



January 4, 2022

Comment Intake—Section 1071
Small Business Lending Data Collection
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

*Submitted electronically
to regulations.gov*

RE: Docket No. CFPB–2021–0015; RIN 3170–AA09; Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B)

Dear Sir or Madam,

The Dakota Credit Union Association (DakCU), which represents state and federally chartered credit unions in the states of North Dakota and South Dakota, appreciates the opportunity to provide comment to the Consumer Financial Protection Bureau (CFPB) regarding its proposed rulemaking concerning small business lending data collection under the Equal Credit Opportunity Act.

DakCU believes it is absolutely essential that all creditworthy small business owners have the same opportunity and access to credit without regard to their race, color, religion, national origin, sex, marital status, or age. DakCU completely agrees with the CFPB that, “Small businesses are an important, dynamic, and widely diverse part of the U.S. economy. They are critical to employment, innovation, and economic growth and stability, both overall and specifically for minority and women entrepreneurs.”¹ However, DakCU is very concerned that if this rulemaking is finalized as proposed it may limit access to credit, which would be opposite of the CFPB’s intent. This concern is greater for rural areas such as those found in the Dakotas, as small community lenders, such as credit unions may be unable to afford the cost of implementing the regulatory changes proposed under this proposed rulemaking and have to make the difficult decision to cut product offerings.

¹ 86 FR 56361, October 8, 2021.



For credit union’s that are able to continue offering business and commercial lending products, the cost of these products will likely increase for the small businesses – again, the very entities that the CFPB is allegedly trying to help. The CFPB’s own research supports that this will be result. In response to a One-Time Cost Survey the CFPB conducted, it found “Consistent with economic theory, respondents reported that they would be most likely to raise rates or fees on small business products and other credit products... Accordingly, the Bureau expects the likely impact of an eventual 1071 rule on the cost of credit to small entities to be higher rates and fees because financial institutions pass on the variable ongoing costs of the required data collection.”²

Credit unions are member owned not-for-profit financial institutions. If this rule is adopted as proposed, it will increase already costly compliance expenses that are incurred by credit unions. This is a cost that must be paid by the owners of the credit union – its members. How is the credit union to explain and/or justify this cost to its members? The member’s cost is going up so more personal and private information can be reported to the Federal government – DakCU doubts this reasoning will be well received by the small business owners.

In its 2021 Small Business Profile, the U.S. Small Business Administration Office of Advocacy noted that there are 89,942 small business in South Dakota, which represents 99.0 percent of South Dakota businesses. Furthermore, these South Dakota small businesses employ 210,301 individuals or 58.5 percent of all South Dakota employees.³ In North Dakota there are 75,427 small businesses, representing 98.8 percent of North Dakota businesses. These North Dakota small businesses employ 196,368 employees or 56.7 percent of North Dakota employees.⁴ The Dakotas depend on our small businesses and these businesses need access to credit. The CFPB should not impose overly burdensome requirements on small credit unions that are trying to support their communities.

DakCU acknowledges that the CFPB has been directed to implement this rulemaking under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) which was signed into law in 2010.⁵ Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to add Section 704B – Small Business Loan Data Collection. As stated in Section 1071 of the Dodd-Frank Act, the purpose of this rulemaking is “to facilitate enforcement of fair

² 86 FR 56575, October 8, 2021.

³ https://www.sba.gov/sites/default/files/resource_files/Small_Business_Economic_Profile_SD_2021.pdf

⁴ <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/08/30142548/Small-Business-Economic-Profile-ND.pdf>

⁵ Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1071 (g)(1) In general.--The Bureau shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to this section.



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.”

Section 1071 of the Dodd-Frank Act gives the CFPB power to exempt any financial institution or class of financial institutions from the requirements of this section.⁶ DakCU stresses that it is paramount that the CFPB exercise this power to ensure continued access to affordable credit by small businesses, especially those in rural areas or from small lenders. Credit unions are owned by their members and run by a board of directors that is democratically elected from the membership. The CFPB needs to consider the fundamental make-up of credit unions and existing regulatory restrictions that are placed on a credit union’s commercial lending program and field of membership when finalizing this rulemaking. Furthermore, credit unions have been and will continue to be subject to fair lending reviews by their examiners. In fact, fair lending was a supervisory priority of the National Credit Union Administration for 2021, noting that “examiners will assess a credit union’s Fair Lending Compliance Management System. Reviews will include areas such as board and management oversight, policies and procedures, training, monitoring and corrective action, and member complaint response.”⁷

Federally insured credit unions are subject to statutory limits on the amount of member business loans that may be held. Unless an exception is met, the aggregate limit on a federally insured credit union's net member business loan balances is the lesser of 1.75 times the actual net worth of the credit union, or 1.75 times the minimum net worth required under section 1790d(c)(1)(A) of the Federal Credit Union Act.⁸ A federally insured credit union that has a low-income designation, or participates in the Community Development Financial Institutions program, or was chartered for the purpose of making member business loans, or which as of the date of enactment of the Credit Union Membership Access Act of 1998 had a history of primarily making commercial loans, is exempt from compliance with the aggregate member business loan limits.⁹

Furthermore, credit unions can only serve and lend to individuals and business within their field of membership. Due to the statutory and regulatory restrictions already in place, credit unions have limited resources and a limited pool of potential business loan applicants.

⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1071 (g)(2) Exceptions.--The Bureau, by rule or order, may adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.

⁷ NCUA’s 2021 Supervisory Priorities, Letter to Credit Unions 21-CU-02.

⁸ 12 CFR 723.8(a)

⁹ 12 CFR 723.8(d)



Increased regulatory burden and expense is an ongoing concern for credit unions, especially small credit unions. In a recent notice of member meeting concerning a proposed credit union merger, the notice to members cited compliance as one of the reasons for merger, specifically, “for a credit union of our small asset size, compliance with increasingly complex regulations forced on all credit unions since 9-11, takes an enormous amount of staff time.”¹⁰ The CFPB notes that bank closures may impact access to credit, “In terms of potential harms, bank closures may have made it more difficult for small businesses, particularly women-owned and minority-owned small businesses, to access credit and remain open—particularly in low- and moderate income areas and rural communities.”¹¹

DakCU is most concerned with the CFPB’s statement, “Non-traditional credit providers may help offset decreases in lending associated with the closure of bank branches. For instance, fintechs may help provide financing to small businesses in rural communities that lack bank branches.”¹² This statement seems contrary to Director Rohit Chopra’s testimony to the Senate Committee on Banking, Housing and Urban Affairs on October 28, 2021. In that testimony, Director Chopra’s remarked that “we will look for ways to restore relationship banking in an era of big data. As automation and algorithms increasingly define the consumer financial services market, there is less transparency into how credit decisions are made. In some cases, these practices can unwittingly reinforce biases and discrimination, undermining racial equity. Increasingly, households and businesses have no place to turn to when they need help, especially when they face errors and problems in their financial lives. In markets like credit reporting, consumers are not the customer and lack the leverage to get problems fixed in a timely manner. The inability to cut through red tape and get help in one’s financial life can be a major obstacle when seeking a job or when applying for credit. Preserving relationship banking is critical to our nation’s resilience and recovery, particularly in these times of stress.”¹³ If the CFPB wishes to preserve relationship banking, and banking services in rural areas then it needs to do more to ensure overly burdensome rules and regulations are not the reason small community lenders, such as credit unions, are terminating products, not expanding product offerings, or are looking at mergers as the only way to stay compliant.

¹⁰ Notice of Meeting of the Members of Tallahassee Community Federal Credit Union, [Docket \(NCUA-2021-0163\)](#).

¹¹ 86 FR 56360, October 8, 2021.

¹² 86 FR 56360, October 8, 2021.

¹³ October 28, 2021, Written Testimony of Director Rohit Chopra before the Senate Committee on Banking, Housing, and Urban Affairs.



With regard to specific aspects of the proposed rule, DakCU provides the following comments:

Coverage

As proposed, this rule is written too broadly and would have a negative effect on credit unions and more importantly the small businesses that these community lenders seek to serve. Currently, the CFPB is proposing that a “covered financial institution,” which would therefore be subject to this rulemaking, be defined as “a financial institution that originated at least 25 covered credit transactions for small businesses in each of the two preceding calendar years. For purposes of this definition, if more than one financial institution was involved in the origination of a covered credit transaction, only the financial institution that made the credit decision approving the application shall count the origination for purposes of this paragraph.”¹⁴

In its discussion of the proposed rule, the CFPB notes that it, “considered whether to exempt financial institutions with fewer than 50 or 100 originations of covered credit transactions for small businesses in each of the two preceding calendar years, instead of 25 originations as proposed. The Bureau also considered whether to exempt depository institutions with assets under \$100 million or \$200 million from section 1071’s data collection and reporting requirements. The Bureau understands that some burden reduction may result from a threshold higher than 25 loans. However, the Bureau is concerned that a higher threshold would result in the elimination of data that are important in fulfilling the purposes of section 1071. Therefore, the Bureau is proposing an originations threshold of at least 25 covered transactions in each of the previous two calendar years.”¹⁵

This threshold is much too low. Section 1071 of the Dodd-Frank Act does not prescribe a coverage threshold. The CFPB must take action and exercise its power under Section 1071 to “adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.”¹⁶ DakCU believes it would be appropriate to adopt an institutional coverage threshold and transactional coverage threshold, similar to the Home Mortgage Disclosure Act (HMDA) as implemented by

¹⁴ 86 FR 56577, October 8, 2021.

