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Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
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Via email: 2020-SBREFA-1071@cfpb.gov

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

To Whom It May Concern:

The U.S. Chamber of Commerce's ("the Chamber") Center for Capital Markets Competitiveness ("CCMC") appreciates the opportunity to submit comments to the Consumer Financial Protection Bureau's ("the Bureau") Small Business Advisory Review Panel regarding the small business lending data collection rulemaking.

Women-owned, minority-owned, and small businesses drive the American economy—and they rely heavily on access to credit to do so. Indeed, it is hard to overstate the importance of credit to these businesses: it allows them to support their inventory, finance their locations, cover payroll, manage downturns, and otherwise push our economy and our nation forward. And this credit comes in many forms: the smallest firms and start-ups often rely on consumer financial products, such as a credit card, mortgage or home equity line of credit, to finance their business needs. [1]It is critical that policymakers continue to support lending to these businesses in all its forms, particularly in light of the COVID-19 pandemic.

CCMC thus long has been focused on the implementation of Section 1071 of the Dodd-Frank Act which requires financial institutions to compile, maintain, and submit to the Bureau certain data on applications for credit for women-owned, minority-owned, and small businesses. We have appreciated the collaborative approach taken by the Bureau throughout its information gathering process, including through engaging in roundtables and creating a dialogue with stakeholders. We likewise welcome the opportunity to respond to the outline of proposals ("Outline") issued by the Small Business Advisory Review Panel.[2] We appreciate the Bureau's

[1] To be clear, small businesses lending differs in many important ways from consumer lending, notwithstanding certain small businesses' reliance on consumer lending. We would urge the Bureau to clearly delineate between small businesses and consumers to avoid undue conflation of the two categories of lending.
[2] Small Business Advisory Review Panel For Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking, Outline of Proposals Under Consideration and Alternatives Considered,

continued engagement and urge it to maintain this collaborative approach as it works through the remaining steps of the rulemaking process.

As the Bureau knows, Section 1071 is intended to "facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses." Properly implemented, in other words, Section 1071 will help strengthen the credit market and help lenders better serve their women-owned, minority-owned, and small business customers. We appreciate the Bureau's commitment to achieving this shared goal. As the Bureau also surely appreciates, however, implementing Section 1071 is both challenging and high-stakes. Implement Section 1071 poorly, and the Bureau could inadvertently reduce women-owned, minority-owned, and small business access to affordable credit, make borrowers doubt the fairness of a lending process by injecting sensitive questions about demographics into loan applications, or expose highly sensitive data to unnecessary security risks. We are grateful that the Bureau is taking these concerns seriously and believe that it can address them through the rulemaking process, largely by following established regulatory best practices. To that end, we write to urge the Bureau to take the four following steps as it proceeds with the Section 1071 rulemaking:

- Ensure that the rule implementing Section 1071 is clear;
- Ensure that the rule implementing Section 1071 is workable given practical challenges and required investments;
- Ensure that the rule implementing Section 1071 reflects the diverse contexts in which it will apply, including retail partner channels; and
- Secure the information collected pursuant to Section 1071.

Analysis

1. Ensure that the rule implementing Section 1071 is clear.

The financial services community supports the important goals of Section 1071. Accomplishing those goals would be much harder—if not impossible—if the rule implementing Section 1071 is unclear. Lenders would not be able to efficiently comply with directions they do not understand and confused borrowers would either provide incorrect data or be discouraged from proceeding with an application. We consequently urge the Bureau to ensure that the anticipated rule implementing Section 1071 is clear: businesses should be able to understand what the law requires so that they may ensure compliance.[3] Specifically, we would urge the Bureau to take the following four steps to advance, rather than undermine, the important purposes of Section 1071.

https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf (Sept. 15, 2020).

[3] In addition to the issues highlighted below, we have also heard concerns that it may not be clear which business may have obligations under Section 1071 in certain contexts, including in the indirect auto lending context. We would urge the Bureau to take appropriate steps to mitigate such risk, either through appropriate scoping of the rule or clarification of how any future rule should work in that or similar contexts.

a. Use a clear small business size threshold.

