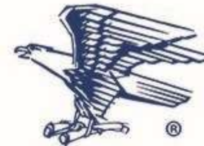
MBa®

MORTGAGE BANKERS ASSOCIATION

NAA
NATIONAL APARTMENT ASSOCIATION
We Lead the Way Home

NMHC
NATIONAL MULTIFAMILY HOUSING COUNCIL
APARTMENT LEADERSHIP RESIDES HERE™

AMERICAN LAND TITLE ASSOCIATION



January 6, 2022

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

Re: Commercial real estate industry comment on small business loan reporting rule

Dear Ladies and Gentlemen:

The undersigned associations respectfully submit our comments below in response to the notice of proposed rulemaking (NPRM) issued by the Consumer Financial Protection Bureau (Bureau) captioned *Small Business Lending Data Collection under the Equal Credit Protection Opportunity Act (Regulation B).*[1] The NPRM proposes rules to implement the small business lending reporting requirements established under § 1071 of the Dodd-Frank Act, to collect information on small business lending, including lending to women- and minority-owned small businesses.

Our organizations represent a broad range of businesses that make or enter into loans secured by income-producing commercial and multifamily properties. These businesses include banks and other depository institutions of all sizes, life insurance companies, sponsors of commercial mortgage-backed securities, and investment funds, among other lenders, as well as business entities that are owners of commercial and multifamily properties, all of which may be affected directly or indirectly by the proposed rule.

---

[1] 86 Fed. Reg. 56356 (Oct. 8, 2021).

EXECUTIVE SUMMARY

Section 1071 applies only to small business lending, and the Small Business Administration (SBA) and federal prudential regulatory agencies have long recognized that lending to finance income-producing investment properties is not small business lending.

Most commercial real estate lending involves the financing of investments in commercial and multifamily investment properties, therefore, the overlap between commercial real estate lending and small business lending under § 1071 should be very narrow. That is, commercial real estate lending that is also small business lending under § 1071 should, generally, be limited to small business loans secured by commercial property that the small business would occupy for its business.

We appreciate that the proposed rule recognizes the distinction between financing income-producing properties and small business lending, at least in part, by proposing an interpretation that clarifies that loans secured by 1-4 unit dwelling investment properties fall outside the scope of § 1071. For the reasons outlined below, we urge the Bureau to clarify also that other investment property types lending similarly fall outside the scope of § 1071. A clarification of the clear boundary between small business lending and all investment property lending would ensure that the information gathered under § 1071 reflects true small business lending and would enable commercial real estate lenders to confidently screen out a category of loans that are not small business loans under § 1071.

We also urge the Bureau to provide a maximum "covered credit transaction" amount threshold, which would similarly provide an efficient screen for excluding credit applications from *non*-small businesses. In addition, we suggest other recommendations to provide clarity and to reduce regulatory burden.

Our specific recommendations fall into the following eight categories:

I. Investment properties exclusion

- Clarify that the investment properties exclusion from § 1071 applies to all investment property lending.

II. Maximum "amount applied for" exclusion

- Establish a maximum credit "amount applied for" set at the $750,000 statutory limit for Small Business Association (SBA) direct loans.

III. Transactional threshold

- Increase the transactional threshold from 25 to 500 small business loan originations in each of the two preceding calendar years.

IV. Implementation period

- Provide an implementation period that covers two full calendar years after the effective date of the final rule rather than the proposal of "about 18 months."

V. Small business definition

- For an applicant that is a newly created single-purpose entity (SPE), permit a financial institution to apply the $5 million gross annual revenue threshold to either the gross annual revenue of the *property* for its most recent fiscal year under its

prior owner or the SPE's *projected* gross annual revenue rather than to its (nonexistent) prior year's gross annual revenue.

- Provide additional guidance on what types of entities may be affiliates of an applicant, e.g., as a result of common ownership or common control.

VI. Firewall

- Clarify operational factors that a financial institution may consider when determining that an officer or employee "should have access" to demographic information collected under § 1071.

VII. Race and ethnicity information

- Treat the reporting of race and ethnicity the same as the proposed treatment of the reporting of sex, in cases where the applicant does not provide the information.

VIII. Applicant-provided information

- Remove the requirement to replace applicant-provided information with information the financial institution verifies.

We discuss each of these recommendations in greater detail below. We also provide a compilation of all suggested language for implementing these recommendations in Appendix A to this letter.

COMMERCIAL REAL ESTATE COMMENTS

I. INVESTMENT PROPERTY EXCLUSION

A. Overview

Commercial and multifamily real estate lending largely consists of financing investment properties. Investment properties include single-family (1-4 unit dwellings), multifamily (5 or more unit dwellings), commercial (e.g., office, retail, hospitality, warehouse, and industrial), and mixed-use investment properties.

It is well recognized that investment property lending is a category of lending distinct from small business lending. For example, the federal prudential regulatory agencies provide separate supervisory guidance for small business lending and investment property lending, and SBA regulations exclude real estate firms that hold real property for investment purposes from eligibility for SBA small business loan programs. As a result, investment property lending should not be considered small business lending within the scope of § 1071, even where an investor may be "small."

The proposed rule recognizes this – but only in part. Specifically, proposed interpretation § 104(d)-4 clarifies that loans secured by investment properties that are 1-4 unit dwellings are excluded from § 1071, but the interpretation does not also clarify that loans to finance other investment property types are similarly outside of the scope of § 1071.

While it may be self-evident that all investment property lending is not small business lending under § 1071, clarifying that fact is important to the commercial real estate industry because such a clarification will provide an efficient way to accurately screen out a category of loan applications that do not fall under § 1071. While loans to finance commercial and multifamily investment property also will generally fall outside of the scope of § 1071 for other reasons (e.g., the

applicants generally will not be small businesses), an investment property exclusion that clarifies that it applies across all investment property types would provide a more efficient way for lenders and borrowers to confidently screen out transactions that do not fall under § 1071.

As we describe below, clarifying that the investment property exclusion applies across all investment property types also would achieve the Bureau's objectives more effectively than would the proposed, limited investment property exclusion. We therefore urge the Bureau to modify official interpretation § 104(d)-4 to clarify that all lending to finance investments in investment property falls outside of the scope of § 1071. We provide specific suggested language for this recommendation in subsection F of this section.

B. Clarifying that all investment property lending falls outside of § 1071 would more fully and effectively achieve the Bureau's objectives.

In the NPRM discussion of the investment property exclusion, the Bureau identified objectives for the proposed investment property exclusion, including to "better capture lending to true small businesses (as opposed to consumers seeking to diversify their investments)," to "better align with financial institution lending practices," and to ensure that "consumer-purpose investment loans" are excluded because including such loans under § 1071 "would be contrary to the purposes of § 1071."[2]

We believe that an interpretation that clarifies that all investment property lending falls outside of § 1071 would achieve each of these objectives more fully and more effectively than the proposed, narrow investment property exclusion, as follows.

- **Lending to small business vs. consumers diversifying investments**. Consumers seeking to diversify their investments by investing in income-producing real estate may elect to do so by investing in 1—4 unit dwellings – or by investing in a small property or a small commercial property such as an office building or retail location. The proposed limited investment property exclusion would not address that full range of possible consumer investments. In contrast, an interpretation that clarifies that all investment property lending falls outside of § 1071 would cover the full range of possible consumers real estate investments.
- **Alignment with financial institution lending practices.** It is evident from the supervisory guidance and Small Business Administration (SBA) regulations described in the in subsections C and D, below, that financial institution lending practices for small business lending are different from lending practices for financing investment properties, and that these differences apply across all investment property types. The proposed, limited investment property exclusion reflects those differences in financial institution lending practices and so is not fully aligned with financial institution lending practices. In contrast, clarifying that all investment property lending falls outside the scope of § 1071 would fully align the rule with financial institution lending practices.
- **Excluding "consumer-purpose investment loans" from § 1071**. As was described above, consumer-purpose investment loans can include loans to invest in income-producing real estate other than 1-4 unit dwellings. The proposed limited investment property exclusion would not be effective in excluding consumer-purpose investment loans intended to finance those other real estate investment property investments.

