American Bankers Association
Building Success. Together.

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Ms. Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Submitted Electronically: FederalRegisterComments@cfpb.gov

Re: Request for Information Regarding the Small Business Lending Market (Docket No. CFPB-2017-0011)

Dear Ms. Jackson:

The American Bankers Association[1] appreciates the opportunity to provide comments on the Bureau of Consumer Financial Protection's (Bureau) Request for Information Regarding the Small Business Lending Market (RFI).[2] The RFI is a first step in the process to implement section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1071 amends the Equal Credit Opportunity Act (ECOA) to require banks to collect and report information regarding credit applications by women-owned, minority-owned, and small businesses to "facilitate the 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."[3]

We support the Bureau's decision to begin the implementation process with an RFI seeking information on the small business lending market, the variety of credit products offered and underwriting models used, and the data currently collected by small business lenders. Understanding small business lending and its dissimilarities to consumer lending will be critical to implementation of a rule that does not increase the cost and/or limit the availability of credit to small businesses.

I. The Bureau should partner with the Small Business Administration to study whether the data and reporting regime envisioned by Congress can achieve its intended objectives.

We believe it is equally important throughout the implementation process for the Bureau to reflect on the purposes of section 1071 and critically evaluate whether the proposed data

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits and extend more than $9 trillion in loans.
[2] Request for Information Regarding the Small Business Lending Market, 82 Fed. Reg. 22318 (May 15, 2017).
[3] 15 U.S.C. § 1691c-2.

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collection *can* achieve its statutory objectives of facilitating enforcement of fair lending laws and enabling the identification of community development needs and opportunities of women and minority-owned small businesses. While the banking industry supports both goals, we have strong concerns that section 1071 will achieve neither objective.

Small business lending at banks is highly individualized, and underwriting and loan pricing depend on many heterogeneous variables that are inherently unsuitable for mass-data fair lending analysis. The key to proper fair lending analysis using mass-data is to compare similarly situated borrowers. While that is possible to a limited degree with consumer credit, where products and factors considered in underwriting are more homogenous, the great variations and unique attributes of individual small business loans will make legitimate comparisons excessively difficult, if not impossible.

Yet, once implemented, the data from such a program will create vulnerabilities to statistical engineering to contrive assertions of discrimination in small business lending. Rather than motivating financial institutions to increase their lending to meet the credit needs of small businesses and their communities, the data collection and the anticipated reliance on statistical manipulation in fair lending supervision and enforcement may discourage lending to small business, particularly by community banks that may lack the resources to engage in a statistical duel with regulators to defend against allegations of violations. At the lower end of vulnerability, bank experiences with regulatory data collections, such as those pursuant to Call Reports, the Home Mortgage Disclosure Act (HMDA), and the like, presage the real likelihood of numerous clerical violations given the volume of data to be collected, categorized, and reported.

The banking industry, small business borrowers, and the U.S. economy can little afford this result. Nor can we afford for the rule to be finalized and lenders begin the Herculean task of collecting and reporting data, only to have regulators recognize that the data offer little value to be used to identify genuine fair lending violations. Therefore, ABA urges the Bureau to initiate soon a study that analyzes to what extent the data collection regime could in fact facilitate reliable fair lending supervision and enforcement and support community development. The study should be a predicate to further work on this rulemaking, as the failure to evaluate whether section 1071 can achieve its statutory purposes prior to adoption of a final rule will inevitably call for costly and market-disrupting rule revisions.[4]

In the conduct of such a study we recommend that the Bureau partner with the Small Business Administration (SBA) and use SBA 7(A) and 504 program data that include the race and ethnicity of the borrower as well as the other 1071 data points. Indeed, ABA urges the Bureau to partner with the SBA throughout related rulemaking in order to benefit from that agency's small

[4] Major rules finalized by the Bureau to date have evinced a troubling predetermined commitment to preconceived policy choices and inadequate consideration of concerns raised about the likely impact on consumers, resulting in multiple rule revisions. For example, the remittance, ATR/QM, mortgage servicing, TRID, prepaid, and HMDA rules all have been amended, several have undergone multiple revisions, to address concerns raised from the outset during the Small Business Regulatory Enforcement Fairness Act (SBREFA) review and in comments on the proposed rule.

