

January 6, 2022

The Honorable Rohit Chopra  
Director  
Bureau of Consumer Financial Protection  
1700 G Street, NW  
Washington, D.C. 20552

RE: Section 1071 Small Business Lending Data Collection Proposed Rule; Docket No. CFPB–2021–0015

Dear Director Chopra:

The members of the Community Development Bankers Association (CDBA) respectfully submit the enclosed comments in response to the October 8, 2021 publication by the Bureau of Consumer Financial Protection (Bureau) in the Federal Register of an invitation to comment on the Bureau’s proposed implementation of the small business lending data collection requirements set forth in section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Section 1071). We are grateful for the opportunity to comment. We humbly submit the comments below, which expand on comments previously submitted by CDBA in response to Federal Register bulletin CFPB-2017-0011, “Request for Information Regarding the Small Business Lending Market” and the 2020 “SBREFA Outline of Proposals Under Consideration and Alternatives Considered.”

CDBA is the national trade association for banks and thrifts that are U.S. Treasury designated Community Development Financial Institutions (CDFIs). Our member banks have a mission of serving low- and moderate- income (LMI) communities that are underserved by traditional financial service providers. Our members work in impoverished urban, rural, and Native American communities. As of Q4 2021, there are 157 banks and 134 bank holding companies with the Treasury’s Community Development Financial Institutions (CDFIs) designation – which means at least 60% of total lending, services and other activities are targeted to LMI communities.

CDFI banks promote entrepreneurship and economic opportunity by providing financial products and services to small businesses located in places that are often disinvested and under resourced. CDFI banks have a strong focus on small business lending. The CDFI Fund’s October 2021 “Annual Certification and Data Collection Report (ACR)” (for fiscal year 2020) states that business lending comprised 27.7% of CDFI banks’ primary lines of business, and 37.6% of secondary lines of business<sup>1</sup>.

CDFI banks share the Bureau’s core value of protecting consumers. We live this value by providing fair and transparent financial products and services to all customers. CDBA unequivocally agrees with the stated purpose of Section 1071 of preventing discrimination on the basis of race, ethnicity and gender. CDFI banks intimately understand the needs of underserved and disinvested communities. In fact, large

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<sup>1</sup>“CDFI Annual Certification and Data Collection Report: FY 2020 Snapshot,” October, 2021, [https://www.cdfifund.gov/sites/cdfi/files/2021-10/ACR\\_Public\\_Report\\_Final\\_10062021\\_508Compliant\\_v2.pdf](https://www.cdfifund.gov/sites/cdfi/files/2021-10/ACR_Public_Report_Final_10062021_508Compliant_v2.pdf)

portions of the people and communities served by CDFI banks consist of racial and ethnic minorities and women that have experienced discrimination, unscrupulous targeting by predatory providers, and a lack of opportunity that undermines long-term economic stability.

### **Maintaining Access to Capital for Small Business in a Post-COVID Recovery, and Beyond**

We emphatically support the CFPB’s efforts to ensure that all Americans have fair access to credit regardless of race, ethnicity or gender. CDFI banks have long worked to remedy the demographic and economic inequalities that the COVID-19 health and economic crisis has exacerbated. We know that the residents and business owners of LMI communities served by CDFI banks are disproportionately racial and ethnic minorities. We know that the participation of CDFIs in COVID-19 small business stimulus initiatives – such as the Paycheck Protection Program (PPP) – was essential to reaching these communities.

The small business sector is incredibly heterogeneous with diverse credit needs. Our members understand their markets’ unique circumstances and work to address individual challenges with credit scores, strengthen business plans, or solve business problems that are barriers to success. The characteristics of each small business and the nature of its credit drive the type of financial instrument that is best suited. Flexibility and local knowledge are critical to serve small business effectively.

We strongly support the need to ensure all small businesses are fairly and well served. Yet, we are also concerned about the costs of data collection. CDFI banks are not immune to the systemic threats to the broader community bank business model. The threats are reflected in a long-term trend of closure and consolidation. In 2020, Raphael Bostic, President, and Michael Johnson, Executive Vice President of Supervision, Regulation & Credit of the Federal Reserve Bank of Atlanta wrote in *American Banker*,

“Between 1990 and 2018, the number of banks with assets less than \$500 million declined by about 70%, representing a loss of about 7,600 institutions. . . . Technological advances, competitive pressures, **regulatory issues, including compliance costs and other forces**, have fueled a wave of bank mergers.<sup>2</sup>”

The ability of small banks to remain viable as the post-pandemic liquidity glut and a rapid increase in compliance costs has materially contributed to the nationwide decline in the number of community banks. The continued concentration of assets within a handful of mega- and regional-banks has a destabilizing effect on communities when credit decisions are no longer made by local lenders.

