ELECTRONIC TRANSACTIONS ASSOCIATION

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Via eRulemaking Portal

Comment Intake – Section 1071 Small Business Lending Data Collection
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Comments Regarding Director Chopra's Payment Systems Statement – Docket No. CFPB-2021-0017; RIN 3170-AA09

To Whom it May Concern:

On behalf of the Electronic Transactions Association (ETA), we appreciate the opportunity to share our thoughts on the Bureau of Consumer Financial Protection's (CFPB) proposed rule to Section 1071 of the Dodd-Frank Act.

ETA supports fair lending and increased access to credit for small businesses, including women-owned and minority-owned businesses. ETA appreciates the CFPB's commitment to weighing any benefits of a future rule against the costs associated with instituting new data collection for small business lenders.

The small business lending industry is responding to the demand for access to credit by small businesses and filling a need for technology-based credit solutions. Small businesses that take advantage of these technology platforms can focus more of their time and effort on growing their businesses, hiring workers, and positively affecting the economy.

ETA and its members support an inclusive financial system that provides high quality, secure, and affordable financial services for the broadest possible set of consumers and small businesses. ETA member companies touch, enrich, and improve the lives of underserved communities' while making the global flow of commerce possible. A goal of ETA member companies is to continually enhance the electronic payments and financial ecosystem so that it is accessible for all customers and small businesses, while ensuring their transactions can be completed securely, efficiently, and ubiquitously. A key driver to achieving such an ecosystem is the development of new technologies that allow the underserved to access financial products and services. ETA encourages policymakers to support these goals through policies that support innovation and the use of technology in financial products and services.

Considering the tangible benefits of such technological advancements, ETA urges policymakers to remain thoughtful and forward-thinking in how to best support industry's on-going efforts to provide opportunities for all consumers and small businesses to access and benefit from innovative financial products and services. Efforts by policymakers to regulate financial products and services should be done collaboratively with industry participants and with careful consideration of the many types of business models and products in the marketplace. ETA stands

willing to work with the CFPB to create a positive regulatory environment for small business lenders and their borrowers.

Who We Are

ETA is the world's leading advocacy and trade association for the payments industry. Our members span the breadth of significant payments and fintech companies, from the largest incumbent players to the emerging disruptors in the U.S and in more than a dozen countries around the world. ETA members make commerce possible by processing more than $21 trillion in purchases worldwide and deploying payments innovation to merchants and consumers.

Comments on Proposed Rule

Exemptions to Section 1071 Rule

The small business financing market has a number of participants who help to provide small businesses with access to funding by matching them with lenders or by providing a variety of financing options. These non-lenders should not be subject to Section 1071 data collection requirements.

Brokers
Brokers may perform a variety of services, including assisting borrowers to identify potential financing options, generating leads for lenders, and assisting in the application process. There are a few types of broker business models in the market today, but the common thread among brokers is that they do not make credit decisions on credit applications.

One prominent broker model is the marketplace matchmaking platform model. Marketplace brokers provide a portal where small business borrowers can go to use the resources and partnerships of the broker to help borrowers with all aspects of getting a loan. In many cases, the borrower fills out an application and then is given a choice of financing available from a variety of lenders. The credit decisions and financing are made by independent, third party lenders including traditional lenders, non-traditional lenders, and SBA-approved lenders. Those participating lenders offer term loans, SBA loans, lines of credit, and small business credit cards. Additionally, other types of financing like merchant cash advance or invoice financing may be available. The criteria is established by the participating lender on the platform to give a borrower a clear understanding of the range of financing options available to them. The borrower chooses their preferred choice of loan product and lender and the broker forwards the application information to the lender. The lender makes the credit decision on the application.

Marketplace brokers often serve as highly valuable price and product comparison tools for small businesses. Marketplace brokers play a key role in helping to match borrowers and their individual credit needs to lenders that can provide products to meet those credit needs.

Section 1071 contains similarities to the information collection function of the Home Mortgage Disclosure Act (HMDA) reporting requirements. Like mortgage brokers who are exempt from

HMDA reporting requirements for loans where they do not make a credit decision regarding the loan application, brokers should continue to be exempt from similar reporting under Section 1071 where they do not make credit decisions.

HMDA applies to brokers that receive loan applications and make credit decisions to ensure that relevant data is captured even in a situation where the broker rejects an application before a lender receives it. Here, because brokers do not make credit decisions or reject borrowers, all relevant information can be obtained from lenders.

Some brokers will not even have access to the type of information discussed in Section 1071, such as application information, type and purpose of financing, amount applied for, and amount approved. Brokers that perform a more limited lead generation function will often not have access to this information, which will be submitted directly by the borrower to the lender. Therefore, in order to obtain the information from the appropriate source, brokers should continue to be exempt from such reporting under Section 1071.

