
DFA Section 1071 Working Group

Summary of Outline of Proposals

A. Scope of proposed rule

Though the statutory text of 1071 applies to “a women-owned, a minority-owned, or a small business,” the Bureau is considering proposing that the data collection and reporting **requirements only apply to applications made by small businesses.**

- CFPB rationalizes that most minority-owned and women-owned small businesses would be covered under the small business threshold, and that applications made by large women-owned or large minority-owned businesses could be too complex and varied
- Under the approach the Bureau is considering proposing, FIs would collect and report lending data for all applicants that satisfy the Bureau’s definition of a small business, including identifying women-owned and minority-owned businesses within that pool, but FIs would not be required to collect and report 1071 data for women-owned and minority-owned businesses that are not “small.”

ICBA Analysis

This is potentially beneficial as it (1) reduces the number of business applications that would otherwise be covered by the rule and (2) avoids potential discrepancy of “women- or minority-owned” business that doesn’t have any women or minority principal-owners.

B. Definition of “financial institution”

The CFPB is considering that the rule cover depository institutions, online lenders/platform lenders, CDFIs, lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and non-profit non-depository lenders.

Exemptions → the CFPB has the authority to exempt “any class of covered entity” from a 1071 rulemaking. These exemptions can be based on an entity’s asset size, transaction volume, or other criteria that the Bureau sets. Because the CFPB is concerned that the smallest FIs, or those with the lowest volume of small business lending, might reduce or cease their small business lending activity because of the fixed costs of coming into compliance with an eventual 1071 rule, it is considering the following exemptions:

- **Asset-size-based exemption threshold**
 - (a) Assets of less than \$100 million
 - (b) Assets of less than \$200 million
- **Activity-based exemption threshold**
 - (a) Originations under 25 loans or \$2.5m
 - (b) Originations under 50 loans or \$5m
 - (c) Originations under 100 or \$10m
- **Combined size- and activity-based exemptions**

Under this option, a FI would be required to collect 1071 data if it exceeds either (1) a given annual number of small business loans or (2) an annual total value of small

business loans,

→BUT, it would not be required to report the data if the FI is less than a given asset size, regardless of dollar value or number of small business loans originated.

ICBA Analysis

This is the most important provision to focus on, and the most worrisome. It is imperative that as many community banks as possible are exempted from this rulemaking. While ICBA appreciates that the Bureau is exploring exemptions from a 1071 rulemaking, the asset and activities thresholds are much too low. For example, setting a threshold of \$100 million would cover 85% of all banks and a threshold of \$200m would cover 60% of all banks.¹

Lender of Record → in the situation where more than one party is involved on the lender side of a single small business loan or application:

- the reporting responsibility depends on which institution made the final credit decision.
- If more than one FI approved a loan, and the loan was purchased after closing by one of the FIs approving the loan, the purchaser (such as an assignee) would report the loan.
- If there was no origination and multiple FIs received the same application, then any FI that made a credit decision would be responsible for reporting (even if other FIs also reported on the same potential non-originated application)

ICBA Analysis

This is potentially beneficial in two ways: (1) treats multi-FI originations in the same manner as HMDA, keeping consistency, and (2) reduces the burden for FIs that use another bank or third-party to originate credit card loans. However, while this outline discusses “reporting,” it does not discuss the associated responsibility of “collecting” the data.

C. Definition of “small business” applicants

The Bureau would not include non-profit small businesses or foreign small businesses as covered borrowers. The Bureau is considering three options to using a simple size standard to define “small businesses” that are covered borrowers.

Option 1: only gross annual revenue → businesses with gross annual revenue of \$1m or \$5m would be classified as “small”

Option 2: either the number of employees (500 employees) in **manufacturing/wholesale or services** and average annual receipts/gross annual revenue of \$8 million for **all other industries**.

Option 3: size standards across 13 industry groups that correspond to two-digit NAICS code industry groupings (see chart below).

¹ Federal Deposit Insurance Corporation, “Statistics on Depository Institutions,” Q2 2019. Available at <https://www5.fdic.gov/sdi/main.asp?formname=compare>.



