Comment Intake—Section 1071
Small Business Lending Data Collection
Mr. David Uejio
Acting Director
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

January 6, 2022

RE: Docket No. CFPB-2021-0015 / RIN 3170-AA09

By electronic mail: 2021-NPRM-1071@cfpb.gov

Dear Mr. Uejio:

Americans for Financial Reform Education Fund commends the Consumer Financial Protection Bureau (CFPB) for its proposed rule on Small Business Lending Data Collection under the Equal Credit Opportunity Act (Reg. B) (Docket No. CFPB-2021-0015).[1] Americans for Financial Reform Education Fund (AFREF) is a coalition of more than 200 consumer, community, labor, civil rights, and other organizations dedicated to advocating for policies that shape a financial sector that serves workers, communities and the real economy, and provides a foundation for advancing economic and racial justice.

Small businesses owned by women and people of color have faced historic, considerable, and persistent inequitable access to financing and credit related to structural racial wealth inequality, patterns of disparate treatment and outcomes securing loans, and discrimination. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) amended the Equal Credit Opportunity Act to collect data on small business lending to "facilitate enforcement of fair lending laws and enable communities and governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[2] The Equal Credit Opportunity Act outlaws lending discrimination on the basis of race, color, religion, national origin, sex, marital status, or age.[3]

Section 1071 of the Dodd-Frank Act requires the CFPB to collect and disclose small business loan application and disposition data by race and gender including the census tract where the business is principally located.[4] Small business lenders are required to report the type and purpose of loan, the amount requested and amount approved, the disposition of the application, the census tract where the business was located, the gross annual revenue of the business, and the race (and ethnicity) and

[1] 86 Fed. Reg. 56356 et seq. October 8, 2021.
[2] Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203. July 21, 2010 at §1071; 15 USC §1691c-2(a).
[3] 15 USC §1691(a).
[4] 15 USC 1691c-2(e)(2).

sex of the applicant.[5] Further, the CFPB was authorized to collect "any additional data" that would fulfill the purpose of the statute.[6]

The proposed rule takes significant and vital steps to assess and enforce compliance with fair lending and anti-discrimination statutes, to identify community development small business capital needs, and to improve transparency in small business credit and lending markets. AFREF wholeheartedly supports the intent of the proposed rule and urges the CFPB to finalize the rule promptly with modest suggested improvements.

1. The inequitable access to small business credit worsens the racial wealth gap

Small businesses are important engines for economic growth and household wealth building, but historic inequitable access to small business credit has impeded the ability of women and people of color to establish and grow entrepreneurial small businesses. Small businesses generate job growth and innovation and support 30 million families whose income and wealth is tied to the small businesses they own.[7] Just under half of all workers are employed by small business.[8]

This lack of equitable access to small business credit and capital contributes to the racial wealth gap. Small businesses are important routes to wealth building.[9] But persistent racial and gender structural inequalities and discrimination have suppressed entrepreneurship for women and people of color, costing communities of color billions of dollars in economic activity every year.[10] Studies have repeatedly found that Black, Latinx, and Asian small business owners had lower access to capital, are charged higher interest rates, receive lower loan amounts, and have higher loan rejection rates than comparably creditworthy white small business owners.[11] More than half of Black-owned and Latinx-owned businesses that needed financing did not apply for loans because they did not think they would be approved, according to a 2018 SBA survey, and "even the most credit-worthy minority borrowers anticipated being denied credit."[12]

A vast and disproportionate number of businesses are owned by white entrepreneurs. The Small Business Administration noted that Black and Latinx families were "greatly underrepresented in business ownership."[13] In 2017, only 3.5 percent of businesses were Black-owned, 5.8 percent were Latinx-owned, 9.7 percent were Asian-owned compared to 81 percent that were white-owned —

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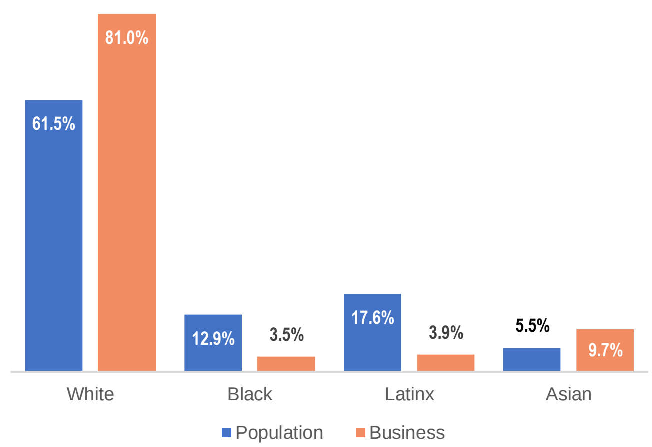
[5] 15 USC 1691c-2(e)(2).
[6] 15 USC 1691c-2(e)(2)(H).
[7] Farrell, Diana, Chris Wheat, and Chi Mac. JPMorgan Chase Institute. "Small Business Owner Race, Liquidity and Survival." July 2020 at 4.
[8] de Zeeuw, Mels. Federal Reserve Bank of Atlanta. "Small Business Credit Survey: Report on Minority-Owned Firms." December 2019 at iii.
[9] de Zeeuw (2019) at iii.
[10] Liu, Sifan and Joseph Parilla. Brookings Institute. "Businesses Owned by Women and Minorities have Grown. Will COVID-19 Undo That?" April 14, 2020.
[11] de Zeeuw, Mels G. and Victor E. da Motta. Federal Reserve Bank of San Francisco. "Minority-owned enterprises and access to capital from Community Development Financial Institutions." *Community Development Innovation Review*. May 19, 2021 at 6 to 7.
[12] Robb, Alicia. Robb Consulting for the U.S. Small Business Administration. "Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms." February 2018 at 35 and 36.
[13] *Ibid.* at 8.

with Black- and Latinx-owned businesses substantially lagging their proportion of the population (see Figure 1).[14]

White families are more likely to own small business and the business equity they own are more valuable than those owned by Black or Latinx families. Black-owned small businesses have been more likely to close, have fewer employees, generate less revenue, and are less profitable than white-owned firms.[15] At the end of 2017, Black-, Latinx-, and Asian-owned small businesses with employees were more likely to break even or operate at a loss than white-owned small businesses — more than half of Black-owned firms did not turn a profit compared to 42 percent of white-owned firms.[16] The 2019 Federal Reserve Survey of Consumer Finances found that white families held business equity at more than twice the rate of Black families and more than three times the rate of Latinx families (16.5 percent, 7.0 percent, and 4.8 percent, respectively), and that white family business equity was far more valuable ($89,000) — nearly twice as valuable as businesses owned by Latinx families ($32,000) and more than 40 percent more valuable than businesses owned by Black families ($70,000).[17]

Fig. 1: Business Ownership & Population by Race 2017



Source: Congressional Black Caucus Foundation/Bank of America

Despite all these challenges, the number of small businesses owned by people of color has grown steadily and about twice as fast as the number of white-owned firms.[18] By 2019, there were 1.1 million small businesses owned by Black, Latinx, and Asian families.[19] But continued inequitable access to credit and financing makes it more difficult for businesses owned by people of color to sustain, reinvest, and expand their businesses.

Banking consolidation has exacerbated credit access for communities of color: The CFPB identified consolidation in the banking industry as a factor that has adversely impacted the small business lending market and disproportionately disadvantaged businesses owned by women and people of color.[20] Bank consolidation can reduce small business lending and have a disproportionate impact on the ability of businesses owned by people of color and women as well as very small businesses to access credit.

