



Preston L. Kennedy, *Chairman*
Noah W. Wilcox, *Chairman-Elect*
Robert M. Fisher, *Vice Chairman*
Kathryn G. Underwood, *Treasurer*
Alice P. Frazier, *Secretary*
Timothy K. Zimmerman, *Immediate Past Chairman*
Rebeca Romero Rainey, *President and CEO*

Via electronic submission

April 23, 2019

The Honorable Kathleen Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Cost-Benefit Analysis of Small Business Data Collection; Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Director Kraninger:

The Independent Community Bankers of America (“ICBA”)¹ welcomed your remarks at the hearings held by the House Financial Services and Senate Banking Committees. Your comments clearly indicated your commitment to leading the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) in a manner that will protect American consumers while still enabling a vibrant financial services marketplace. ICBA also appreciated your recent announcement that the Bureau will convene a series of symposia to explore the challenges of implementing consumer finance protection law in a dynamic financial services marketplace.² These symposia will allow industry experts to discuss and contemplate the best ways to utilize all of the Bureau’s tools to further the Bureau’s mission. Presumably, the Bureau’s newly created Office of Cost-Benefit Analysis (“Office”) will prove to be an important resource at these symposia.

While the Office is yet to be fully staffed, ICBA is optimistic that the Office will work in concert with other offices to identify potential benefits and burdens *before* rules are promulgated. This would be a welcome shift from the previous practice of issuing broad rules applicable to a wide-

¹ The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers’ dreams in communities throughout America. For more information, visit ICBA’s website at www.icba.org.

² CFPB, *Press Release*, “Consumer Financial Protection Bureau Announces Symposia Series,” Apr. 18, available at <https://www.consumerfinance.gov/about-us/newsroom/bureau-announces-symposia-series/>.

The Nation’s Voice for Community Banks.®

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org

scope of products or persons, then only later acknowledging the burden and further tailoring the rule in subsequent iterations. Although many community banks often benefit from further tailoring that excludes them from subsequent coverage, they have already incurred the costs of complying with the overly-broad initial version. A better approach would be to first carefully evaluate a potential rule's effects, then tailor it before an initial rulemaking.

ICBA believes that the new Office of Cost-Benefit Analysis will greatly inform the CFPB's policy and rulemaking decisions by providing a fuller picture of the Bureau's actions. As the Office begins to deploy resources toward certain issues, ICBA recommends that the Office collaborate with the Bureau's Office of Small Business Lending Markets and prioritize one of the last unimplemented provisions of the Dodd-Frank Act: Section 1071, Small Business Data Collection ("Section 1071" or "1071"). ICBA believes that consumers and market participants alike would benefit from a detailed analysis of Section 1071 and the impacts of potential rulemaking scenarios.

Background

As you are aware, Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act ("ECOA") to require the CFPB to implement rules for the collection and reporting of data on financial institutions' small business lending. This requirement covers the collection of certain data in connection with credit applications made by women- or minority-owned businesses and small businesses, including the race, sex, and ethnicity of the principal owners of the business, and the loan amount, census tract, annual revenue of the business, and more. The Bureau has yet to promulgate a rule under Section 1071's mandate, but it has taken several interim steps, including a 2017 field hearing held in Los Angeles, the 2017 publication of a Request for Information ("RFI") to solicit public feedback, and multiple stakeholder meetings and outreach.

ICBA has repeatedly expressed concerns with Section 1071. Small business lending is a complex business that cannot be "commoditized" in the same way as consumer lending. Each small business loan has customized terms based on an analysis of numerous factors. Complex lending should not be subject to simplified, rigid analysis, which might give rise to unfounded fair lending complaints. For this reason, the rules under Section 1071 will have a chilling effect on lenders' ability to price for risk, unless the Bureau can properly tailor a rule **before** implementation. This will require substantial analysis.

The application of a *consumer* protection law is grossly incongruous with the underlying nature of small business lending. Unlike consumer loan products, such as mortgages and credit cards, small business loans are non-homogenous and do not lend themselves to standardized recordkeeping or comparative analysis.

Full Analysis of a Potential Rulemaking and Its Various Effects is Warranted

While the Bureau considers a potential rulemaking, ICBA encourages the Bureau's new Office to fully study the potential benefits and costs of an implementation rulemaking. Imposing any new data collection and reporting requirements under Section 1071 on community bank small business lenders would negatively impact small business lending and lead to unfortunate, unintended consequences for small business owners seeking credit. ICBA stresses the importance of thorough study and analysis before the issuance of a proposed rule that could disincentivize small business lending, thereby impairing small business access to credit. Following are several areas that are ripe for further study in advance of any potential rulemaking.

Staffing Issues Unique to Community Banks

Unlike large financial institutions, community banks have small staffs that often perform multiple functions. They cannot afford to hire several people to process the data collection on small business credit applications. It is common for the same employee that meets with an applicant and gathers information during the application process to make or participate in the credit decision. As such, it would be extraordinarily costly to segregate the information collection and storage process from the decision-making process.

Adoption of New IT Systems and Forms

In addition to increasing staff to ensure the information collection is segregated from the decision-making process, community banks would have to develop a separate database to store and report such information. Community banks would have to create and develop an entirely new small business lending process to accommodate a new data collection and reporting requirement and remove the nuanced and unique nature of community bank small business lending.