Destabilization is particularly acute in the communities CDBA members serve: distressed rural communities, disinvested urban neighborhoods, and under resourced Native American communities. As Messrs. Bostic and Johnson write,

“Community banks bring truly unique benefits to the communities where they operate, **particularly in rural areas and underserved urban neighborhoods. Small, locally based institutions have always been vital to small business, agricultural and consumer lending.** . . . Nearly half of small businesses that sought outside financing in the second half of 2018 approached community banks . . . Further, deep local knowledge and relationship-based lending

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<sup>2</sup> Bostic and Johnson “How to Keep Community Banks Thriving,” [www.americanbanker.com/opinion/how-to-keep-community-banks-thriving](http://www.americanbanker.com/opinion/how-to-keep-community-banks-thriving)

can stem losses during downturns as community bankers work closely with borrowers to avoid defaults. Simply put, *community-based lenders stick with their borrowers in tough times.*<sup>3</sup>

### **Major Data Collection and Implementation Timeline Burdens**

CDBA supports the proposed rule and Congressional intent. Yet, we strongly believe there is a real need to fine-tune specific provisions to mitigate costs and ensure existing small business lenders remain active – particularly those serving the most underserved markets.

Discretionary Data: The Bureau has included in its proposed rule a requirement that lenders collect seven (7) “discretionary” data-points that are not mandated in the statute. CDBA has previously urged the Bureau to limit data collection to statutorily mandated requirements. Collecting, organizing and transmitting the mandated data alone will require immense operational investments, especially for small, community-focused CDFI lenders. In the event the Bureau does proceed with proposed “discretionary” points, we strongly recommend the agency mitigate the cost and operational challenges for CDFIs. ***We recommend allowing at least three years (as opposed to the current 18 months) for US Treasury certified Community Development Financial Institutions to implement the rule (see comments for sections 114(a) and 114(b)) to ensure small business credit continues to flow in underserved markets.***

Application Method: We are concerned about the circumstances under which the Bureau added “Application Method” as a data point. The Bureau added “Application Method” to its proposed list of discretionary data points late in the rule-making process. We are concerned that the public has not been given sufficient opportunity to consider the implications. ***Rather than introduce this data point at this stage in the rule-making process, we urge the Bureau to examine the relative advantages of different application methods outside of the rule-making process prior to introducing this point into the regulatory compliance framework. (See comments for section 107(a)(3)).***

Primary Owner Demographics: The proposed rule requires lenders that meet in person with applicants to guess the race and ethnicity of the primary owner of a small business if an owner declines to self-identify (see comments for section 107(a)(20)). Our concerns are three-fold. First, we are concerned that allowing guessing could potentially lead to the collection of misleading or inaccurate data. Second, this provision disproportionately exposes community-based lenders to potential legal and regulatory risks. Third, it allows unregulated on-line lenders and larger regulated institutions (with immense online resources and access to big data) to opt out altogether. ***We strongly urge the Bureau to omit this requirement. Instead, we urge the agency to allow lenders to rely on applicants’ self-identification for race and ethnicity, and report an applicant’s refusal to self-identify as a fact in itself.***

Reporting Deadlines: The proposed rule requires lenders to report annually by June 1 (see comments for section 109(a)(1)). The great majority of CDFI banks, and certainly non-CDFI community banks and unregulated lenders, do not file annual HMDA or CRA small business reports, either due to their asset size or regulatory status.

As suggested during the SBREFA process, ***CDBA instead strongly recommends that the Bureau establish a process for ongoing reporting. This could take the form of a central portal or “receiving engine”***

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<sup>3</sup> Ibid

***maintained by the Bureau where lenders could enter the information into manual entry fields at an appropriate time in the individual applications' workflow.***

These new regulations need to be responsive to the size and capacity of the lender. Our members are among the smallest banks in the nation. As of the third quarter, 2021, the smallest CDFI bank is \$26 million in assets, the largest is just over \$5.5 billion, and the average is \$548 million. While the cost of any single new regulation mandated by Dodd-Frank is manageable for many large institutions, the sheer volume of the many new regulations that have gone into effect since the law's passage is overwhelming -- particularly for small institutions. Significantly increasing the costs may have the unintended negative outcome of forcing the smallest lenders to abandon this type of lending because it is no longer profitable and/or the compliance risks are too great.