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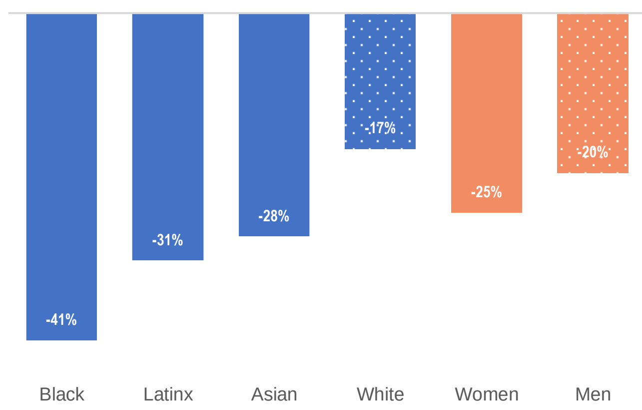
[14] Howard, Tiffany, Naomi Smith, and Uju Mwaigwe. Congressional Black Caucus Foundation and Bank of America. "Banks & the Black Community." June 2020 at 3 to 4.
[15] Farrell, Wheat, and Mac. (2020) at 6.
[16] de Zeeuw (2019) at 1.
[17] Federal Reserve Board (FRB). Survey of Consumer Finances 2019. Business equity by race and ethnicity. 2020.
[18] Robb (2018) at 12.
[19] de Zeeuw (2019) at iii.
[20] 86 Fed. Reg. 56359.

Larger banks may be less likely to provide small business credit and more likely to provide larger loans to larger businesses because it is easier to underwrite and monitor fewer, larger loans.[21] Mergers between larger banks that create more concentrated markets reduce small business credit access, especially for more marginal firms, and leave fewer credit alternatives in local markets.as mergers reduce the number of banks.[22] A 2014 Massachusetts Institute of Technology paper found that large bank merger-driven branch closures reduced small business lending for several years and that the decline was concentrated in lower-income areas and communities of color.[23]

Fig 2: Decline in Number of Small Business in Early Months of Pandemic by Race, Gender



Source: NBER 2020

Highly concentrated markets can impede access to credit to businesses owned by people of color that are more likely to be able to receive financing at smaller banks. The Federal Reserve Bank of Atlanta 2018 small business credit survey focused on firms owned by people of color found that Black- and Latinx-owned businesses were more likely to be approved for a small business loan at small banks than large banks and that only 5 percent of borrowers of color were dissatisfied by their small bank loan experience — several-fold lower than at large banks or online lenders and comparable to white borrower dissatisfaction at 6 percent.[24] Studies have found that small businesses pay higher interest rates in more concentrated banking markets.[25]

Pandemic heightened economic precarity for small businesses owned by women and people of color: The pandemic-driven economic downturn was especially pronounced for small businesses owned by people of color and women. These more financially vulnerable firms are typically more susceptible to closure and shut-down during economic crises. Black-owned and Latinx-owned companies were less likely to have survived the 2008 financial crisis and Great Recession than white-owned firms.[26]

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[21] Carletti, Elena, Philipp Hartmann, and Giancarlo Spagnolo. "Implications of the bank merger wave for competition and stability." *Risk Measurement and Systemic Risk, Proceedings of the Third Joint Central Bank Research Conference*. January 2002 at 40.
[22] Samolyk, Katherine and Christopher A. Richardson. Federal Deposit Insurance Corporation. Working Paper 2003-02. "Bank consolidation and small business lending within local markets." April 2003 at 9.
[23] Nguyen, Hoai-Luu. Massachusetts Institute of Technology. "Do Bank Branches Still Matter? The Effect of Closing on Local Economic Outcomes." December 2014 at 3.
[24] de Zeeuw (2019) at 13 and 15.
[25] Carletti, Hartmann, and Spagnolo (2002) at 40.
[26] Jarmon, Ron, C.J. Krizan, and Adela Luque. U.S. Census Bureau. "Owner Characteristics and Firm Performance during the Great Recession." September 2014.

In the first months of the pandemic, the number of businesses owned by people of color and women plummeted far faster than the number owned by white men (see Figure 2).[27] The federal pandemic relief Paycheck Protection Program (PPP) for small businesses reinforced rather than compensated for the structural and historic racial barriers to accessing credit for small businesses owned by women and people of color.[28] According to the *Associated Press*, companies owned by people of color "struggled to find banks that would accept their applications or were disadvantaged by the terms of the program."[29] A Goldman Sachs survey found that Black-owned businesses were less likely to apply and more likely to get rejected for PPP loans.[30] A National Community Reinvestment Coalition matched-pair test found that 43 percent of Black PPP applicants received less encouragement, were offered different products, had more information requested than white applicants and that Black women applicants received worse treatment in 59 percent of the cases.[31]

2. The CFPB must make the small business lending data comprehensive and comprehensively available and accessible

There is almost no comprehensive, publicly available, small business lending data. A 2017 study found that "sources of small busines data are extremely limited" beyond the aggregate annual assessment by the Small Business Administration.[32] The proposed rule would create the first applicant-level dataset of small business loans and would be an invaluable tool for the CFPB, for other regulators and policy makers, and for the public. The granularity of the proposed applicant-level data would be a substantial step forwards and would not only promote governmental fair lending enforcement but provide vital tools for community groups, local governments, and small business advocates to assess the availability of credit necessary to promote community development, especially in lower-income areas and communities of color.

The history of the Home Mortgage Disclosure Act (HMDA) demonstrates the power of transparency and disclosure in lending markets. Since the inception of the HMDA, community groups, newspapers, and local governments have been able to demonstrate racially disparate home mortgage lending patterns, press for greater enforcement of fair lending laws, hold banks accountable for failing to equitably meet the credit needs of people of color and communities of color. The publicly available data became a powerful tool to make federal and state anti-discrimination statutes more meaningful and effective.

The proposed small business applicant-level lending data holds the same promise for small businesses lending. AFREF concurs with the CFPB assessment that it "must collect and make available sufficient data to help the public and regulators identify potentially discriminatory lending

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[27] Fairlie, Robert W. National Bureau of Economic Research (NBER). "The impact of Covid-19 on small business owners: Evidence of early-stage losses from the April 2020 Current Population Summary." NBER Working Paper No. 27309. June 2020.

[28] Center for Responsible Lending. "The Paycheck Protection Program Continues to be Disadvantageous to Smaller Businesses, Especially Businesses Owned by People of Color and the Self-Employed." May 27, 2020.

[29] Rosenberg, Joyce M. and Justin Myers. "Minority-owned companies waited months for loans, data shows." *Associated Press*. December 31, 2020.

[30] Goldman Sachs. "Help (still) wanted." April 27, 2020.

[31] Lederer, Anneliese and Sara Oros. National Community Reinvestment Coalition. "Lending Discrimination within the Paycheck Protection Program." July 15, 2020.

[32] Bone, Sterling et al. Jon. M Huntsman School of Business. Utah State University. "Detecting Discrimination in Small Business Lending." 2017 at 10.

patterns that could constitute violations of fair lending laws."[33] The proposed statutory and discretionary data elements would provide necessary granularity to compare comparable applicants by controlling business characteristics and examining the extent to which Black-, Latinx-, Asian-, and women-owned small business applicants are receiving comparable credit at comparable prices and terms as white-owned applicants.

The CFPB proposes making the dataset available to the public "subject to modifications or deletions" at CFPB's discretion "to protect privacy interests."[34] AFREF urges the CFPB to publicly release as much data as possible to maximize the benefits of the proposed rule. The proposed dataset mirrors the loan application record data under the Home Mortgage Disclosure Act which has successfully protected the privacy of mortgage applicants for decades. While recognizing the importance of protecting applicant privacy, AFREF believes that the data poses minimal privacy risks to applicants — certainly far less than the many documented data and identity breaches at banks, credit bureaus, and retailers over the past few decades. The data should be publicly available and downloadable in easy-to-use formats including aggregate-level, institution-level, and geography-based machine-readable data as well as providing the entirety of the application-level data available for download (nationally, by state, by metropolitan area, and by institution).

3. The proposed rule should comprehensively cover small business lenders

AFREF supports broad coverage of entities and institutions that provide credit to small businesses. The CFPB should not exempt classes of institutions that provide small business lending if the institutions meet the activity-based loan level threshold of 25 small business loans annually. The CFPB correctly assesses that to meet the purpose of 1071 it must collect "small business lending data from all sizes and types of financial institutions" except those with very low loan volume.[35] AFREF supports the inclusion of community development financial institutions and credit unions that provide important sources of small business credit, especially to borrowers of color. It is also essential to collect information from merchant cash advance lenders and online-only lenders that provide small business credit often at high prices and with opaque terms that can amount to predatory loans. The CFPB should include all credit card lending to small business borrowers. The proposal only includes small business credit card accounts and credit lines but the CFPB should include personal credit card borrowing that finances small business expenses.

