SULLIVAN & CROMWELL LLP

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Consumer Financial Protection Bureau

CFPB Rule Implements Dodd-Frank Small Business Lending Data Collection and Reporting Requirements

SUMMARY

On March 30, the Consumer Financial Protection Bureau issued a final rule implementing section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Final Rule"). Section 1071 amended the Equal Credit Opportunity Act to require financial institutions to collect and report information concerning credit applications made by "women-owned, minority-owned, or small business[es]." Under the Final Rule, financial institutions are required to collect and report owner demographic information (race, sex/gender, and ethnicity) as well as other data regarding applications for credit by all small businesses ($5 million or less in annual revenue) to identify those that are owned by women and minorities. In a provision that was not included in the proposed rulemaking, financial institutions will also be required to collect and report whether applicants are owned by "LGBTQI+ individuals," which the Final Rule defines to "include[ ] an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex."

The Final Rule will result in the creation of the first largely comprehensive database of small business credit applications in the United States. Consistent with section 1071's express purposes, the collection and reporting of this data will likely facilitate the enforcement of fair lending laws and provide information for various stakeholders to better identify business and community development needs and opportunities for small businesses, including those that are minority-owned, woman-owned and LGBTQI+-owned. The Final Rule imposes a new comprehensive compliance regime akin to that of the Home Mortgage Disclosure Act ("HMDA"). As a result, covered financial institutions should consider whether they will need to undertake their own fair lending assessments with respect to the demographics of the owners of their small business lending customers, as most currently do using HMDA data for home mortgage lending.

Some elements of the Final Rule have already created some controversy, with efforts underway in Congress to void the Final Rule through the Congressional Review Act or otherwise mandate meaningful

modifications. The outcome of those efforts or of any future court challenge is likely months, if not years, away. In the meantime, financial institutions that originate more than 100 small business loans annually should prepare for a compliance date that may be as little as 18 months away.

BACKGROUND

The Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B, prohibit credit discrimination on the basis of race, color, religion, national origin, sex, marital status, or age.[1] Section 1071 amended ECOA to require that financial institutions collect and report to the CFPB certain data regarding applications for credit by "women-owned, minority-owned, or small businesses," including, among other information, the "race, sex, and ethnicity of the principal owners of such businesses."[2] Congress intended this amendment 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."[3] Under section 1071, the CFPB must "prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to [section 1071]."[4]

In April 2011, shortly before section 1071's effective date,[5] the CFPB issued guidance stating that institutions' obligations "do not go into effect until the Bureau issues necessary implementing regulations."[6] Over the next several years, the CFPB took preliminary steps toward promulgating a proposed rule. In May 2019, a coalition of community-based organizations and others filed suit against the CFPB seeking a court order requiring the CFPB to "promptly" issue a section 1071 rule.[7] The parties eventually settled, resulting in the issuance of a proposed rule on September 1, 2021 (the "Proposed Rule"). The CFPB received approximately 2,100 comments in response to the Proposed Rule. On July 8, 2022, the parties to the litigation stipulated that March 31, 2023, would be the deadline for the CFPB to issue a final rule.[8] The Final Rule was issued on March 30, 2023.[9]

FINAL RULE

The Final Rule aligns in many respects with the Proposed Rule, but also deviates from it in several significant ways. For instance, the Final Rule requires financial institutions to collect and report data not only with respect to minority-owned businesses and women-owned business status, as proposed, but also with respect to LGBTQI+-owned business status. The CFPB has also meaningfully increased—from 25 to 100—the threshold of annual small business credit originations required for a financial institution to be subject to the Final Rule. In the subsections below, we address seven key questions prompted by the Final Rule:

A. WHICH INSTITUTIONS AND TRANSACTIONS ARE COVERED?

1. Covered Financial Institutions

Compliance with the Final Rule is required of any "covered financial institution," defined as "a financial institution that originated at least 100 covered credit transactions for small businesses in each of the two preceding calendar years."[10] As in the Proposed Rule, "financial institution" is defined broadly to encompass a wide array of entities—both traditional and non-traditional—that engage in small business lending.[11] As mentioned above, the Final Rule's higher annual origination threshold marks a meaningful departure from the Proposed Rule's origination threshold of 25 transactions—a change intended to address commenter concerns that the lower threshold could force smaller lenders to stop making loans to small businesses.[12] Like the Proposed Rule, there are no general exemptions for particular categories of financial institution and no asset-based exemption threshold for depository institutions.[13] However, in the official commentary, the CFPB notes that certain lending-related activity will not count as originations for purposes of the origination threshold, such as the extension of additional credit and transactions that extend, renew, or otherwise amend a transaction.[14] The Final Rule contemplates that some financial institutions will find it difficult to determine the number of covered credit transactions originated to small businesses prior to the Final Rule's effective date and, unlike the proposal, allows financial institutions to use "reasonable methods" to estimate the number of originations.[15]