### **Concerns Regarding Examiner Training**

To implement Section 1071 effectively, it is of the utmost importance that bank examiners receive comprehensive training on the new regulation. The training bank examiners currently receive on ECOA (and other rules) is inconsistent at best. CDFI banks are often assigned to less experienced examiners without the sufficient background to understand a CDFI bank's context and market. We recommend that the Bureau and implementing agencies (e.g. FDIC, OCC, and Federal Reserve) invest in good examiner training and ensure senior personal are assigned to CDFI bank examinations.

### **Guiding Principles for Rule**

In our December 2020 comment letter, we recommended the following principles for successful implementation and believe they should guide the Bureau's decision-making. The rule should be written to be:

- Broad: Implementation should gather information on the broadest practical universe of borrowers and lenders based on the definition of small business and credit.
- Consistent: The Bureau should strive to reduce uncertainty by ensuring the underlying standards and definitions are consistent with those in place at other agencies, and that no institution's operations will be disproportionately impacted relative to its size and resources.
- Simple: Concision in data collection, simplicity in management of customer information privacy, and efficiency in reporting are essential to make the task manageable for small lenders.

### **CDBA Responses to Notice of Proposed Rule-making**

We offer the comments below to inform the Bureau on how to make implementation of Section 1071 less onerous for CDFI banks.

#### **Section 1002.102 Definitions**

CDBA does not have specific comments or recommendations related to the definitions provided in this section of the proposal. Where definitions are expanded on, e.g., in order to clarify "covered" institutions, applications, and types of credit, we have commented on the section where the definitions are clarified.

#### **Section 1002.103 Covered Applications**

CDBA supports the Bureau’s proposal to consider defining an “application” largely consistent with the Regulation B definition of that term—i.e., “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.” CDFI banks are accustomed to working with the Reg B definition, and this would minimize the need for additional training or new procedures.

CDBA further supports the Bureau’s proposed clarification of circumstances that would not be reportable under Section 1071, such as the reevaluation, extension, and renewal requests, except requests for additional credit amounts; and inquiries and prequalification requests. Each of these examples are appropriate to avoid duplicative steps and to keep data collection focused on its purpose.

### **Section 1002.104 Covered Credit Transactions and Excluded Transactions**

CDBA believes the definition of “credit product” currently proposed is a good start. We are encouraged that at least one item previously contemplated for exclusion (merchant cash advances), is now proposed for inclusion. However, the definition is still too narrow and leaves out many products that small businesses are accessing. ***We strongly urge the Bureau to revise its plan and ensure a broad base of coverage, including consumer credit contemplated for business purposes, leases, factoring, and trade credit.*** Acknowledging the breadth of the small business lending sector is critical.

The products proposed for exclusion above are often offered by the rapidly growing unregulated online fintech sector. As evidenced by the ongoing entry of fintechs into mainstream finance -- such as approved lenders in the SBA’s PPP program – this sector has captured a growing share of the small business lending market since the financial crisis. As reported in *American Banker*, in October of 2021,

“For the first time, the percentage of C&I loans held by nonbanks will by the end of the year be nearly equal to that held by banks.”<sup>4</sup>

Further, a 2020 working paper from the Federal Reserve Bank of Cleveland found that:

“The businesses using online lenders are not representative of small and medium-size enterprise in the US. *Businesses borrowing online are younger, smaller, and less profitable. Through reaching borrowers less likely to be served by traditional lenders, fintech lenders have substantially expanded the small business finance market.*”<sup>5</sup> (Emphasis CDBA).

Like online predatory consumer lenders, there is a growing body of evidence that a portion of this sector is engaging in the same type of unscrupulous targeting of vulnerable customers (including racial and ethnic minorities) as their consumer lender counterparts.<sup>6</sup>

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<sup>4</sup> Allissa Kline, “Banks losing ground to nonbanks in business lending,” *American Banker*, October 4, 2021

<sup>5</sup> Federal Reserve Bank of Cleveland, “The Rise of Fintech Lending to Small Businesses: Businesses’ Perspectives on Borrowing,” [www.clevelandfed.org/wp20-11](http://www.clevelandfed.org/wp20-11)