Elimination of "High-Touch," Relationship Underwriting

Community banks would need to revert to a check-the-box system and algorithm where small businesses either meet a predetermined set of standardized credentials or do not. Homogenization of small business lending would drive various small business credit out of small banks and significantly reduce access to credit for the businesses that need it most – small businesses with unique credit needs.

Community banks do not use standard applications for small business loans. Unlike other types of consumer credit, each small business has its own distinctive characteristics with unique credit needs. Existing business lending practices do not conform to a standard data collection practice and would require extraordinary change to comply. Unlike the residential mortgage

market, where there is a standard portfolio of products, each small business has its own unique characteristics and credit needs, and each small business loan has unique credit terms. For example, the terms of a loan can vary depending on whether it is collateralized, the nature of that collateral, or even the bank's relationship with the small business. As a result, there is no standard application for small business loans. The current small business lending process for community banks would not conform to a standard data collection process. If banks were forced to automate their small business loans, many small borrowers that do not meet the standardized underwriting box would miss-out on opportunities for credit.

Consumer Re-Identification Risk

In addition to community banks' inability to comply with a 1071 rule, the breadth of the data required to be collected and potentially published under the CFPB's initiatives may make it possible to identify an individual borrower or business. Consequently, private and potentially embarrassing financial data about applicants could be revealed. This is especially true in rural and smaller markets where the small number of loans and households make it easier to identify individual borrowers. Special consideration should be given to lenders that serve such areas.

The Bureau is statutorily authorized to collect data, both as a means to facilitate its overall function and as method to provide consumers with marketplace information.³ However, given the scale and magnitude of the data collected, as well as the ramifications of potential vulnerabilities and data breaches, ICBA remains concerned with the Bureau's collection and control of data.

For example, ICBA has repeatedly expressed concern with the Bureau's lack of written procedures and documentation for data intake and management. ICBA raised concerns about the possibility of bad actors reassembling disaggregated data to identify personal information about consumers, as well as the degree to which the Bureau shares information with others, including federal and state agencies.

ICBA also maintains that transparency is necessary to determine what sources the Bureau used to collect data. Concurring with several of these concerns, the Government Accountability Office ("GAO") issued a report in 2014, finding that the Bureau lacked robust data governance protocols that provide the public with transparency on how the Bureau uses data.⁴ Although the Bureau has addressed and remedied many of these concerns in its recently published a report on the Bureau's sources and uses of data,⁵ ICBA recommends that the report be

³ 12 U.S.C. 5511(c).

⁴ Gov't Accountability Off., GAO-14-7 58, Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced, (Sept. 22, 2014), available at <https://www.gao.gov/assets/670/666000.pdf>.

⁵ Sources and Uses of Data at the Bureau of Consumer Financial Protection, Sept. 2018, available at https://files.consumerfinance.gov/f/documents/bcfp_sources-uses-of-data.pdf

amended to include the handling and potential treatment of data collected under a 1071 rulemaking.

Evaluation of Rulemaking Options to Determine Optimal Benefit and Least Disruptive Effect

In addition to studying the costs of implementing a 1071 rule, the Office also has the opportunity to address more nuanced questions and determine how different variations of a 1071 rule would ripple across the marketplace. For example, the Office could examine how definitional variances of “small business” would alter the underlying data pool. The definition of “small business” could vary based on a business’s asset size, revenue, or number of employees. Alternatively, the Bureau could study how varying the covered loan size threshold would alter the collected data, and what impact that would have on statistical analyses.

Small Business Lending is the Lifeblood of the Economy

ICBA strongly urges the Bureau to continue collecting information about the small business lending market and the impact Section 1071 will have on community bank small business lenders before initiating any rulemaking. It is clear that this market is complex, and it is important to understand the market dynamics before potentially increasing small business borrowing costs and reducing access to small business loans. ICBA recommends that the Bureau continue its outreach to all stakeholders and hold a Small Business Advocacy Review (SBAR) panel under the Small Business Regulatory Enforcement Fairness Act (SBREFA). Finally, ICBA was pleased to learn that one of the Bureau’s forthcoming symposia will focus on the challenges of promulgating a Section 1071 rule. This is a topic of great importance to community banks. It warrants thorough consideration and ICBA would welcome an opportunity to present the unique challenges for community banks at the forthcoming symposium.

Again, ICBA still believes that the only comprehensive solution would be Congressional recognition of these problems and a full legislative repeal. However, short of legislative action, ICBA recommends that the Bureau use all the resources at its disposal to closely study the impact of a 1071 rulemaking and plot a course that would have the smallest disruption to the marketplace. After further exploration, ICBA is confident that the Bureau will recognize the inordinate burden that this rule would place on community banks and will use its authority under the Dodd-Frank Act to exempt community banks from data collection and reporting, limit any regulation to data points required by statute, and prioritize protecting customer privacy as it considers new data reporting requirements.

If you have any questions or would like additional information, please do not hesitate to contact me or Michael Emancipator, ICBA's vice president and regulatory counsel, at (202) 659-8111 or michael.emancipator@icba.org.

Sincerely,

/s/

Rebeca Romero Rainey
President and CEO

The Nation's Voice for Community Banks.[®]

WASHINGTON, DC
1615 L Street NW
Suite 900
Washington, DC 20036

SAUK CENTRE, MN
518 Lincoln Road
PO Box 267
Sauk Centre, MN 56378

866-843-4222
www.icba.org