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May 8, 2023

Spencer W. Clark
Treasury PRA Clerk
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Emergency Capital Investment Program Quarterly Supplemental Report (Docket No. TREAS-DO-2022-0013)

Dear Mr. Clark:

Thank you for the opportunity to comment on the Treasury Department's proposed Quarterly Supplemental Report (QSR). The proposed report is important, both for Treasury's ability to gauge the success of the Emergency Capital Investment Program (ECIP) and for ECIP awardees, for whom the reporting represents a significant obligation over several years. While we support Treasury's goal of assessing credit unions' success in deploying ECIP funds, the burden and risks posed to ECIP-awardee credit unions by Treasury's proposed QSR far outweighs the benefits of the data sought by Treasury and, for some, the benefits of the ECIP award itself.

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 Treasury Department in response to its proposed QSR. Sisseton-Wahpeton Federal Credit Union, located in South Dakota is an awardee of $1,000,000 in ECIP investment funds. This small credit union with $5 million in assets and two full time employees is located in Agency Village, SD and serves members and employees of the Sisseton-Wahpeton Sioux tribe, employees of area schools, Indian Health Service, and Bureau of Indian Affairs. The proposed reporting would be overly burdensome and redirect critical staff and resources that is needed elsewhere to serve their membership and community.

Treasury severely underestimates the significance of its requirement to obtain actual demographic data on all loans and is ignoring the compliance, operational, litigation, and reputational risk associated with the requirement.

The QSR instructions state that credit unions will be required to have "processes in place to attempt to collect the data necessary to complete all the fields" in the QSR, including customer's demographic data.[1] While credit unions do not have to require their members to self-identify their demographic data, if they

[1] Instructions for the Quarterly Supplemental Report for Credit Unions (Mar. 21, 2023), section I.G., p. 10.

refuse to do so, credit unions must collect the information using methods other than statistical proxies, regardless of whether these are currently required by the *Home Mortgage Disclosure Act* (HMDA) or the Community Development Financial Institution (CDFI) Fund.

When credit unions have raised deeps concerns regarding the fair lending risk associated with collecting, storing, and reporting this actual demographic data, Treasury has pointed to the statutory provision[2] that clarifies that collecting this information is not a violation of section 701(a)(1) of the *Equal Credit Opportunity Act* (ECOA).[3] This carve out clarifies that collection is not a violation of ECOA and specifies that neither the Consumer Financial Protection Bureau (CFPB) nor any Federal agency can take adverse action related to that collection. This in and of itself does not provide credit unions with sufficient infrastructure to undertake collection without exposing the credit union to unacceptable levels of risk.

The statutory carve-out does not protect credit unions from private rights of action related to the information collection, nor does it address state law prohibitions on discrimination.

The statutory carve out cited by Treasury specifically protects credit unions from adverse action related to the collection by the CFPB or the National Credit Union Administration (NCUA) which oversees credit union consumer compliance as part of its oversight examinations. However, the statute does not provide credit unions with protection against individual or class action lawsuits brought under ECOA's private right of action.[4]

Further, it is not at all clear that the federal carve out would protect credit unions against state laws that are parallel to ECOA and that directly make reference to exceptions in ECOA.

Credit unions that attempted compliance with the requirement would likely be exposing themselves to significant litigation at the state and Federal level. Even if a credit union were to eventually succeed in winning that litigation, the risk of reputational damage, financial cost, and loss of member resources is simply not an acceptable risk.

Treasury has not provided the necessary regulatory infrastructure to permit ECIP-awardees to collect demographic data on loans not covered by HMDA.

Lenders are accustomed to the data gathering and reporting requirements for HMDA and the normal CDFI reporting requirements. Mortgage lending is the most extensively regulated type of consumer lending and because of the significant training, structure, and protections in place, it is also the most expensive type of loan to obtain. While the statutory carve out cited by Treasury may provide some protection for credit unions that attempt to collect the information against regulatory action related to the act of collection itself, it does not address the compliant methods of collection, the appropriate language to use

[2] 12 U.S.C. §4703a(k).
[3] 15 U.S.C. §1691(a)(1).
[4] 15 U.S.C. § 1691e.

during collection, or how information should be appropriately stored or shared throughout the lending process.

It is simply not reasonable for Treasury to assume that credit unions can simply “cross-apply” mortgage training, forms, and procedures to other types of loans. For example, Treasury has not provided any guidance in how credit unions should design compliant procedures related to processes like indirect auto lending. Indirect auto lending is exceedingly common among credit unions and a critical way to assist members in accessing affordable loans to ensure they have a car to get to work. When this was raised to Treasury, credit unions were told to call Treasury directly to obtain information on a case-by-case basis. This is not sufficient. In an indirect lending context, dealers have the ability to decline to work with lenders. Where credit unions may be seen to be collecting information improperly or requiring dealers to implement processes that they are not comfortable with, they may simply be dropped. In order to reasonably implement this requirement, credit unions would need guidance from the CFPB to be established and broadly published so that lending partners, like dealers, are able to establish their own requirements and manage their own levels of risk associated with doing business with ECIP-awardee credit unions.