As the Outline explains:

> Section 1071(h)(2) defines the term "small business" as having the same meaning as "small business concern" in section 3 of the [Small Business] Act (15 U.S.C. 632). The SB Act provides a general definition of a "small business concern," authorizes [the U.S. Small Business Administration ("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. As a general matter, the Bureau is considering proposing to define "small business" by cross-referencing the SBA's general definition of "small business concern," but adopting a simplified size standard for purposes of its section 1071 rule. Consistent with the statutory requirements, the Bureau will seek SBA approval for a simplified size standard if it ultimately decides to take this approach. The Bureau understands that implementing this approach will necessitate close coordination with, and approval from, the SBA.[4]

We agree with the Bureau's general approach and agree that working effectively with the SBA will be critical to ensuring its success. Simplicity will facilitate compliance and help avoid confusion that deters applications and jeopardizes the quality of information collected under Section 1071. We thus welcome the Bureau's belief that "the better approach is to use a simpler, more straightforward approach to the size standard aspect of the 'small business' definition for purposes of its 1071 rule," since it would help both financial institutions and applicants "seeking to quickly understand whether a business is 'small'" and not rely upon navigation of "the potential complexities of determining the appropriate six-digit NAICS code, and then the relevant size standard based on that NAICS code, for each applicant."[5]

To that end, the Bureau is considering "three alternative approaches for a simpler size standard" that respectively would use "(1) only gross annual revenue; (2) either the number of employees or average annual receipts/gross annual revenue, depending on whether the business is engaged in either manufacturing/wholesale or services; or (3) size standards across 13 industry groups that correspond to two-digit NAICS code industry groupings."[6] We would urge the Bureau to use gross annual revenue as the size standard. This approach is simple and clear for lenders and borrowers, and will support compliance without unduly deterring lenders or complicating the application process. In particular, to ensure appropriate coverage, we would urge the Bureau to use the $1.0M gross annual revenue threshold that it identifies as one option that it is currently considering.

b. Clearly define what constitutes an application that gives rise to data collection requirements.

[4] Outline at 14 (internal citations omitted).
[5] *Id* at 16.
[6] *Id.*

Section 1071 generally requires the collection of data upon "any application to a financial institution for credit for women-owned, minority-owned, or small business."[7] The term "application" is not defined in Section 1071 or in the Equal Credit Opportunity Act ("ECOA"), which Section 1071 amends, although it is defined in Regulation B, which implements ECOA. The Bureau now is considering proposing to define an "application" in a way that is largely consistent with the Regulation B definition,[8] i.e., 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."[9] We think that this approach should be generally workable. We are concerned, however, about numerous potential edge cases in which it may not be clear whether there would be an application for purposes of Section 1071. We would ask the Bureau to take two steps to address this risk.

First, as a general matter, we think it critical that the Bureau define or illustrate the meaning of "application" and related exclusions with sufficient clarity to leave as little doubt as possible about what falls within the definition and what does not. No one will win if that term remains ambiguous; the inevitable result would be different approaches across lenders, unnecessary compliance costs that ultimately are likely to be passed down to borrowers, and a worse borrower experience.

Second, we would urge the Bureau to account for the purpose of Section 1071 and the practical realities of the marketplace in deciding where to draw lines around what constitutes an "application." For example, we agree that inquiries and prequalifications should be excluded from the definition of application because, as the Bureau says, including them "could pollute the 1071 dataset,"[10] and, relatedly, because doing so would impose significant burdens on financial institutions without any countervailing benefit. Likewise, we agree with the Bureau's plan to exclude trade credit, which often supports retail transactions rather than constitutes stand-alone financing, from the rule's scope.[11] Including such products in a future rule would not significantly advance the goals of Section 1071, but would impose new compliance burdens on very small entities that are not well-equipped to gather accurate information.

In a similar vein, we would also urge the Bureau to pay particular attention going forward to circumstances in which requiring the collection of data could have unintended negative consequences. For example, we would urge the Bureau to avoid defining application so that it would sweep in—and add significant friction to—more informal interactions that nonetheless have significant benefits for borrowers. The Bureau should be careful to avoid introducing disruptive information collection burdens in a way that makes it harder for a financial institution to efficiently and effectively serve its customers. For example, we are concerned that the inclusion of requests for credit line increases within the definition of application could make it harder for financial institutions to provide timely approvals that they otherwise could provide.[12]

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[7] 15 U.S.C. § 1691o–2(b).
[8] *See* Outline 22.
[9] *See* 12 C.F.R. § 1002.2(f).
[10] *See* Outline 23.
[11] *See* Outline 21.
[12] *See* Outline 23.

c. Ensure that relevant forms and associated instructions are clear.