Merchant Cash Advance

ETA does not agree with the CFPB that merchant cash advances (MCAs) should be included in the Section 1071 rule. MCAs are not loans, but rather, they are a sale of a portion of future credit and/or debit card receivables. State Supreme Courts, such as in New York, have ruled that the transaction is not a loan, and asking the court to convert an agreement to sell future receivable into a loan agreement "would require unwarranted speculation."[1]

MCA companies provide funds to businesses in exchange for a percentage of the businesses' daily credit card income, directly from the processor that clears and settles the credit card payment. A company's remittances are drawn from customers' debit and credit-card purchases on a daily basis until the obligation has been met. Many providers of MCAs form partnerships with payment processors and take a percentage of a merchant's future credit card sales. MCAs offer an alternative to businesses who may not otherwise qualify for a conventional loan and provide flexibility for merchants to manage their cash flow by fluctuating with the merchant's sales volume.

One fundamental distinguishing characteristic of an MCA from a traditional loan is that there is no fixed scheduled payment amount or term. When the merchant makes a sale paid by credit card, a percentage of the transaction is forwarded to the MCA provider. This continues until the total amount of purchased receivables have been paid. The MCA provider receives the purchased receivables in one of the following ways: 1) the merchant's processor forwards the purchased receivables directly to the funder; 2) the merchant's receivables are deposited into a lockbox account that forwards the purchased receivables to the funder and remits the balance to the merchant; or 3) the funder is notified of the amount of the credit card receivables generated and the funder debits the purchased portion from the merchant's bank account.

[1] *Platinum Rapid Funding Grp. Ltd. v. VIP Limousine Servs., Inc.,* No. 604163-15, 2016 BL 275403, (Sup. Ct. June 08, 2016).

Additionally, for many small businesses, MCAs offer an alternative to a traditional commercial loan because MCAs do not require personal guarantees from the business owner. Unlike a traditional commercial loan, the performance guarantee of an MCA only requires that the owner ensure that the business entity complies with all of the terms and conditions of the MCA agreement. These distinguishing characteristics, in additional to the court precedent, demonstrate that MCAs are not loans, and thus, should not be included in Section 1071.

Be Strategic About Data Points to Collect

Section 1071 specifies particular data points that financial institutions must compile, maintain, and submit annually to the CFPB. ETA urges the Bureau to be strategic about including data points beyond what is statutorily mandated. Each data field includes its own set of challenges for businesses to collect and remit to the CFPB. Among other issues, adding additional data fields would increase cost of compliance, thereby increasing cost to small business borrowers, and ultimately, increase time for businesses to apply for credit. Given that small business borrowers are already time pressed, each additional data point represents another hurdle to accessing credit for woman and minority owned small businesses.

The CFPB has recently promulgated a data collection rule where the CFPB also had authority to deviate from the statutorily required data points. In the HMDA rulemaking, the CFPB expanded well beyond what Congress required. However, the small business lending landscape is different from the mortgage landscape. There is not the same need for the CFPB to collect expanded data fields beyond what was statutorily required in the way it did for HMDA, because the current required data points provide sufficient visibility into each small business transaction. Further, HMDA data collection is fundamentally different from small business lending. For example, every small business loan is unique and has to be underwritten in accordance with the lenders underwriting standards – unlike HMDA where loans are underwritten consistently, making it possible to perform comparative analysis for fair lending trends. It is difficult to perform comparative file analysis on small business loans due to their uniqueness and the resulting challenge to identify similar loans to compare.

For each data point identified in Section 1071, ETA would recommend that the CFPB confirm that lenders may rely on self-reported and third-party sourced applicant data. Requiring lenders to independently verify the reported data points would require time-consuming and costly changes and would undercut the efficacy benefits provided by many lenders to their customers. Additionally, even with such changes, some data points may not be independently verifiable by our members.

Lenders' Obligation to Inquire

Section 1071 requires lenders to inquire whether or not a loan applicant is a women-owned, minority-owned, or a small business. When a lender sees a business loan application, the lender will likely be communicating (sometimes wholly virtually) with one representative of the business, who may or may not be an owner. Consequently, the lender may not know or be able to observe whether or not the applicant is women-owned and/or minority-owned.

The lender may also not have sufficient information to determine the size of the applicant if, for example, the applicant has not provided information concerning its size, and the application becomes withdrawn, closed for incompleteness or declined.

Alternatively, to the CFPB's current proposed approach, ETA recommends requiring registration of this data with the Secretaries of State, when a future applicant registers their small business. In doing so, small business lenders could verify this data with the State, rather than asking the small business for additional information during the application process – something that may either slow down or confuse the borrower during the application itself. This allows for a central repository for such information with a trusted source.