2. Covered Credit Transactions and Covered Applications

The Final Rule, like the Proposed Rule, defines a "covered credit transaction" as a transaction that meets the definition of "business credit" under existing Regulation B and that is not otherwise specifically excluded under the Final Rule.[16] Accordingly, covered credit transactions include loans, lines of credit, credit cards, merchant cash advances, and other types of sales-based financing,[17] and credit products used for agricultural purposes, unless otherwise excluded.[18] As in the Proposed Rule, the CFPB relies on its exemptive authority under section 1071 to exclude trade credit, public utilities credit, securities credit, and incidental credit from the meaning of "covered credit transaction."[19] Under the same authority, and unlike the Proposed Rule, the CFPB also excludes transactions that are reportable under HMDA and insurance premium financing.[20] The new HMDA exclusion addresses commenter concerns regarding duplicative reporting and compliance burden,[21] while the new insurance premium financing exclusion appears to be grounded in a determination that such financing is unlike any other form of small business credit.[22] In addition to these exclusions, the official commentary states that various other types of transactions are not covered credit transactions, including factoring transactions, leases, consumer-designated credit, and

purchases of originated covered credit transactions.[23] The CFPB acknowledges that HMDA and the CRA require reporting of purchased loans, but notes the different statutory language and related interpretations governing each regime.[24]

Like the Proposed Rule, a "covered application" is any "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."[25] According to the CFPB, this definition encompasses incomplete, withdrawn, and denied applications, as well as refinances and consolidations.[26] As such, it is "largely consistent" with the existing Regulation B definition of "application."[27] However, unlike the existing definition (but consistent with the proposal), the Final Rule specifically excludes from the definition of covered application: (1) reevaluation, extension, or renewal requests on existing business credit accounts, *unless* the request seeks additional credit amounts; and (2) inquiries and prequalification requests.[28] Although not treated as covered applications under the Final Rule, "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."[29]

B. WHICH BORROWERS ARE COVERED?

Borrower coverage is generally consistent with the Proposed Rule. The Final Rule requires covered financial institutions to collect and report section 1071 data regarding *all* covered applications from small businesses.[30] Like the proposal, the CFPB interprets the language of section 1071 to cover only small business lending,[31] although, as acknowledged by the CFPB in the preamble,[32] the statute could be read to also include all women- or minority-owned businesses regardless of size.[33] Among other reasons for limiting the coverage to small business lending, the CFPB points to data indicating that almost all women- or minority-owned businesses fit within the definition of small business.[34]

Also like the Proposed Rule, the Final Rule defines "small business" in accordance with the meaning of "business concern or concern" and "small business concern" under the Small Business Act and the Small Business Administration's ("SBA") implementing regulations, but without regard to the SBA's size standards.[35] Instead of those size standards (and as proposed), the Final Rule considers whether the business had $5 million or less in gross annual revenue for its preceding fiscal year.[36]

C. WHAT DATA MUST BE COLLECTED AND REPORTED AND WHEN?

For each covered application, covered financial institutions must collect and report 20 discrete data points within three categories of data: (1) data only the applicant can provide;[37] (2) data that may be provided by the applicant or discerned from information provided by the applicant or a third party; and (3) data that the institution itself generates.[38] Covered financial institutions are permitted (and in some instances required) to rely on statements made by an applicant or information provided by the applicant when collecting and reporting applicant-provided data and need not (and in some instances cannot) verify that information.[39]

Where verification is permitted and undertaken, the institution generally is required to report the verified information. In another meaningful change from the Proposed Rule, financial institutions are now permitted to reuse, for up to 36 months, certain applicant-provided data so long as there is no reason to believe the data are inaccurate.[40] Gross annual revenue, however, can be reused only if collected within the same calendar year.[41] The data required by the Final Rule must be reported to the CFPB on or before June 1 for data collected during the entirety of the prior calendar year.[42]

Consistent with the Proposed Rule, a covered financial institution that is a subsidiary of another covered financial institution is required to maintain its own separate small business lending data and may report its data to the CFPB either directly or through its parent.[43] Unlike the Proposed Rule, however, if multiple financial institutions are involved in an origination, only the last covered financial institution with authority to set the material terms is required to report the application (whether or not it was originated).[44]

1. Data *Only* the Applicant Can Provide

The Final Rule requires covered financial institutions to collect and report information regarding whether an applicant is minority-owned or women-owned.[45] The Final Rule uses the same threshold as the Proposed Rule for determining whether a small business is "owned" by one or more minorities (in the case of minority-owned) or one or more women (in the case of women-owned)—*i.e.*, one or more such persons hold(s) more than 50 percent of the business's ownership or control and more than 50 percent of the net profits or losses accrue to one or more such individuals.[46]

Unlike the Proposed Rule, the Final Rule also requires covered financial institutions to collect and report information regarding whether the applicant is LGBTQI+-owned using the same threshold as is used to determine whether an applicant is minority-owned or women-owned—*i.e.*, both ownership or control of more than 50 percent by one or more LGBTQI+ individuals and more than 50 percent of net profits or losses accrue to one or more LGBTQI+ individuals.[47] For this purpose, the Final Rule defines "LGBTQI+ individual" to "include[ ] an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex."[48] The CFPB solicited comment on this topic in the Proposed Rule, but did not include relevant definitions or data collection and reporting requirements.[49] In imposing this particular data point, the CFPB relies on its authority under section 1071 to collect "any" additional data it determines would aid in fulfilling the purposes of section 1071; the CFPB does not assert that LGBTQI+-owned business are within the statutory definition of "minority-owned."[50]

The Final Rule, like the Proposed Rule, also requires covered financial institutions to collect and report principal owners' ethnicity, race, and sex, but, as discussed in subsection D below, certain procedural requirements imposed by the Final Rule differ meaningfully from those proposed.