The CFPB should refrain from categorizing or defining online-only lenders as "fintech" institutions because there is no need for a regulatory definition in this context (they should be either be categorized as online-only lenders or non-depository institutions) and the addition of a fintech regulatory definition could adversely impact other regulatory efforts by states or the CFPB to address predatory practices by these non-depository, primarily online, financial services companies.

The CFPB should maintain the 25 small business loan activity-based threshold (§1002.105(b)): The CFPB should utilize a straightforward activity-based threshold to ensure clarity of compliance and the lower 25 annual small business loan origination (over each of the two prior years) is the appropriate activity-based threshold.[36] An activity-based threshold is far superior to an

[33] 86 Fed. Reg. 56373.
[34] 86 Fed. Reg. 56358.
[35] 86 Fed. Reg. 56420.
[36] 86 Fed. Reg. 56420.

asset-based threshold which could exclude companies that do not report their asset levels (like many online-only lenders) or smaller institutions that nonetheless are an important source of local small business credit, especially in rural areas or urban neighborhoods. The CFPB observes that an asset threshold would effectively "only apply to depository institutions" and "risk distorting the collected data."[37] The 25-loan threshold is the most appropriate level because it would cover a far larger portion of depository institutions; raising the threshold to 50 loans would exempt nearly half (48 percent) of depository institutions and a 100-loan threshold would exempt two-thirds of institutions.[38]

The CFPB should collect data on merchant cash advance lenders and loans ((§1002.105(a)): AFREF supports the CFPB's proposed inclusion of data collection from merchant cash advance (MCA) lenders. MCA lenders provide high-cost financing to small businesses with lower credit scores secured and repaid by future business revenues — usually by pledging a portion of daily credit card receipts of a set daily withdrawal from business accounts.[39] These lenders made approximately $20 billion in loans in 2019.[40] Nearly one in ten small businesses (9 percent) sought credit from merchant cash advance firms in 2018 and 85 percent of these applications were approved.[41] Black-, Latinx, and Asian-owned small businesses were more likely to use merchant cash advance loans than white-owned businesses (6 percent, 8 percent, 8 percent, and 5 percent, respectively).[42]

New York and California have recently applied APR disclosure laws to cover MCA loans because of their opaque and high interest rates.[43] The Federal Trade Commission has singled out MCA lenders for offering very high-cost loans (the repayment of 20 percent to 50 percent of principle amounts to triple-digit APRs) that small businesses struggle to repay, often having to renew the MCA which double dips on their receipts (known as 'stacking').[44] Further, the industry often uses "abuse collection tactics," including confessions of judgement requirements where small businesses waive their rights to contest collection efforts in court.[45] One merchant cash advance firm under federal investigation charged interest rates over 50 percent APR (sometimes over 400 percent) and engaged in "Mafia-style threats of violence" to collect on its loans, according to the *Philadelphia Inquirer*.[46] The CFPB rightly identifies these abusive practices as potentially raising fair lending concerns.[47]

The CFPB should collect data from community development financial institutions and credit unions (§1002.105(a); §1002.109(b)(9)(v) and (b)(9)(iii)): AFREF supports the inclusion of community development financial institutions (CDFIs) and credit unions in covered financial

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37 86 Fed. Reg. 56423.
38 86 Fed. Reg. 56421.
39 86 Fed. Reg. 56404; Lipman, Barbara J. and Ann Marie Wiersch. Federal Reserve Bank of Cleveland. "Alternative Lending through the Eyes of 'Mom & Pop' Small-Business Owners: Findings from Online Focus Groups." August 25, 2015 at 4 and 5.
40 86 Fed. Reg. 56404.
41 Federal Reserve Banks. "Small Business Credit Survey: Report on Employer Firms 2019." 2019 at 15 and 18.
42 de Zeeuw (2019) at 5.
43 86 Fed. Reg. 86368.
44 Federal Trade Commission (FTC). Staff Perspective. "'Strictly Business' Forum." February 2020 at 6.
45 *Ibid*. at 7.
46 Arvedlund, Erin and Jeremy Roebuck. "Par Funding threatened violence, trashed reputations after business took out loans at brutal interest rates, borrowers say." *Philadelphia Inquirer*. August 30, 2020.
47 86 Fed. Reg. 56405.

institutions.[48] Black-owned businesses turn to credit unions and CDFI's more frequently than other borrowers. Black-owned small businesses were more likely than others to seek small business loans from credit unions (19 percent) or CDFIs (17 percent).[49] Community Development Financial Institutions are an important source of credit to Black-owned small businesses accounting for over 6 percent of Black-owned firms but the Federal Reserve Bank of San Francisco found evidence that Black business owners were half as likely to receive loans as whites from CDFIs.[50] These patterns warrant further exploration that would be enhanced by collection of data under the proposed rule.

The CFPB should collect data on credit card loans — including personal credit card loans that finance small businesses (§1002.105(a)): AFREF supports the CFPB's inclusion of business credit card loans in the proposed rule but recommends that the Bureau additionally include personal credit card loans that finance business expenses, a vital source of credit for very small, start-up, and businesses owned by women and people of color. The CFPB estimates that some $62 billion in credit card financing went to small businesses — likely an underestimate that does not include personal credit card debt.[51] Credit cards are a significant portion of financing for small business start-ups especially for people of color and these loans have far higher interest rates that impose costs that constrain business growth and wealth building. More than one-fourth (25.7 percent) Black-owned small business start-ups used credit cards (both personal and business credit cards), compared to 20.9 percent of Latinx-owned, 15.9 percent of Asian-owned, and 15.7 percent of white-owned small businesses — Black- and Latinx-owned businesses were more likely to use credit cards than receive bank loans.[52] The CFPB cautions that it will difficult to determine which credit card loans are for business versus personal expenditures, but the small business owners already must keep track of their personal and business expenses for tax and other reporting purposes. Moreover, some or many purchases would seem to be clearly business-related expenses (industrial kitchen equipment, for example). The CFPB could request credit card lenders ask personal credit card borrowers to report whether purchases are primarily for business purposes, could set a threshold over which credit card borrowers would identify business expenses paid through personal credit card, or ask whether larger purchases are predominantly for business purposes.

The CFPB should include online-only lenders but should not define "fintech" (§1002.105(a); §1002.109(b)(9)(xii)): AFREF supports the inclusion of online-only small business lenders in the list of covered institutions. These online-only lenders are providing credit to small businesses — especially many owned by people of color that are discouraged by their prospects of receiving loans at depository institutions — but many online-lenders charge high fees and have opaque and expensive terms that disadvantage borrowers. In 2018, nearly one-third (32 percent) of small businesses had turned to online lenders for credit.[53] The CFPB notes that online-only lenders could be "apparently be filling an important need, but this could actually be an area with predatory conduct."[54]

Online-only lenders offer often high-priced loans (over 45 percent APR) and difficult to navigate terms, conditions, and prices that may disadvantage small businesses and impose unnecessarily high

[48] 86 Fed. Reg. 53380; 86 Fed. Reg. 56605.
[49] de Zeeuw (2019) at 13
[50] de Zeeuw abd da Motta (2021) at 12 and 17.
[51] 86 Fed. Reg. 56366.
[52] Includes personal and business credit cards. Robb (2018) at 15 and 16.
[53] Federal Reserve Banks (2019) at 16.
[54] 86 Fed. Reg. 56454.

