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National Association of Federally-Insured Credit Unions

February 18, 2020

Comment Intake
Bureau of Consumer Financial Protection
1700 G Street NW.
Washington, DC 20552

RE: Small Business Compliance Cost Survey under the Generic Information Collection Plan (Docket No. CFPB-2020-0008)

Dear Sir or Madam:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing to share comments on the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed information collection related to small business data collection. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve nearly 120 million consumers with personal and small business financial service products. As proposed, the information collection would seek to assess future compliance costs incurred under section 1071 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act). If this information collection is meant to be the last before the Bureau convenes a panel of small business representatives pursuant to the *Small Business Regulatory Enforcement Fairness Act* (SBREFA), then NAFCU recommends that the Bureau modify its survey to balance questions about future costs with additional questions regarding future benefits. Furthermore, the Bureau should consider administering additional surveys to test other pre-rulemaking assumptions that may exist *before* developing an outline of proposals or convening a SBREFA panel.

NAFCU remains concerned that future implementation of section 1071 may yield misleading information about credit unions and negatively influence future small business lending. Credit unions serve distinct fields of membership and are subject to an aggregate limit on member business loans (MBLs). Given the unique characteristics of credit unions and their limited capacity to absorb additional regulatory costs, the CFPB should seek to exempt credit unions from any future rulemaking that compels disclosure of small business lending information. Doing so would be the best way to preserve credit unions' strong relationships with women-owned, minority-owned, and small businesses that seek access to affordable credit.

General Comments

Section 1071 of the Dodd-Frank Act assigns the CFPB the responsibility to issue implementing regulations for collection of "small business loan data." In general, section 1071 aims to facilitate enforcement of fair lending laws and enable communities, businesses and other entities to better identify the needs of women-owned, minority-owned, and small businesses. Section 1071 requires

financial institutions (broadly defined as anyone who engages in a "financial activity") to inquire of any business applying for credit, whether the business is a small business, women-owned or minority-owned. Additionally, the Bureau would collect information about the borrower and action taken on the credit application — similar to what is required under the *Home Mortgage Disclosure Act* (HMDA).

The collection of small business lending data from credit unions will present challenges for the CFPB in terms of developing a methodology that controls for variables such as field of membership and statutory caps on MBLs.

Credit unions are bound by defined fields of membership, which means that small business lending could be limited by geographic restrictions, employer groups, or other charter-specific language that defines who the credit union may serve. In general, the *Federal Credit Union Act* (FCU Act) allows three kinds of field of membership: single common bond charters, multiple common bond charters, and community charters.[1] Community credit unions have a field of membership that is defined primarily in terms of geographic area, whereas an occupational common bond credit union might have a membership that is limited to the employees of a specific company. Women-owned, minority-owned, and small business lending activity could look substantially different for credit unions simply because of regional concentrations of businesses.

The statutory cap on MBLs is another factor that will likely frustrate analysis of business lending data collected from credit unions. In 1998, Congress codified the definition of a member business loan and limited a credit union's member business lending to the lesser of either 1.75 times the net worth of a well-capitalized credit union or 12.25 percent of total assets. This aggregate cap impairs credit unions' ability to effectively lend to small businesses and was recognized in the Bureau's recent Data Point on "Small Business Lending and the Great Recession."[2]

As a result of both MBL and field of membership restrictions, data about credit union business lending will not translate easily when compared to other lenders. If the Bureau is still at the information gathering stage, it would be prudent to consider whether this lack of comparability, weighed against the costs of greatly expanded data collection, can be overcome to facilitate efficient fair lending supervision.

In NAFCU's estimation, the costs of section 1071 implementation far outweigh the benefits for credit unions and their members. NAFCU surveys reveal that many credit unions have limited resources to devote to specialized small business lending. For example, a majority of NAFCU respondents polled in February 2019 reported that staff limitations and insufficient expertise prevented them from retaining a dedicated staff member for SBA lending. Another survey from September 2018, asking questions similar to those presented in the proposed survey, found that 54 percent of respondents characterized their overall business lending process as "marginally

[1] *See* 12 U.S.C. § 1759.
[2] See CFPB, Data Point: Small Business Lending and the Great Recession (January 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf. https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf.

manual." The same survey revealed that the median number of staff involved in the decision-making and internal reporting process for small business loans was only two.

These examples are meant to illustrate credit unions' limited capacity to absorb the costs associated with section 1071 implementation. For some credit unions, the total cost of compliance could easily reach millions of dollars. Furthermore, given credit unions' obvious resources constraints, it is doubtful that their members would appreciate the negative impact mandatory business data collection might have on access to credit—particularly at a time when credit unions are one of the few lenders acting to offset the small business lending void left by banks following the financial crisis.[3]

At a more principled level, the Bureau should consider whether credit unions' historical pattern of good conduct and compliance with fair lending law warrants treatment similar to less scrupulous lenders or nonbank financial institutions. As the Bureau's own data reveals, relatively few credit unions are able or willing to offer small business lending products—and this is mostly due to cost. For credit unions offering such products, the introduction of new reporting rules could threaten the viability of lending programs and potentially consolidate small business lending among banks and online lenders—reducing consumer choice.