Minority-owned business status, women-owned business status, LGBTQI+-owned business status, and principal owners' ethnicity, race, and sex are referred to in the preamble as an applicant's "protected

demographic information" ("PDI"). A covered financial institution is prohibited from making its own determinations as to PDI,[51] and must rely on the applicant's determinations of its ownership and control, and accrual of net profits and losses.[52] In other words, a financial institution must request and collect (and report) the applicant's substantive responses to inquiries for PDI, even if the financial institution otherwise obtains such information for other purposes and even if the institution perceives possible or obvious discrepancies or inaccuracies.[53] If an applicant declines to or does not provide PDI, the covered financial institution must report the declination or non-provision.[54]

2. Data the Applicant, the Covered Financial Institution, or Third Parties Can Provide

Non-PDI data that may be provided by the applicant or that an institution may discern from information provided by the applicant or a third party include information related to the credit being applied for—*e.g.*, credit type, credit purpose, and the amount applied for—and to the applicant's business—*e.g.*, address or location for purposes of determining census tract, gross annual revenue, NAICS code or information to determine NAICS code, the number of non-owners working for the applicant, the applicant's time in business, and the number of principal owners of the applicant.[55] For this category of data points, a covered financial institution generally may rely on information provided by the applicant or appropriate third party sources and is not required to undertake verification; however, if an institution chooses to verify, it is required to report the verified information.[56] These requirements are consistent with the Proposed Rule. With the exception of data related to the credit being applied for and gross revenue, this category of data generally may be reused if collected within the 36 months preceding the current application.[57] The Proposed Rule would have generally permitted reuse if the data were collected within the same calendar year.[58]

3. Institution-Generated Data

Data that only the covered financial institution can generate would include a unique identifier, the application date, the method by which the applicant submitted its application, the recipient of the application—*e.g.*, the financial institution, its affiliate, or a third party—the action taken by the institution on the application, the date such action was taken, the amount of and pricing information for an originated credit transaction, the reasons for any denial, and census tract based on the address or location provided by the applicant.[59] If an approved credit is not accepted by the applicant, the institution would still be required to collect and report the amount approved and pricing information.[60] These requirements are consistent with the Proposed Rule.

D. DOES THE DATA NEED TO BE COLLECTED OR RECORDED IN A PARTICULAR MANNER OR FORM?

Covered financial institutions are required to implement procedures to collect section 1071 data, provide definitions and notices with respect to PDI, to collect race and ethnicity data using specified categories, and permit applicants to self-describe race, ethnicity, and sex. In addition, the Final Rule introduces new

provisions aimed at ensuring that covered financial institutions do not discourage applicants from responding to requests for information. The Final Rule also prohibits the collection of PDI based on visual observation or surname.

1. Procedures

A covered financial institution is prohibited from "discourag[ing] an applicant from responding to requests for applicant-provided data … and shall otherwise maintain procedures to collect [applicant-provided data] at a time and in a manner that are reasonably designed to obtain a response."[61] The prohibition on discouragement was not in the Proposed Rule. The Final Rule outlines four "minimum provisions" aimed at addressing potential discouragement: (1) the initial request for data must occur prior to notifying the applicant of final action; (2) the request must be prominently presented; (3) the collection procedures must not have the effect of discouraging responses; and (4) it should be easy for the applicant to respond.[62] The Final Rule includes a provision specifying that low response rates may indicate discouragement or unreasonable design.[63] To address this concern, in another substantial change from the Proposed Rule, 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."[64] In the official commentary, the CFPB addresses how a financial institution should report data if, despite having the requisite procedures in place, it is unable to obtain the data from an applicant.[65]

2. Definitions and Notices

Covered financial institutions are required to provide specific definitions to applicants (and make other definitions available).[66] An institution must permit an applicant to refuse to provide PDI and advise the applicant that it is not required to respond and that the institution cannot discriminate on the basis of the applicant's minority-owned, women-owned, or LGBTQI+-owned business status, a principal owner's ethnicity, race, or sex/gender, or whether the applicant provides these statuses.[67] An institution must also notify an applicant that federal law requires the institution to inquire into these statuses to help ensure that small business applicants for credit are treated fairly and that communities' small business credit needs are being fulfilled. In appendix E to the Final Rule, the CFPB includes a form that may be used to satisfy requirements to provide these mandatory definitions and notifications.[68] These requirements largely align with the Proposed Rule, except with respect to the introduction of LGBTQI+-owned business status and the requirements to provide related definitions and notices.

3. Race, Ethnicity, and Sex

Principal owners' ethnicity must be collected using aggregate categories (Hispanic or Latino and Not Hispanic or Latino) and disaggregated subcategories (Hispanic or Latino and, regardless of whether the applicant selects any aggregate categories, Cuban, Mexican, Puerto Rican, or Other Hispanic or Latino).[69] If an applicant selects Other Hispanic or Latino, the institution must permit the applicant to provide additional

ethnicity information.[70] Institutions must permit applicants to select as many aggregate and disaggregate categories as the applicant chooses.[71]

Principal owners' race would also be collected using aggregate categories (American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or other Pacific Islander, and White) and disaggregated subcategories (*e.g.*, Asian Indian, Chinese, Filipino, Japanese, Korean, Vietnamese, or Other Asian).[72] In contrast to HMDA's implementing Regulation C, the Final Rule also includes disaggregated race subcategories for the Black or African American race category (African American, Ethiopian, Haitian, Jamaican, Nigerian, Somali, or Other Black or African American)[73]. If an applicant selects an Other race category, the institution must permit the applicant to provide additional race information (*e.g.*, Thai).[74] Institutions must permit applicants to select as many aggregate and disaggregated categories as the applicant choses.[75] These requirements are consistent with the Proposed Rule.