[2] 86 Fed. Reg. at 56412.

> Clarifying that all investment property lending falls outside the scope of § 1071, however, would achieve the objective of excluding "consumer-purpose investment loans" across the full range of possible consumer real estate investments.

C. Supervisory guidance recognizes that financial institution lending practices for financing of investment property are not the same as practices for small business lending.

Clarifying that all lending to finance investments in investment property is not small business lending under § 1071 would align the rule with financial institution practices described in supervisory guidance issued by federal prudential regulatory agencies, which recognizes a clear distinction between lending to finance investment property and small business lending.

A key element of that illustrates this distinction is the difference in the primary source of repayment financial institutions generally look to when underwriting the loan, a difference shown in the table and guidance cited below.

Primary sources of funds for repayment

Category of lending	Primary source of funds for repayment
Small business lending	Cash flow from the small business
Investment property lending	Net operating income (NOI) generated by the property itself

Small business lending

An *Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers* advises financial institutions that the cash flow from a small business generally is the primary source of funds for repayment for small business lending, as follows:

> For most small business loans, the primary source of repayment is often the cash flow of the business, either through the conversion of current assets or ongoing business operations. An institution's cash flow analysis should cover current and expected cash flows, and reflect expectations for the borrower's performance over a reasonable range of future conditions, rather than overly optimistic or pessimistic cases.[3]

The OCC highlights in its *Commercial Real Estate Lending Handbook* that this is also true where the loan is secured by property the business occupies and uses in the conduct of its business:

> **Loans Secured by Owner-Occupied Properties**
>
> For owner-occupied properties, the primary source of repayment is usually the cash flow generated by the occupying business. ... As an owner-occupied loan, the underwriting analysis should emphasize the repayment ability of the occupying business.[4]

---

[3] See *Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers*, p. 2 (Feb. 5, 2010) available at https://www.occ.treas.gov/news-issuances/bulletins/2010/bulletin-2010-6a.pdf

[4] OCC Commercial Real Estate Lending Comptroller's Handbook, pp. 56-57 (Jan. 2017); available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/commercial-real-estate-lending/index-commercial-real-estate-lending.html

Investment property lending

The OCC *Commercial Real Estate Lending Handbook* advises that the primary source of funds for repayment of loans to finance investment properties generally is the net operating income (NOI) of the property itself:

> Because repayment of loans that finance income-producing real estate is typically primarily dependent on the property's ability to service debt from cash flow and collateral value is largely determined by a property's NOI, it is important to carefully analyze and fully understand the income generating capacity of the real estate. A property's cash flow and NOI projections should be carefully reviewed to ensure they are reasonable and supported.[5]

The OCC residential lending handbook clarifies that this is also the case where the investment property is a 1-4 unit dwelling investment properties:

> Banks are also authorized to make loans to investors for the purpose of purchasing or refinancing one- to four-family RRE [residential real estate] properties for rental to others. In many banks, investor-owned residential real estate (IORR) financing is managed like owner-occupied one- to four-family residential loans. The credit risk presented by IORR lending, however, is more similar to that associated with loans for income-producing commercial real estate. Because of this similarity, the OCC expects banks to use the same types of credit risk management practices for IORR that are used for commercial real estate lending.[6]

Together, this guidance demonstrates that the federal prudential regulatory agencies recognize the distinction between small business lending and lending to finance investment properties of all types, and that well-recognized distinction supports the conclusion that investment property lending is not small business lending covered by § 1071.

D. SBA regulations recognize that financing of investment property is not small business lending.

Clarifying that all investment property lending is not small business lending under § 1071 would be consistent with SBA regulations, which establish a clear boundary between small business lending and lending to finance investment property, and a clear boundary between engaging in investment activity and engaging in small business.

SBA regulations are relevant to § 1071 because:

- The missions and focus of both § 1071 and the SBA are small business lending,
- The § 1071 definition of small business is explicitly tied to the Small Business Act and SBA regulations,[7] and

---

[5] Id. at p. 36.

[6] OCC, *Residential Real Estate Lending Comptroller's Handbook* at p. 12 (Jan. 2017); available at: https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/residential-real-estate-lending/index-residential-real-estate-lending.html

[7] See 15 U.S.C. § 1691c-2(h)(2) ("The term "small business" has the same meaning as the term "small business concern" in section 632 of this title [15 U.S.C. § 632]"); and proposed 12 C.F.R. § 1002.106(b) ("*Small business* has the same meaning as the term ''small business concern'' in 15 U.S.C. 632(a), as implemented in [SBA regulations at] 13 C.F.R. 121.101 through 121.107.").

- There are existing SBA regulations that directly address the question of how to draw the boundary between the financing of investment properties and true small business lending.

For purposes of determining the scope of § 1071, it is relevant that the SBA clearly distinguishes between lending to finance investment property and small business lending both in (1) regulations limiting eligibility for the SBA's core section 7(a) small business lending program and (2) regulations restricting the use of small business loan proceeds, as we describe below.

Real estate investment as an ineligible business

SBA regulations on section 7(a) eligibility[8] clearly distinguish between real estate investing and small businesses by placing firms engaged in real estate investing on the list of "ineligible businesses." The SBA summarizes that exclusion as follows:

> **Ineligible businesses [include]**
>
> Real estate investment firms, when the real property will be held for investment purposes as opposed to loans to otherwise eligible small business concerns for the purpose of occupying the real estate being acquired.[9]

Real estate investment as a prohibited uses of proceeds

SBA's regulations restricting the permissible uses of small business loan proceeds similarly distinguish between real estate investing and small businesses by explicitly barring the use of any small business loan proceeds for investment purposes, as follows:

> **13 C.F.R. § 120.130 Restrictions on uses of proceeds.**
> SBA will not authorize nor may a Borrower use loan proceeds for the following purposes (including the replacement of funds used for any such purpose): …
>
> (d) Investments in real or personal property acquired and held primarily for sale, lease, or investment (except for a loan to an Eligible Passive Company or to a small contractor under § 120.310); …

In sum, SBA regulations establish a clear boundary between real estate investment and small business, and a clear boundary between investment property lending and small business lending. Those boundaries should equally apply in the context of § 1071.

[8] See 13 C.F.R. § 120.110 ("What businesses are ineligible for SBA business loans? The following types of businesses are ineligible: … (c) Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111); ...."); 13 C.F.R. § 120.100 ("What are the basic eligibility requirements for all applicants for SBA business loans? To be eligible for an SBA business loan, a small business applicant must: … (a) Be an operating business (except for loans to Eligible Passive Companies); ....").

[9] From SBA webpage on terms, conditions, and eligibility for section 7(a) small business loans; Terms, conditions, and eligibility (sba.gov)

E. Clarifying that all investment property lending falls outside of § 1071 would not conflict with the Regulation C comment that was the model for the proposed investment property exclusion.

The investment property exclusion in proposed interpretation § 104(d)-4 was modeled on Regulation C comment 4(a)(6)-4,[10] and both proposed interpretation § 104(d)-4 and Regulation C comment 4(a)(6)-4 are limited to 1-4-unit dwellings. Clarifying that all investment property lending falls outside the scope of § 1071 would not conflict with the Regulation C comment.

Under Regulation C, HMDA reporting financial institutions data must report Occupancy Type for the property securing each reported mortgage loan. Allowable values are *primary residence*, *second residence*, and *investment property*. Regulation C comment 4(a)(6)-4 provides guidance on how to report Occupancy Type for 1-4 unit dwellings.

The Regulation C comment is limited to 1-4 unit dwellings because this was the only category of loan for which financial institutions needed guidance. The Occupancy Type for multifamily loans must always be reported as *investment property*, and other loans secured by other commercial properties are not subject to HMDA reporting at all (and if they were, their Occupancy Type would presumably also be *investment property*).

That is, the scope of the Regulation C comment is limited to 1-4 unit dwellings solely because the reporting of other loans secured by other property types was clear. The scope of the comment is not limited to 1-4 unit dwellings because the scope of the term *investment property,* even in the HMDA context, is limited to 1-4 unit dwellings. As a result, an investment property exclusion that clarifies that all investment property lending falls outside the scope of § 1071 would not conflict with Regulation C comment 4(a)(6)-4.

