January 6, 2022

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

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

Dear Consumer Financial Protection Bureau:

Better Markets Inc.[1] appreciates the opportunity to comment on the above-captioned proposal ("Proposal" or "Release"), issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau").[2] The Proposal would amend Regulation B by requiring that certain financial institutions collect and report demographic and other data on small business applications for credit, including small businesses owned by women and minorities. The Proposal would implement the requirements that Congress set forth in Section 1071 of the Dodd-Frank Act.

This data will be essential to creating a fairer and more equitable financial system for all Americans, including those who have historically been shut out of the opportunity to engage in entrepreneurship. The data will be instrumental in providing underserved communities with the benefits that come from having vibrant small businesses. Assembling more comprehensive data is a critical step in serving these goals and ultimately addressing the unjustifiable economic inequality that has plagued our society and our economy for centuries. Better Markets therefore urges the CFPB to finalize the rule without delay and without dilution.

INTRODUCTION AND BACKGROUND

It is no secret that certain groups in America (and throughout the world) face unjustified economic hardships as a result of historical and ongoing discrimination. One of these groups is

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[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

[2] 86 Fed. Reg. 20,334 (Apr. 19, 2021).

women, who in part because of antiquated but persistent notions about gender roles, still earn up to 33% less than men. That means women may earn as little as 77 cents for every dollar a man earns.[3] There is also an even more significant gender wealth divide: As of 2019, in America, women owned just **32 cents** for every dollar owned by a man.[4]

Similarly, there are significant economic inequalities along racial lines. The racial wealth divide is rooted in the brutal institution of slavery, which persisted in America for hundreds of years. It was perpetuated by the post-civil war Jim Crow laws and other de jure and de facto instances of outright discrimination and segregation, many of which persist in some form to this day.[5] The painful economic impact of these practices is evident in many areas. Among them, for example, is the racial disparity in employment, reflected in the fact that the unemployment rate for Black Americans has persistently been higher than that for white Americans—frequently as much as twice as high.[6] There is also the racial wealth divide, which reflects the fact that the typical Black household has just **10%** of the wealth of the typical white household, a disparity that amounts to an astonishing wealth differential of **$10.6 trillion**.[7]

Most directly relevant to the Proposal, the economic inequality faced by women, Black Americans, and other minorities is both reflected in, and driven by, the so-called "entrepreneurship gap." According to a 2017 report compiled by Senator Jeanne Shaheen, women make up only 39% of the country's majority business owners, employ only 8% of America's private sector workforce,

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3 Tyler M. Wood, *Never Ask A Woman Her Wage: The Constitutionality of Salary-History Bans*, 88 U. Chi. L. Rev. 1247, 1248 (2021).

4 Janice Traflet & Robert E. Wright, *America Doesn't Just Have a Gender Pay Gap. It Has a Gender Wealth Gap*, Wash. Post (Apr. 2, 2019), https://www.washingtonpost.com/outlook/2019/04/02/america-doesnt-just-have-gender-pay-gap-it-has-gender-wealth-gap/.

5 Stephen Hall & Jason Grimes, How Can the SEC Address Racial Economic Inequality Through Regulation of the Securities Markets for All Americans (Dec. 9, 2021), https://bettermarkets.org/wp-content/uploads/2021/12/BetterMarkets_SEC_Steps_To_Improve_Racial_Inequality_Dec-2021.pdf.

6 Stephanie Aaronson, *et al.*, Brookings Institute, *A Hot Labor Market Won't Eliminate Racial and Ethnic Unemployment Gaps* (Sept. 2, 2021), https://www.brookings.edu/blog/up-front/2021/09/02/a-hot-labor-market-wont-eliminate-racial-and-ethnic-unemployment-gaps/.