The collection of race, sex, and ethnicity data differs from the Proposed Rule in two meaningful ways. First, covered financial institutions are generally *not* required to collect at least one principal owner's ethnicity and race information on the basis of visual observation or surname analysis.[76] In fact, the Final Rule effectively prohibits such collection by requiring an institution to report principal owners' ethnicity, race, and sex information as provided by the applicant, even if it verifies or otherwise obtains the information for other purposes.[77] The removal of this requirement also differentiates the Final Rule from requirements under Regulation C. Second, the Final Rule requires a covered financial institution to adopt an approach that permits "sex/gender" data collection through free-form text or self-description.[78] The Proposed Rule would have required the collection of principal owners' sex information using the following categories: "Male, Female, [or] the applicant prefers to self-describe their sex (with the ability of the applicant to write in or otherwise provide additional information)[.]"[79] The CFPB indicates that it chose to use "sex/gender" in the Final Rule in response to concerns that "sex" alone may not be sufficiently inclusive of individuals who identify as or exhibit attractions and behaviors that do not align with heterosexual or traditional male-female binary gender norms.[80] This and other language in the preamble confirm that the CFPB intends "sex/gender" to encompass not only gender and gender identity, but also sexual orientation.

4. Recordkeeping

Covered financial institutions are required to retain evidence of compliance with subpart B for at least three years after the data is required to be submitted to the CFPB.[81] As to PDI specifically, a covered financial institution must maintain, separately from the rest of the application and accompanying information, an applicant's responses to the institution's inquiries regarding PDI.[82] In maintaining and reporting data, covered financial institutions are prohibited from including any personally identifiable information concerning any individual who is, or is connected with, an applicant, other than as required by the Final

Rule's mandatory data points or the provision requiring the separate maintenance of PDI.[83] These requirements are consistent with the Proposed Rule.

E. WHAT DATA WILL BE MADE PUBLIC, AND WILL THERE BE LIMITATIONS ON ACCESSING THE DATA?

1. Public Availability

The CFPB will make available to the public, on an annual basis, the application-level data submitted to it by each financial institution, subject to modifications or deletions made by the CFPB to advance privacy interests.[84] The CFPB also may make aggregate data publicly available.[85] With respect to application-level data, because the CFPB believes it will need a full year of reported data to perform a full privacy analysis and does not know how long it will take to perform that analysis and make modifications or deletions as needed, the Final Rule does not set a publication deadline.[86] The CFPB will employ a different approach in conducting that privacy analysis than that outlined in the Proposed Rule; namely, the CFPB will "consider modification and deletion techniques to reduce [personal privacy] risks, while also considering the non-personal commercial privacy risks of small businesses," instead of employing the "balancing test" reflected in the Proposed Rule.[87]

Like the Proposed Rule, a financial institution will satisfy its obligation under section 1071 to make data available to the public on request by publishing on its website a statement that its small business lending data, as modified by the CFPB, are or will be available from the CFPB.[88] The Final Rule includes language to use—verbatim or in "substantially similar" form—and specifies when and how long the statement must be maintained on the website.[89]

2. Access Limitations

PDI is subject to a so-called "firewall" shielding it from disclosure to an employee or officer of the covered financial institution or its affiliate who is involved in making a decision on the application *unless* the institution has determined such a person should have access—meaning it is not feasible to limit the person's access—and has provided notice to the applicant.[90] Any such disclosure must be provided prior to making inquiries regarding PDI and when providing the related notices.[91] The notice must, at a minimum, be provided to an applicant whose responses will be accessed in the underwriting process, but alternatively may be provided to applicants more widely, regardless of whether the applicant's response will actually be accessed.[92] Appendix E to the Final Rule includes sample notice language. Because the "firewall" encompasses only an applicant's responses to inquiries made regarding the applicant's PDI, it does not prohibit an employee who, for example, knows by virtue of professional relationships that an applicant is a minority-owned business from being involved in making a decision on an application.[93]

The Final Rule also prohibits a covered financial institution from disclosing or providing to a third party the PDI it collects under subpart B except in limited circumstances, and any third party who receives the PDI is prohibited from making further disclosures.[94]

F. WHAT IF AN INSTITUTION MAKES A MISTAKE OR COMMITS A VIOLATION?

A violation of section 1071 or subpart B is subject to administrative sanctions and civil liability as provided in ECOA and in existing Regulation B.[95] In the preamble to the Final Rule, the CFPB notes the enforcement authority that various Federal agencies possess under ECOA and the availability of private civil remedies for violations.[96] The Final Rule, like the proposal, includes several provisions intended to limit liability for certain potential or actual violations.