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business lending expertise. Although section 1071 assigns responsibility for implementation to the Bureau, nothing in the statute precludes consultation with another agency with experience and institutional proficiencies for understanding commercial lending and gathering data on small businesses, experience which the consumer Bureau lacks.

At the conclusion of the study, the Bureau and SBA should report to Congress on whether small business loan data collection would be likely 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 and minority-owned small businesses. The report should clearly articulate how and to what extent the data collection would serve the statutory objectives.

II. Comments on the Request for Information

In response to the Bureau's RFI, we highlight the following observations and recommendations, which are explained further in the proceeding commentary:

- HMDA-like reporting is not appropriate for small business lending, and now is the time for the Bureau to begin estimating the costs of a new reporting regime so that the public can more accurately weigh how these costs will affect small businesses.

- The new analysis regime for small business lending data can be expected to discourage bank lending to small business customers.

- To minimize the disruption of small business lending and the costs of the data collection, the Bureau's rules governing the collection and reporting of the data should not be prescriptive; lenders should be permitted to identify such things as to when they have a *bona fide* application (rather than just an expression of interest, for example) and when and how to collect the data so that the data genuinely and accurately represent the transaction.

- The data collection should be limited to the statutorily-mandated data points.

- The data collection should be limited to women-owned and minority-owned "small business," and the definition of "small business" must be clear and easy to apply at time of application.

- A rule should permit the use of a model disclosure when a firewall is not feasible.

- The Bureau should limit or curtail the public disclosure of certain information to mitigate customer privacy concerns.

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1. *HMDA-like reporting is not appropriate for small business lending and will impose costs on small business customers.*

Not only is it essential to test whether the proposed data collection will achieve its statutory objective, the Bureau should begin now to assess the cost of implementation of the data collection as well as to estimate ongoing annual operational costs. As the Bureau is aware, section 1022 of the Dodd-Frank Act requires the Bureau to—

> [C]onsider the potential benefits and cost to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services resulting from such a rule;[5] and
>
> [C]onsult with the appropriate prudential regulators or other Federal agencies[6] prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.[7]

Having credible – and transparent – cost estimates, along with exposing for public review the cost estimates and all of information that was relied upon by the Bureau in making these estimates, will be critical to meeting both of these statutory obligations.

While we recognize that Bureau staff may consider as a model the work that was done to estimate the cost of complying with the recent changes to HMDA data collection and reporting requirements for residential mortgages, we caution that those estimates quantified the operational costs involved with a change to an *existing* data collection and reporting obligation.[8] In contrast, the small business lending data collection will be a completely *new* reporting regime and one that impacts far more lines of business, credit products, and employees than HMDA's reporting obligation. To comply with section 1071, banks will need to establish new procedures and processes for collecting and maintaining the data for all affected business units, update core systems and loan origination systems (many will require new systems), train all employees involved with commercial lending, test the new process and systems, and make necessary adjustments. Banks also will need to hire and train employees to conduct data integrity scrubs and to report the data.

In addition to these costs, the Bureau must factor in the additional costs to be incurred annually on fair lending compliance, inasmuch as the data may be used to engineer statistically-based regulatory assertions of fair lending issues to which the banks will need to respond. To be prepared to respond to such anticipated claims, banks will need to devote considerable additional resources to expanded fair lending regulatory compliance programs.

[5] 12 U.S.C. § 5512(b)(2)(A)(i).
[6] We believe "other Federal agencies" would include the prudential regulators, the SBA, OIRA, among any others.
[7] 12 U.S.C. § 5512(b)(2)(B).
[8] Home Mortgage Disclosure (Regulation C); Final Rule, 80 Fed. Reg. 66265 (Oct 28, 2015).

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Aggregate implementation and ongoing costs imposed by the new data collection can be expected to be in the hundreds of millions, if not billions, of dollars.