F. Recommendations.

We provide suggested language below to clarify that all investment property lending falls outside of § 1071, as discussed above. For additional clarity, we further recommend that the substance of the revised investment property exclusion be included in the rule text as well as in interpretation § 104(b)-4. We also recommend making a conforming technical change to the allowable fields for the *credit purpose* data field, consistent with the recommended expansion of the investment property exclusion.

Revised interpretation § 104(d)-4[11]

We recommend revising interpretation § 104(d)-4 to apply across all investment property types and to model the interpretation on applicable supervisory guidance and SBA regulations, for example, as follows:

> (4) *Investment property credit*. The term "covered credit transaction" does not include an application for credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment. This includes loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds. A characteristic that distinguishes investment property credit from small business lending

[10] See 86 Fed. Reg. at 56412 ("proposed comment 104(b)–4, which would address what does and does not constitute an investment property, is modeled on Regulation C's comment 4(a)(6)–4"). The extent of that modeling is evident in the side-by-side table attached as Appendix B to this letter.

[11] The suggested language for interpretation § 104(d)-4 would replace the current text in its entirety.

> is that the primary source of funds for repayment of investment property credit is generally the net operating income (NOI) of the property and the primary source of funds for repayment of a small business loan is generally the cash flow of the small business. A loan to finance a commercial property that the small business borrower will occupy in the furtherance of its business, is not an investment property credit.

The suggested language is modeled on language from SBA regulations and supervisory guidance and is offered as a substitute for language and examples in proposed interpretation § 104(b)-4.

In suggesting substitute language, we acknowledge that the proposed interpretation was modeled on a Regulation C comment.[12] That comment, however, was designed to address a different question in a different context (i.e., how to populate Occupancy Type for HMDA reporting). As a result, it is not well aligned with the investment property exclusion from § 1071. For example, one of the illustrative examples imported from the Regulation C comment would in fact *exclude* small business loans that should clearly be covered by § 1071.[13] Accordingly, we recommend substituting language modeled on SBA regulations and supervisory guidance.

New subparagraph to § 1002.104(b)

For additional clarity, we recommend incorporating the key substance of the revised investment property exclusion into the rule text, for example, as follows:

> *(#) Investment property credit.* Credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment, including loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds.[14]

Conforming technical revision

As a conforming technical revision, we recommend modifying the list of allowable values under the official interpretation of section 107(a)(6) to remove loan purposes that describe credit secured by investment properties (or consumer credit transactions), as follows:

---

[12] See side-by-side table comparing interpretation § 104(d)(-4 and Regulation C official comment 4(e)(6)-4 attached as Appendix B to this letter.

[13] That example provides as follows: "For example, if a corporation purchases a property that is a dwelling under § 1002.102(j), that it does not occupy, but that is for the long-term residential use of its employees, the property is an investment, even if the corporation considers the property as owned for business purposes rather than investment purposes, does not generate income by renting the property, and does not intend to generate income by selling the property at some point in time." In our view, an application for a loan to finance this property would be a small business loan subject under § 1071, so long as the corporation was a small business. This example illustrates how a loan that is properly reported with an Occupancy Type of *investment property* for HMDA purposes could be a small business loan, not a loan to finance investment property, for purposes of under § 1071.

[14] By describing the exclusion in terms of loan purpose rather than by reference to the asset securing the loan, the exclusion avoids confusion in circumstances where, for example, a small business may request a loan for the purpose of obtaining working capital, where the real property that secures the loan has no relationship to the business (e.g., the primary residence of the business owner or a relative, or an income-producing property with no relationship to the business).

107(a)(6) Credit purpose.

1. *General.* A financial institution complies with § 1002.107(a)(6) by selecting the purpose or purposes of the covered credit transaction applied for or originated from the list below.

~~i. Purchase, construction/improvement, or refinance of owner-occupied dwelling(s).~~[15]

~~ii. Purchase, construction/improvement, or refinance of non-owner-occupied dwelling(s).~~

~~iii. Purchase, construction/improvement, or refinance of non-owner-occupied, non-dwelling real estate.~~

II. MAXIMUM "AMOUNT APPLIED FOR" EXCLUSION

We recommend that the Bureau provide a threshold for excluding applications where the "amount applied for" is in an amount inconsistent with small business lending (i.e., greater than the $750,000 statutory limit for Small Business Association (SBA) direct loans). That is, if an applicant applies for an amount of credit that exceeds that specified threshold, the application is excluded from the definition of "covered credit transaction" under the rule.

A maximum for credit amounts applied for under § 1071 would substantially reduce the burden on both financial institutions and borrowers of verifying that loan applicants are not small businesses, by providing a bright line screen. Absent such a screen, the rule would impose a significant burden on lenders and borrowers of gathering and analyzing borrower information, even in cases where the amount of credit requested is far beyond the amount a prudent lender would grant to a small business. Ideally, a transaction-reporting rule should aim not to impose a regulatory burden on transactions that fall outside of the scope of that rule.

As a starting point for establishing a maximum for credit amounts applied for, we note that the primary source of funds to repay a small business loan is the cash flow of the small business, and "small business" is defined as a business with gross annual revenues of not more than $5 million. Consistent with prudent lending practices, the cash flow generated by a business of that size could support repayment only of a loan of a limited size. Operationalizing that principle with a maximum for credit amounts applied for would substantially reduce the burden of screening out non-small business applicants.

There are two natural choices for models for such a maximum. One model is the $750,000 statutory maximum loan size permitted under the Small Business Act and implementing SBA regulations.[16] The other model is the loan size threshold under FFIEC Call Report instructions for reporting bank loans under $1 million to businesses of any size[17] that the Bureau relied on for some of the analysis underlying the rule.

---

[15] Credit for the purpose of: Purchase, construction/improvement, or refinance of owner-occupied dwelling(s) would appear to be excluded as consumer credit if the loan was primarily for personal, family, or household purposes. See 12 C.F.R. § 1002.1(g), (h).

[16] See 13 C.F.R. § 120.211 (establishing statutory maximum loan amounts for direct SBA loans ranging from $350,000 to $750,000 and establishing administrative limits that are much lower (e.g., $150,000)); see also 13 C.F.R. § 120.151 (establishing a $5 million maximum *aggregate* loan amount, with SBA's maximum exposure limited to an aggregated total of $3.75 million).

[17] FFIEC Call Report Instructions instruct that reporting of "loans to small businesses" is limited to loans with original amounts of $1 million or less. See Instructions for Preparation of Consolidated Reports of Condition and Income (FFIEC 031, 032, 033, and 034), p. RC-C-37 ("Schedule RC-C, Part II. Loans to

Possible choices for maximum loan amount threshold.

Threshold ($)	$750,000	$1 million
Threshold description	Statutory maximum amount for SBA direct small business loan.	FFIEC Call Report instruction for reporting small business loans, defined as "loans with original amounts of $1 million or less" reported as loans secured by nonfarm nonresidential properties or as Commercial or Industrial loans, without regard to borrower size.

While we believe either threshold amount could facilitate the ability of institution to establish effective procedures, we believe the SBA statutory maximum loan size is the better model. The proposed rule is closely related to the Small Business Act and SBA regulations,[18] so it would be appropriate to harmonize the Bureau's small business loan reporting rule with the SBA's maximum small business loan amount. In contrast, as the Bureau acknowledges, the $1 million threshold in the Call Report instructions is, as the Bureau has acknowledged, a threshold for reporting on small loans to businesses of any size rather than a maximum threshold for small business loans.[19] As a result, a threshold tied to the statutory maximum for SBA small business loans is a more appropriate threshold for a maximum for credit amounts applied for under § 1071.

We further suggest linking to the maximum for credit amounts applied for threshold by a cross reference to the applicable SBA regulation so that the threshold would automatically update without additional action any time the SBA maximum loans amount is increased.

Recommendation

Establish a maximum loan size screen by adding a new "large loans" exclusion to section 1002.104(b), for example as follows:

> (#) *Large credit transactions*. Applications for credit in an amount greater than the maximum direct loan amount permitted under 13 C.F.R. § 120.211 [currently $750,000].