<sup>6</sup> Lenore Palladino, “Another Risk for Small Business: Lightly Regulated Fintech Loans,” *Barrons*, April 21, 2020 [www.barrons.com/articles/small-businesses-risk-predatory-loans-to-survive-51587492858](http://www.barrons.com/articles/small-businesses-risk-predatory-loans-to-survive-51587492858)

## **Section 1002.105 Covered Financial Institutions and Exempt Institutions**

CDBA supports the Bureau's proposal to adopt a general definition of "financial institution" which defines the term "financial institution" as "any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity." We agree that this broad definition is appropriate to capture the wide range of lenders required to gain representative information about the market. It is appropriate for currently unregulated small business lenders (such as online lenders, platform lenders, lenders involved in equipment and vehicle financing, and commercial finance companies) to be subject to the rule.

Regarding Section 1071's exemption of some lenders from collection and reporting requirements, CDBA supports the NPR's "de minimus" activity-based threshold of 25 loans per year, consistent with the Bureau's previous closed-loan threshold for lenders reporting mortgage loans. This will be simpler to apply across the broad range of lenders.

## **Section 1002.106 Business and Small Business**

CDBA agrees with the Bureau's adoption of a simplified size standard for defining a small business. We understand that the Bureau must seek SBA approval for a simplified size standard. We believe that the proposed size standard based on businesses under \$5 million based on the applicant's gross annual income in the preceding fiscal year is sufficiently broad and can encompass as great a portion of the population of minority- and women-owned business as practical.

We urge the Bureau that borrowers should be responsible for self-identifying their business status based on these standards -- ***under no circumstances should lenders be held responsible to verify a borrower's self-identification as a small business.***

## **Section 1002.107 Compilation of Reportable Data**

### Mandatory vs Discretionary Data Points

Of the 23 data point proposed for collection, fully seven (one third of the total) are not enumerated in the statute and are therefore discretionary, relying for their inclusion on section 704B(e)(2)(H). While regulated financial institutions collect many of the 17 mandatory data points, none of the discretionary points are currently universally defined, collected, organized or used by lenders. The information may currently be collected and compiled in internal paper credit memos, but not collected in software or a bank's core data processing systems. Further, this data may not be accessible digitally, as banks use different standards for recording the mandatory items and borrowers may not even track some.

CDFI banks acknowledge the some of the proposed discretionary points have the potential to help the Bureau meet the intention of the statute. However, complying with collecting the mandatory data points will be a challenge itself and it is most important to ensure the statutory requirements are met. ***We believe the proposed time to implement the regulation is too short and should be extended. We strongly recommend that the Bureau provide flexibility around the implementation of the discretionary points. We strongly recommend that implementation be set at no less than three (3) years for CDFIs.***

## Discretionary Data Points

### *107(a)(3) Application Method*

We are concerned about the circumstances under which the Bureau added “Application Method” as a data point. Rather than introduce this data point at this stage in the rule-making process, we urge the Bureau to examine the relative advantages of different application methods outside of the rule-making process prior to introducing this point into the regulatory compliance framework. We have three concerns:

- The Bureau added “Application Method” to its proposed list of discretionary data points late in the rule-making process. The public has not been given sufficient opportunity to consider the implications. This proposal should be properly vetted by the public.
- The Bureau states that it is proposing this data point based on the suggestion of “one CDFI SER . . . in order to monitor for possible discouragement of applicants.” As support, the Bureau cites the assertions of “several *SERs that took applications for credit primarily or entirely online . . . that such channels (online) were less likely to result in discrimination and more likely to increase access to credit to women-owned and minority-owned small businesses.*” (Emphasis CDBA). No contrary assertions appear to have been considered. These are serious assertions and worthy of further study. We agree that it is important to understand whether any particular method of accepting applications is likely to lead to discouragement or result in discrimination. However, we are concerned about how this topic has been introduced into the rule-making process.
- We are concerned that the source SERs for the recommendation have a vested interest in the outcome. Specifically, online lenders have an interest in advancing a perception that their methodology is inherently less discriminatory. Yet, there is no data to prove the assertion. Adoption of the provision without public input imposes an unfair burden on community-based lenders. The proposed rule risks subjecting community-based lenders that have not adopted online or digital technology to additional scrutiny. This scrutiny will be based on insufficiently considered and potentially compromised assertions.