ABA urges the Bureau to begin now to estimate these costs so that the information is available to the public, prudential regulators, the Small Business Administration (SBA), and the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) early in the rulemaking process. Indeed, we believe the Bureau should make the cost information available to the small entity representatives (SERs) that will participate in the Small Business Regulatory Enforcement Fairness Act (SBREFA) review process so that the SERs can react to it and suggest how the changes might affect their business practices and costs and gauge the likely impact on their ability to lend to small businesses.[9]

2. *Small business lending promotes economic growth and financial inclusion.*

Small businesses are a key engine of growth and job creation for the U.S. economy. As reported in the Bureau's whitepaper on small business lending, SBA data show that more than 27 million small businesses provide 55% of all jobs in the United States and are responsible for 65% of new job creation.[10] A 2013 Federal Reserve Bank of Atlanta study found that counties with a higher percentage of their workforce employed by small local businesses exhibited positive trends with respect to local incomes, employment rates, and poverty rates.[11]

In order for small businesses to grow, they require safe and reliable funding, which the banking industry offers. Seventy three percent of small business borrowers turn to banks first when seeking financing advice.[12] Bank lending to small business plays an important role in the economic health of local communities. Therefore, it is critical that the Bureau understand the commercial lending process to ensure that the data collection does not impede small business lending.

Many entrepreneurs and small business borrowers contact a banker with little more than a concept for a new business or a proposed expansion of an existing business but lack knowledge of financing options, including how much credit they actually need. Bank lenders work with

[9] In preparation for the SBREFA review, ABA urges the Bureau to gather and share with SERs any information from third-party service providers that may be involved in regulatory proposals under consideration. We believe that the Bureau – whose access is far superior to that of small entities – should have an affirmative duty to obtain this information and to provide it to the SERs.

[10] CONSUMER FINANCIAL PROTECTION BUREAU, KEY DIMENSIONS OF THE SMALL BUSINESS LENDING LANDSCAPE, (May 2017), available at http://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-Landscape.pdf.

[11] Anil Rupasingha, *Locally Owned: Do Local Business Ownership and Size Matter for Local Economic Well Being?* (Fed. Res. Bank of Atlanta, Discussion Paper, No. 01-13, 2013), available at https://www.frbatlanta.org/-/media/documents/community-development/publications/discussion-papers/2013/01-do-local-business-ownership-size-matter-for-local-economic-well-being-2013-08-19.pdf.

[12] According to the 2015 Federal Reserve Survey, see Fed. Res. Bank of New York, Atlanta, Boston, Cleveland, Philadelphia, Richmond, and St. Louis, 2015 Small Business Credit Survey: Report on Employer Firms, (March 2016), available at https://www.newyorkfed.org/medialibrary/media/smallbusiness/2015/Report-SBCS-2015.pdf.

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small business borrowers to develop a more fulsome business plan, evaluate cash flow needs and debt service capabilities, analyze the market, and suggest the credit product that will best suit the small business. Banks offer their small business customers a wide range of credit products, including but not limited to term loans, lines of credit, business credit cards, equipment leasing loans, asset-based loans, and SBA loans. Importantly, banks tailor small business loans to the unique borrowing needs of their customers. The careful thought, analysis, and counsel that banks provide when working with small businesses is a critical contributor to job growth and financial inclusion in the U.S. economy.

This "high touch" approach is successful because it considers and adapts to the customer's needs and promotes the success of the borrower's business undertaking and repayment of the loan. The simplistic data collection contemplated by section 1071, however, is at odds with the consultative, tailored approach to small business lending. It will tend to encourage standardization and simplification of the commercial loan application, processing, and underwriting processes, which will limit the flexibility that is the key characteristic of successful small business lending, particularly small business lending by community banks.

Traditionally, banks have been willing to rely on their knowledge of local market conditions and their assessment of the borrower's experience and anticipated ability to execute on a business plan to overcome weaknesses in a credit application. However, willingness to consider mitigating factors and make exceptions to underwriting policies may be discouraged by the anticipated fair lending analysis of the data, which tends to apply harsh treatment to exercises of banker judgment. Rather than motivating banks to increase their lending to meet the credit needs of small businesses and neighborhoods, the data collection can be expected to discourage bank lending to small businesses.

Moreover, marginally qualified applicants are more likely to seek loans from non-traditional or even "informal" sources. We believe that public policy should expand access of such borrowers to bank loans rather than make bank lending to these small businesses more difficult.

Along these lines, Farm Credit System (FCS) institutions should have to comply with 1071 standards and be supervised for their compliance with such standards so that banks that seek to serve small agricultural borrowers will not be at a further competitive disadvantage. There are numerous examples of Dodd-Frank requirements for which non-FCS institutions are currently supervised that FCS institutions are either not required to comply with or are not subject to the same level of supervision. Furthermore, failure to ensure that data is collected from FCS institutions will result in significant gaps in 1071 data as it is reasonable to presume that many women-owned and minority-owned small agricultural businesses rely on FCS institutions for credit.