repayment burdens.[55] Online lenders offer a wide variety of descriptions and calculations for key loan features (costs, fees, and terms) that make it very difficult for small businesses to shop for the best loan and comparatively assess the costs of credit offerings.[56] More than half (53 percent) of small business borrowers that took out loans from online-only lenders were dissatisfied with the high interest rate costs and one-third (32 percent) were dissatisfied the unfavorable repayment terms (32 percent), dissatisfaction levels that were far higher than at banks.[57] The lack of clear disclosures of loan costs, fees, and terms cost small businesses billions of dollars each year.[58]

The online lending industry suggests that it is more effectively reaching borrowers of color than brick-and-mortar lenders. Black-owned and Latinx-owned businesses have turned to online lenders in part because they are discouraged by the high denial rates at depository institutions.[59] In 2018, online lenders approved 82 percent of all small business loan applications.[60]

The disproportionate share of small businesses owned by people of color seeking loans from online lenders could raise significant fair lending concerns because of the generally higher costs and hidden terms and conditions. Black and Latinx small business owners applied to online lenders about one-third more frequently than white business owners (41 percent, 43 percent, and 32 percent, respectively).[61] During the pandemic, more than half of the government-backed small business emergency loans under the Paycheck Protection Program to Black-owned businesses were from online lenders and those lenders made 27 percent of their originations to Black-owned businesses (compared to 3 percent of small bank PPP loans and somewhere between 4 and 8 percent of large bank PPP loans).[62]

These patterns raise multiple potential fair lending concerns. First, a 2021 New York University and University of Chicago study found that the disparity in PPP lending between online and brick-and-mortar banks could not be explained by business revenues or cash-flow, suggesting that even the federal loan guarantees did not reduce the propensity of traditional lenders to underserve Black-owned businesses.[63] Second, are online lenders disproportionately push marketing more costly loan products to Black- and Latinx-owned small businesses compared to the prices and terms offered to white-owned businesses.

Finally, AFREF recommends that the CFPB not define these online-only lenders as "fintech" institutions and that the CFPB should not include "fintech" as a category in its covered lending institution typology.[64] The other institution types in the list are governed by objective, statutory definitions (credit union, bank, CDFI, Farm Credit System institution). So-called "fintech" companies contend that they are alternatives to traditional banking services, but in reality, things like

[55] Lipman, Barbara J. and Ann Marie Wiersch. Federal Reserve Board. "Searching for small business credit online: What prospective borrowers encounter on fintech lender websites." *Consumer & Community Context*. November 2019.
[56] FTC (2020) at 4.
[57] Federal Reserve Banks (2019) at 20.
[58] Beyond, Lydia. "Square, PayPal face cost disclosures for small business loans." *Bloomberg Law*. October 14, 2021.
[59] Bone et al. (2017) at 7.
[60] Federal Reserve Banks (2019) at 19.
[61] de Zeeuw (2019) at v.
[62] Howell, Sabrina T. et al. New York University Stern School of Business, National Bureau of Economic Research, and University of Chicago. "Racial Disparities in Access to Small Business Credit: Evidence from the Paycheck Protection Program." October 15, 2021 at 13.
[63] *Ibid.* at 3 and 28.
[64] 86 Fed. Reg. 56498; §1002.109(b)(9)(xii); 86 Fed. Reg. 56605.

small business lending are actually a traditional banking service delivered primarily in an online-only format. The online mechanism would already be captured by the proposed rule's application channel (in-person, by telephone, or online) data element. These online only lenders could be considered non-depository institutions or commercial finance companies under the financial institution type. Alternately, the CFPB could replace "fintech" with "online-only" in its lender typology.

The CFPB should not attempt to provide a new regulatory definition for "fintech" in the proposed rule. Any regulatory definition or application could have broad ramifications for borrower protections and disclosure requirements for other consumer or commercial services offered by these online-only banking service providers. The fintech industry has contended that since the companies are not banks, they are not bound by consumer protection and disclosure laws even when these online-only firms offer traditional banking products (like small business loans in this instance) delivered online. Any CFPB regulatory definition could have spill-over effects in other areas of federal consumer protection or state consumer protection. A CFPB definition and institutional categorization could give the online-only businesses an imprimatur of authorization to operate in other contexts that the CFPB did not anticipate that would likely disadvantage consumers.

4. The CFPB should collect necessary demographic information on small business applicants and the geography of the businesses to assess compliance with fair lending laws

The proposed rule would collect robust demographic information on small business owners that AFREF generally supports. More specific and more granular data on the race, ethnicity, and sex of small business credit applicants would make fair lending enforcement more robust. While AFREF supports the general approach of the proposed rule, it recommends considering collecting data on whether the applicant is a person with disabilities; better data collection on gender, gender identity, and sexual orientation of the applicant; and supports adding a Middle Eastern or North African racial category. Further, AFREF recommends that CFPB be more proscriptive in collecting geographic data by mandating that lenders specifically inquire as to the location where the proceeds of the small business credit would be used to get a more precise geolocation of the small business to assess whether community development credit needs are being met, to more fully monitor compliance with fair lending laws in communities of color, and to strengthen Community Reinvestment Act compliance.

The CFPB should enhance the reporting of minority-owned and women-owned businesses (§1002.102(m) and §1002.102(s)): The definition of minority-owned, women-owned businesses is appropriate and the reporting of the number and race, ethnicity, and sex of principal owners provides the potential to more carefully assess the extent to which firms are owned and controlled by women and/or people of color. The statute defines both minority-owned and women-owned business status as a more than 50 percent of the ownership stake *and* a greater than 50 percent share of net profits accruing to a or multiple minority or women owners.[65] This definition is appropriate to prevent straw, named owners without a majority ownership or property stake from creating the false impression that the small business is owned and controlled by women or people of color.

[65] §1002.102(m) and §1002.102(s). 86 Fed. Reg. 56576.

The separate collection of data on women-owned and minority-owned businesses also allows the assessment of the experience of firms owned by women of color who likely face even higher barriers to access small business credit. These firms make up a significant portion of small businesses and there are a greater proportion of women of color that own businesses than the share of white-owned businesses owned by women. The Atlanta Fed survey found that about one-fourth of Black-owned and Latinx-owned small businesses were women owned (28 percent and 24 percent, respectively) and women owned 32 percent of Asian-owned businesses, compared to 19 percent of white-owned businesses.[66] The JPMorgan Institute has also found that Black- and Latinx-owned firms were more likely to be owned by women than white-owned firms (45 percent, 41 percent, and 37 percent, respectively)[67]

The data collected under the proposed rule provides the opportunity to measure the proportion of the firm that is owned by women and/or people of color. The proposed rule also collects information on the number of principal owners (those with more than 25 percent stake in the ownership and profits) and the race, ethnicity, and sex of these principal owners.[68] The CFPB should consider adding two separate data elements that would measure the percent share of control held by women or people of color based on the number of principal owners and their respective race, ethnicity, and sex.

This would enable the evaluation of credit availability, terms, and prices to small businesses based on the proportion of ownership and control held by women and/or people of color and whether firms that are 100 percent owned by women and/or people of color have comparable access to credit on comparable terms as firms with smaller ownership stakes by women and/or people of color. It also would allow the evaluation of partnerships between women and men or partnerships between white owners and owners of color. The Atlanta Fed survey found that women and men were equal partners in a significant number of businesses — 15 percent for white-owned and Latinx-owned firms, 8 percent for Black-owned firms and 11 percent for Asian-owned firms.[69]

The proposed use of aggregate and disaggregated race and ethnicity categories is appropriate but can be strengthened (§1002.107(a)(20)): The proposed collection of race and ethnicity aggregate and disaggregated data would further fair lending enforcement and AFREF supports not only the proposed disaggregated categories but also the addition of Middle Eastern or North African racial category and the option for applicants to enter a different, undesignated disaggregated racial or ethnic category. People in the United States have an increasingly complex and fluid assessment of race both in society and in their own racial identity. The proposal advances the racial and ethnic categories under discussion at the Census Bureau and Office of Management and Budget but also critically adds to nuanced assessment of fair lending concerns. The current aggregate racial and ethnic categories cloud large variations of experience faced by many people at the loan window.