***For these reasons, we strongly urge the Bureau to explore this topic outside of the current rule-making process, so that it can be properly considered.***

### *107(a)(4) Application Recipient*

The Bureau notes, “Certain section 1071 requirements might apply to intermediaries in the application chain.” Although Application Recipient was not addressed as a potential data point for consideration in the SBREFA outline, we agree that this information can be helpful for data users to know the relationship between the covered financial institution and the applicant. It may provide context for other collected and reported data and improve transparency around when and whether an intermediary “agent” is considered a “financial intuition” for the purposes of this data collection.

CDBA supports clear rules to define who is responsible for collecting and reporting demographic information. Clarification is important to ensure lenders and their partners understand and take appropriate responsibility for collecting 1071 data. ***To ensure simplicity, we respectfully request that***

***the Bureau align the reporting requirements for financial institutions that are not the lender of record with that for HMDA reporting in Regulation C.***

*107(a)(11) Denial Reasons*

The proposal to collect data on Denial Reasons has the potential to help identify ways to improve service in underserved communities. We agree this is an opportunity to “provide financial institutions with data to evaluate their business underwriting criteria and address potential gaps as needed.” The proposed list from which covered institutions may select denial reasons adequately covers the potential reasons, and aligns largely with Reg C standards. The opportunity to select “other” with “additional information provided via free form text” is an important element of the current proposal and we urge that it be retained.

*107(a)(12) Pricing Information*

Pricing creates particular problems for data collection. CDBA is concerned that this area in particular has the potential to hurt CDFI banks and their customers. We anticipate that large banks and HMDA reporting lenders will be able to meet the reporting requirements of this data field relatively quickly, while CDFIs, and those that are not HMDA reporting will not.

With that said, the Bureau’s proposal for pricing is appropriately simple, and the primary challenge for CDFIs will be time. We agree with the Bureau’s distinction between fixed-rate and variable rate transactions (i.e. where fixed rate loans report the interest rate, and variable rate loans report the margin, index value, and index name) is appropriate. We also agree that fields to capture the total origination charges, broker fees and any non-interest charges that will be imposed over the first annual period, as well as pre-payment penalties, are appropriate, as they can be considered separately.

*107(a)(15) NAICS Code*

CDBA does not object to the Bureau’s proposal to collect NAICS codes. NAICS code has the advantage of being independently defined and available for reference. If self-reported by the borrower, and reported by the Bureau only in the aggregate, NAICS code can contribute useful information without unduly burdening lenders.

*107(a)(16) Number of Workers*

“Number of workers” is a discretionary data point that few non-SBA lenders collect. We do not believe it is a necessary data point for fulfilling the purposes of Section 1071. Yet, we note, an increasing number of CDFI banks collect this information for the purposes of demonstrating their impact within their communities. We do not object to its inclusion; yet, we caution some of the real pitfalls of collecting this data. As noted by some of the SBREFA commenters, this data point may frustrate small business applicants given some of the difficulties small businesses face in defining the different categories of employees, including seasonal, part time, contractors etc. During PPP implementation, both lenders and borrowers had trouble with these definitions, particularly sole-proprietorships and small farms.

We believe the proposal mitigates (but does not eliminate) some of the risks in implementation by clearly explaining who counts as an employee. We agree with the proposal that applicants should report only non-owner workers, and that the definition of non-owner workers include full-time, part-time, and



seasonal workers, as well as contractors who work primarily for the applicant. We agree that volunteers should not be included. The most important considerations are that the Bureau provide language for lenders to provide to applicants to help applicants correctly answer the question, and that the Bureau continue to emphasize that financial institutions may rely on statements made by the applicant without incurring risk.

#### *107(a)(17) Time in Business*

CDBA does not object to the Bureau's proposal to collect Time in Business. The details are appropriate, such as the proposal to report the time in business in whole years, or allow lenders to indicate if a business has not begun operating yet, or has been in operation for less than a year. This data has the potential to be useful for lenders, policymakers, regulators and communities. Time in business is a common credit consideration for the type of small business lending undertaken by CDFI banks. We agree with the Bureau that this data point is helpful context to "help explain differences in underwriting risk among small business applicants and thus avoid misinterpretation of the section 1071 dataset by distinguishing potentially riskier new businesses from established businesses."

Effective implementation will require that the options be kept very simple, particularly in the format of reporting, and that the Bureau continue to clarify that financial institutions may rely on statements made by the applicant without incurring risk.