3. *The small business definition must be clear and easy to apply.*

Given the significant costs that will be imposed on banks and their customers, the definition of a "small business" must be clear and easy to apply at the time of application. In addition, the data

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collection should be limited to women- and minority-owned small business applicants. We believe the rule should reflect Congress' intent and limit the scope of the collection and reporting regime lending to women-owned and minority-owned small businesses. Any other interpretation could result in the collection of data on lending to all women-owned and minority-owned businesses, regardless of size. The consequence of not limiting the data collection to those that are "small businesses" would be that every borrower would need to be evaluated to determine if it was women-owned or minority-owned, even if the business had revenue, for example, of tens of millions of dollars and/or was publicly traded. It is reasonable to assume that Congress did not intend to have lenders collect data on companies that are not small businesses as the statutory provision is entitled "Section 1071 Small Business Data Collection."

Moreover, a strict interpretation of the statutory language might impose data collection on lending to *all* small businesses, regardless of their ownership. This would significantly increase the data collected, within which a mountain of information on lending to women-owned and minority-owned small business could be lost, inconsistent with the Congress' focus on women-owned and minority-owned small businesses.

Banks and applicants need to be able to determine quickly and easily whether a 1071 data collection need arises in a transaction. Accordingly, a definition of a women-owned and minority-owned small business needs to be easy to apply and leave no ambiguity, so that applicants are able to determine quickly and easily if they belong in either of these categories.

Section 1071 defines "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)." That section, in turn, includes a provision that authorizes the SBA to establish industry specific size standards using North American Industry Classification Standards (NAICS). A small business definition relying on industry-specific NAICS codes would require the lender and applicant to review 39 pages of NAICS industry descriptions to determine the applicable size standard. Current industry-specific NAICS code definitions rely on revenue standards for some industries and number of employees standards for other industries, adding additional complexity. Some applications for unsecured credit (e.g., some small business credit cards) do not require the institution to gather information on the annual revenues of the business which would create a problem if the small business size standard for the industry in question relies on revenue. These are perplexing complexities that could frustrate realization of the purposes of the statute.

We support the Bureau's interest in adoption of a simple and more practical definition of "small business" and offer the following definition:

> A small business should be defined as an enterprise (including all parent entities, subsidiaries, and affiliates) that, at time of application, reports the prior year's gross annual revenue as $1 million or less and has requested a loan amount of $1 million or less.

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In view of the variety of small business lending programs and products available, both elements of the definition cannot be applied in all cases. To minimize implementation costs and avoid unnecessary disruption of small business lending processes, we urge the Bureau to recognize expressly the following exceptions to the proposed definition above:

- For those credit products for which at the time of application there is no loan amount requested, then revenue of $1 million or less would be the sole determinant.
- For those credit products (some credit cards and other lending products) for which revenue is not collected, the lender may make the determination based on a loan amount requested of $1 million or less exclusively.

This proposed definition would encompass the vast majority of loans to small businesses, including women-owned small businesses and minority-owned small businesses.[13]

To avoid confusion regarding a borrower's revenue size in the event that a borrower has subsidiaries or is itself a subsidiary of one or more entities, gross annual revenue should be that of the enterprise (including all parent entities, subsidiaries and affiliates). Furthermore, gross annual revenue of the enterprise should be self-reported by the applicant to the prospective lender, and the lender should not be obligated to confirm or validate the enterprise's gross annual revenue.

4. *The Bureau should expressly exclude certain loans from the data collection.*

The scope of section 1071 should be limited to loans for commercial and industrial purposes to business entities where the revenues from the on-going business operations of the business enterprise is the primary source of repayment of the loan. Thus section 1071 should not apply to the following:

a. Loans primarily for personal, family, and household purposes. If the credit terms specify that the loan proceeds can be used only for personal, family, or household purposes, then institutions should not be collecting 1071 data for such loans. Furthermore, lenders should be permitted to rely on an applicant's stated use for the requested funds. If a borrower starts or invests in a business using the proceeds of a personal loan, it is unlikely that the bank would know (and should not be expected to know) that the use of the proceeds had changed.

b. Loans secured by real estate other than loans secured by owner-occupied commercial real estate where the primary source of repayment is the cash flow from the ongoing business operations of the owner/operator or an affiliate of the owner of the real estate.