1. Bona Fide Errors

Similar to the Proposed Rule, the Final Rule provides that an error that was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid such an error—*i.e.*, a "bona fide error"—is presumed not to violate ECOA or subpart B if the number of such errors does not exceed the thresholds set forth in the Final Rule's appendix F.[97] Permissible error rates range from 6.5 percent for the smallest institutions by application count to 2.5 percent for the largest institutions by application count.[98] This presumption can be rebutted by evidence that the error was intentional or the institution had not maintained procedures reasonably adapted to avoid errors.[99]

The preamble to the Final Rule includes a new "general statement of policy" not included in the Proposed Rule, which provides all institutions making "good faith efforts to comply" a grace period for their first 12 months of collecting data.[100] The grace period is intended to give institutions "further time to diagnose and address unintentional errors without the prospect of penalties for inadvertent compliance issues[.]"[101] If the CFPB identifies errors during the grace period in a financial institution's initial data submissions, the CFPB does not intend to require data resubmission unless data errors are material; the CFPB also does not intend to assess penalties.[102] In addition, examinations of initial data submissions will consider good faith efforts to comply and will be "diagnostic."[103] Errors that are not the result of good faith efforts, "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."[104]

2. Safe Harbors

The Final Rule also includes four safe harbors under which certain errors will not constitute violations.[105] These safe harbors relate to application date,[106] census tract,[107] NAICS code,[108] and initially incorrect determinations of small business status, covered credit transaction, or covered application.[109] The first three safe harbors generally are consistent with the comparable safe harbors in the Proposed Rule. The fourth safe harbor, however, is more expansive than the proposal, which would have extended only to initially incorrect determinations of small business status.[110]

G. WHEN WILL COMPLIANCE BE REQUIRED?

The Final Rule will become effective 90 days after its publication in the *Federal Register* but, unlike the proposal, provides a tiered approach to compliance dates depending on origination volume.[111] Covered

financial institutions that originate at least 2,500 covered transactions for small businesses in each of 2022 and 2023 must comply with the Final Rule beginning October 1, 2024.[112] Institutions that originated between 500 and 2,499 covered transactions for small businesses during that period are required to comply beginning April 1, 2025.[113] Institutions that originated between 100 and 499 covered transactions for small businesses are required to comply beginning January 1, 2026.[114] An institution that does not originate at least 100 covered transactions for small businesses in 2022 and 2023, but subsequently does so, must comply no earlier than January 1, 2026.[115] Although not entirely clear, it appears an institution that becomes a covered financial institution by virtue of credit origination numbers in, say, 2024 and 2025 would be required to report data to the CFPB on or before June 1, 2026. The Final Rule, like the proposal, permits an institution to begin collecting protected demographic information 12 months prior to its applicable compliance date.[116] Unlike the proposal, the Final Rule expressly recognizes that an institution may not have ready access to the information needed to determine origination volume and permits such an institution to use any "reasonable method" to estimate originations to small businesses for 2022 and 2023.[117]

OBSERVATIONS

As noted above, the Final Rule is consistent in many respects with the Proposed Rule, but also deviates from it in several significant ways. We offer several observations.

- **Introduction of LGBTQI+-owned Status.** In *Bostock* v. *Clayton County, Georgia*, the U.S. Supreme Court held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 encompasses sexual orientation discrimination and gender identity discrimination.[118] *Bostock* and the CFPB's subsequent interpretive rule issued under Regulation B[119] provide the foundation for the CFPB's introduction in the Final Rule of requirements to collect and report LGBTQI+-owned business status. We are aware of no decisions extending *Bostock*'s Title VII holding to sex discrimination claims under ECOA (and only one published decision holding that a claim of sex discrimination under ECOA may be premised on gender identity discrimination—a decision that preceded *Bostock* by two decades).[120] It is common for courts to look to Title VII case law in interpreting ECOA,[121] but that has not yet occurred in this area and there is no reference to sexual orientation or gender identification in section 1071's definition of "minority" or "minority-owned."[122]

- **Potential Under- and Over-Inclusiveness.** Under the Final Rule, "LGBTQI+ individual *includes* an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex."[123] The inclusion of "plus" and use of the word "includes" suggest that the CFPB intends the definition to encompass not only gender identities and sexual orientations encompassed by established Title VII precedent, but also gender identities and sexual orientations such as questioning, two-spirit, pansexual, and asexual. As to under-inclusiveness, the CFPB intends "sex/gender" in the Final

Rule to be inclusive of sexual orientation. There is a question as to whether many people with same-sex attraction or who otherwise "identify as or exhibit attractions and behaviors that do not align with heterosexual . . . norms" would describe their orientation as their "sex/gender." This could lead to reduced usefulness of the collected data for its intended purposes.