#### Mandatory Data Points

CDBA has no comments or suggestions specific to the proposed implementation of the following statutorily required data points:

- 107(a)(1) - Unique identifier
- 107(a)(2) - Application date
- 107(a)(5) - Credit type
- 107(a)(6) - Credit purpose
- 107(a)(7) - Amount applied for
- 107(a)(8) - Amount approved or originated
- 107(a)(9) - Action taken
- 107(a)(10) - Action taken date
- 107(a)(13) - Census tract (principal place of business)
- 107(a)(14) - Gross annual revenue (GAR)
- 107(a)(18) - Minority-owned business status
- 107(a)(19) - Women-owned business status
- 107(a)(21) - Number of principal owners

CDBA strongly urges the Bureau to revise its proposed implementation of the following statutorily required data points:

107(a)(20) - Ethnicity of principal owner(s), Race of principal owner(s), Sex of principal owner(s)

**CDBA strongly urges the Bureau to revise its proposal that requires a lender to report the ethnicity or race of one or more principal owners based on "visual observation and/or surname" in circumstances**

***where there is a meeting with a principal owner.*** As with proposed discretionary data point 107(a)(3) *Application Method*, this proposal very specifically challenges the principle that the rule should be applied consistently across lenders, and across data points. Further, it risks introducing enormous error risk into the data. It is highly preferable to treat the collection of this information consistently with the other mandated demographic data points, namely that it be strictly limited to applicant self-reporting.

The Bureau should heed the very specific objections that it reports it received during the SBREFA process. ***We strongly agree with the SERs quoted in the proposal, that identifying ethnicity based on “visual observation and/or surname” is tantamount to guessing, that it is “extremely difficult and ineffective,” that “collecting demographic information based on visual observation makes staff uncomfortable” and guessing is “likely to introduce both error and bias to the process.”***

Among other strongly negative outcomes, this requirement will create an operational and compliance bias against community lenders, such as CDFI banks. Meeting “in person” is a hallmark of CDFI lenders, including CDFIs banks. Such meetings provide an opportunity for CDFIs to learn more about their borrowers, for borrowers to gain comfort with their lenders, and for both to identify correct products and services in a way that is especially responsive to the needs of LMI and other underserved communities. As written, the burden to guess ethnicity and race will fall entirely on lenders that interact directly with the community. This requirement will lead to a wildly disparate impact between CDFIs and unregulated and large bank online lenders that will not have such risk, and it does so with a high likelihood of incompleteness, inaccuracy, reputational damage, and operational disruption. The consequence will be lenders leaving local markets, and borrowers migrating online.

Further, it not consistent to require this level of reporting for ethnicity or race, but not to require the same for sex. The proposed rule takes the correct position for reporting sex, which is that financial institutions will not be required to guess an applicants’ sex if the applicant chooses not to identify it. Requirements made of lenders should not be limited to either one lender subset or to a borrower subset.

### Conditions Related to the Collection of Data Points

#### *107(b) Verification of Applicant-Provided Information*

With the exception noted above under our discussion of 107(a)(20), CDBA does not object to the requirements around verification of applicant-provided information. It is generally correct that a financial institution should be able to rely on statements of the applicant when compiling data. It is reasonable to expect an institution to continue to collect, verify and report for the purposes of this proposal *if it is already doing so for its own business purposes*. We agree with the Bureau’s assessment that “requiring verification of applicant-provided data points would greatly increase the operational burden of the 1071 rule,” and we hope that the Bureau extends this understanding to its inappropriate requirement for lenders to guess applicants’ ethnicity and race if a lender meets in-person with principal owner(s).

#### *107(c) Time and Manner of Collection*

CDBA agrees with the Bureau’s decision not to specify a particular time-period during the application process when Financial Institutions must collect Section 1071 data from applicants. The example procedures the Bureau provides that cover timing and manner of collection and are helpful. CDBA

agrees that it is important to have safeguards to ensure data is collected “at a time and in a manner that is reasonably designed to obtain a response.” These safeguards should encourage consistent collection across individual institutions and sectors of the small businesses ecosystem.

The Bureau has also proposed a definition of “reasonably designed” procedures for data collection. We believe the definition of “reasonably designed” is appropriate, as is the proposed requirement for a periodic reassessment of the procedures. Also helpful are the examples of procedures that are generally “not reasonably” designed to obtain a response, in order for lenders to understand what to avoid. However, we strongly recommend that procedures should not need to be reexamined more frequently than every three years.

For most CDFI banks, the best practice will likely be to collect mandatory data points as early in the process as possible, and possibly at the time an application is initiated (see definition of “application”). Lenders should have the flexibility to respond to discrete market concerns in making this determination.