[13] As the Bureau noted in its RFI, a definition of small businesses as businesses with annual revenue of $1 million or less covers approximately 95% of all firms, over 97% of all minority-owned firms, and over 98% of all women-owned firms, surely statistically sufficient to satisfy the policy purposes of the statute.

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c. Participation loans. Very few small business loans are structured as participations. Reporting on participations would be unnecessarily burdensome as one would have to specify whether the lead underwriting institution would report the participation, the participant, or both. To avoid introducing unnecessary complexity for such a small segment of the market, ABA recommends that loan participations be excluded.

d. Credit applications for trusts other than business trusts.[14] These entities are not for-profit businesses but rather are created for family, investment, or charitable purposes. Collecting 1071 data on these trusts would be inappropriate and complex as it would be difficult to determine on whom the data must be collected. For example, a bank would need to determine if the data should be collected on the settlors, beneficiaries, trustees or some combination thereof. Similarly, determining the "net profit or loss" of the trust and to whom that net profit or loss accrues would be challenging to say the least. Given the challenges involved in capturing data for trusts and the limited utility that collecting these data will have, we request that the Bureau explicitly exempt them.

e. Credit applications for tax-exempt entities.[15] Determining ownership, control, and net profit or loss would, in most cases, be foreign concepts, as these entities are not structured in a way that resembles businesses. Given that tax-exempt entities are not for-profit businesses, we recommend that the Bureau explicitly exempt them.

f. Applications for credit by foreign-owned entities. The Bureau should clarify that 1071 data collection requirements be limited to applications for credit submitted within the United States and U.S. territories, and that applications for credit by foreign-owned entities be exempt from 1071 data collection. Determining beneficial ownership and evaluating net profit or loss for companies subject to different legal and accounting regimes would introduce significant unnecessary complexity for little utility relative to section 1071's statutory purpose.

5. *To minimize the disruption of small business lending and the cost of the data collection, the Bureau should adopt clear and flexible rules governing the collection and reporting of the data.*

Small business customer interactions may be on the phone, at a community event, or through a third party, and the collection of underwriting information about a potential borrower may take place over time and may require iterative interactions between the lender and the borrower. For those lenders that use applications, many are paper-based. However, it is important to recognize that even within a single bank, the application process and collection of information to be used in underwriting may vary by line of business and credit product. To minimize disruption to existing

[14] *See* 26 C.F.R. § 301.7701-4.
[15] *See* 26 U.S.C. § 501(a).

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processes and to reduce costs, we urge the Bureau to avoid procrustean rules that will dictate when and how the data must be collected.

The ultimate obligor on the requested credit may change as additional guarantors are added or new entities are formed. Unlike consumer credit, the small business credit process evolves over time. Therefore, consistent with safe and sound practices employed by banks, the identification of the borrower may change, and banks should be permitted flexibility in identifying when in the process the 1071 data should be collected, bearing in mind that it should not be *required* to be contemporaneous with the receipt of an application. For example, banks that offer private label credit cards do not interact directly with the customer at the time of application; applications are often taken at point of sale. In these instances, banks may prefer the flexibility to request 1071 data later so that they may interact more directly with their customers to obtain accurate and relevant information.

Institutions also should be given flexibility to determine how they will collect applicant-reported 1071 data points. The Bureau should not explicitly or implicitly mandate use of an application or other form, as small business data collection varies by product and business line. Imposing uniform standards on the process will constrain small business lending to a one-size-fits-all approach that is incompatible with the small business lending process and would therefore undermine the flexibility needed for successful small business lending. Quite unlike residential mortgage lending, different business loan originators emphasize different elements in the credit decision process, and their respective data gathering tools reflect those different criteria.

We encourage the Bureau to apply Regulation B's definition of what constitutes an "application" to the small business data collection. Regulation B defines 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."[16] Thus, Regulation B recognizes that the bank should be able to define the information that needs to be gathered (pursuant to the applicable bank underwriting guidelines) to determine what constitutes a completed application and thereby generates the data collection and reporting obligation. For example, preliminary discussions with a customer about possible financing needs should not trigger an application and obligation to collect 1071 data. Similarly, if a customer asks about a particular type of loan, and the bank does not make that type of loan, the bank should not have to report 1071 data.