- **Congressional Opposition and Court Challenge.** On April 3, 2023, a joint resolution of disapproval under the Congressional Review Act was introduced in the House of Representatives, in an effort to halt implementation of the Final Rule.[124] If the joint resolution is enacted, the Final Rule will not take effect and could not be reissued in substantially the same form unless Congress says otherwise.[125] Legislation has also been introduced in both houses of Congress that would, among other modifications, extend the compliance period to three years and increase to 500 the origination threshold for an institution to be a covered financial institution.[126] In addition, we are aware of at least one suit that has already been filed challenging the Final Rule on grounds the rule is overreaching, burdensome, and otherwise infirm for a variety of constitutional and statutory reasons.[127]

- **Fair Lending Self-Assessments and Examination Approach.** To minimize fair lending risk, covered financial institutions should consider whether they will need to undertake fair lending assessments with respect to section 1071 data akin to those already generally conducted using HMDA data.[128] Indeed, the preamble emphasizes the importance of "regulators and other enforcers" reviewing data collected and reported pursuant to section 1071 to identify preliminarily both financial institutions that may not be appropriately defining an "application" and indicia of potential illegal discouragement in the pre-application stage, and the importance of financial institutions self-monitoring for those issues.[129] In a similar vein, the preamble signals the CFPB's section 1071 data examination approach: "[B]ecause 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."[130] The CFPB also indicates it will conduct both technical compliance examinations and fair lending examinations.[131]

- **CRA Alignment.** The Final Rule includes language strongly suggesting that the forthcoming revised CRA rule will align with the Final Rule in relevant respects.[132] Covered financial institutions with CRA obligations should remain alert to the language of any revised CRA rule. Absent alignment, the Final Rule could create confusion, duplication, and possible data integrity issues.

- **Fraud or False Statements.** The requirement that a financial institution collect and report the applicant's substantive responses to inquiries for PDI, even if the institution perceives possible or

obvious discrepancies or inaccuracies, could raise concerns regarding fraud or false statements by applicants. The Final Rule gives no indication as to how such situations should be treated.

- **Need to Conform Certain Definitions Even if Not Covered.** The Final Rule permits an institution that does not have readily accessible the information needed to determine its origination volume to use any "reasonable method" to estimate originations to small businesses *for 2022 and 2023*. Given the limitation of this authorization to those two years, financial institutions that engage in covered lending activity would be well advised to conform their policies, procedures, and controls to the relevant definitions in the Final Rule so that they can accurately assess whether they qualify as a covered financial institution in years beyond 2023. As indicated above, in years beyond, if a financial institution exceeds the origination threshold in one year, it may have to collect the next year's data even before it knows it has crossed the origination threshold for that year because the data will be due to the CFPB the following June 1.

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ENDNOTES

[1] 15 U.S.C. § 1691 and 12 C.F.R. § 1002.4, 1002.2(z). ECOA and Regulation B also prohibit discrimination on the basis of the receipt of public assistance or the applicant's good faith exercise of a right under the Consumer Credit Protection Act.

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

[3] 15 U.S.C. § 1691c-2(a).

[4] 15 U.S.C. § 1691c-2(g)(1).

[5] 15 U.S.C. § 1691c-2 note (specifying the section's effective date as the "designated transfer date"). In September 2010, the Secretary of the Treasury designated July 21, 2011 as the "designated transfer date." 75 Federal Register 57,252 (Sept. 20, 2010).

[6] Memorandum from Leonard J. Kennedy, General Counsel, CFPB, to Chief Executive Officers of Financial Institutions under Section 1071 of the Dodd-Frank Act Re: Section 1071 of the Dodd-Frank Act, dated April 11, 2011, *available at* https://files.consumerfinance.gov/f/2011/04/GC-letterre-1071.pdf.

[7] *See California Reinvestment Coalition* v. *Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau, In Her Official Capacity, and Consumer Financial Protection Bureau*, No. 19-cv02572, ECF No. 1.

[8] *Id.*, ECF Nos. 67, 68.

[9] Bureau of Consumer Financial Protection, Small Business Lending Data Collection under the Equal Credit Opportunity Act (Mar. 30, 2023), *available at* https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf. As proposed, the CFPB is implementing section 1071's requirements as a new subpart B to Regulation B and the existing Regulation B will become subpart A.

[10] 12 CFR 1002.2(h) and 1002.105(b).

[11] "Financial institution" includes any partnership, company, corporation, association (whether or not incorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. 12 CFR 1002.102(j) and 1002.105(a). The definition does not include motor vehicle dealers, which are excluded by law from coverage. *See* 12 U.S.C. § 5519. This exclusion is explicit in the Final Rule. *See* 12 CFR 1002.101(a) and Comment 105(a)-2.

[12] Final Rule at 68, 227 and 232.

[13] *Id.* at 3.

[14] Comment 105(b)-5; *see also* Final Rule at 229.

[15] 12 CFR 1002.114(c)(2); *see also* comment 114(c)-5.

[16] 12 CFR 1002.103(a). These terms are not defined in section 1701. Under existing Regulation B, "business credit" refers to "extensions of credit primarily for business or commercial (including agricultural) purposes[.]" 12 CFR 1002.2(g). This definition is subject to exclusions for public utilities credit, securities, credit, incidental credit, government credit. Under the Final Rule, "credit" is also as defined in existing Regulation B. 12 CFR 1002.102(i). As such, it means "the right granted by a creditor to defer payment of a debt, incur debt and defer its payment, or make a purchase and defer payment therefor." 12 CFR 1002.2(j).

[17] As explained in the preamble to the Final Rule, merchant cash advances are "a form of financing for small businesses that purport to be structured as a sale of potential future income. . . . [U]nder 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 . . . . The merchant promises to repay by either pledging a percentage of its future revenue, such as its daily credit and debit card receipts . . ., or agreeing to pay a fixed daily withdrawal amount to the merchant cash advance provider until the agreed upon payment amount is satisfied." Final Rule at 153.