7 Calvin Schermerhorn, Opinion, *Why the Racial Wealth Gap Persists, More than 150 Years After Emancipation*, Wash. Post (June 19, 2019), https://www.washingtonpost.com/opinions/2021/07/30/us-wealth-gap-race/; Vanessa Williamson, Brookings Institute, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth* (Dec. 9, 2020), https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/. All of these gaps perpetuate each other in an endless cycle. Lack of Black entrepreneurship means fewer jobs in predominantly Black communities, which means lower employment in Black communities, which means less wealth in Black communities, which means fewer people in Black communities with the capital to start a business, and so on and so forth.

and account for only 4% of business revenues.[8] Similarly, according to the Census Bureau, as of 2018, only 18.3% of businesses were minority-owned, with approximately 3.8% of businesses being Hispanic-owned, approximately 2.3% being Black-owned, and approximately 10.5% being Asian-owned.[9]

The entrepreneurship gap can contribute to other economic disparities, which can in turn feed back into those other economic inequalities in a vicious cycle. For example, entrepreneurship is one way to build more wealth, but it takes wealth to start a business. As the Bureau noted in the Proposal, small businesses are critical for creating jobs, but fewer minority-owned businesses in minority communities means fewer jobs.[10] Conversely, businesses owned by women or minorities can contribute to a cycle of curative effects, as they are less likely to improperly devalue the contributions of women or minority employees, helping finally close the persistent gender and racial wage and wealth divides.

Recognizing the importance of small business ownership to addressing economic inequality, and the importance of fair access to credit to enabling small business ownership, Congress included Section 1071 in the Dodd-Frank Act. It directs the Bureau to establish a rule for the collection of small business loan data, and it declares that "The purpose of this Section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses."[11]

OVERVIEW OF RULE

The Bureau's fact sheet on the Proposal is a helpful resource, as the Release is lengthy and detailed.[12] The Proposal covers these core elements:

- The scope of the Proposal, in terms of the financial institutions, small businesses, and credit transactions that are subject to the reporting requirement;

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8 Senator Jeanne Shaheen, Ranking Member, U.S. Senate Committee on Small Business & Entrepreneurship, *Tackling the Gender Gap: What Women Entrepreneurs Need To Thrive* (2017), https://www.sbc.senate.gov/public/_cache/files/2/5/25bd7ee9-a37b-4d2b-a91a-8b1ad6f5bd58/536DC6E705BBAD3B555BFA4B60DEA025.sbc-tackling-the-gender-gap.december-2017-final.pdf.

9 U.S. Census Bureau, Press Release, *Annual Business Survey Release Provides Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses* (Jan. 28, 2021), https://www.census.gov/newsroom/press-releases/2021/annual-business-survey.html.

10 *See* Release at 56,361.

11 15 U.S.C. § 1691c-2(a).

12 *See* CFPB, *Summary of Proposed Rulemaking: September 2021 Proposal Regarding Small Business Lending Data Collection* (Sept. 1, 2021), https://files.consumerfinance.gov/f/documents/cfpb_section-1071-nprm_summary_2021-09.pdf.

- The specific data points that financial institutions must collect and report, including items such as the action taken on applications and the reasons for denial; the amount and pricing of loans; and the ethnicity, race, and gender of the principal owners of the applying businesses;
- The obligation of financial institutions to make data publicly available, subject to protection of privacy limitations;
- Limits on access to the reportable data concerning race, ethnicity, or gender by financial institution employees or officers who are involved in making determinations on loan applications;
- Recordkeeping duties; and
- The compliance date, proposed to be 18 months from publication in the Federal Register.

COMMENTS

The CFPB's Data Collection Rule Will Be Critical to Addressing the Economic and Human Costs of Unjust Economic Inequality

As noted above, there are a variety of ways that women and minorities suffer economic inequality in America. It would be a mistake to think, however, that this economic inequality only results in hardship for the communities that are directly impacted by it. In fact, this economic inequality drags down the entire economy, and it therefore should be a concern for all Americans, regardless of race or gender or any other characteristic. A recent report from Citi found that if racial divides in wages, education, housing, and investment had been closed 20 years ago, an estimated **$16 trillion** would have been added to the economy.[13] In particular, the report found that providing "fair and equitable lending to Black entrepreneurs might have resulted in the creation of an additional $13 trillion in business revenue and potentially created 6.1 million jobs per year."[14] The report further found that closing these gaps now could add $5 trillion to the economy over the next few years.[15]

It is also important to note that those data points are not just abstract numbers; they represent real people and families suffering real hardship as a result of the denial of economic opportunity. For example, research has shown that those with less wealth are more likely to suffer from depression.[16] Similarly, it has long been established that unemployment can have a

[13] Citi GPS, *Closing the Racial Inequality Gaps* (Sept. 2020), https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D.