6. *The Bureau should adopt clear, simple definitions of the legislatively-mandated data points.*

To further minimize the disruption of small business lending and the cost of the data collection, the Bureau should adopt very clear and simple definitions for the legislatively-mandated data points. We recommend the following definitions:

[16] 12 C.F.R. § 202.2(f).

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- *Type and purpose* should be defined as closed-end, revolving, or an owner-occupied commercial mortgage. Additional granularity would result in unnecessary burden and confusion, with little value added.

- *Principal place of business* should be defined as the address submitted by applicants as their principal place of business, provided through the bank's normal application process. An alternative definition, which would rely on the census tract in which revenue activities are generated, would be overly confusing and would result in inconsistent reporting, making the potential for data misinterpretations even greater and comparisons of data less straightforward.

- *Amount applied for* is subject to complexity as the extension of small business credit may involve multiple counteroffers. In some cases, the iterative process of small business lending makes it unclear whether a counteroffer has been made and whether the applicant has accepted the counteroffer. Since the loan amount requested by the borrower can change, the clearest possible way to define amount applied for is to report the approved loan amount in the case that the loan is approved and, in all other cases the amount for which the applicant applied (if any), should be reported.

- *Type of action taken* should contain three response options: approved, application denied, or incomplete. Incomplete applications would be those that did not make it to the final underwriting stage for one reason or another. Current HMDA rules specify several more response options that would introduce significant and unnecessary complexity.

Institutions should be permitted to make it very clear to the borrower that the provision of 1071 demographic data is completely voluntary and that the borrower's decision to provide or withhold the information will have no effect on the application. In addition, lenders must be able to rely on the self-reported race, sex, and ethnicity of the principal business owners as indicated by the representative of the small business applicant. The lender should be able to rely on the applicant's answers even if the applicant is not a principal owner. Bankers should not be required to determine an applicant's sex or ethnicity, factors that are and should be irrelevant to the underwriting process. Bankers have been trained for many years to ignore race, ethnicity, and sex in order to ensure all credit applicants are treated fairly in the application process.

Furthermore, the bank should be permitted to rely exclusively on answers provided by a small business-credit applicant representative regarding the gross annual revenue in the last fiscal year and the small business' status as women-owned or minority-owned. There should be no requirement for the institution to verify or validate the information provided independent of what the institution may do as part of their standard underwriting processes. Similarly, there should be no requirement to coach or to urge the applicant to answer, as doing so could jeopardize the customer relationship.

It is important to recognize that the person submitting the credit request may not have ready access to the applicant provided data (e.g., gross annual revenue; race, sex, and ethnicity of the

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principal business owners; and minority-owned or women-owned status). Accordingly, a lender should only be required to request the data once, and the lender should simply be required to record the borrower's responses. If an applicant asks to verify some of the requested information with the owners of the business, the lender should be able to record the applicant's non-response and should not have to ask the applicant again. If an applicant subsequently volunteers answers, the lender may update its records.

7. *The data collection should be limited to the statutory data.*

Section 1071 authorizes the collection of the following data:

a. the number of the application and the date on which the application was received;
b. the type and purpose of the credit applied for;
c. the amount of the credit applied for, and the amount of the credit approved;
d. the type of action taken on the application, and the date of that action;
e. the census tract in which the principal place of business of the loan applicant is located;
f. the gross annual revenue of the business in the last fiscal year preceding the date of the application; and
g. the race, sex, and ethnicity of the principal owners of the business.

In addition to these data points, the Bureau states that it will consider whether supplementing with a "limited number of discretionary data points would serve the purposes of section 1071, improve the quality of the data for all stakeholders, and reduce the possibility of misinterpretations or incorrect conclusions that might arise from the collection or release of more limited data."

As discussed above, collecting and reporting the statutory data points will impose tremendous costs and produce data that we believe will not achieve the statutory objectives. In fact, the anticipated reliance on statistics in fair lending supervision and enforcement may discourage lending to small businesses, particularly by community and mid-size banks. Expanding the data points beyond those required data points required by statute would only make the problems worse.

8. *Limit 1071 data collection requirements to genuinely new credit to the customer.*

At many institutions, renewal events for certain commercial loan products occur on an annual basis (i.e., not at the customer's *request*), following periodic reviews to ensure that the borrower is still performing as agreed by the contract and the ownership and management structure have not changed. For example, commercial lines of credit are often established for one year but include provisions for annual renewal unless either party gives notice of non-renewal.