III. TRANSACTIONAL THRESHOLD

As part of the rule's definition of "covered financial institution," the proposed rule would establish a transactional threshold of 25 originations of "covered credit transactions" (small business loans) in each of the two prior years. We recommend that the threshold be increased to 500 originations of "covered credit transactions" (small business loans) in each of the two prior years, modeled after the 2018-2021 HMDA transactional threshold for open-end lines of credit.

A function of a transactional threshold is to establish the proper balance between (1) the cost and other burdens a financial institution (and its small business borrowers) would bear under the rule and (2) the marginal benefit information on that institution's small business loans would have on

---

Small Businesses and Small Farms"); available at: Schedule RC-C, Part II. Loans to Small Businesses and Small Farms (fdic.gov)

[18] See 15 U.S.C. § 1691c-2(h)(2) ("The term "small business" has the same meaning as the term "small business concern" in section 632 of this title [15 U.S.C. § 632]"); and proposed 12 C.F.R. § 1002.106(b) ("*Small business* has the same meaning as the term ''small business concern'' in 15 U.S.C. 632(a), as implemented in [SBA regulations at] 13 CFR 121.101 through 121.107.").

[19] See 86 Fed. Reg. at 56362 ("Under the FFIEC and CRA reporting regimes, small loans to businesses of any size are used in whole or in part as a proxy for loans to small businesses."), 56366 note 104.

the purpose of the reporting requirement, i.e., improving small businesses' fair access to credit in the future.

As proposed, the rule would apply to any financial institution that originates more than about one small business loan every two weeks, which is a very low volume of lending. At those low levels of lending, institutions would not have the economies of scale necessary to absorb the cost of reporting without also passing that cost on to the very small business borrowers the rule is intended to help. Moreover, at those low levels of production, financial institutions may elect to eliminate or limit their small business lending rather than taking on the considerable cost of reporting. That outcome would decrease rather than increase the availability of credit to small businesses, which would be the opposite of what the rule is intended to accomplish.

The proposed transactional threshold for § 1071 appears to be modeled on the transactional threshold for closed-end mortgage loans for HMDA reporting, prior to the 2020 amendments to Regulation C that increased that threshold to 100 loans in each of the two prior years. This suggests a working assumption that small business loans are similar to home mortgages.

We suggest that the Bureau look instead to the threshold for open-end lines of credit (i.e., home equity lines of credit, or HELOCs) because small business loans are more like open-end loans lines of credit secured by a mortgage than they are like closed-end home mortgages. In fact, the Bureau recognized that HELOCs are often used to fund small businesses, but the Bureau elected to excluded HELOC's from § 1071.[20] Accordingly, we recommend that the Bureau adopt the 500-loan transactional threshold that applied to open-end loans for 2018-2021.

While we recognize that this threshold recently dropped to 200 loans on January 1, 2022, we believe that the higher, 500-loan threshold is more appropriate for reporting small business loans because small business loans are likely to include many small loan amounts that would be less than the minimum HELOC's amounts (many lenders set a minimum credit amount of $10,000 for a HELOC, but the SBA has no minimum credit amount for SBA small business loans). In addition, lower-volume small business lenders with more than 500 originations per year would be less likely than smaller-volume lenders to elect to exit small business lending to avoid the substantial burden of reporting under § 1071.

Recommendation

We recommend the transactional threshold be increased to 500 originations of small business loans over each of the preceding two years, as follows:

> **§ 1002.105 Covered financial institutions and exempt institutions**
>
> (b) Covered financial institution means a financial institution that originated at least ~~25~~ 500 covered credit transactions for small businesses in each of the two preceding calendar years. For purposes of this definition, if more than one financial institution was involved in the origination of a covered credit transaction, only the financial institution that made the credit decision approving the application shall count the origination for purposes of this paragraph (b).

[20] See 86 Fed. Reg. at 56411 and proposed official interpretation § 104(d)-3.

IV. IMPLEMENTATION PERIOD

As proposed, the rule would have a compliance date "about 18 months" after publication of the final rule in the *Federal Register.* That proposed implementation period would be insufficient operationally because it would not provide enough time for financial institutions to apply the rule's transactional threshold, which applies a two-calendar-year look-back period to a determination of whether a financial institution is covered by the rule.

For a financial institution to determine whether it is covered by the rule, it must determine how many small business loans it originates in two consecutive years. To determine whether a loan is a small business loan, a financial institution must have access to information about the gross annual revenue for the borrowers to which the institution has extended business credit.

Many financial institutions will not have gross annual income information on prior loans and would have no way to apply the transactional threshold to prior years. This can be the case for investment property lending, where lending is based on NOI rather than gross annual revenue. And, even for institutions that might have collected gross annual revenue for some business borrowers, that information may not have been collected and stored in a manner that can readily be used to apply the transactional threshold.

At a minimum, financial institutions need to know the final rules of the road enough in advance of the beginning of a calendar year to be able to put in place a way to gather gross annual revenue information and begin to track their originations of "covered credit transactions" under the rule.

We believe these problems can be addressed by adopting the following implementation and compliance schedule, which we believe provides the earliest possible compliance date that can be accomplished without requiring the retroactive application of the rule.

Recommended Section 1071 Final Rule Implementation and Compliance Schedule

Partial Yr.	Calendar Year 1	Calendar Year 2	Calendar Year 3
Final rule becomes effective.	First calendar year financial institutions track originations of "covered credit transactions."	Second calendar year financial institutions track originations of "covered credit transactions."	January 1 "compliance date." Financial institutions that met the transactional threshold in each of the preceding two calendar years are required to collect and report information under the final rule.

This schedule is an effort to identify the path to the earliest compliance that would be feasible operationally. However, the schedule does have its limitations. That is, this schedule would work only if (1) there is a substantial gap between the time the final rule is issued and the beginning of the next calendar year; and (2) the Bureau issues technical compliance specifications sufficiently in advance of the compliance date to enable financial institutions and third-party service providers to operationalize the rule's requirements ahead of the compliance date.[21] If either of those conditions is not met, the schedule above would need to be extended.

[21] For an example of such technical guidance, see *Filing instructions guide for HMDA data collected in 2022* (Oct. 2021); available at https://s3.amazonaws.com/cfpb-hmda-public/prod/help/2022-hmda-fig.pdf

To enable the Bureau to begin gathering information earlier, this schedule can be supplemented by the proposed rule's guidance that financial institutions may voluntarily begin collecting and reporting data under the rule prior to the compliance date.

Recommendation

We recommend the following suggested revisions to § 1002.114 to incorporate our recommendations above into the rule text.

> **§ 1002.114 Effective date, and special transitional rules.**
>
> (a) *Effective date.* The effective date for this subpart is [90 days after the date of publication of the final rule in the **Federal Register**].
>
> (b) *Compliance date.* The compliance date for this subpart is [January 1 of the first calendar year that begins more than two years ~~approximately 18 months~~ after the effective date of this subpart ~~publication of the final rule in the **Federal Register**~~].
>
> (c) *Special transitional rules*—(1) *Collection of information prior to the compliance date.* A financial institution that will be a covered financial institution as of the compliance date in paragraph (b) of this section is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business under § 1002.107(a)(18), a women-owned business under § 1002.107(a)(19), and the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(20) beginning [12 months prior to the compliance date]. A financial institution collecting such information pursuant to this paragraph (c)(1) must do so in accordance with the requirements set out in §§ 1002.107(18) through (20) and 1002.108.
>
> (2) *Determining whether a financial institution is a covered financial institution for purposes of this subpart.* For purposes of determining whether a financial institution is a covered financial institution under § 1002.105(b) as of the compliance date specified in paragraph (b) of this section, a financial institution shall use its originations in the first two full calendar years after the effective date of this subpart. A financial institution is permitted, but not required, ~~to use its~~ to use its originations of covered credit transactions for small businesses in the, second and third preceding calendar years (rather than its originations in the two immediately preceding calendar years~~)~~.