Establishing a Safe Harbor

Furthermore, there may be circumstances in which an applicant misidentifies themselves as a women-owned, and/or minority-owned business prompting the lender to inquire about race, ethnicity, and/or sex of the principal owners of the applicant, all of which would be violations of the Equal Credit Opportunity Act (ECOA). ETA recommends that a safe harbor be adopted that sets a reasonableness standard for data collection and/or relying on self-reporting where lenders are not held liable for the accuracy of the applicant's responses because they are in jeopardy of violating other laws.

Adequately Protecting Privacy and Addressing Reidentifying Concerns

In the interest of consumer privacy, we believe Section 1071 data should be kept confidential by the CFPB. In the alternative, Section 1071 data should only be made public in the aggregate or when the privacy of the applicant is protected.

Breaches of consumers' private information collected and maintained by companies and government entities – affecting millions or even tens of millions of consumers – have become commonplace, making information protection and data security a matter of highest priority to our members. Loan-level Section 1071 data collected and made available to the public in combination with other publicly available data sources, if provided for all proposed data fields, could easily enable data prospectors, bad actors and others to reidentify individual borrowers' exceedingly confidential data and exploit it for their own purposes. Consequently, if Section 1071 data are inadvertently or knowingly released to the public, the harm associated with reidentification would be even greater.

If the aggregate data is made public, the CFPB must adopt detailed rules for collecting and releasing data following public notice and comment. These rules should specifically address the treatment of each Section 1071 data field subject to release as well as conditions on release outside of the government for research or other purposes.

To protect against data breach, we urge the CFPB to detail the types of data security safeguards it will undertake and publish them for public comment. The possibility of a breach of confidential

financial data is even more troubling when consumers cannot control distribution of data concerning them, as seems to be the case with Section 1071.

Amplify Regulatory Harmony

ETA and its members support fair lending and have extensive compliance programs in place to address these important issues. Today, laws around discrimination, unfair practices and privacy are already being applied to commercial lenders. In fact, commercial lenders are heavily regulated entities by multiple federal agencies and state-level agencies and licensing structures. The Federal Trade Commission enforces restrictions on unfair or deceptive acts or practices. The Securities and Exchange Commission enforces various securities laws applicable to the lenders that sell loans, notes, or interest in securities loans. The Federal Banking Regulators regulate, supervise, and examine issuing banks and their platform-lending partners. The Financial Crimes Enforcement Network (FinCEN) enforces the Bank Secrecy Act and anti-money laundering requirements. The CFPB enforces the ECOA and the Fair Credit Reporting Act, which contains requirements applicable to commercial credit. The Small Business Administration administers the Small Business Act and the Small Business Investment Act. On the state level, financial regulators and state attorneys general enforce lender licensing and usury laws. Additionally, platform lenders that partner with banks are subject to Federal Deposit Insurance Corporation requirements, and much of the technology that is used by those online lenders is also examined by the Office of the Comptroller of the Currency. ETA recommends striving for regulatory harmony.

One example of a regulatory requirement that the CFPB should consider when attempting to provide regulatory harmony with any future rule is the FinCEN beneficial ownership rule. FinCEN has recently proposed a beneficial ownership rule, which requires financial institutions to identify and verify the identity of beneficial owners of legal entity customers, subject to certain exclusions and exemptions. When requiring new data collection, the CFPB should work to minimize implementation challenges and duplicative requirements.

Additionally, the CFPB should carefully consider thoughts on this rule from other regulatory agencies with jurisdiction over small business lending and the economy. ETA encourages the CFPB to be sensitive to the risk that additional regulation in this space would ultimately prevent expansion of credit to those not currently served and provide an additional roadblock on future innovation. ETA encourages the CFPB to take a thoughtful approach to drafting a final rule to implement Section 1071. This includes working with industry and other regulators to ensure that any data collection regarding business lending is done so in a way that minimizes the regulatory confusion possible with so many regulators in this space.

General Questions on the Proposed Rule

- Would a “covered application” only include those completed applications that are submitted to the lender and contain sufficient information for a decision? It’s unclear as written whether “covered application” would include “incomplete applications” where a

request has been made but the information provided nevertheless is insufficient to render a credit decision by the lender.

- Is there opportunity for greater inclusivity of ethnic groups – can a lender/broker collect demographic information with a greater level of specificity than the current categories required?

- How can a lender properly account for lending distribution percentages when the underlying customer base is not the general small to medium sized business public?

- What is the underwriting imbalance threshold to initiate investigation and enforcement? How can that process allow for the mitigation of data anomalies and errors?

- Will the filing instructions guide (FIG) be open for comment and when can we expect it to be available?

- How closely will the Section 1071 FIG mirror the HMDA FIG?

- Will there be Application Programming Interface considerations for the transmission of data?

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ETA appreciates the opportunity to provide input on this important issue. If you have any questions, please contact me or ETA's Senior Vice President of Government Affairs, Scott Talbott at stalbott@electran.org.

Sincerely,

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