18 Comment 104(a)-1; *see also* Final Rule at 150. In the preamble, the CFPB pays particular attention to its decisions to include both merchant cash advances and agricultural lending, indicating that it has fair lending concerns as to each of those markets. *See* Final Rule at 153-161 (merchant cash advances) and 162-168 (agricultural lending).

19 12 CFR 1002.104(b)(1), (4), (5) and (6); *see also* Final Rule at 150, 169 and 202-204.

20 12 CFR 1002.104(b)(2) and (3); *see also* Final Rule at 150-151, 176-178 and 183-184.

21 *See, e.g.*, Final Rule at 81 and 177.

22 *See, e.g.*, *id.* at 184. The exclusion does not extend to insurance policy premium financing obtained in connection with financing goods and services. *Id.*

23 Comment 104(b)-1 through -4.

24 Final Rule at 201-202.

25 12 CFR 1002.103(a); *see also* Final Rule at 131.

26 Comment 103(a)-11; *see also* Final Rule at 132, 137.

27 Final Rule at 3-4

28 12 CFR 1002.103(b); *see also* Comment 103(b)-2 through -5; Final Rule at 4, 60 and 142.

29 Final Rule at 148.

30 12 CFR 1002.107(a).

31 Final Rule at 87.

32 Final Rule at 84.

33 15 U.S.C. § 1691c-2(b).

34 Final Rule at 86.

35 12 CFR 1002.106(b). The SBA's regulations include both size standards and "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.'" Final Rule at 236 (citing 13 CFR 121.105).

36 12 CFR 1002.106(b); *see also* Final Rule at 249-250. For certain financial industries, the SBA uses financial assets and for the petroleum refining industry the SBA uses refining capacity and employees. Final Rule at 240. Federal agencies are prohibited from prescribing a size standard absent approval by the SBA Administrator, which the CFPB secured in connection with the Final Rule. *Id.* at 241.

37 An "applicant" for purposes of new subpart B means "any person who requests or who has received an extension of business credit from a financial institution." 12 CFR 1002.102(b).

38 The Proposed Rule included 21 discrete data points. The Final Rule combines minority-owned business status and women-owned business status, which were discrete data points under the Proposed Rule, into one data point (that also includes LGBTQI+-owned business status), thus leading to 20 discrete data points. In addition to these 20 data points, a covered financial institution must report 10 items of "financial institution identifying information," including its Legal Entity Identifier, its federal prudential regulator, parent information, and financial institution type(s). 12 CFR 1002.109(b).

ENDNOTES (CONTINUED)

39 12 CFR 1002.107(b); *see also* comments 107(b)-1, 107(a)(18)-9 and 107(a)(19)-9.

40 12 CFR 1002.107(d); *see also* comment 107(d)-1. The Proposed Rule would have generally permitted reuse only if the data were collected within the same calendar year as the current application. Final Rule at 502.

41 Comment 107(d)-7; *see also* Final Rule at 504 and 508.

42 12 CFR 1002.109(a); *see also* Final Rule at 527.

43 12 CFR 1002.109(a)(2).

44 12 CFR 1002.109(a)(3). The proposal would have required the covered financial institution that made the final credit decision approving the application to report the loan as an origination. Final Rule at 531.

45 12 CFR 1002.107(a)(18). Unlike the Proposed Rule, the Final Rule incorporates the definition of "minority individual" directly into the "minority-owned business" definition. Final Rule at 114.

46 12 CFR 1002.102(m) and 1002.102(s); *see also* Final Rule at 113 and 123.

47 12 CFR 1002.102(l) and 1002.107(a)(18); *see also* Final Rule at 107.

48 12 CFR 1002.102(k). Final Rule at 107. The CFPB explicitly includes intersex individuals in this definition, relying on *Bostock* v. *Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020), and *Grimm* v. *Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020).

49 *See* 86 Federal Register 56,356 at 56,482 (Oct. 8, 2021); *see also* Final Rule at 105.

50 Final Rule at 107. The CFPB points to evidence that "LGBTQI+-owned businesses may experience particular challenges assessing small business credit." *Id.* at 409.

51 Comments 102(l)-2, 102(m)-2 and 102(s)-2.

52 Comments 102(l)-3, 102(m)-3 and 102(s)-3.

53 Comments 107(a)(18)-9 and 107(19)-9.

54 Comments 107(a)(18)-1, 107(a)(18)-7, 107(a)(19)-1 and 107(a)(19)-7.

55 Comment 107(c)(1)-3.

56 12 CFR 1002.107(b).

57 12 CFR 1002.107(d).

58 Final Rule at 502.

59 Comment 107(c)(1)-3.

60 Comments 107(a)(8)-1 and 107(a)(12).

61 12 CFR 1002.107(c).

62 12 CFR 1002.107(c)(2); *see also* Final Rule at 62.

63 12 CFR 1002.107(c)(4).

64 12 CFR 1002.107(c)(3); *see also* Comment 107(c)(3)-1.

65 *See, e.g.*, Comments 107(a)(18)-6 and -7 and 107(19)-6 and -7.

66 Comments 107(a)(18)-1 and -2 and 107(a)(19)-1 and -2.

67 Comments 107(a)(18)-1 and -4 and 107(a)(19)-1 and -4.

68 *See* Appendix E to Part 1002—Sample Form for Collecting Certain Applicant-Provided Data under Subpart B.