Two-digit NAICS code	Industry description	Type of standard	Size standard
11	Agriculture, forestry, fishing and hunting	Receipts	\$8 million
21	Mining, quarrying, and oil and gas extraction	Receipts	\$41.5 million
22	Utilities	Receipts	\$30 million
23	Construction	Receipts	\$16.5 million
31-33	Manufacturing	Employee	500
42	Wholesale trade	Employee	100
44-45	Retail trade	Receipts	\$8 million
48-49	Transportation and warehousing	Receipts	\$30 million
51	Information	Receipts	\$35 million
52-53	Finance and insurance, Real estate and rental and leasing	Receipts	\$8 million
54	Professional, scientific, and technical services	Receipts	\$16.5 million
55	Management of companies and enterprises	Receipts	\$22 million
56-81	Administrative and support and waste management and remediation services; Educational services; Health care and social assistance; Arts, entertainment, and recreation; Accommodation and food services; Other services (except public administration)	Receipts	\$8 million

ICBA Analysis

It is important to establish a definition of “small business” that is easily and simply ascertainable. Of the three options discussed above, the first option based on gross annual receipts appears to meet these criteria. The larger the gross revenue threshold, the more borrowers would potentially be covered (i.e., if small business is defined as gross receipts of less than \$100k, very few small businesses borrowers would be covered and there would be virtually no collection/reporting burden).

D. Definitions of “women-owned business,” “minority-owned business,” and “minority individual”

Women-/minority-owned business would be one where (A) more than 50 percent of the ownership or control is held by one or more women/minority individuals; and (B) more than 50 percent of the net profit or loss accrues to one or more women/minority individuals (using GAAP standards and/or IRS filings).

The Bureau is considering adding guidance that would mirror HMDA’s interpretation of “minority,” which would be a natural person who is Black or African American, Asian, American Indian or Alaska Native, Native Hawaiian or Other Pacific Islander, and/or Hispanic or Latino.

The Bureau is considering the use of FinCEN’s CDD rule in defining “ownership” and “control:”

Ownership → means directly or indirectly having an equity interest in a business (i.e., directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise, owning an equity interest in the business);

Control → means having significant responsibility to control, manage, or direct a business

ICBA Analysis

For banks that will be covered by the rule, this interpretation is potentially beneficial. It would be a simple, objective definition that could reduce regulatory confusion by mirroring existing regulation.

E. Product Coverage

Covered products → Bureau is considering proposing that covered products under section 1071 include:

- term loans,
- lines of credit, and
- business credit cards.

Products excluded from coverage → The Bureau is considering **excluding** the following products from coverage under 1071:

- consumer credit used for business purposes,
- leases,
- trade credit,
- factoring, and
- merchant cash advances.

ICBA Analysis

This seems to be a beneficial interpretation that would limit the number of products that banks would be required to collect and report data on. It seems positive that the Bureau would not require banks to discern whether consumer credit products will be used for business purposes, which would otherwise be a difficult requirement to comply with.

However, it is not clear why the Bureau is contemplating excluding merchant cash advances from coverage, where MCAs are akin to payday loans in the consumer space. MCAs seem like an attractive target to direct consumer advocate angst toward, possibly deflecting their attention from other provisions that would be favorable for community banks.

F. Definition of “application”

The definition of “application” will trigger data collection and reporting under section 1071. The term “application,” however, is not defined in either section 1071 or ECOA, though it is defined in Regulation B. The Bureau is considering proposing to define an “application” as “an oral or written request for an extension of credit that is made in accordance with procedures used by a creditor for the type of credit requested.”

The Bureau is also considering proposing to clarify certain circumstances that would not be reportable under 1071, even if circumstances meet the elements that otherwise constitutes an “application.” Activities that would not be reportable are:

Inquiries/prequalifications → The Bureau is considering not covering inquiry or prequalification based requests. The Bureau is concerned that inclusion of these requests would “cloud” the datasets. This

mirrors Regulation C, which does not cover prequalifications and inquiries.

Reevaluation, extension and renewal requests, except requests for additional credit amounts: The Bureau is considering not including borrower requests to modify the terms and/or duration of an existing extension of credit in data collection and reporting, or creditor-initiated reviews of existing credit.