The ultimate success of data collection under Section 1071 will depend upon the development of clear and concise forms for borrowers, as well as appropriate instructions that clearly explain how to complete the form. We recognize that the Bureau has not yet proposed forms that lenders should use to collect data under Section 1071, nor the instructions for how borrowers should complete those forms. We highlight the importance of these materials, however, since missteps here could lead to the collection of inaccurate information or to the disruption of the application experience—possibly even resulting in women-owned, minority-owned, or small businesses being deterred from getting the credit they need. Such unfortunate and unjustifiable outcomes would defeat the purpose of Section 1071 and hurt our economy more broadly. It accordingly is critical that the Bureau take every reasonable step to ensure that future applications and instructions are as well-crafted as possible.

d. Clarify relationship between Section 1071 and other legal requirements.

As the Bureau knows, the Equal Credit Opportunity Act (ECOA) and Regulation B generally prohibit a creditor from inquiring "about the race, color, religion, national origin, or sex of an applicant or any other person in connection with a credit transaction" with a few exceptions, including for applications for home mortgages covered under the Home Mortgage Disclosure Act (HMDA).[13] As a result, collection of sensitive demographic information is not an established element of many lenders' current business practices—and, equally importantly, is not something that borrowers will expect in the application process. Any uncertainty about when a creditor is required to collect demographic information pursuant to Section 1071 consequently would put lenders in untenable situations. In such cases, lenders would be forced to try to ensure legal compliance (potentially in the face of seemingly contradictory legal requirements) without clear guideposts. This inevitably will lead to different approaches to the same question, which in turn could create uncertainty in borrowers' minds about lenders' commitment to fair lending. Such an outcome would be extremely unfair to lenders and would undermine the very principles that Section 1071 was enacted to advance. We accordingly would urge the Bureau to ensure that legal obligations under Section 1071 are clear. The Bureau particularly should clarify how Section 1071 requirements interact with other legal requirements, such as those that otherwise prohibit the collection of demographic information.

2. Ensure that the rule implementing Section 1071 is workable given practical challenges and required investments.

We appreciate that the Bureau "seeks to ensure that [Financial Institutions] have sufficient time to implement the Bureau's eventual 1071 rule," and that it recognizes the need for "loan processing and management vendors to adjust their products and services to accommodate 1071 requirements, and for [financial institutions] to update or revise their systems and processes, and make other changes necessary to meet the new 1071 data collection and reporting requirements."[14] These changes will be significant: financial institutions and other businesses will be required to

[13] *See* 12 C.F.R. § 1002.5 and 12 C.F.R. § 1002.13. For HMDA and its implementing regulation, Regulation C, see 29 U.S.C § 2801-2810 and 12 C.F.R. Part 1003. For the Regulation B provisions concerning requests for information generally, see 12 C.F.R. § 1002.5.

[14] Outline 42.

make substantial investments in compliance processes and information systems to ensure that they can meet obligations under any forthcoming rule. We accordingly urge the Bureau to take appropriate steps to avoid unnecessary compliance burdens and accommodate necessary implementation steps as it proceeds with this rulemaking.

As an initial matter, we welcome the Bureau's consideration of the time that will be necessary to effectively implement any future rule under Section 1071. We think it is critical that the Bureau provide an adequate period of time to comply with the forthcoming rule, including by considering using a phased implementation or other similar tools as appropriate. We welcome the Outline's discussion of possible approaches to this end. We would caution, however, that the appropriate implementation period will depend in large part on the complexity of compliance with the ultimate rule. While a two-year implementation period may be a good starting point, an unduly complicated rule may make that period too short to adequately prepare to comply with the rule. We would urge the Bureau to continue to evaluate whether a longer implementation period is appropriate as it proceeds with the rulemaking process.