V. SMALL BUSINESS DEFINITION

A. Newly formed SPEs and gross annual revenue

The rule should provide guidance as to how to apply the $5 million gross annual revenue test to determine the small business status of a newly formed single-purpose entity (SPE), also known as a special-purpose vehicle (SPV).

Commercial (including multifamily) real estate lending is different from many other types of lending because the applicant for a commercial real estate loan is generally an SPE rather than a business entity with broad purposes or a natural person.

An SPE, is established for the sole purpose of owning the commercial real property that will secure the loan. This requirement helps limit the number of creditors that might be involved in bankruptcy proceedings. The SPE can be formed in a variety for ways, including forming a Limited Liability Company (LLC) or a Limited Partnership (LP). In cases where the borrower/owner is an LP, the lender may require that the General Partner of the LP must be an SPE.

An applicant will generally be a *newly formed* SPE where the purpose of an application for credit is to finance the acquisition of commercial real property. That newly formed SPE will, of course, have zero gross annual revenue for its most recent fiscal year and will, in fact, have no most-recent fiscal year. As a result, the SPE applicant could appear to be a “small business” under a mechanical application of the gross annual revenue test, even if the commercial property were projected to generate $50 million in gross annual revenue. On the other hand, to underwrite the loan, a lender will generally collect and analyze the financial performance (e.g., NOI) of the property for its most recent fiscal year, under prior ownership, and/or the applicant’s projected financial performance.

Recommendation

As a practical solution to address applicants that are newly created SPEs formed to own real property, we recommend guidance that the financial institution can apply the gross annual revenue test to either the gross annual revenue of the property for the most recent fiscal year, even if the property was then under different ownership, or the applicant’s *projected* gross annual revenue. That information should be readily available to the applicant and would likely be collected by the financial institution in the normal course of underwriting the loan.”[22]

This guidance could be in the form of an additional subsection of official interpretation § 2001.106, specifically 106(b), as follows:

> [#]. *Gross annual revenue for* newly formed *single-purpose entities (SPEs)*. If the applicant is a newly formed single-purpose entity (SPE) formed for the purpose of owning real property that will secure the loan, the financial institution may rely on the gross annual revenue of the property for the most recent year or the applicant’s projected gross annual revenue for purposes of determining the small business status of the applicant.

B. Affiliate revenue

The gross annual revenue test under the definition of small business measures the sum of the gross annual revenue of the applicant and the gross annual revenue of any affiliates of the applicant.[23] If the aggregate gross annual revenue is $5 million or less for the most recent fiscal year, the applicant is a small business. If the aggregate gross annual revenue is greater than $5 million or less, the applicant is a not a small business.[24] As a result, affiliate revenue is an important element of the determination of whether an applicant is a small business under § 2001.016(b).

Affiliate revenue is addressed in official interpretation 106(b)-3, which we appreciate. However, the interpretation on taking affiliate revenue into account for determining small business status

[22] We note that considering projected gross annual revenue of a newly formed SPE would be in harmony with SBA’s small business lending criteria, which include consideration of “Past earnings, *projected cash flow*, and future prospects.” 13 C.F.R. § 120.150(d) (emphasis added).

[23] See proposed official interpretation § 1002.106(b)-3 (“a financial institution is permitted to rely on an applicant’s representations regarding gross annual revenue (which may or may not include the affiliate’s revenue) for purposes of determining small business status under § 1002.106(b)”); see also proposed official interpretation § 1002.107(a)(14)-3 (“in determining whether the applicant is a small business under § 1002.106(b), a financial institution may rely on an applicant’s representations regarding gross annual revenue, which may or may not include the affiliate’s revenue”).

[24] See proposed 12 C.F.R. § 1002.106(b) (“for purposes of this subpart, a business is a small business if and only if its gross annual revenue … for its preceding fiscal year is $5 million or less.”).

would be clearer if the interpretation did not also describe guidance for interpretation 107(a)(14)-3 on the separate issue of reporting affiliate revenue.

Recommendation

To clarify interpretation 106(b)-3, we suggest the following editorial revision:

> 3. *Affiliate revenue.* ~~As explained in comment 107(a)(14)–3, a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. As explained in comment 107(a)(14)–1, pursuant to § 1002.107(b), if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. Likewise, a~~ A financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include the affiliate's revenue) for purposes of determining small business status under § 1002.106(b). However, if the applicant provides updated gross annual revenue information (see comment 107(c)(1)–7), or the financial institution verifies the gross annual revenue information, the financial institution must use the updated or verified information in determining small business status.

C. Definition of affiliates

The proposed rule incorporates the SBA definition of affiliates, including affiliation based on common control, common ownership, and common management. As described above, in commercial real estate lending, the applicant is generally an SPE whose sole purpose is to own the property that will serve as collateral for the loan. It would be useful therefore for the Bureau to clarify how that definition of affiliates applies in the normal contexts of commercial real estate lending, both for "owner-occupied" properties and for investment properties.

Investment properties

For loans to finance investment property (which we believe are not "small business loans," as we discuss in section I in this comment), the SPE is generally organized by a "sponsor." A sponsor puts together a real estate transaction to acquire or hold income-generating property, for the benefit of various investors. Depending on the SPE's organization, the investors may own shares in the LLC or other corporation, if that is how the SPE is organized, or they may be limited partners in the limited partnership, if that is how the SPE is organized. The sponsor also generally maintains an ownership interest in each property.

As part of underwriting a commercial real estate loan, a lender generally will require a sponsor to provide a schedule of other real estate in which the sponsor has an ownership interest. Under the SBA's general principles of affiliation, the SPEs that own that other real estate would be affiliates of the applicant SPE, because of the overlapping ownership interest. The SPEs on the schedule of real estate could additionally be affiliates of the applicant SPE where one or more officers, directors, managing members, or partners controls the board of directors or management of both the applicant SPE and the SPEs on the schedule of real estate.

As a result, the gross annual revenues of each of the affiliates can be aggregated with the gross annual revenue of the applicant SPE, to apply the gross annual revenue test under the definition of the "small business." Therefore, a lender that establishes that the gross annual revenue of the applicant SPE and the SPEs on the schedule of real estate exceeds $5 million can conclude that the applicant SPE is not a small business and that the loan applied for does not fall within the scope of the rule.

Owner-occupied properties

Where a business concern seeks to finance a commercial property that such business will use and occupy in its business, the applicant for the financing generally will still be an SPE. Because the SPE will be under the ownership and control of the parent operating company, the SPE and the operating company will be affiliates. As a result, the gross annual revenue of the operating company can be combined with that of the SPE when determining whether the applicant is a small business under the rule.

If a lender determines that the gross annual income of the SPE applicant and the parent operating company exceed $5 million, the lender can conclude that the applicant SPE is not a small business and that the loan does not fall within the scope of the rule.

Recommendation

To provide guidance on the application of the definition of affiliates in the real estate lending context, we recommend adding an additional subsection to official interpretation 106(b), as follows:

> [#]. *Gross annual revenue for real estate affiliates.* If a financial institution collects a schedule of real estate in which the applicant has an ownership interest in connection with a loan application, the owners of any real property listed on that schedule and the applicant are affiliates because of the common ownership.

While this recommended guidance would be helpful for commercial real estate lenders, the most impactful change the Bureau can make to address the complexity of the task borrowers and lenders face would be to expand the investment property exclusion to clarify that it applies across investment property types.

VI. FIREWALL

The so-called firewall protections in § 1071 aim to separate the collection of the demographic information from the process of making a credit decision, but the statute also allows for exceptions where that separation is infeasible or the financial institution determines that any officer or employee involved in the credit decision "should have access" to information collected under § 1071.[25] This exception is a practical necessity for many smaller lenders or lending lines of business that rely on a small staff.

We appreciate the Bureau's efforts at providing guidance on the firewall, and we believe it would be additionally helpful to provide guidance on the operational business factors that a financial institution may reasonably rely on in making a determination that any individual or individuals "should have access."

[25] Section 1071(d)(1) requires a financial institution to create a firewall that prevents anyone involved in making a credit decision from having access to the demographic information collected under section 1071, but only "where feasible." Section 1071(d)(2) provides that, if the financial institution determines that individuals involved in the credit decision "should have access to" that demographic information, the financial institution must provide the applicant with a disclosure to that effect.

