



2021 SMALL BUSINESS DATA COLLECTION NOTICE OF PROPOSED RULE

COMMENTS ARE DUE NOVEMBER 30, 2021

Docket No: CFPB-2021-0015 or RIN 3170-AA09

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Mail/Hand Delivery/Courier: Comment Intake – Section 1071 Small Business Lending Data Collection, Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20552

BACKGROUND

Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Equal Credit Opportunity Act (ECOA) to require that financial institutions collect and report certain data regarding business credit applications. Section 1071 specifies multiple data points that are required to be collected and contains several other requirements regarding information collected pursuant to Section 1071. The purposes of this section are to facilitate enforcement of fair lending laws and to enable the identification of business and community development needs and opportunities for women-owned, minority-owned, and small businesses.

PROPOSED DEFINITIONS

Financial Institution - considered any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, other entity that engages in any financial activity. Including depository institutions (i.e., banks, savings associations, and credit unions), online lenders, platform lenders, community development financial institutions (CDFIs), lenders involved in equipment and vehicle financing, commercial finance companies, governmental lending entities, and nonprofit lenders.

Covered Financial Institution – a “financial institution” that originated or approved at least **25 covered credit transactions** to small businesses in **each of the two preceding calendar years**.

Small business – the Bureau is proposing to define “small business” by referencing the definitions of “business concern” and “small business concern” as set out in the Small Business Act and Small Business Administration (SBA) regulations. SBA uses the following general criteria to define a small business concern. A small business:

- ⊗ Is organized for profit
- ⊗ Has a place of business in the United States (U.S.)
- ⊗ Operates primarily within the U.S. or makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor

- ⊗ Is independently owned and operated
- ⊗ Is not dominant in its field on a national basis
- ⊗ May be a sole proprietorship, partnership, corporation, or any other legal form.

The SBA sets numerical definitions, or “size standards”, for every small business industry in the U.S. based on the business’s number of employees and average annual receipts. The Bureau is **seeking approval from the SBA** to define small business based on whether the business had **\$5 million or less in gross annual revenue for its preceding fiscal year.**

Covered application – an 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.

Covered applications would not include:

- ⊗ Reevaluation requests, extension requests, or renewal requests on an existing business credit account, unless there is a request for an increase to the credit amount; or
- ⊗ Inquiries and prequalification requests.

Covered credit transaction – loans, lines of credit, credit cards, and merchant cash advances (including such credit transactions for agricultural-purposes *and those that are also covered by the Home Mortgage Disclosure Act of 1975 (HMDA)*) and includes a transaction that meets the definition of business credit under existing Regulation B.

Covered credit transactions would not include:

- ⊗ Financing arrangements wherein a business acquires goods or services from another business without making immediate payment to the business providing the goods or services (i.e., trade credit);
- ⊗ Public utilities credit – referring credit for the purchase of a utility service, such as electricity, gas, or telephone service.
- ⊗ Securities credit – referring to extensions of credit subject to regulation under section 7 of the Securities Exchange Act of 1934 or extensions of credit by a broker or dealer subject to regulation as a broker or dealer under the Securities Exchange Act of 1934.
- ⊗ Incidental credit – referring to extensions of credit other than public utilities credit and securities credit, that are not made pursuant to the terms of a credit card account; that are not subject to a finance charge; and that are not payable by agreement in more than four installments. But without regard to whether the credit is consumer credit, is extended by a creditor, or is extended to a consumer.

Principal owner – a natural person who directly owns 25 percent or more of the equity interests of a business. Limiting reporting to no more than four (4) principal owners and may not have any principal owners if no natural person directly owns **25 percent or more of the equity interests.**

Minority-owned business – one or more minority individuals (i) directly or indirectly own or control more than 50 percent of the business and (ii) receive more than 50 percent of the new profits of the business.

Women-owned business – one or more women individuals (i) directly or indirectly own or control more than 50 percent of the business and (ii) receive more than 50 percent of the new profits of the business.

Minority individual – a natural person who is Hispanic or Latino, American Indian or Alaskan Native, Asian, Black or African American, or Native Hawaiian or Other Pacific Islander. A multi-racial or multi-ethnic individual is a minority individual for this purpose.

PROPOSED DATA POINTS

The proposed rule currently contains twenty-three (23) data points to be collected and reported for covered applications. These data points are all too familiar, as most mirror the data points collected for Home Mortgage Disclosure Act (HMDA) reporting and may even be reporting on your HMDA LAR, when applicable.

The Bureau is categorizing the data fields into three (3) buckets:

- ⊗ Data points that financial institutions would generate or provide;
- ⊗ Data points that could be provided by the applicant or that the financial institution could determine by reviewing information provided by the applicant or a third-party; and
- ⊗ Data points that address the demographics of the applicant's principal owners or ownership status. These data points would include minority-owned business status, women-owned business status, and the ethnicity, race, and sex of the applicant's principal owners.
 - Race and ethnicity may be collected on visual observation if **an applicant does not provide it**
 - Sex, minority-owned business status, and women-owned business status **would not be reported unless the applicant provides it**. Financial institutions would not be permitted or required to report these data points on visual observation, surname, or any other basis.

DATA COLLECTION

As part of the proposed rule, the Bureau included Appendices to assist financial institutions in collection and reporting minority-owned status, women-owned status, and principal owners' ethnicity, race, and sex; including a sample data collection form. The Bureau is proposing ethnicity and race categories identical to those categories outlined in HMDA.

The sample data collection form, identified as Appendix E, includes disclosures similar to those required by Regulation B today. These notices communicate to applicants that the financial institution is not permitted to discriminate on the basis of an applicant's minority-owned business status, women-owned business status, or any principal owner's ethnicity, race, or sex. This non-discrimination notice is required to be provided by the financial institution at the time the information is requested. Financial institutions should maintain procedures to collect applicant-provided data at a time and in a manner that is reasonably designed to obtain a response.