The proposed rule includes the five racial and ethnic aggregate categories (American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; White;

[66] de Zeeuw (2019) at 20.
[67] Farrell, Wheat, and Mac (2020) at 12.
[68] §1002.107(a)(20-21); 86. Fed. Reg. 56578.
[69] de Zeeuw (2019) at 20.

and Hispanic or Latino).[70] The proposal includes the disaggregated racial categories for Hispanic or Latino (Cuban, Mexican, Puerto Rican, Other Hispanic or Latino) and Asian (Asian Indian, Chinese, Filipino, Japanese, Vietnamese, or Other Asian) as well as disaggregated categories for Native Hawaiian or Other Pacific Islander (Guamanian or Chamorro, Native Hawaiian, Samoan, or Other Pacific Islander), Black (African American, Ethiopian, Haitian, Jamaican, Nigerian, Somali, or Other Black or African American) and allows American Indian or Alaska Native applicants to designate their enrolled or principal tribe.[71] The CFPB should consider allowing applicants to provide a different disaggregated category than those specified in the proposal besides "other" in a text field in the same manner that American Indian or Alaska Natives can identify tribal affiliation. This would allow the addition of Nicaraguan or Hmong, for example, that may provide important additional information for fair lending enforcement.

The CFPB should add a racial or ethnic category for Middle Eastern or North African that could be added as a new racial aggregate category that applicants could self-identify, which would not affect other categorizes since applicants can select more than one racial or ethnic category.[72] Small businesses owned by people of Middle Eastern or North African descent may face unique barriers accessing credit and these may be heightened for people in more isolated communities where there are fewer people of Middle Eastern or North African descent.

These aggregated and disaggregated racial and ethnic categories would greatly improve fair lending enforcement as the aggregated racial and ethnic categories can mask wide economic disparities, social capital, and experiences. The addition of disaggregated racial and ethnic categories for home mortgage loans under HMDA have already shown that applicants are using the disaggregated categories and that applicants from different disaggregated populations have different outcomes than the aggregate categories would suggest. A 2020 UnidosUS/National Community Reinvestment Coalition study found that half of Latinx mortgage applicants chose a disaggregated category and that Mexican home purchase borrowers faced much higher interest rates than other Latinx borrowers (and far higher than white borrowers) and Puerto Rican home purchase borrowers were far more likely to receive government backed mortgages than Cuban borrowers.[73] These findings demonstrate that different disaggregated subgroups face significantly different mortgage borrowing experiences that raise fair lending concerns (why Puerto Rican applicants seem to be steered to government-backed mortgages and why Mexican homebuyers are paying more for their mortgages).

The proposed collection of applicant sex data should more fully include gender identity and sexual orientation (§1002.107(a)(20)): The proposed collection of small business owner applicant sex information does not recognize the emerging landscape of gender, gender identity, and sexual orientation sufficiently to address fair lending concerns. The proposed rule would only allow applicants to report their sex as male, female, prefer not to describe, or prefer to self-describe (and then provide any self-description).[74] It obviously is important to identify women-owned businesses to both comply with the statutory directives and enforce fair lending laws.

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[70] 86 Fed. Reg. 56478.
[71] 86 Fed. Reg. 56484.
[72] 86. Fed. Reg. 56393.
[73] So, Agatha and Jason Richardson. UnidosUS and National Community Reinvestment Coalition. "Hispanic Mortgage Lending: 2019 HMDA Analysis." June 30, 2020.
[74] 86 Fed. Reg. 56482.

The vast majority of small businesses are owned by men or with partners that are men. Women face persistently higher barriers to accessing credit than men, one of the motivations for the Equal Credit Opportunity Act.[75] In 2018, men owned two-thirds of small businesses, 21 percent were owned by women and 15 percent were partnerships between men and women.[76] And there is considerable intersectionality with sex and race as well because women of color own a large portion of businesses owned by people of color and face credit barriers because of their race and gender. One-third of Asian-owned businesses and one-fourth of Black- and Latinx-owned businesses are owned by women (32 percent, 28 percent, and 24 percent, respectively).

But the proposed rule collects less information even than other federal agencies on gender, gender identity, and sexual orientation. For example, the Census Bureau solicits information on gender identity (male, female, transgender, or none of the above) and sexual orientation (gay or lesbian, straight, bisexual, something else, or I don't know).[77] There is already evidence that gay and lesbian couples are more likely to be denied for home mortgages and more likely to pay higher interest rates than straight homebuying couples.[78]

The CFPB should consider revisiting the proposed applicant sex reporting to more fully encompass gender, gender identity, and sexual orientation. The lesbian, gay, bisexual, transgender, queer/questioning, intersex, and asexual/agender (LBGTQIA+) community is not monolithic and a more nuanced data collection than the proposal is necessary to begin to assess potential fair lending concerns. The Census Bureau survey is considerably stronger than the CFPB proposal and should be considered as an alternative but more options may be needed to encompass the LBGTQIA+ community more fairly.

The CFPB should collect data on whether the small business applicants are people with disabilities: The CFPB should require lenders to collect data on whether applicants for small business credit are people with disabilities — the proposed rule does not address small businesses owned by people with disabilities at all. People with disabilities tend to face higher barriers to securing a mortgage — both because of economic hurdles and lender bias — and these barriers may be higher for people with developmental disabilities.[79] The Department of Justice has pursued lending and housing discrimination cases against lenders that have discriminated against people with disabilities.[80]

People with disabilities are underrepresented in small business ownership although many would like to start their own enterprises and many would benefit from sole-proprietary business opportunities (for example, self-employment and home-based work might be more accommodating than other

[75] Fishbein, Allen J. and Patrick Woodall. Consumer Federation of America. "Women are Prime Targets for Subprime Lending." December 2006.
[76] Federal Reserve Banks (2019) at 29.
[77] 86 Fed. Reg. 56482.
[78] Sun, Hua ad Lei Gao. "Lending practices to same-sex borrowers." *Proceedings of the National Academy of Sciences of the United States of America*. April 16, 2019;
[79] Hagner, David and Jay Klein. "Home ownership for individuals with disabilities." *Journal of Disability Policy Studies*. Vol. 15, No. 4. 2005; Hemingway, Laura. "Taking a risk? The mortgage industry and perceptions of disabled people." *Disability &* Society. Vol. 25. 2010; Guzelian, Christopher P., Michael Ashley Stein, and Hagop S. Akiskal. "Credit scores and psychosocial disability." *Boston University Law Review*. Vol. 95. 2015.
[80] U.S. Department of Justice. [Press release]. "Justice Department reaches settlement with Bank of America to resolve claims of disability discrimination and compensate victims." July 23, 2020;

employment opportunities). People with disabilities often face significant economic disparities such as lower household net worth or thinner credit history that may create inequitable barriers to entrepreneurship.[81] The CFPB should require lenders to collect data on whether small business applicants are people with disabilities (and like other demographic questions, applicants should be free to choose not to answer this question).

The CFPB should identify the census tract geography of small business loan applications and dispositions as accurately as possible (§1002.107(a)(13)): The geographic distribution of small business applications and loans is critical to assess the extent to which lenders are meeting the credit needs of lower-income areas and communities of color. Small businesses in Black and Latinx neighborhoods have persistently been less profitable and had lower cash flow than those in white neighborhoods.[82] The disproportionately lower revenues and fewer employees at small businesses owned by women and people of color translates into "lost jobs, lost income, and lost wealth-building" for these communities, according to the Brookings Institute.[83] Fair lending and Community Reinvestment Act concerns would be raised If small businesses located in commercial areas in Black, Latinx, Asian, or lower-income neighborhoods are not receiving small business credit, are denied for small business loans, or face higher prices or more onerous terms.