### **Section 1002.108 Firewall**

We believe that lenders of many sizes, business models and regulatory levels will conclude, as permitted, that an underwriter or others involved in making a determination regarding an application “should have access” to demographic information collected under Section 1071. This is largely because the logistics of implementing a strict firewall is simply too much for most lenders. CDBA strongly supports the Bureau’s proposal to develop model disclosures that lenders could use when notifying applicants of an underwriter’s access to personal information, e.g. women-owned and minority-owned business status and the race, sex, and ethnicity of principal owners.

Small lenders in particular, both regulated and unregulated, collect paper applications. Requiring an underwriter “firewall” for these lenders would force them to implement complicated and expensive systems investments to segregate data at different steps in the lending process, or discontinue small business lending. The principles of uniformity and simplicity guide us to suggest that having a universal and consistent statement will benefit both borrowers and lenders in these circumstances.

### **Section 1002.109 Reporting of Data to the Bureau**

#### *109(a)(1) Annual Reporting*

***CDBA strongly urges the Bureau to adopt an alternative approach to data collection from the proposed annual, calendar year (June 1) basis.*** CDBA recognizes that the Bureau’s proposal is consistent with other reporting practices, such as the CRA Small Business Data submissions. However, the great majority of CDFI banks, and certainly non-CDFI community banks and unregulated lenders, do not file these annual reports, due either to their asset size<sup>7</sup> or regulatory status<sup>8</sup>. The resources available to these lenders to stand up a new annual reporting process, complete with data quality assurance and the host of attendant responsibilities, is limited and potentially very onerous. This method risks creating a great burden.

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<sup>7</sup> The 2020 FFIEC CRA Small Business Asset Size Reporting threshold is \$1.305 billion, <https://www.ffiec.gov/cra/reporter20.htm>

<sup>8</sup> Credit Unions and unregulated lenders do not file CRA Small Business reports as they are not covered by the Community Reinvestment Act.

***We respectfully urge the Bureau to adopt an alternative that was suggested during the SBREFA process. Specifically, we urge the Bureau to establish a process for ongoing reporting.*** Many lenders would benefit from the opportunity to build reporting as a single discreet step into an existing process, relying on already allocated resources. This could take the form of a central portal or “receiving engine” maintained by the Bureau where lenders could enter the information into manual entry fields at an appropriate time in the individual applications workflow. A further alternative, which would simplify the very desirable priorities of ensuring applicant privacy and self-reporting, would be for applicants to be provided with a link to the Bureau’s portal for them to fill in, or certify their desire to decline the request.

This will be especially valuable for small lenders, those with limited volume, or those still relying on largely manual processes. Another alternative would be for lenders to have the option to upload data in batches at their convenience. In this case, the Bureau should promulgate a template that can be uploaded.

#### *109(a)(2) Reporting by Subsidiaries*

CDBA has no objections specific to the proposed requirements for reporting by subsidiaries

#### *109(a)(3) Reporting Obligations Where Multiple Financial Institutions are Involved in a Covered Credit Transaction*

CDBA believes that the proposed provisions for reporting when more than one financial institutions is involved in a credit transaction are appropriate. We agree with the provision that:

*“Only one covered financial institution shall report each covered credit transaction as an origination, and that if more than one financial institution was involved in an origination, the financial institution that made the final credit decision approving the application shall report the loan as an origination, if the financial institution is a covered financial institution.”*

Further, we find that the Bureaus’ requirement that “**any** covered financial institution that made a credit decision shall report the application,” (Emphasis CDBA) is consistent, regardless of whether the lender is aware of subsequent originations at other lenders, as covered institutions are required in any case to report decisions on covered applications.

#### **Section 1002.110 Publication of Data**

##### *110(a) Publication of Small Business Lending Application Registers and Associated Financial Institution Information and 110(b) Publication of Aggregate Data*

CDBA urges the Bureau to limit its annual data publication to aggregated data. At the aggregate level, the data outlined in the statute does not create privacy concerns. Release of the data on individual loans, however, could create privacy concerns for CDFI bank customers. For example, data on census tract, Gross Annual Revenue (if collected) and borrower NAICS code could easily be used to identify a borrower in a less populated rural or Native American community. CDBA recommends that the agency use great caution in releasing individual borrower data or some aggregated data in less populated places.

In the event the Bureau undertakes an aggregated approach, data can be organized into category “bands” (e.g. identifying borrowers by employees in ranges between 0 and 100, 100-250, 250-500 etc.). This would increase its value to the public.