REPORTABLE DATA BREAKDOWN

The CFPB has provided a chart summarizing the data points that covered financial institutions would be required to collect and report with respect to small business applications for covered credit transaction pursuant to proposed §1002.107.

[Proposed data points for small business lending data collection](#)

The proposed rule also permits the reuse of certain previously collected data to satisfy the requirement to collect and report data points if:

- ⊗ The data were collected within the same calendar year as the current covered application; and
- ⊗ The financial institution has no reason to believe the data are inaccurate.

In addition to the data collection form, the proposed rule includes detailed instructions, identified as Appendix F, for collecting and reporting small business applicant's minority-owned business status and women-owned business status. The Appendix outlines twelve (12) points for collecting the required information about covered applications.

1. Financial institutions **must** ask the applicant about its minority-owned business status and women-owned business status but cannot require an applicant to provide it.
2. This information **must** be requested on a paper or electronic data collection form that is separate from the application and other documents used to collect information.
 - a. This information **must** be asked orally for telephone applications or applications received by a medium not involving any paper or electronic documents
3. Financial institutions **must** provide the applicant with definitions of the terms “minority individual”, “minority-owned business”, and “women-owned business”.
4. Financial institutions,
 - a. **May** communicate that federal law requires it to ask for minority-owned business status and women-owned business status
 - b. **Must** communicate that the applicant is not required to respond to the requests regarding minority-owned business status and women-owned business status
 - c. **Must** communicate that the financial institution cannot discriminate on the basis of minority-owned business status and women-owned business status or on the basis of whether the applicant provides the information.
5. Financial institutions **must** report the answers provided on the data collection form or in response to oral inquiry regardless of any answers provided for other purposes.
6. Financial institutions are **not** required nor **permitted** to verify the minority-owned business status and women-owned business status provided.
7. If the applicant declines to provide minority-owned business status and women-owned business status information, the financial institution **must** report that the applicant declined to provide the information and **cannot** obtain the information based on visual observation.
8. If the applicant does not respond regarding its minority-owned business status and women-owned business status (such as by leaving the response blank or failing to submit a data form) the financial institution **must** report that the information was not provided.
9. If the applicant checks either “yes” or “no” but also checks “I do not wish to provide” the financial institution reports minority-owned business status and women-owned business status provided.
10. Financial institutions **cannot** provide minority-owned business status and women-owned business status based on visual observation, surname, or any basis other than the applicant's response.
11. Financial institutions may report information previously collected but are not required to do so.
12. If a financial institution reports minority-owned business status and women-owned business status based on previously collected data, they **must** also report that fact.

Further, Appendix G, contains an additional twenty-nine (29) points detailing instructions for collecting information from small business applicants about covered applications, including ethnicity, race, and sex of the applicant's principal owners. These instructions are in line with the procedures for collecting demographic information for HMDA purposes. With the following differences:

- ⊗ Sex **cannot** be collected based on visual observation, surname, or any basis other than the applicant's response. If the applicant indicates "I do not wish to provide" the financial institution reports that fact.
- ⊗ Financial institutions **may** report information previously collected but are not required to do so
- ⊗ If a financial institution reports minority-owned business status and women-owned business status based on previously collected data, they **must** also report that fact.
- ⊗ If a financial institution reports one or more principal owner's demographic information based on previously collected data, no additional information need be collected. However, they may need to report that the applicant did not provide or declined to provide the information when the data was previously collected.
- ⊗ If a financial institution is reporting a principal owner's ethnicity and/or race based on data that the financial institution previously collected via visual observation and/or surname, the financial institution reports that it is reporting ethnicity and race based on previously collected data and based on visual observation and/or surname. Additionally, the financial institution reports that the applicant declined to provide information about the principal owner's sex or that the applicant did not provide the principal owner's sex, as applicable, and reports that the financial institution is reporting sex based on previously collected data.

FIREWALL

The Bureau's proposed rule includes a section to limit access to certain data points from underwriters and loan officers. The "firewall" provisions state an employee or officer of a covered financial institution or affiliate thereof would be prohibited from accessing an applicant's responses to inquiries regarding minority-owned business status, women-owned business status and regarding the ethnicity, race, and sex of the applicant's principal owners, if that employee or officer is involved in making any determination concerning the applicant's covered application.

This prohibition would not apply to an employee or officer, if the financial institution determines that it is not feasible to limit that employee's access to an applicant's responses and the financial institution provides a notice to the applicant regarding that access. The notice must be provided to each applicant whose information will be accessed or, alternatively, the financial institution could provide the notice to all applicants whose information could be accessed.

Notice provided in paper or electronic form must be provided on the same form, located at the top and similar to:

"Employees and officers making determinations concerning an application, such as loan officers and underwriters, may have access to the information provided on this form."

Notice provided orally must be provided prior to asking the applicant if it is a minority-owned business or women-owned business and prior to asking for a principal owner's ethnicity, race, or sex and must be substantially similar to:

“Employees and officers making determinations concerning your application, such as loan officers and underwriters, may have access to your responses regarding your minority-owned business status, your women-owned business status, and your principal owners’ ethnicity, race, or sex.”

REPORTING

Covered financial institutions will be required to collect data on a calendar-year basis and report their data to the Bureau by **June 1st** of the following year. In addition, similar to HMDA, financial institutions will be to disclose the availability of public data on the Bureau’s website.

RETENTION

Covered financial institutions will be required to retain copies of small business lending application registers and evidence of compliance **for at least three (3) years**.