The CFPB proposal would collect census tract geography data in what it terms a "waterfall" method from most specific to least specific.[84] The proposed rule would ideally collect the census tract where the proceeds of the loan would be used. If that is unknown it would collect the headquarters or another business location (and identify which of the three types of geographic specificity was collected). This approach would account for financing for multiple locations or unknown expansions, for example. But many lenders already have extensive experience geocoding census tracts for their small business or home mortgage lending (and HMDA compliance).[85]

Unfortunately, the proposed rule would not require lenders to specifically ask about the location where the proceeds of the loan would be used. It seems likely that many lenders would solicit information about how and where the proceeds of the small business loan would be used, such as for equipment upgrades or real estate purchases. The CFPB acknowledges that the location where the loan proceeds would be used "would be more useful to carry out the community development and fair lending" statutory goals.[86] The CFPB should require lenders to specifically ask for the address where the proceeds of the loan would be used to improve the quality and utility of the data.

5. The CFPB should collect critical and comprehensive data on small business loan applicants' business characteristics

The proposed rule defines small businesses by annual revenue of $5 million (which should be raised to $8 million) and would collect information on the small businesses characteristics that may be used by lenders for underwriting or to assess the viability and repayment capacity of the small business

[81] Renko, Maija, Sarah Parker Harris, and Kate Caldwell. "Entrepreneurial entry by people with disabilities." *International Small Business Journal.* 2015.
[82] Farrell, Wheat, and Mac (2020) at 9.
[83] Liu and Parilla (2020).
[84] 86 Fed. Reg. 56463.
[85] 86 Fed. Reg. 56462.
[86] 86 Fed. Reg. 56462.

applicants. The CFPB should collect this data to provide a fuller assessment of the small business credit applicant to determine if smaller businesses and small businesses owned by women and people of color are able to access credit equitably. Larger firms, more established firms, and businesses with more workers may have an easier time accessing credit than smaller or very small firms.

Some data points (like business revenue) would likely be considered as part of the underwriting process. For example, comparing different small businesses with similar debt-to-income ratios (loan amount requested and gross annual revenue could create a proxy for DTI) would be useful in order to consider fair lending compliance. The CFPB should require the collection of small business credit score to more fully enable comparison of firms with similar scores in order to strengthen the rigor of fair lending analysis.

The CFPB should use an inclusive $8 million gross revenue size threshold for small business (§1002.106(b)): The CFPB proposal defines small business as those with $5 million or less in average annual revenue (over the prior five years).[87] The definition of small business for the purposes of data collection should be straightforward for applicants and lenders and sufficiently inclusive (large enough) to cover the small business lending market. The CFPB notes that $8 million in annual revenue is already the most common size threshold for most businesses.[88] Moreover, a smaller size threshold could exclude genuinely small businesses that operate in some higher-cost regions where revenues (but also expenses) were higher.[89] AFREF believes a higher size threshold of $8 million (adjusted every 5 years according to the Small Business Administration recalibration) would better cover the small business market, account for differences in business types (such as manufacturing) and regional economic conditions, and would more closely align with what lenders already consider small businesses. It is important that the collected and disclosed data include applicant gross annual revenue in discrete units rather than bands to assess the availability of credit to the smallest firms, especially those owned by women and people of color.

The CFPB should collect time-in-business in whole years not in ranges (§1002.107(a)(17)): The proposal appropriately would collect the number of years the small business has operated rather than in ranges (such as under 2 years, 10 years or more, etc.). There are persistent disparities in the durability of Black- and Latinx-owned small businesses over time that are especially critical in early years. Black- and Latinx-owned small businesses are far more likely to go out of business in the early years — after the first three years 39 percent of Black-owned and 34 percent of Latinx-owned firms are shuttered compared to 29 percent of white-owned firms.[90] Black start-ups have less access to funding than white start-ups, and personal wealth, credit cards, and loans from friends and family are insufficient to reduce these disparities.[91] Lenders already collect or consider the number of years a small business has been in operation; it is an element of loan risk and underwriting. Collecting time-in-business data would allow the assessment of whether businesses of similar duration are comparably likely to receive credit at comparable terms, such as comparing Black-owned, Latinx-owned, Asian-owned start-ups with white-owned start-ups.

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[87] 86 Fed. Reg. 56430; 86 Fed. Reg. 56434.
[88] 86 Fed. Reg. 56428.
[89] 86 Fed. Reg. 56428.
[90] Farrell, Wheat, and Mac (2020) at 23.
[91] Fairlie, Robert W., Alicia Robb, and David T. Robinson. National Bureau of Economic Research. "Black and White: Access to Capital Among Minority-Owned Startups." Working Paper No. 28154. November 2020 at 31,

The CFPB should collect detailed information on the type of small businesses applying for credit (§1002.107(a)(15)): The proposal would collect 6-digit North American Industrial Classification System (NAICS) codes for small business credit applicants to identify community credit needs and enforce fair lending laws.[92] The CFPB reports that more than half of lenders already collect 6-digit NAICS data from small business loan applicants.[93]The Small Business Administration already uses 6-digit NAICS codes to determine business size levels and thresholds to qualify for eligibility for small business lending programs,[94] which means lenders already collect this information for government-backed small business loans. More detailed industry specification would help assess which industries in which neighborhoods sought and could access small business credit. Patterns of lending to specific kinds of businesses to the exclusion of others could suggest bias or fair lending problems. The CFPB should not reduce the requirement to 2-digit NAICS business codes because they are far too broad to usefully analyze.

The CFPB should report annual small business gross revenue as a value and not a range (§1002.107(a)(14)): The proposal would collect discrete, continuous values for the small business applicants' gross annual revenue. The CFPB should maintain this approach and not shift to collecting or reporting the data in a range of gross income levels. Narrow ranges sufficiently detailed bands to enable careful assessment (bands of $10,000, for example) would be cumbersome to collect. Larger income bands (bands of $50,000 or $100,000) would not be detailed enough to allow analysis.

The CFPB should collect and disclose credit scores of small business loan applicants: The CFPB has proposed not to collect applicant credit score.[95] The CFPB should collect and disclose the credit score and other discretionary underwriting data to enable more precise assessment of compliance with fair lending laws — whether comparable applicants of different races or genders are treated comparably and receiving comparable loan products. For decades, mortgage lenders have contended that clear disparate racial patterns in mortgage lending data could easily be explained by underwriting data that was not collected or disclosed by the Home Mortgage Disclosure Act.

While recognizing that lenders may utilize different credit scores and credit score assessment systems, the CFPB could require a uniform credit score reporting — for example the system used by the Federal Reserve Bank of Atlanta's small business credit survey — that accommodates a single score irrespective of how it was used by the lender. The Atlanta Fed survey usefully includes either business credit score or personal credit score that is normalized into range bands.[96] The inclusion of credit scores in the data would vastly improve the robustness of the data and strengthen it as a tool to enforce fair lending laws.

Comparing small business loan application outcomes (approval rates, pricing information, approval amounts) based on credit scores and the race or gender of the business owner would allow clearer assessment of whether applicants of similar credit risks are receiving similar treatment and similar credit offerings. About half of small businesses have middle credit scores from 680 to 760 (49

[92] 86 Fed. Reg. 56467.
[93] 86 Fed. Reg. 56428.
[94] 86 Fed. Reg. 56427.
[95] 86 Fed. Reg. 56437.
[96] de Zeeuw (2019) at 6.

percent of Black-owned, 52 percent of Latinx-owned, 42 percent of Asian-owned, and 47 percent of white-owned small businesses.[97] In theory these businesses with similar credit risks should have comparable access to credit, but the higher loan rejection rates and lower approval amounts for businesses owned by people of color casts doubt on whether Black, Latinx, and Asian business owners with comparable credit scores are having equal access to loans.

6. The CFPB should collect all appropriate data on loan type, terms, and pricing

The proposed rule should collect the necessary information to evaluate whether comparable applicants for small business loans are receiving comparable credit at comparable prices. The proposed rule addresses many key data elements of loan types to evaluate community credit needs and fair lending, including government guarantees and the difference between requested loan amounts and origination amounts that could suggest racial steering or racial gaps on approval amounts or percentages. The proposed loan pricing and term elements would be invaluable in assessing disparities in loan pricing, but AFREF recommends that CFPB collect or model an annual percentage rate, single-price metric to more easily compare loans on an apples-to-apples basis. AFREF also recommends that CFPB separately identify refinancing loans (as the Home Mortgage Disclosure Act does) from original loans used to purchase real estate, equipment, or make other investments. Finally, AFREF recommends that the CFPB require the collection of data on small farm applications for farm credit. Black, Latinx, Native, and Asian farmers have faced considerable longstanding barriers to accessing farm credit that have been the subject of several class action lawsuits. Collecting applicant-level farm loan disposition, price, geography, and demographic data would enable more comprehensive assessment of farm lenders compliance with fair lending laws and the equitable provision of credit in rural areas.