¹⁵ 86 FR 56573, October 8, 2021.

¹⁶ Dodd-Frank Act Section 1071(g)(1).



Regulation C. In its recent HMDA rulemaking, the CFPB found that increasing the transactional threshold from 25 to 100 closed-end mortgage loans provided, “meaningful burden relief for lower-volume depository institutions while maintaining reporting sufficient to achieve HMDA’s purposes.”¹⁷ DakCU urges the CFPB to provide the same relief for lower-volume credit unions and increase this threshold to at least 100 covered credit transactions for small businesses in each of the two preceding calendar years. Furthermore, the CFPB should adopt an institutional coverage threshold for small asset sized financial institutions.

Based on December 2020, NCUA Call Report data concerning Dakota credit unions there were 38 credit unions that reported at least one commercial loan. In this context a commercial loan is defined as “any loan, line of credit, or letter of credit (including any unfunded commitments), and any interest a credit union obtains in such loans made by another lender, to individuals, sole proprietorships, partnerships, corporations, or other business enterprises for commercial, industrial, agricultural, or professional purposes, but not for personal expenditure purposes. Excluded from this definition are loans made by a corporate credit union; loans made by a federally insured credit union to another federally insured credit union; loans made by a federally insured credit union to a credit union service organization; loans secured by a 1- to 4-family residential property (whether or not it is the borrower's primary residence); loans fully secured by shares in the credit union making the extension of credit or deposits in other financial institutions; loans secured by a vehicle manufactured for household use; and loans that would otherwise meet the definition of commercial loan and which, when the aggregate outstanding balances plus unfunded commitments less any portion secured by shares in the credit union to a borrower or an associated borrower, are equal to less than \$50,000. The definition of commercial loan also excludes covered loans issued under the Small Business Administration's Paycheck Protection Program, 15 U.S.C. 636(a)(36).”¹⁸

These Dakota credit unions range in asset size from \$4.1 million to over \$1.6 billion. Staffing at these 38 credit unions ranges from one full time employee to over 300. DakCU urges the CFPB to adopt a threshold to exempt small asset sized financial institutions from coverage of this proposed rule in addition to increasing the transactional coverage threshold.

The potential benefit of any finalized regulation on small business data collection and reporting must outweigh the regulatory cost. On this issue, DakCU is concerned that any perceived benefit will not be outweighed by the significant cost to comply, especially for small community based financial institutions, such as not-for-profit credit unions. Many credit unions, especially those

¹⁷ 85 FR 28370, May 12, 2020.

¹⁸ 12 CFR 723.2



located in the Dakotas, have manual processes to comply with the various regulations. This proposed data collection for small business lending would only add another layer to the already unsurmountable amount of regulatory burden that exists. As more and more regulatory burden is added, credit unions have to address implementation and compliance costs in their strategic business planning, and some will undoubtedly make the business decision to cut or limit certain products and services due to the compliance cost being too great in relation to the narrow returns received on certain products. Thus, there will be fewer creditors in the marketplace to make loans to small businesses, including those owned by minority and women.

Reportable Data

Section 1071 of the Dodd-Frank Act statutorily requires that certain data be collected. DakCU does acknowledge that this section does provide that the CFPB may require “any additional data that the Bureau determines would aid in fulfilling the purposes of this section.” It is the position of DakCU, that the CFPB should finalize a rule with only the statutorily required data points and avoid adding any discretionary data points.

Business lending is very unique to each small business. It would be difficult to perform any worthwhile analysis due to their uniqueness and challenges in identifying similar loans to compare to. Deriving the type of conclusions that one can obtain from HMDA data, may not be as apparent envisioned.

Compliance Date

The CFPB proposes for any finalized rule to have a compliance date approximately 18 months after it is published in the Federal Register.¹⁹ DakCU believes it is necessary to have at least a 36 month timeframe for covered financial institutions to come into compliance with any final adopted rule. Credit unions will be at the mercy of third party vendors that must develop systems to track, monitor and report this data. Additionally, credit unions must properly train staff and update forms and processes as necessary.

Conclusion

DakCU is very concerned with the increased regulatory burden any additional data collection and reporting for commercial lending will place on credit unions. DakCU does not believe the cost and burden created by this rulemaking will be outweighed by any perceived benefits to small

¹⁹ 86 FR 56580, October 8, 2021.

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businesses. The cost to implement, track and monitor will potentially reduce services available from credit unions and/or, at the very least, increase the cost of credit for business owners. Credit union margins are already razor thin. Credit unions simply have no additional funds or resources to pay for new systems or staff.

Thank you for this opportunity to share our comments and concerns.

Respectfully,



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