We recommend that the 1071 data collection should be required only when a bank extends genuinely new credit to the customer as defined by the receipt of an application (pursuant to the

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Regulation B definition of "application" as referenced earlier in this letter). If customer data must be collected for insignificant line increases (or decreases), rate changes, covenant modifications, "business as usual" short-term renewals, or relatively minor modifications of terms, the customer relationship will be significantly disrupted and banks will be required to spend more time complying as opposed to making and managing loans. In addition, the necessary resources required to collect the data will inevitably add to the cost for credit. Yet the additional information gathered would have no meaningful value beyond what was gathered from the original extension of credit.

9. *Permit use of a model disclosure when a firewall is not feasible.*

Section 1071 contemplates, where feasible, establishment of a "firewall" that prevents loan underwriters from access to information about the race, ethnicity, or sex of the small business applicant (the demographic data). The statute states—

> (d) NO ACCESS BY UNDERWRITERS.— (1) LIMITATION.—Where feasible, 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 a request under subsection (b) in connection with such application. (2) LIMITED ACCESS.—If a financial institution determines that a 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 should have access to any information provided by the applicant pursuant to a request under subsection (b), 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.

Establishment and maintenance of a firewall will multiply the regulatory burden for all institutions, since it means that the data cannot be collected on the application or during the application process and must be stored in systems or files that the underwriter cannot access. However, many institutions grant underwriting and loan approval authority (under certain loan amounts) to the same staff that is interacting with customers. For many institutions, it would necessitate the hiring of "shadow staff" to collect the demographic data.

Moreover, even providing a disclosure to the applicant that underwriters may see the information will lead the borrower to assume that the information is being used in decision-making, as demonstrated by borrower responses to requests for government monitoring of information on mortgage loan applications.

To avoid these issues, we believe the Bureau should adopt a rule that permits a bank to determine the feasibility of a firewall. The regulation should expressly recognize that maintenance of a firewall is not feasible if it would require the bank to alter its application and or underwriting

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process or loan processing systems. Further, under these circumstances, we recommend that the rule include model language that a lender may use (at its discretion) to explain why the lender is requesting information relating to race, ethnicity, and sex of the principal owners, the ability of the applicant not to furnish the information, and an affirmative statement that the lender will not discriminate on the basis of the information or whether the applicant chooses not to furnish it. This approach would be consistent with HMDA.

We understand that the Bureau may be considering use of a third party to collect the data, perhaps requiring a lender to direct a commercial loan applicant to an independent website to provide the demographic data and other applicant-supplied data (i.e., loan amount requested and enterprise gross revenue). Our members believe that involvement of a third party in collecting data from an applicant would disrupt the customer relationship experience. Furthermore, applicant reporting to a third party would introduce significant data integrity challenges.

10. *Mitigate customer privacy and confidentiality challenges by exempting certain small data sets and by using county-level aggregations for all other data.*

In many communities, information about the annual revenue or demographic data about the principal owners of a small business will disclose private information about the small business and its financing needs. Indeed, the mere fact that a borrower is applying for a loan is something that a borrower may not want publicly disclosed. Many borrowers may be hesitant to apply for a loan if that personal information may be made available to the public. In addition, publication of 1071 data may also encourage aggressive marketing by online lenders that may be unwelcome by the borrower. Finally, it is important to recognize that the type of action taken and the amount approved, among other potential data points, may reveal bank proprietary information that should not be compromised.

The Bureau should establish a minimum size for data sets below which 1071 data would not be publicly disclosed. To maintain public confidence, banks need to be able to assure borrowers that their information will be treated with the utmost confidentiality. Small data sets within a particular geography are highly likely to lead to the public obtaining information that should remain confidential.

Even if small datasets within a geography are exempted, algorithms that cross-reference other publicly available data in "larger" data sets can be used to reverse-engineer a borrower's private information or a bank's proprietary information. To protect borrower privacy, and to preserve confidential bank proprietary information, public disclosure of the applicant/borrower data should not contain loan-level detail but rather should be disclosed consistent with the current county-level aggregation of small business lending data reported pursuant to Community Reinvestment Act regulations.

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III. Conclusion

ABA appreciates the opportunity to provide our comments to the RFI. If you have any questions or would like to discuss anything further, please contact Barry Mills at 202-663-5311.

Sincerely,

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