The CFPB should collect information on loan guarantees and government guarantees (§1002.107(a)(5)(4)): The CFPB correctly intends to collect data on whether the small business loans are secured by a guarantee (either a government or other guarantee).[98] The Federal Reserve Banks' 2019 survey found that 58 percent of all businesses with debt relied on personal guarantees.[99] Including the government guarantee information is essential to determine whether lenders are disproportionately offering credit to small businesses owned by women or people of color when the government guarantees the loan. This type of steering raises potential fair lending concerns. The government backing data is similar to the HMDA loan type for Veterans Administration and Federal Housing Administration backed mortgages. Over one-fifth (22 percent) of small businesses applied for SBA backed loans or lines of credit in 2019.[100] Black and Asian small business owners rely on direct government lending and government guaranteed small business loans more frequently than white business owners and Latinx owners (3.6 percent, 2.6 percent, 2.3 percent, and 1.7 percent respectively).[101]

The CFPB loan purpose data should separate refinance credit from purchase lending (§1002.107(a)(6)): The CFPB's proposed list of loan purposes is necessary to determine whether

[97] *Ibid.* at 6.
[98] §1002.107(a)(5)(4); 86 Fed. Reg. 56592.
[99] Federal Reserve Banks (2019) at 9.
[100] *Ibid.* at 15.
[101] Robb (2018) at 15.

different credit needs are being adequately met by lenders (in broad strokes, owner- and non-owner-occupied dwellings, owner- and non-owner-occupied non-dwellings, vehicles, equipment, working capital, financing for start-ups, expansions, acquisitions, other refinancing, credit line increases, and other).[102] The delineation of these purposes would help to assess whether the credit needs of all borrowers were being met, to assess compliance with fair lending laws, and to determine whether the small business credit needs in lower-income areas and communities of color were being served (whether it was easier to obtain lines of credit, start-up financing, working capital, etc.) both for fair lending and Community Reinvestment Act purposes.

These categories are appropriate but the CFPB should disaggregate the purchase-construction-repair purpose from refinancing for things like real estate, vehicles, and equipment. Refinance lending may be offered at different prices and terms than purchase, construction, or repair first-time originations. It may be difficult to compare costs and terms of small business loans if these two distinct types of loans are aggregated together. The HMDA data separates purchase, refinance, and home-improvement lines of credit because the application process and terms of these loans are different. The easiest way to do this would be to add an additional data point for purchase/construction/repair or refinancing.

The CFPB should include amount applied for and amount distributed §1002.107(a)(7) and §1002.107(a)(8)): The amount requested and amount approved are key metrics to assess fair lending compliance. The proposed rule would require the collection of the amount initially requested by the small business applicant or if no specific amount is requested it could report the amount that was considered for underwriting.[103] The proposed rule also collects the size of the small business loan that was originated, or approved but not accepted, or the credit limit for approved or originated credit lines.[104] These two data elements are essential to assessing compliance with fair lending laws.

Black-, Latinx-, and Asian-owned businesses have been substantially less likely to receive the full small business loan amount requested than white-owned small businesses.[105] A 2018 Small Business Administration survey found that more than half of Black-owned businesses (53 percent) and more than one-third of Latinx-owned and Asian-owned businesses (39 percent and 34 percent, respectively) did not receive the funding they applied for from banks or financial institutions compared to less than one-fourth (24 percent) of white-owned businesses.[106]

Recognizing the difficulty of determining the application amount in some cases, AFREF notes that some lenders may dissuade applicants from making a specific request and steer them to the considered underwriting amount that is lower than the financing need of the small business. This could artificially diminish the potential gap between the amount requested and amount received and could present fair lending concerns. The CFPB should heighten scrutiny of lenders where the application and approval amounts are conspicuously close, especially if there appears to be a disproportionate impact on small businesses owned by women or people of color.

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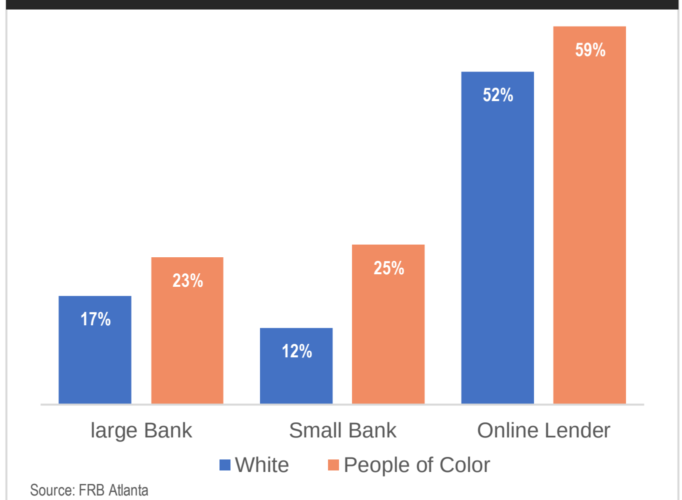
[102] §1002.107(a)(6); 86 Fed. Reg. 56592.
[103] §1002.107(a)(7); 86. Fed. Reg. 56447.
[104] §1002.107(a)(8); 86 Fed. Reg. 56449.
[105] de Zeeuw (2019) at 10.
[106] Robb (2018) 2018 at 26.

The CFPB should include term length as a critical component of loan pricing, cost, and repayment burden (§1002.107(a)(5)(iii)): The proposed rule includes loan term in months,[107] which is essential to evaluate the loan cost and is especially critical for some forms of shorter-term credit that may be offered by merchant cash advance and online-only lenders.

The CFPB proposed pricing data elements are essential but it should also include annual percentage rate (§1002.107(a)(12)): The CFPB rightly includes discretionary data related to credit pricing of small business lending, but the CFPB should also collect or model annual percentage rate (APR) loan pricing as well to simplify the comparison of different loan prices. Pricing data is essential to assess the availability of credit on comparable terms for small businesses owned by women and people of color. The prevalence of differential pricing for similar products or push marketing of higher-cost loans or loans with predatory terms can raise fair lending concerns.

Small businesses owned by people of color face higher interest rate charges and costs for their loans than white-owned businesses. According to a Federal Reserve Bank of Atlanta survey, small businesses owned by people of color were more likely to be challenged by high interest rates than white business owners at large banks, small banks, and online lenders (see Figure 3).[108] The cost burden racial gap is highest at small banks but exists at larger banks and online lenders as well.

Fig. 3: Share of Small Business Borrowers Challenged by High Interest Rates



The proposed rule would report pricing data including interest rates, total origination charges, broker fees, all non-interest charges, the difference between the amount advanced and repaid for sales-based financing (like merchant cash advance), and any prepayment penalties.[109] These are important pricing elements that should be reported but the CFPB should collect data on the annual percentage rate (APR) as well.

The APR assesses the total cost of loan products (including the interest rate as well as all other costs and fees associated with the loan) expressed as an annualized percentage that makes it possible to compare loans on a single pricing metric. The CFPB acknowledges that many lenders already calculate APRs and many more are likely to do so to comply with state disclosure laws.[110] Providing clear pricing in the form of APR is in alignment with what small business owners themselves want in a small business loan product disclosure, according to a 2015 Federal Reserve Bank of Cleveland focus group.[111] The CFPB should either require lenders to collect and report loan APRs or it should

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[107] 86 Fed. Reg. 56444.
[108] de Zeeuw (2019) at 16.
[109] §1002.107(a)(12); 86 Fed. Reg. 86 Fed. Reg. 56456.
[110] 86 Fed. Reg. 56456.
[111] Lipman and Wiersch (2015) at 3.

develop a model that can calculate and APR or APR-like single pricing metric based on the other loan pricing data and loan term.