Recommendation

To provide additional guidance on factors that a financial institution may reasonably rely on in making a determination that any individual or individuals "should have access," we recommend adding the following additional language to the end of interpretation 108(c)-1:

> A financial institution's determination that a particular employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) through (20) may be based on a reasonable business justification, taking into account relevant operational factors such as the size of the institution, the number of personnel within the line of business that receives and processes applications from small businesses, job descriptions, the number of applications typically received by the line of business that is subject to § 1002.107, and the proportion of applications within a line of business that are and are not subject to § 1002.017.

VII. RACE AND ETHNICITY INFORMATION

Where a small business applicant does not provide information about the race or ethnicity of a principal owner in response to a request under § 1071, financial institution personnel should not be required to guess a principal owner's race or ethnicity based on visual observation or surname, and to report that guess to the Bureau in the institution's § 1071 reporting.

As proposed, the rule requires a financial institution to guess an applicant's race or ethnicity if the applicant does not provide that information, including instances where the applicant affirmatively checks the box, ''I do not wish to provide this information.''

The prescribed procedure is described in the following language of Instruction 17 of Appendix G:

> **Instructions for Collecting Ethnicity and Race Information via Visual Observation and/or Surname if the Applicant Declines To Provide Information or Does Not Respond**
>
> 17. If an applicant does not provide any ethnicity, race, or sex information for any of its principal owners or declines to provide all of the requested ethnicity, race, or sex information, and during the application process the financial institution meets in person with at least one principal owner of that applicant, the financial institution must collect the ethnicity and race of the principal owner(s) with whom it meets on the basis of visual observation and/or surname.

This element of the proposal is modeled on HMDA reporting requirements for collecting sex, race, and ethnicity information,[26] except that the proposal does not similarly require financial institutions to guess applicants' sex.[27]

We appreciate this departure from the HMDA-reporting model, and we recommend that the Bureau extend that departure to the reporting of race and ethnicity under the § 1071 rule. Treating

[26] See 12 C.F.R. Part 103 **Appendix B to Part 1003 — Form and Instructions for Data Collection on Ethnicity, Race, and Sex.**

[27] In the NPRM, the Bureau explanation of the determination not to require financial institutions to guess applicants' sex in cases where the applicants to not provide that information cites the recent Supreme Court case of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). That case held that the clear statutory text in the Civil Rights Act of 1964 prohibited discrimination based on sexual orientation and gender identity.

the reporting of race and ethnicity the same as the reporting of sex would honor the wishes of small business applicants not to be categorized as any particular race or ethnicity (a wish recognized in the statutory right under § 1071(c) to refuse to provide requested information) and would avoid placing financial institution personnel into the untenable and uncomfortable position of guessing customers' preferred racial and ethnic identities.

Treating the reporting of race and ethnicity the same as the reporting of sex also would better serve the § 1071 purpose of providing data to facilitate fair lending enforcement and inform important decision making. Guesses are not data. Even with a flag identifying that the information reported was based on someone's guess, the presence of these guesses in the database can undermine the credibility of any conclusions or actions that might be based on analysis of that database.

Recommendation

We recommend that the Bureau apply its approach to the reporting of sex to the reporting of race and ethnicity. To that end, we recommend removing any language that would require financial institutions to report any race or ethnicity information that is not provided directly or indirectly by the applicant. We also specifically recommend eliminating any suggestion that it is required or even acceptable for a financial institution to report race or ethnicity based on visual observation or surname.

This recommend would include, but not be limited to, the following suggested revisions:

> **§ 1002.107 Compilation of reportable data.**
>
> (a) *Data format and itemization*. A covered financial institution shall compile and maintain data regarding covered applications from small businesses. The data shall be compiled in the manner prescribed below and as explained in associated Official Interpretations and the Filing Instructions Guide for this subpart for the appropriate year. The data compiled shall include the items described in paragraphs (a)(1) through (21) of this section.
>
> * * *
>
> (20) *Ethnicity, race, and sex of principal owners.* The ethnicity, race, and sex of the applicant's principal owners and whether ethnicity, race, and sex are being reported based on previously collected data pursuant to § 1002.107(c)(2). ~~The data compiled for purposes of this paragraph (a)(20) shall also include whether ethnicity and race are being reported based on visual observation or surname. The financial institution shall collect and report principal owners' ethnicity, race, and sex information as prescribed in appendix G to this part.~~ When requesting ethnicity, race, and sex information from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information.
>
> **Appendix G to Part 1002—Instructions for Collecting and Reporting Ethnicity, Race, and Sex of Small Business Applicants' Principal Owners Under Subpart B.**
>
> * * *
>
> ~~***Race Information via Visual Observation and/or Surname if the Applicant Declines To Provide Information or Does Not Respond***~~
>
> ~~17. If an applicant does not provide any ethnicity, race, or sex information for any of its principal owners or declines to provide all of the requested ethnicity, race, or sex~~

> ~~information, and during the application process the financial institution meets in person with at least one principal owner of that applicant, the financial institution must collect the ethnicity and race of the principal owner(s) with whom it meets on the basis of visual observation and/or surname. For example, assume a financial institution provides electronic data collection forms to applicants, and an applicant fails to complete and submit the data collection form. Assume that the financial institution is not permitted to report based on previously collected data. Also, assume that the financial institution meets in person with two of the applicant's four principal owners at the same time during the application process. The financial institution reports the ethnicity and race information for the two principal owners it met with in person based on visual observation and/or surname. Additionally, as noted in Instruction 21, the financial institution reports that it is reporting this information based on visual observation and/ or surname. The financial institution reports that the applicant did not provide sex information for these two principal owners. It also reports that the applicant did not provide ethnicity, race, and sex information for the other two principal owners. For additional information on when a financial institution has or has not met in person with a principal owner, see comment 107(a)(20)–10.~~

VIII. APPLICANT-PROVIDED INFORMATION

The rule should limit the reporting of § 1071 applicant-provided information to information provided by an applicant. Specifically, the rule should not require financial institutions to replace applicant-provided information with information the financial institution has verified.

Section 1071 requires financial institutions to request certain information from applicants and to report the information the applicant provides (applicant-provided information). Applicant-provided information includes information related to the credit being applied for (i.e., credit type; credit purpose; and the amount applied for), and information related to the applicant's business (i.e., a census tract based on an address or location provided by the applicant; gross annual revenue for the applicant's preceding fiscal year; the six-digit North American Industry Classification System (NAICS) code appropriate for the applicant; the number of the applicant's non-owner workers; the applicant's time in business; and the number of the applicant's principal owners). Applicant-provided information also includes data points that address the demographics (ethnicity, sex, and race) of the applicant's principal owners or ownership status.[28]

As proposed, § 1002.107(b) would permit a financial institution to rely on an applicant's statements when compiling data under the rule, which we support. That approach increases the ability of the § 1071 reporting process to stand alone, which is consistent with the intention of the § 1071 firewall provision, which seeks to minimize unnecessary access to § 1071 information.

Proposed § 1002.107(b), however, would also require the financial institution to substitute different information for a data point if the financial institution verifies the information. While we appreciate the objective of wanting to receive verified information where possible, the operational impacts of that requirement are considerable, and it would reduce the ability to separate § 1071 data collection and reporting from other lending systems and processes.

---

[28] See *Summary of Proposed Rulemaking: September 2021 Proposal Regarding Small Business Lending Data Collection*, pp. 4-5 (Sept. 1, 2021); available at: https://files.consumerfinance.gov/f/documents/cfpb_section-1071-nprm_summary_2021-09.pdf

Considering the nature of the data points that reflect applicant-provided information, and the minimal marginal benefit that would result from substituting verified data, we do not believe that the benefits would justify the additional complexity and burden.[29]

The question of complexity and burden is particularly relevant here, where the Bureau is proposing an entirely new reporting rule, for which the Bureau is proposing an implementation period of only "about 18 months" and for which there is no guaranteed date for the issuance of technical compliance specifications that financial institutions and third-party providers can rely on to operationalize the final rule. Simplifying the rule by not requiring financial institutions to substitute verified information for applicant-supplied information could help ease that considerable implementation burden.