Considering these risks, NAFCU appreciates the survey's attempt to measure a future rulemaking's impact on the cost of credit for smaller lenders. However, we ask that the Bureau seriously consider exercising its authority under section 1022 of the Dodd-Frank Act to exempt credit unions from a section 1071 rulemaking. At the very least, the Bureau should communicate its intentions regarding the potential use of exemptive authority as early as possible so that credit unions may present additional information to inform the Bureau's pre-rulemaking analysis.

The Bureau should ask credit unions whether they believe a rulemaking to implement section 1071 would enhance small business lending activity.

The Bureau's cost-benefit analysis must not presume that credit unions and other lenders have no insights related to the purported benefits of a section 1071 rulemaking. By seeking to measure only costs, the survey disregards the fact that credit unions are financial cooperatives and represent the interests of their member-owners. Furthermore, a survey that only measures costs suggests that the Bureau has not clearly defined what the benefits of such a rulemaking would be for credit union members. To ensure that the pre-rulemaking record adequately reflects credit unions' views regarding how section 1071 might enhance lending activity, the Bureau must ask questions about those benefits. Obtaining such views would be an essential part of an honest and thorough cost-benefit analysis, which the Bureau has committed to performing. These questions might include the following:

1. *Would collection of the statutorily defined data elements in section 1071—*
    a. *make it easier to market loans to women-owned, minority-owned, and small businesses?*

[3] *See id*. at 30.

b. make it easier to underwrite loans to women-owned, minority-owned, and small businesses?
c. lower rates or fees on small business products?
d. lower rates or fess on other credit products?
e. increase the profitability of small business lending?
f. enable the offering of more small business loan products?

In short, the answers to these questions in combination with existing question 17 would help the Bureau determine whether a future rule's benefits might be overshadowed by its costs.

The Bureau should test pre-rulemaking assumptions using additional surveys before assembling a panel of small business representatives.

The SBREFA directs the Bureau to convene a panel of "small entity representatives" (SERs) when it is considering a proposed rule that could have a significant economic impact on a substantial number of small entities. Following the administration of the compliance cost survey, the Bureau should not rush to assemble such a panel. The statutory time limit placed on the panel's consultative process (60 days) creates enormous pressure for smaller lenders, like credit unions, to gather necessary data to assess or challenge the Bureau's assumptions.

Furthermore, depending on the number of alternatives presented in a future outline of proposals, a thorough assessment of hypothetical compliance burdens associated with section 1071 implementation might be impossible in such a short time frame. Accordingly, the Bureau should communicate its pre-rulemaking assumptions and general thinking using additional surveys, which are not bound by strict time limits. NAFCU regards the current data collection as an appropriate first step in such a process—but it should not be the last. For example, the Bureau might ask separately whether discretionary publication of section 1071 data might introduce additional costs or challenges related to protecting the privacy of small business loan applicants. The question might be posed this way:

Would publication of section 1071 data by the Bureau create additional, privacy-related compliance burdens that would not otherwise exist?

NAFCU has also urged the Bureau in previous comments to give credit unions additional time to consider proposal outlines before convening a formal SBREFA panel. Given the magnitude of a rulemaking to implement section 1071, the outline should be made available for at least 120 days before a panel is convened. The Bureau should also treat the SBREFA panel as convened when the SERs meet for the first time, which would give SERs more time to fully articulate their perspectives and concerns.

The Bureau should not convene a SBREFA panel until it has formally addressed comments received on its 2018 requests for information regarding external engagements and rulemaking processes.

Although the current information collection request does not propose a timetable for assembling a future SBREFA panel, it is generally expected that the Bureau will do so sometime this year. Before this happens, the Bureau should address the comments it received in 2018 related to its requests for information (RFIs) on rulemaking processes and external engagements. In doing so, the Bureau should formally communicate whether it intends to revise any of its pre-rulemaking policies or procedures in response to the RFI comments, since any change would be relevant to the agency's section 1071 activity. Convening a SBREFA panel before responding to suggestions offered by both consumer and financial institution stakeholders would not only be premature, but could cast doubt upon the Bureau's transparency and responsiveness to such feedback, particularly if the Bureau is already contemplating changes to the panel process.

Conclusion

NAFCU and our members ask that the Bureau exempt credit unions from data collection requirements under section 1071. Credit unions have and continue to maintain strong relationships with women-owned, minority-owned, and small businesses. An elaborate data collection regime comparable to HMDA would only increase compliance costs and frustrate ongoing efforts to expand lending opportunities for small businesses.

NAFCU also asks the Bureau to revise its survey to solicit credit union views on the apparent benefits of a section 1071 rulemaking so that such perspectives are adequately reflected in a future cost-benefit analysis. Additional surveys should be used to validate or test pre-rulemaking assumptions before the Bureau convenes a SBREFA panel. Lastly, the Bureau should formally address comments received on its 2018 RFIs before convening a SBREFA panel to ensure that stakeholder feedback regarding the SBREFA process—and other pre-rulemaking activities—is properly considered.

NAFCU appreciates the opportunity to comment on the Bureau's information collection plan. Should you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

Andrew Morris
Senior Counsel for Research and Policy