*110(c) Statement of Financial Institution’s Small Business Lending Data Available on the Bureau’s Website and 110(d) Availability of Statements*

CDDBA supports the Bureau’s proposal that for disclosure purposes, lenders may direct website visitors to the Bureau’s website to view the small business application register.

**Section 1002.111 Recordkeeping**

*111(a) Record Retention*

CDDBA believes the Bureau is correct to propose that lenders retain Section 1071 data for at least three years after it is submitted to the Bureau, as this is within the five years required by banks to maintain data under the Bank Secrecy Act.

*111(b) Certain Information Kept Separate from the Rest of the Application*

CDDBA recognizes that, while difficult, the requirement to maintain a record of the “responses to [the] inquiry’ required by 704B(b)(1) separate from the application and accompanying information” is mandated in the statute.

***In order to remain consistent with section 1002.108(b), we strongly urge the Bureau to waive this requirement for financial institutions that determine that underwriters or other persons should have access to applicants’ demographic information pursuant to that section.***

*111(c) Limitation on Personally Identifiable Information Retained under this Section*

CDDBA believes the Bureau has correctly identified a consistent and correct approach to implementing the rule in regards to protecting Personally Identifiable Information (PII).

**Section 1002.112 Enforcement**

*112(a) Administrative Enforcement and Civil Liability and 112(b) Bona Fide Errors*

CDDBA believes the section implementing enforcement is appropriate, particularly in the treatment of unintentional bona fide errors that occur despite the maintenance of procedures reasonably adapted to avoid such an error. It is important that such errors not be treated as violations of either ECOA or subpart B. We strongly support the provision of a table of thresholds to help institutions identify a number of errors equal to or below reasonable thresholds, which is broadly consistent with HMDA.

*112(c) Safe Harbors*

CDDBA believes that the four proposed safe harbor provisions, providing that certain types of errors would not constitute violations of ECOA or Regulation B, are appropriate.

## Section 1002.113 Severability

CDBA has no comments on this section.

## Section 1002.114 Effective Date, Compliance Date, and Special Transitional Rules

### *114(a) Effective Date and 114(b) Compliance Date*

#### ***The proposed implementation time of 18 months (one and one-half years) is far too short for CDFIs.***

The implementation of section 1071 is a sea-change in the delivery of small business credit. The data collection, retention and reporting requirements require lenders to generate new policies and procedures, train employees, modify forms and systems, communicate changes to their customers and within their markets to minimize disruption, and assign responsibility for all of these tasks across multiple departments, including compliance. ***Anything shorter than three (3) years will create undue burden among CDFIs and puts the quality of data, as well as the viability of these lenders' small business lending programs, at risk.***

### *114(c) Special Transitional Rules*

CDBA supports the proposal in part 114(c)(1) to permit covered financial institutions to collect information regarding applicants' minority-owned business status, women-owned business status, and the race, sex, and ethnicity of applicants' principal owners under proposed § 1002.107(a)(18) through (20) beginning 12 months prior to the compliance date.

CDBA also supports the proposal in part 114(c)(2) to permit (but not require) lenders to use their originations of covered credit transactions for small businesses in the second and third preceding calendar years (rather than originations in the two immediately preceding calendar years), in determining their status as a covered financial institution as of the compliance date.

## **Additional Considerations**

### *Implementation Challenges*

Section 1071 will be meaningless if unregulated lenders that are ostensibly covered by the proposed regulation are not consistently identified, contacted, and compelled to comply through regular examination. To fairly apply Section 1071, the Bureau will need to build capacity to conduct examinations, including data integrity reviews, of the currently unregulated business lending sector. If the Bureau cannot fairly apply Section 1071, it should delay implementation until such time that it has sufficient capacity to enforce it across all covered lenders.

###

Thank you for considering our recommendations. If you have any questions, please contact Jeannine Jacokes, CDBA Chief Executive Officer, at (202) 689-8935 ext. 222 or [jacokesj@pcgloanfund.org](mailto:jacokesj@pcgloanfund.org), or Brian Blake, Public Policy Director at (646) 283-7929 or [blakeb@pcgloanfund.org](mailto:blakeb@pcgloanfund.org).

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 Sunrise Banks, N.A. (MN)  
 Sycamore Bank (MS)  
 Texas National Bank (TX)  
 The Bank of Vernon (AL)  
 The Citizens National Bank of Meridian (MS)  
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