Recommendation

We recommend that the rule eliminate the requirement to substitute verified information for applicant-provided information where the financial institutions has verified the information, for example, as follows:

§ 1002.107 Compilation of reportable data.

* * *

(b) *Verification of applicant-provided information.*

~~Unless otherwise provided in this subpart, t~~ The financial institution may rely on statements of the applicant when compiling data. A financial institution is not required to verify any applicant-provided information collected under this subpart, nor is the financial institution permitted to substitute information from other sources for any information collected from an applicant under this subpart, including information it has verified. ~~unless it verifies the information provided, in which case it shall use the verified information~~.

* * *

We appreciate this opportunity to provide input into the Bureau's rulemaking process from the commercial real estate perspective. The undersigned organizations represent leaders in commercial and multifamily real estate which, as noted above, is distinct from small business lending. We recognize that both commercial real estate and small business lending are outside of the scope of the Bureau's typical subject matter, and we are pleased to provide these comments that are informed by our members' collective expertise and experience.

[29] For example, difference between applicant-provided and verified information for data fields such as the number of employees, gross annual revenue, number of principal owners, and amount of time in business would not materially affect the utility of data reported under § 1071.

Please let us know if there is any additional background information on commercial real estate lending that the Bureau might find helpful as it implements section 1071. Feel free to contact Bruce Oliver, Vice President, Commercial and Multifamily Policy, Mortgage Bankers Association, at boliver@mba.org or 202-557-2840; or David McCarthy, Managing Director, Head of Policy, Commercial Real Estate Finance Council, at dmccarthy@crefc.org or 202-322-9044.

Sincerely,

Mortgage Bankers Association

Commercial Real Estate Finance Council

American Land Title Association

National Apartment Association

National Multifamily Housing Council

The Real Estate Roundtable

APPENDIX A

CUMULATIVE RECOMMENDATIONS

Investment Property Lending Exclusion

§ 1002.104 Covered credit transactions and excluded transactions.	**NOTES**
* * * (b) *Excluded transactions.* The requirements of this subpart do not apply to: * * *	
( ) *Investment property credit.* Credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment, including loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds. *Official interpretations* *Section 1002.104 -- Covered Credit Transactions and Excluded Transactions* *104(b)*	*Adding new subparagraph consistent with proposed revision to interpretation § 1002.104(b)-4. Language modeled after SBA regulations at 13 C.F.R. §§ 120.100 (What are the basic eligibility requirements for all applicants for SBA business loans?), 120.110 (What businesses are ineligible for SBA business loans?), and 120.130 (Restrictions on use of proceeds).*
(4) *Investment property credit*. The term "covered credit transaction" does not include an application for credit where the loan purpose is to finance real property acquired and held primarily for sale, lease, or investment. This includes loans to developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds. A characteristic that distinguishes investment property credit from small business lending is that the primary source of funds for repayment of investment property credit is generally the net operating income (NOI) of the property and the primary source of funds for repayment of a small business loan is generally the cash flow of the small business. A loan to finance a commercial property that the small business borrower will occupy or use in the furtherance of its business is not an investment property credit.	*Substituting revised interpretation modeled after SBA regulations and bank regulatory guidance. See SBA regulations at 13 C.F.R. §§ 120.100, 120.110, and 120.130; and* See *Interagency Statement on Meeting the Credit Needs of Creditworthy Small Business Borrowers*, p. 2 (Feb. 5, 2010) available at https://www.occ.treas.gov/news-issuances/bulletins/2010/bulletin-2010-6a.pdf; OCC Commercial Real Estate Lending Handbook, pp. 36, 56-57 (Jan. 2017); available at https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/commercial-real-estate-lending/index-commercial-real-estate-lending.html; OCC Residential Real Estate Lending Controller's Handbook, p. 12 (Jan. 2017); available at: https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/residential-real-

	estate-lending/index-residential-real-estate-lending.html
~~4. *Credit secured by certain investment properties*. The term “covered credit transaction” does not include an extension of credit that is secured by 1-4 individual dwelling units, that the applicant (or one or more of the applicant’s principal owners) does not, or will not, occupy. A financial institution should determine whether the property to which the covered credit transaction or application relates is or will be used as an investment property. For purposes of this comment, a property is an investment property if the applicant or one or more of the applicant’s principal owners does not or will not occupy the property. For example, if an applicant purchases a property, does not occupy the property, and generates income by renting the property, the property is an investment property for purposes of this comment. Similarly, if an applicant purchases a property, does not occupy the property, and does not generate income by renting the property, but intends to generate income by selling the property, the property is an investment property. A property is an investment property if the applicant does not or will not occupy the property, even if the applicant does not consider the property as owned for investment purposes. For example, if a corporation purchases a property that is a dwelling under § 1002.102(j), that it does not occupy, but that is for the long-term residential use of its employees, the property is an investment, even if the corporation considers the property as owned for business purposes rather than investment purposes, does not generate income by renting the property, and does not intend to generate income by selling the property at some point in time. If the property is for transitory use by employees, the property would not be considered a dwelling under § 1002.102(j).~~	*Recommending replacing the language that interpretation was based on Regulation C official comment 4(a)(6)-4; see 86 Fed. Reg. at 56412. That Regulation C comment provided guidance as to how to report Occupancy Type for 1-4 unit dwellings reported under Home Mortgage Disclosure Act (HMDA) regulations, among the allowable fields: primary residence, second residence, and investment property. Note that the third example in this version would exclude small business loans that should be covered by § 1071.*

APPENDIX A

CUMULATIVE RECOMMENDATIONS

Section 1002.106—Business and Small Business 105(b)

Section 1002.107 – Compilation of Reportable Data

107(a)(6) Credit purpose.

1. *General.* A financial institution complies with § 1002.107(a)(6) by selecting the purpose or purposes of the covered credit transaction applied for or originated from the list below.

~~i. Purchase, construction/improvement, or refinance of owner-occupied dwelling(s).~~

~~ii. Purchase, construction/improvement, or refinance of non-owner-occupied dwelling(s).~~

~~iii. Purchase, construction/improvement, or refinance of non-owner-occupied, non-dwelling real estate.~~

Making technical change to conform to the recommended changes above. A loan for any of these purposes would be an investment property credit or consumer credit.

iv. Purchase, construction/improvement, or refinance of owner-occupied, non-dwelling real estate.

v. Purchase, refinance, or rehabilitation/repair of motor vehicle(s) (including light and heavy trucks).

vi. Purchase, refinance, or rehabilitation/repair of equipment.

vii. Working capital (includes inventory or floor planning).

viii. Business start-up.

ix. Business expansion.

x. Business acquisition.

xi. Refinance existing debt (other than refinancings listed above).

xii. Line increase.

xiii. Other.

xiv. Not provided by applicant and otherwise undetermined.

xv. Not applicable.

APPENDIX A

CUMULATIVE RECOMMENDATIONS

Maximum Loan Size Threshold

§ 1002.104 Covered credit transactions and excluded transactions.	**NOTES**
* * *	
(b) *Excluded transactions.* The requirements of this subpart do not apply to:	
* * *	
( ) Large credit transactions. Applications for credit in an amount greater than the maximum direct loan amount permitted under 13 C.F.R. § 120.211 [currently $750,000].	*Adding new exclusion to enable financial institutions to screen out transactions where the amount applied for exceeds the SBA statutory maximum loan size from reporting under section 1071.*

Activity Threshold

§ 1002.105 Covered financial institutions and exempt institutions.	**NOTES**
(b) Covered financial institution means a financial institution that originated at least ~~25~~ 500 covered credit transactions for small businesses in each of the two preceding calendar years. For purposes of this definition, if more than one financial institution was involved in the origination of a covered credit transaction, only the financial institution that made the credit decision approving the application shall count the origination for purposes of this paragraph (b).	*Increasing transactional threshold to have at least 500 loans per year, consistent with the 2018-2021 threshold for HMDA reporting threshold for open-end loans.*

Definition of Small Business/Affiliate Revenue

1002.106 Business and small business.	**NOTES**
(a) *Business* has the same meaning as the term ‘‘business concern or concern’’ in 13 CFR 121.105.	
(b) *Small business* has the same meaning as the term ‘‘small business concern’’ in 15 U.S.C. 632(a), as implemented in 13 CFR 121.101 through 121.107. Notwithstanding the size standards set forth in 13 CFR 121.201, for purposes of this subpart, a business is a small business if and only if its gross annual revenue, as defined in § 1002.107(a)(14), for its preceding fiscal year is $5 million or less.	
Official interpretations	
Section 2001.106 – Business and Small Business	
106(b) Small business.	