*HOWEVER, the Bureau is considering coverage of borrower-initiated actions that trigger reviews of existing credit, including additional credit amounts (line increases or new money on existing facilities).

Solicitations and firm offers of credit: CFPB is considering excluding collection and reporting of data for prescreened solicitations of firm offers of credit unless the applicant responds in a manner that otherwise triggers an “application.”

Alternative definitions considered: The Bureau considered possible alternative definitions of an “application” for purposes of 1071 data collection and reporting, including using Reg B’s “completed application,” which would have been situations where the creditor has received “all the information that the creditor regularly obtains and considers” in evaluating similar products. The Bureau is disinclined to use this definition as it would exclude incomplete and withdrawn applications, and thus, not meet the statutory purpose of 1071.

The Bureau also considered defining “application” as particular documents or specific data points that, if collected, would trigger a duty to collect and report 1071 data. The Bureau is disinclined to take this route due to concern that a novel definition of “application” would be introduced to the regulatory landscape, which would require FIs to alter their existing practices.

ICBA Analysis

Whether this provision will be burdensome depends on how the statement “made in accordance with procedures used by a creditor” will be implemented in the proposed rule. While the statement appears to be flexible and may allow creditors to develop individually tailored requirements on what constitutes an “application” that fits within existing processes (i.e., not having to create a standardized, homogenous application), the language of the proposed rule will confirm whether this proves true.

G. Data Points

Mandatory Data points

The following data points are statutorily required under 1071:

- Is applicant is a **women-owned business, a minority-owned business, and/or a small business**?
 - self-reporting;
 - no obligation to verify.
 - Not requiring lender to guess by observation

-
- **Application/loan number** → proposing that FIs report an alphanumeric application or loan number of no more than 45 characters that is unique to the referenced extension of credit
 - **Application date** → considering using the (i) date shown on a paper or electronic application form; or (ii) the day on which a credit request becomes an “application”
 - **Loan/credit type** → comprised of 3 subcomponents
 - Type of Loan Product (chosen from a specified list);
 - Type of Guarantee (chosen from a specified list)
 - Loan term (in months)
 - **Loan/credit purpose** → proposing that FIs report the loan purpose data point by choosing one or more purposes from a specified list.
 - **Credit amount/limit applied for** → proposing that FIs report 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 FI’s evaluation of the credit request
 - Report n/a for products without specified loan amount (ie, credit cards)
 - **Credit amount/limit approved** → proposing that FIs report
 - (1) the amount of the originated loan for a closed-end origination;
 - (2) the amount approved for a closed-end loan application that is approved but not accepted; and
 - (3) the amount of the credit limit approved for open-end products (regardless of whether the open-end product is originated or approved but not accepted)
 - **Type of action taken** → proposing 5 categories
 - Loan originated
 - Application approved but not accepted
 - Application denied
 - Incomplete application (closed or denied)
 - Application withdrawn by applicant
 - **Action taken date** → proposed to be reported with day/month/year
 - **Census tract** → proposed that the FI would use the address where the loan proceeds will principally be applied
 - **Gross annual revenue** → proposing that FIs report the gross annual revenue of the applicant during its last fiscal year.
 - **Race, sex, and ethnicity of principal owner(s)** → proposing to define the term “principal owner” in a manner that is consistent with the CDD rule
 - “principal owner” if the individual directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, owns 25 percent or more of the equity interests of the business

ICBA Analysis

By using a limited selection of options or choices, the Bureau appears to have made an earnest effort to ease the process of requesting and collecting the data from covered business applicants. However, the collection of these datapoints are still a burden and are likely to alter a bank’s existing credit procedures.