The CFPB should collect data on agricultural lending: The CFPB should collect agricultural lending data under the proposed rule. Small farmers, especially Black, Latinx, Native, Asian, and women farmers, have faced long-standing disparate treatment and discrimination in accessing farm credit on equitable terms.[112] Small farmers face substantial and similar barriers to credit on fair and equitable terms as small businesses, especially during economic crises.[113] Since 2019, three quarters of all farm loans have carried variable interest rates, meaning that the cost of repayment is likely to rise, putting more pressure on smaller farmers to cash-flow their operations.[114]

Currently, the aggregate small businesses loan collection is parallel with identical aggregate small farm loan data disclosure under the Community Reinvestment Act.[115] Small farm loans are covered broadly by the Equal Credit Opportunity Act and by Section 1071, making the collection of small farm data an imperative to address known, historic fair lending problems in agricultural credit.[116] Application-level, lender-level, disposition-level, and geography-level data would be invaluable in assessing and enforcing fair lending laws, determining the credit needs and availability for farmers and rural communities, and providing vital transparency in a farm credit market that has been rife with documented discrimination. The Home Mortgage Disclosure Act data has provided a critical tool for community groups, local governments, and federal regulators to evaluate the disparate impact of mortgage lending on Black, Latinx, and Asian borrowers and communities and press lenders to improve their performance and comply with fair lending and fair housing laws. Including farm loans in the data collection would enable small farmers and rural and farm advocates to the necessary data disclosure to evaluate the farm credit markets for the first time.

7. The CFPB must collect appropriate application and disposition data

The CFPB should collect data on the application channel or method (in person, by telephone, online) (§1002.107(a)(3)): The CFPB proposes collecting discretionary data on the channel small business owners apply for their loans (online, by telephone, or in person — including video-based applications by telephone, or online).[117] The collection of application method would greatly facilitate evaluation and enforcement of fair lending laws. First, it would allow the comparison of application outcomes (approval rates, approval amounts, terms, prices) based on the application channel at specific institutions — were Black or Latinx applicants more likely to receive

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[112] de Sam Lazaro. Fred an Simeon Lancaster. "Historically denied 'pivotal' loans, Black farmers still struggle to get support." *PBS Newshour*. December 7, 2021; Rosenberg, Nathan. "How USDA distorted data to conceal decades of discrimination against Black farmers." *The Counter*. June 26, 2019; Matin, Michel. "USDA awards Native Americans millions in discrimination suit." *NPR*. October 21, 2010; LaFraniere, Sharon. "U.S. opens spigot after farmers claim discrimination." *New York Times*. April 25, 2013; U.S. Department of Agriculture. [Press release]. "USDA notice to women and Hispanic farmers and ranchers: Compensation for claims of discrimination." July 7, 2011; Robinson, Jessica. "Women, Hispanic farmers say discrimination continues in settlement." *NPR*. November 9, 2012.

[113] Farm Aid, Food & Water Watch, National Family Farm Coalition, Rural Advancement Foundation Intl.-USA. "Don't Bank on It: Farmers Face Significant Barriers to Credit During Economic Downturn." March 2011.

[114] Federal Reserve Bank of Kansas City. National Survey of Terms of Lending to Farmers. Table 6. Share of Non-Real Estate Bank Loans with a Floating Interest Rate. 2021 3rd Quarter. Smialek, Jeanna. "Fed shifts to inflation battle, winding down pandemic support." *New York Times*. December 15, 2021.

[115] 12 CFR §345.42(a)(4); 12 CFR §345.42(h).

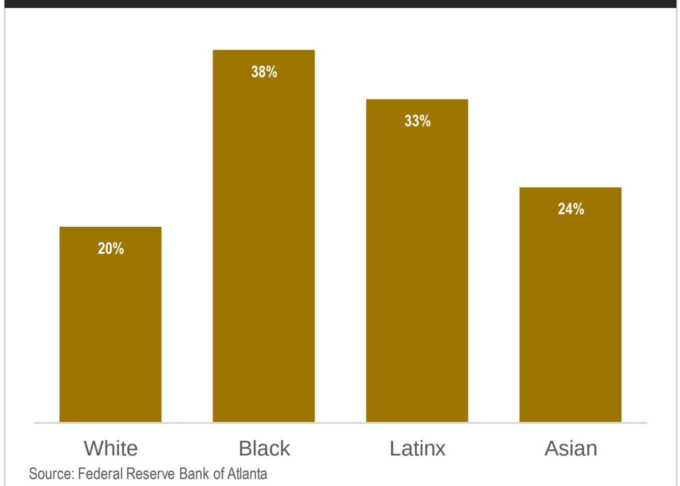
[116] 86 Fed. Reg. 56406.

[117] 86 Fed. Reg. 56439; §1002.107(a)(3); 86 Fed. Reg. 56591.

loans and at what terms in person, on the phone, or online. Second, it could help assess whether applicants are receiving comparable access to comparable credit across application channels — were Black- and Latinx-owned businesses paying higher prices for small business loans applied for online than in person.

The CFPB's proposed categories for lender action taken in the disposition of applications are appropriate (§1002.107(a)(9)): The CFPB proposes collecting data on the action lenders take on the disposition of small business loan applications: loan originated, loan approved but not accepted, loan denied, loan application withdrawn by applicant, or incomplete application.[118] The final disposition of loan applications is an essential metric to enforce fair lending laws and these lender action categories are substantially identical to the HMDA lender actions for home mortgages (and thus should be familiar to many lenders).

Fig. 4: Small Business Loan Rejection Rates by Race 2017



Businesses owned by people of color are turned down for small business loans more frequently than white applicants.[119] A 2002 Federal Reserve study found that Black, Latinx, and Asian small business owners were denied loans substantially more frequently than white small business owners even when controlling for household wealth.[120] The Federal Reserve Bank of Atlanta found that Black small business owners were rejected for loans nearly twice as frequently as white applicants, Latinx owners were rejected more than 50 percent more frequently than white applicants, and Asian applicants were rejected 20 percent more than white applicants in 2017 (see Figure 4).[121]

The other lender actions could also suggest concerns about biased treatment or steering of small business applicants owned by women or people of color. A high number or proportion of withdrawn or incomplete applications could suggest that lenders discriminated against or discouraged applicants. A 2017 Utah State University matched pair testing study found that Black small business loan applicants at banks were asked to provide more financial information than white applicants and were asked whether they were married and if their spouse worked (in seeming violation of ECOA's prohibition of discrimination on the basis of marital status); no white applicants were asked these questions.[122]

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118 §1002.107(a)(9); 86 Fed. Reg. 56451.
119 Bone et al. (2017) at 6.
120 Cavalluzzo, Ken and John Wolken. Georgetown University and Federal Reserve Board. "Small Business Loan Turndowns, Personal Wealth and Discrimination." July 2002.
121 de Zeeuw (2019) at 10.
122 Bone et al. (2017) at 16 to 17.

Applications that were approved but not accepted could suggest that the offered loan terms (amount, price, terms) did not meet the financing needs of the small business applicants. A high number or proportion of unaccepted approvals for businesses owned by women or people of color could suggest that these applicants were being offered excessively high-cost loans or credit products with terms that were unacceptable to the applicant.

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Americans for Financial Reform Education Fund generally supports the CFPB's proposed small business loan data collection rule, with some suggested improvements. The lack of equitable access to credit has hindered the ability of Black, Latinx, and Asian families to build wealth through entrepreneurship which, in turn, entrenches and worsens the racial wealth gap. Credit market transparency is critical to evaluate the credit needs of communities of color and to monitor and enforce fair lending laws. Small business lending has been almost totally opaque with too few sources of information that are insufficiently detailed. The proposed rule would fulfil the statutory requirements of Dodd-Frank and provide the transparency needed to enforce the Equal Credit Opportunity Act for small businesses owned by women and people of color.