[14] *Id.*

[15] *Id.*

[16] Catherine K. Ettman, et al., *Is Wealth Associated With Depressive Symptoms in the United States?*, 43 Annals of Epidemiology 25 (2020), https://www.sciencedirect.com/science/article/abs/pii/S1047279719306519?via%3Dihub.

devastating impact on the mental and physical health of workers, an effect that has a cascading effect on their families and communities.[17]

The CFPB's data collection rule, mandated by Congress, will be a key tool in helping narrow the persistent economic inequality that exists in America, and thus in ending the preventable human suffering it causes. The collection and reporting of data will provide the CFPB and other policymakers with the tools necessary to identify unfairness and other problems in the credit market serving small businesses and respond as appropriate, whether through enforcement, supervisory actions, rulemaking, legislation, or other measures. In short, it will help policymakers develop targeted tools for directly addressing economic inequality.

However, it is also important to note that the collection and reporting of data can have a positive impact on economic inequality even before policymakers take specific, direct action in response to it. As the National Community Reinvestment Coalition has pointed out:

> "The experience of updating the Home Mortgage Disclosure Act (HMDA) data illustrates how enhancing the publicly available small business data will boost lending to underserved borrowers. After Congress updated HMDA data in 1989 to require information on the demographics of applicants, lending to minorities climbed in the 1990s before the advent of high-cost and abusive lending. For instance, from 1993 through 1995, conventional (non-government insured) home mortgage lending to African Americans and Hispanics surged 70 percent and 48 percent, respectively. In contrast, the increase was just 12 percent for whites."[18]

This demonstrates the potential power of meaningfully improved data collection, but the HMDA experience also illustrates a potential pitfall when that data is not sufficiently robust:

> "After the lending increases in the 1990s, the home lending market adopted risky practices that the HMDA data was unable to monitor. High-cost and subprime lending riddled with obtuse and abusive terms and conditions surged in the early to mid-2000s. HMDA data could not keep track of these developments because it lacked robust data on pricing and loan terms and conditions."[19]

In other words, while the enhanced data requirements of the HMDA did help boost lending to borrowers of color, insufficiently granular data on the nature of those loans inhibited the ability

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17 S*ee* Margaret W. Linn, et al., *Effects of Unemployment on Mental and Physical Health*, 75 Am. J. Public Health 502 (1985).

18 Statement of the National Community Reinvestment Coalition: Data Drives Access to Credit and Capital for Small Business CFPB Symposium on Section 1071 at 2-3 (Nov. 6, 2019), https://files.consumerfinance.gov/f/documents/cfpb_taylor-written-statement_symposium-section-1071.pdf.

19 *Id.* at 3.

of policymakers to spot the warning signs of the coming subprime-fueled economic crisis, with devastating consequences for the American economy, not to mention the victims of those predatory loans.[20] This contains important lessons for the Bureau as it finalizes the rule.

The CFPB Must Ensure It Collects Robust Data by Maintaining the Broad Scope of the Proposal

The experience with HMDA's enhanced data collection underscores the critical importance of collecting sufficiently robust data—the enhancements to HDMA data had a concrete, real world, and positive impact on lending to minorities, while shortcomings to that enhanced data contributed to a failure to spot increasingly predatory lending activity. Below, we focus on two particular principles the Bureau must adhere to as it finalizes the rule, to ensure that it produces robust, usable, actionable data.