Treasury severely underestimates the time, cost, and burden associated with implementing these requirements.

If a credit union were to ignore the litigation, compliance, and reputational risk associated with implementing these requirements, the operational burden associated with doing so would be enormous.

In addition to system requirements, credit unions would also need to conduct highly sensitive and intensive training on how to safely obtain this information for an extremely broad class of employees. Credit unions would need to implement new forms, processes, and procedures across all loan product lines, including those that involve third parties. Additionally, as the credit union would now be storing significant quantities of highly sensitive information, they would likely also need to implement additional protection for the safety and confidentiality of this information, requiring significant changes to their privacy and information security policies. Credit unions would have to design all these structures themselves and obtain legal opinions regarding their compliance as there is no guidance from the CFPB or NCUA regarding what is sufficient. Credit unions estimate that these changes could take between 5 and 10 years, depending on individual credit union’s size, sophistication, and the loan products offered.

Implementation of Treasury’s requirement would harm and confuse consumers and poses risk to credit unions’ reputations.

Because mortgage lending is the most extensively regulated type of consumer lending and because of the significant training, structure, and protections in place, it is also the most expensive type of loan to obtain. Creating parallel frameworks for other types of loans will directly increase the cost associated with those loans. Further, these requirements may mean credit unions are less competitive in their market, as is likely to happen in the indirect auto lending context as described above.

When consumers obtain a mortgage loan, they experience the same forms and inquiries regarding their race and ethnicity information at every lender they speak with. Many credit unions report that consumers are sometimes put off by the request initially. Seeing formal regulatory language, posted HMDA signs, and having the same experience across all lenders leads consumers to understand and accept that these inquiries are Federal requirements and not driven by an intention to discriminate.

Treasury's requirements would apply to only a small number of individual credit unions, many of which may be the only lender in their market requesting this information on non-mortgage loans. If a consumer asks another lender why the credit union requested this information, it is likely the consumer will be told that they were being discriminated against based on their race or ethnicity. This is simply an unacceptable outcome for credit unions. The regulatory framework for obtaining data under HMDA makes these requests ubiquitous and legitimizes them in the request of consumers. Treasury is requiring ECIP-awardee credit unions to proceed without those protections or any consumer-facing messaging.

Basic fairness requires that Treasury should have been clear about this requirement prior to allowing credit unions to execute agreements and accept ECIP award funds.

Neither the Initial Supplemental Report nor the Securities Purchase Agreement indicated the ECIP-awardees may be required to implement processes to collect actual demographic data on all loans without the use of proxies. The use of proxies was clearly contemplated in the Initial Supplemental Report and credit unions have absolutely no indication this would be required. This requirement is incredibly burdensome, and implementation is excessively risky. Many credit unions would have declined to apply for or accept the funds if this requirement had been disclosed prior to the publication of the proposed QSR.

Obligating credit unions to accept this level of risk without notice once they have already taken the money and endangering their CDFI designation if they fail to comply is not reasonable. This fails as a measure of basic fairness in dealing with ECIP awardees.

Treasury should make the requirement to collect demographic data on non-HMDA loans voluntary.

For all the reasons previously stated, Treasury should make the requirement to collect actual demographic data on non-HMDA loans and report that data in Schedule C voluntary. If Treasury wants demographic data on loans of all types, it should accept proxy data in lieu of actual data.

If Treasury wishes to pursue the goal of obtaining actual demographic data on all loans, it should work with the CFPB and NCUA to provide reasonable compliance guidance and examination expectations for ECIP-awardee credit unions so that credit unions can illustrate to their examiners, auditors, and membership that they are meeting their compliance obligations and not unduly exposing the credit union to litigation and reputational risk. Further, Treasury and the CFPB should jointly undertake a consumer-facing messaging campaign to make consumers aware that this information may be requested for their

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benefit and protection in order to provide reasonable assurances to consumers that ECIP awardee credit unions are not discriminating against them in complying with the requirement.

Finally, once these basic foundations have been laid, Treasury should permit a reasonable implementation period after the publication of sufficient guidance to allow for the establishment of third-party solutions, vendor due diligence, and implementation and training. The minimum implementation period should be three years.

Thank you for the opportunity to provide comments on the QSR.

Sincerely,

Respectfully,

Jeffrey Olson
CEO/President

Amy Kleinschmit

Amy Kleinschmit
Chief Compliance Officer