We also would particularly urge the Bureau to focus on areas of the future rule that pose the greatest risk of being unworkable. In particular, we are extremely concerned that the future rule could include an unworkable implementation of Section 1071's requirement that "no loan underwriter or other officer or employee of a financial institution, or any affiliate of a financial institution, involved in making any determination concerning an application for credit shall have access to any information provided by the applicant pursuant" to Section 1071.[15]

To be clear, we understand and support the purpose of this "firewall" provision. Lenders should not – and do not want to – use the information collected pursuant to Section 1071 in their underwriting processes. Moreover, we generally agree with the approach that the Bureau contemplates. Here, in particular, however, the details will be critical. In particular, it will be important to allow financial institutions to leverage their existing systems as much as possible and not require the creation of artificial barriers that create enormous unnecessary expense without any countervailing benefit. This appears to be the Bureau's intent as it notes in the Outline that "it 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."[16] However, we believe that missteps here could make compliance unworkable. We accordingly would urge the Bureau to keep the costs of compliance associated with the "firewall" provision top of mind as it proceeds in the rulemaking process.

3. Ensure that the rule implementing Section 1071 reflects the diverse contexts in which it will apply, including retail partner channels.

Lending to women-owned, minority-owned, and small businesses occurs through numerous channels. As a result, any future rule under Section 1071 must be appropriately calibrated to apply across channels without causing undue disruption to access to credit. We particularly would draw the Bureau's attention to lending partnerships that financial institutions enter with a diverse range of businesses, from office supply companies to home improvement

[15] 15 U.S.C. § 1691o–2(d).
[16] Outline 46 n.73.

stores, and much more. These partnerships are highly valuable to these business customers: they are accessible through retailers or other vendors the business already frequents, they frequently provide preferred benefits and loyalty programs associated with those same businesses, and they often offer financing terms tailored to the clientele of those businesses.

These partnerships also raise particular complex issues for purposes of Section 1071 compliance, however.

- First, these credit programs are offered through a broadly varied set of partners. As a result, there are significant differences in the personnel who would provide and collect an application, the systems run by the partner, the physical layout of any store or other facility, and other key characteristics of the borrower's experience.
- Second, the individuals who submit an application may hold a variety of roles at the relevant business, and many may not be able to accurately answer the questions requested pursuant to Section 1071 (e.g. because the individual submitting the application is the foreman on a team, but does not know the demographic makeup of the business' ownership).
- Third, in the case of partnerships with businesses that operate retail facilities, particular privacy concerns may be raised by the collection of sensitive demographic data in public locations.
- Fourth, there may be particular risk in this channel that an applicant will be surprised at the request for demographic information. This creates a corresponding risk that the applicant will be concerned that this demographic information will be used improperly in the underwriting process.
- Fifth, personnel at the partner business may not be able to answer questions posed by a potential applicant and the partner business may not realistically be able to train them to do so.

Each of these factors increases the risk of unintended consequences from any Section 1071 rule. Most significantly, a poorly tailored Section 1071 rule could result in reduced access to credit by women-owned, minority-owned, or small businesses, whether because the compliance costs are unsupportable in this channel (leading to withdrawal of partners) or because applicants are unable to or discouraged from completing applications. We accordingly urge the Bureau to take every reasonable step to avoid these problems in any rule that it issues. Specifically, we would urge the Bureau to take the following steps in any future rule:

- Ensure that it is clear than an applicant need not complete the information requested pursuant to Section 1071.
- Allow flexibility as to when the applicant can provide requested information and the means by which they can provide that information.
- Accommodate variations in systems and resources across and within channels.
- Provide appropriate education and training resources to support channels that will face significant new obligations under Section 1071.

By taking these and other appropriate steps, the Bureau can ensure that Section 1071 does not unduly discourage women-owned, minority-owned, or small businesses lending through each of the various channels through which it occurs.

4. Secure the information collected pursuant to Section 1071.

Finally, we would urge the Bureau to take appropriate steps now to prepare to secure the data that it will collect pursuant to the anticipate rule issued under Section 1071. As the Bureau knows, it will be gathering large volumes of extremely sensitive information about American women-owned, minority-owned, or small businesses. As demonstrated by the hack of the Office of Personnel Management that reportedly affected 22.1 million people, government agencies are established targets of sophisticated hackers, including highly sophisticated nation state actors. The Bureau should take every appropriate step to maintain the security of Section 1071 data against these threats, including by taking any appropriate preparatory steps well in advance of the collection of live data. In short, the Bureau must hold itself to the highest standards of data security and protect the information that it gathers if it is going to achieve long-term success in administering Section 1071.

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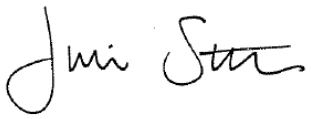
We thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,



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