The CFPB Must Resist Industry Pressure to Establish Carveouts from the Rule

The Proposal is appropriately broad, particularly in its definition of the financial institutions to which it would apply. As the Release explains, the proposed definition of "financial institution" would—

> "include any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, **or other entity that engages in any financial activity.** Under the proposed definition, the Bureau's 1071 rule would apply to a variety of entities that engage in small business lending, including depository institutions (i.e., banks, savings associations, and credit unions), online lenders, platform lenders, community development financial institutions (both depository and nondepository institutions), lenders involved in equipment and vehicle financing (captive financing companies and independent financing companies), commercial finance companies, governmental lending entities, and nonprofit nondepository lenders."[21]

Further, the Proposal would require that any financial institution that originated at least "25 covered credit transactions" to small businesses in each of the preceding two calendar years report the required data.[22] To the extent that there is concern about not burdening financial institutions that make a *de minimis* number of loans to small businesses, the 25-transaction threshold amply addresses that concern. The Bureau considered but appropriately rejected pleas to set the loan threshold considerably higher, with some stakeholders arguing for a 100-loan test and others

[20] BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING 66-69 (2015), https://bettermarkets.com/sites/default/files/Better%20Markets%20-%20Cost%20of%20the%20Crisis.pdf.
[21] Release at 56,357 (emphasis added).
[22] *Id.*

pressing for even higher triggers. While complete data was not available to the Bureau, the analysis set forth in the Release shows that just increasing the threshold from 25 loans to 50 loans dramatically ***decreases*** the universe of covered depository institutions, from 70% of banks to barely over half.[23] It is thus evident that increasing the threshold above the 25-loan mark would undermine the remedial purposes that underlie Section 1071.[24]

In other words, if the CFPB establishes any further carveouts from the rule, it runs the risk that it will produce inadequate data and fail to fulfill Congress's purpose in establishing Section 1071. Undoubtedly, the industry will urge the CFPB to establish carveouts for particular types of lenders, or particular types of loans, or lenders under a particular size. While Section 1071 expressly allows the Bureau to create exceptions or exemptions from the requirements of the law, it conditions the exercise of that authority on the Bureau's judgment that such measures are "necessary or appropriate to carry out the purposes of" Section 1071. Absent credible evidence that a particular carve out will have no deleterious effect on the quantity or quality of data reported, or on the efficacy of the final rule in fulfilling the purposes of Section 1071, the CFPB must not further narrow the Proposal with additional exemptions, exceptions, or thresholds.

The CFPB Must Collect Robust Data on Applicants and Loan Terms to Identify Predatory and Discriminatory Practices

To avoid the pitfalls that limited the ability of data collected pursuant to the HMDA to spot predatory trends in the mortgage market, the CFPB must ensure that it collects sufficiently granular data on loan applicants and loan terms. To that end, the Proposal would appropriately require that lenders report information on credit type, information on the business (such as business type and address), and loan pricing information.[25] This information is critical to collect because lending discrimination is not just evidenced in the denial of loan applications submitted by women or minority borrowers. Lending discrimination also manifests itself in women or minority borrowers receiving less favorable loan terms than white borrowers. This was evidenced during the subprime mortgage crisis when "Black and Hispanic families making more than $200,000 a year were more likely on average to be given a subprime loan than a white family making less than $30,000 a year."[26]

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23 *Id.* at 56,421.

24 Requiring just 70% of depository institutions to report under the Proposal could actually be considered too low. However, the Bureau's analysis also shows that the 25-loan test will be effective on a loan-level, if not a bank-level basis, as the 25-loan trigger is expected to capture over 98% of all small business loans by depository institutions.

25 Release at 56,358.

26 Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom*, Bloomberg CityLab (Aug. 16, 2013), https://www.bloomberg.com/news/articles/2013-08-16/the-dramatic-racial-bias-of-subprime-lending-during-the-housing-boom?sref=mtQ4hc2k.

In short, to ensure that the CFPB and others are able to meaningfully enforce fair lending laws and appropriately spot and respond to problematic trends, the final rule must ensure the reporting of robust data on applicants and loan terms within the broad parameters of Section 1071 of the Dodd-Frank Act.

CONCLUSION

We hope these comments are helpful as you evaluate the Proposal.

Sincerely,

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