(b).

i. Prior to October 1, 2023, Financial Institution A did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution A chose to use the methodology set out in comment 114(c)-5.i and as of October 1, 2023 began to collect information on gross annual revenue as defined in § 1002.107(a)(14) for its covered credit transactions originated for businesses. Using this information, Financial Institution A determined that it had originated 750 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution A originated 3,000 covered credit transactions for small businesses (750 originations * 4 = 3,000 originations per year). Applying this annualized figure of 3,000 originations to both calendar years 2022 and 2023, Financial Institution A is in Tier 1 and has a compliance date of October 1, 2024.

ii. Prior to July 1, 2023, Financial Institution B collected gross annual revenue information for some applicants for business credit, but such information was only noted in its paper loan files. Financial Institution B thus does not have reasonable access to information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions for calendar years 2022 and 2023. Financial Institution B chose to use the methodology set out in comment 114(c)-5.i, and as of October 1, 2023, Financial Institution B began to ask all businesses for whom it was closing covered credit transactions if they had gross annual revenues in the preceding fiscal year of $5 million or less. Using this information,

Financial Institution B determined that it had originated 350 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution B originated 1,400 covered credit transactions for small businesses (350 originations * 4 = 1,400 originations per year). Applying this estimated figure of 1,400 originations to both calendar years 2022 and 2023, Financial Institution B is in Tier 2 and has a compliance date of April 1, 2025.

iii. Prior to April 1, 2023, Financial Institution C did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution C chose its own methodology pursuant to comment 114(c)-5.iii, basing it in part on the methodology specified in comment 114(c)-5.i. Starting on April 1, 2023, Financial Institution C began to ask all business applicants for covered credit transactions if they had gross annual revenue in their preceding fiscal year of $5 million or less. Using this information, Financial Institution C determined that it had originated 100 covered credit transactions for businesses that were small as defined in § 1002.106. On an annualized basis, Financial Institution C originated approximately 133 covered credit transactions for small businesses ((100 originations * 365 days) / 275 days = 132.73 originations per year). Applying this estimate of 133 originations to both calendar years 2022 and 2023, Financial Institution C is in Tier 3 and has a compliance date of January 1, 2026.

iv. Financial Institution D did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution D determined that it had originated 3,000 total covered credit transactions for businesses in each of 2022 and 2023. Applying the methodology specified in comment 114(c)-5.ii, Financial Institution D assumed that all 3,000 covered credit transactions originated in each of 2022 and 2023 were to

small businesses. On that basis, Financial Institution D is in Tier 1 and has a compliance date of October 1, 2024.

v. Financial Institution E did not collect gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution E determined that it had originated 700 total covered credit transactions for businesses in each of 2022 and 2023. Applying the methodology specified in comment 114(c)-5.ii, Financial Institution E assumed that all such transactions in each of 2022 and 2023 were originated for small businesses. On that basis, Financial Institution E is in Tier 2 and has a compliance date of April 1, 2025.

vi. Financial Institution F did does not have readily accessible gross annual revenue or other information that would allow it to determine the small business status of the businesses for whom it originated covered credit transactions in calendar years 2022 and 2023. Financial Institution F determined that it had originated 80 total covered credit transactions for businesses in 2022 and 150 total covered credit transactions for businesses in 2023. Applying the methodology set out in comment 114(c)-5.ii, Financial Institution F assumed that all such transactions originated in 2022 and 2023 were originated for small businesses. On that basis, Financial Institution E is not in Tier 1, Tier 2 or Tier 3, and is subject to the compliance date provision specified in § 1002.114(b)(4).

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[FR Doc. 2023-07230 Filed: 5/30/2023 8:45 am; Publication Date: 5/31/2023]