Discretionary data points

-
- **Pricing** → The Bureau is considering the inclusion of pricing is approved but not accepted
 - A pricing data point could be reported on the basis of annual percentage rate (APR), total cost of credit (TCC), interest rate and total fees, or some other pricing metric.
 - **Time in business** → proposing to include as a discretionary data point the time in business of the applicant (as of the date of application), expressed in years, or months
 - avoid misinterpretation of the section 1071 dataset by distinguishing potentially riskier new businesses from less risky established businesses
 - **NAICS code and number of employees**

Timing considerations for collection of certain 1071 data → Bureau is not currently considering specifying a particular time period in which FIs must seek to collect 1071 data from applicants during the application process. The Bureau is aware of a risk that FIs may not seek to collect information about principal owners until late in the process when applicants may be less motivated to supply their demographic information. To guard against this risk, the Bureau is considering FI to seek to collect 1071 data within or by a specified time period, such as simultaneous with the triggering of an “application.”

ICBA Analysis

Second only to the concern and priority of the exemption thresholds, the inclusion of discretionary data points is a burdensome requirement that is not needed to achieve the goal of 1071. If the Bureau insists on collecting this information, it should only require it from banks that are significantly large (such as \$10B) to collect the data without disrupting their businesses practices.

H. Shielding data from underwriters and other persons (firewall)

FI would not be required to limit underwriters’ and other persons’ access to applicants’ responses regarding women-owned/minority-owned business status, and the race, sex, and ethnicity of principal owners, if it is not feasible to do so.

ICBA Analysis

The burden of this provision hinges on how the Bureau proposes to establish the “feasibility standard.”

I. Applicants’ right to refuse to provide certain information

The Bureau is considering proposing that the right to refuse under section 1071(c) applies to the FI’s specific inquiries regarding women-owned and minority-owned business status in 1071(b), as well as the race, sex, and ethnicity of principal owners, but not to the FI’s specific inquiry regarding small business status.

ICBA Analysis

This seems prudent since many borrowers will feel this information is sensitive. However, BECAUSE it is so sensitive, many borrowers will abstain from providing the data and the results could create misconstrued findings. Additionally, it is imperative that the Bureau not require

loan officers to “guess” if this information is not provided.

J. Compiling, maintaining, and reporting 1071 data to the Bureau

The Bureau is considering proposing that 1071 data collection be done on a calendar year basis and submitted to the Bureau by a specified date following the end of each calendar year. The Bureau is considering proposing that FIs retain their 1071 data for at least three years after it is submitted to the Bureau.

ICBA Analysis

Seems prudent and neutral.

K. Privacy considerations

CFPB is determining whether and how to exercise its discretion to modify or delete 1071 data prior to publication

Balancing test → the Bureau is considering proposing to use a “balancing test” that weighs the risks and benefits of public disclosure → data would be modified or deleted if its disclosure in unmodified form would pose risks to privacy interests that are not justified by the benefits of public disclosure.

- As an alternative to a balancing test, the Bureau considered an approach in which it would modify data if an identified privacy risk crosses some significance threshold

Bureau publication of 1071 data → The Bureau is considering proposing an approach in which FIs could satisfy the requirement to make 1071 data available to the public upon request by referring the public to the Bureau’s website where 1071 data would be available. Under this approach, the 1071 data would be available with any modifications or deletions required based on the Bureau’s application of the balancing test described above. The Bureau also considered requiring FIs to make their own data available to the public directly, upon request. However, the Bureau is concerned that this approach could involve greater burden for FIs, lead to privacy risks.

ICBA Analysis

Though it is a positive development that the Bureau is considering the privacy concerns of borrowers and the community banks that serve them, it is imperative that the Bureau establish a simple metric or test to exclude public disclosure of borrower information. Again, the best metric would exclude smaller community banks from having to collect and report this data. If data is excluded from public reporting by certain size or types of community banks, then the Bureau should not require the collection of that data, either. Requiring a bank to collect the data but not report it would create a very costly academic exercise that doesn’t further the goals of 1071.

L. Implementation period

The Bureau is considering proposing that FIs have approximately two calendar years for implementation following the Bureau’s issuance of its eventual 1071 rule.

ICBA Analysis

Two years will likely not be an adequate time for compliance with the rulemaking. Depending on the results of the Bureau's cost-benefit survey, training staff and developing systems to comply with this rule will be costly and likely rife with challenges and errors. It is important that the Bureau give smaller community banks adequate time to come into compliance, perhaps through a staggered implementation or a prolonged period of "good faith compliance" exceptions.