ENDNOTES (CONTINUED)

69 Comment 107(a)(19)-13.

70 Comment 107(a)(19)-13.

71 Comment 107(a)(19)-13.

72 Comment 107(a)(19)-14; *see also* Final Rule at 431 and 440.

73 Comment 107(a)(19)-14; *see also* Final Rule at 431 and 440.

74 Comment 107(a)(19)-14.

75 Comment 107(a)(19)-14.

76 Final Rule at 472. This shift in approach is premised on the CFPB's belief that such a requirement could pose particular challenges for small business lending that are not present in mortgage lending. *Id*.

77 Comment 107(a)(19)-9; *see also* Final Rule at 428.

78 Comment 107(a)(19)-15; *see also* Final Rule at 421, 446, and 459.

79 Final Rule at 446.

80 Final Rule at 459-461.

81 12 CFR 1002.111(a).

82 12 CFR 1002.111(b) ; *see also* comments 107(a)(18)-5 and 107(a)(19)-5.

83 12 CFR 1002.111(c).

84 12 CFR 1002.110(a).

85 12 CFR 1002.110(b).

86 Final Rule at 555.

87 *Id.* at 654 and 656.

88 12 CFR 1002.110(c) and (d); *see also* Final Rule at 63.

89 Comment 110(c)-1.

90 12 CFR 1002.108.

91 12 CFR 1002.108; *see also* comment 108(d)-3.

92 Comment 108(d)-1.

93 Final Rule at 510.

94 12 CFR 1002.110(e).

95 12 CFR 1002.112(a).

96 Final Rule at 574.

97 12 CFR 1002.112(b) and Appendix F to Part 1002—Tolerances For Bona Fide Errors in Data Reported under Subpart B.

98 Appendix F to Part 1002—Tolerances For Bona Fide Errors in Data Reported under Subpart B.

99 12 CFR 1002.112(b) ; *see also* comment 112(b)-1.

100 Final Rule at 651-653.

101 *Id.* at 651.

102 *Id.* at 652.

ENDNOTES (CONTINUED)

103 *Id.*

104 *Id.*

105 12 CFR 1002.112(c).

106 12 CFR 1002.112(c)(1).

107 12 CFR 1002.112(c)(2).

108 12 CFR 1002.112(c)(3).

109 12 CFR 1002.112(c)(4).

110 Final Rule at 589.

111 12 CFR 1002.114; *see also* Final Rule at 591.

112 12 CFR 1002.114(b)(1); *see also* Rule at 608.

113 12 CFR 1002.114(b)(2).

114 12 CFR 1002.114(b)(3).

115 12 CFR 1002.114(b)(4).

116 12 CFR 1002.114(c)(1); *see also* comment 114(c)-1.

117 12 CFR 1002.114(c)(2); *see also* comment 114(c)-5 and -6.

118 140 S. Ct. 1731 (2020).

119 86 Fed. Reg. 14363 (Mar. 16, 2021).

120 *Rosa* v. *Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000). In the same decision, the court said that sexual orientation discrimination was not prohibited by ECOA, but the caselaw cited by the court in support of that conclusion addressed discrimination under Title VII and was overruled by *Bostock*.

121 *See, e.g.*, *Rosa* v. *Park West Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Mays* v. *Buckeye Rural Electric Cooperative, Inc.*, *et al.*, 277 F.3d 873, 876 (6th Cir. 2002). *But see Latimore* v. *Citibank Fed. Sav. Bank*, 151 F.3d 712, 715 (7th Cir. 1998). This approach is consistent with congressional intent. *See, e.g.*, S. Rep. No. 589, 94th Cong., 2nd Sess. 1976, 4-5 (1976), 1976 U.S.C.C.A.N. 403, 406.

122 *See* 15 U.S.C. § 1691c-2(h)(4), (5).

123 12 CFR 1002.102(k) (emphasis added); *see also* Final Rule at 107. The CFPB explicitly includes intersex individuals in this definition, relying on *Bostock* v. *Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020), and *Grimm* v. *Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020).

124 5 U.S.C. § 802. *See* H.R.J.Res. 50, 118th Cong. (introduced April 3, 2023).

125 5 U.S.C. § 801(b).

126 S. 1159, 118th Cong. (introduced March 30, 2023); H.R. 1806, 118th Cong. (introduced March 27, 2023).

127 *Texas Bankers Ass'n, et al.* v. *Consumer Financial Protection Bureau, et al.*, No. 23-cv-00144, ECF No. 1. Among other things, the plaintiffs allege that the CFPB expanded section 1071's three pages of statutory text and 13 reporting data points to a nearly 900-page, single-spaced rule that imposes over 80 reporting requirements, performed a flawed cost/benefit analysis, and failed to meaningfully address commenter concerns about the disproportionate burden on community banks presented by the Final Rule. *Id.*

128 *See, e.g.*, Final Rule at 440.

129 *Id.* at 147-148.

130 *Id.* at 575.

131 *Id.*

132 *See, e.g.*, Final Rule at 82 (The proposed CRA rule "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[.]"); *see also* Final Rule at 177 (The Final Rule's exclusion of HMDA data "resembles the effort by the CRA agencies to eliminate dual reporting under section 1071 and the eventual CRA rule.") and 252 (CRA alignment will occur if the CRA rule is revised as proposed, which the CFPB "strongly supports.").

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