APPENDIX A

CUMULATIVE RECOMMENDATIONS

* * *

3. *Affiliate revenue.* ~~As explained in comment 107(a)(14)–3, a financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. As explained in comment 107(a)(14)–1, pursuant to § 1002.107(b), if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. Likewise, a~~ A financial institution is permitted to rely on an applicant's representations regarding gross annual revenue (which may or may not include the affiliate's revenue) for purposes of determining small business status under § 1002.106(b). However, if the applicant provides updated gross annual revenue information (see comment 107(c)(1)–7), or the financial institution verifies the gross annual revenue information, the financial institution must use the updated or verified information in determining small business status.

Removing content from comment 107(a)14)-3 on reporting gross annual revenue that reduces the clarity of the guidance provided as to how to use gross annual revenue when determining small business status.

4. *Gross annual revenue for newly formed single-purpose entities (SPEs).* If the applicant is a newly formed single-purpose entity (SPE) formed for the purpose of owning real property that will secure the loan, the financial institution may rely on the gross annual revenue generated by the property or the applicant's projected gross annual revenue for purposes of determining the small business status of the applicant.

Addressing newly created SPEs, which would otherwise be assumed to be small businesses, regardless of projected gross annual revenues, which are not covered under the proposal.

5. *Gross annual revenue for real estate affiliates.* If a financial institution collects a schedule of real estate in which the applicant has an ownership interest in connection with a loan application, the owners of any real property listed on that schedule and the applicant are affiliates because of the common ownership. Where the schedule of real estate a financial institution normally uses collects information on valuations of the real properties but does not collect the gross annual revenues, the financial institution may estimate the gross annual revenue of any income-producing real property for purpose of determining the applicant's small business status. However, if the financial institution collects gross annual revenue of any property, the financial institution must rely on that gross annual revenue information.

Clarifying likely affiliates in standard commercial real estate lending context.

Section 1002.107—Compilation of Reportable Data

Section 102.107

107(a)(14)

3. *Affiliate revenue.* A financial institution is permitted, but not required, to report the gross annual revenue for the applicant that includes the revenue of affiliates as well. For example, if the financial institution does not normally collect information on affiliate revenue, the financial institution reports only the applicant's revenue and does not include the revenue of any affiliates when it has not collected that information. However, as explained in comment 107(a)(14)–1, pursuant to § 1002.107(b), if the financial institution verifies the gross annual revenue provided by the applicant, it must report the verified information. As is explained in official interpretation 106(b)-3, ~~Similarly,~~ in determining whether the applicant is a small business under § 1002.106(b), a financial institution may rely on an applicant's representations regarding gross annual revenue, which may or may not include the affiliate's revenue.

For clarity, explicitly adding cross reference to official interpretation 106(b)-3, see revisions above.

Applicant-provided Information

§ 1002.107 Compilation of reportable data.

* * *

(b) *Verification of applicant-provided information.*

~~Unless otherwise provided in this subpart, t~~ The financial institution may rely on statements of the applicant when compiling data ~~unless it verifies the information provided, in which case it shall use the verified information~~.

NOTES

Simplifying rule to provide that reporting financial institutions report only information provided by the applicant.

Firewall

108(c) Exceptions to the prohibition on access to certain information.

1. General. A financial institution is not required to limit the access of a particular employee or officer who is involved in making determinations concerning covered applications if the financial institution determines that the particular employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) through (20) and the financial institution provides the notice required by § 1002.108(d). A financial institution can also determine that several employees and officers should have access or that all of a group of similarly situated employees or officers should have access. See comment 108(a)–2. However, the financial institution

NOTES

cannot permit all employees and officers to have access simply because it has determined that one or more employees or officers should have access. For example, a financial institution may determine that a single compliance officer or all of its compliance officers should have access and then permit one or all of its compliance officers, respectively, to have access. However, the financial institution cannot permit other employees or officers to have access unless it independently determines that they should have access. A financial institution's determination that a particular employee or officer should have access to the information collected pursuant to § 1002.107(a)(18) through (20) may be based on a reasonable business justification, taking into account relevant operational factors such as the size of the institution, the number of personnel within the line of business that receives and processes applications from small businesses, job descriptions, the number of applications typically received by the line of business that is subject to § 1002.107, and the proportion of applications within a line of business that are and are not subject to § 1002.017.

Adding factual considerations that might reasonably support a financial institution's determination that an officer or employee should have access to collected demographic information.

Effective Date and Implementation

§ 1002.114 Effective date, and special transitional rules.

NOTES

(a) *Effective date.* The effective date for this subpart is [90 days after the date of publication of the final rule in the **Federal Register**].

(b) *Compliance date.* The compliance date for this subpart is [January 1 of the first calendar year that begins more than two years ~~approximately 18 months~~ after the effective date of this subpart ~~publication of the final rule in~~ the ~~**Federal Register**~~].

Providing the minimum time necessary for an institution to determine whether they are a "covered institution," which is based on a two-calendar-year lookback, based on small business lending volume information that may not be available for prior years.

(c) *Special transitional rules*—(1) *Collection of information prior to the compliance date.* A financial institution that will be a covered financial institution as of the compliance date in paragraph (b) of this section is permitted, but not required, to collect information regarding whether an applicant for a covered credit transaction is a minority-owned business under § 1002.107(a)(18), a women-owned business under § 1002.107(a)(19), and the ethnicity, race, and sex of the applicant's principal owners under § 1002.107(a)(20) beginning [12 months prior to the compliance date]. A financial institution collecting such

information pursuant to this paragraph (c)(1) must do so in accordance with the requirements set out in §§ 1002.107(18) through (20) and 1002.108.

(2) *Determining whether a financial institution is a covered financial institution for purposes of this subpart.* For purposes of determining whether a financial institution is a covered financial institution under § 1002.105(b) as of the compliance date specified in paragraph (b) of this section, a financial institution shall use its originations in the first two full calendar years after the effective date of this subpart. A financial institution is permitted, but not required, ~~to use its~~ to use its originations of covered credit transactions for small businesses in the, second and third preceding calendar years (rather than its originations in the two immediately preceding calendar years).

Providing the minimum time necessary for an institution to determine whether they are a "covered institution," which is based on a two-year lookback, based on information that may not be available for prior years.

Race and Ethnicity information

§ 1002.107 Compilation of reportable data.

NOTES

(a) *Data format and itemization*. A covered financial institution shall compile and maintain data regarding covered applications from small businesses. The data shall be compiled in the manner prescribed below and as explained in associated Official Interpretations and the Filing Instructions Guide for this subpart for the appropriate year. The data compiled shall include the items described in paragraphs (a)(1) through (21) of this section.

* * *

(20) *Ethnicity, race, and sex of principal owners.* The ethnicity, race, and sex of the applicant's principal owners and whether ethnicity, race, and sex are being reported based on previously collected data pursuant to § 1002.107(c)(2). ~~The data compiled for purposes of this paragraph (a)(20) shall also include whether ethnicity and race are being reported based on visual observation or surname. The financial institution shall collect and report principal owners' ethnicity, race, and sex information as prescribed in appendix G to this part.~~ When requesting ethnicity, race, and sex information from an applicant, the financial institution shall inform the applicant that the financial institution cannot discriminate on the basis of a principal owner's ethnicity, race, or sex, or on whether the applicant provides this information.

Applying uniform treatment of responses across requests for race, ethnicity, and sex. [Also would require other conforming changes, e.g., directly or indirectly referring to paragraph 17 of Appendix G.]

APPENDIX A

CUMULATIVE RECOMMENDATIONS

Appendix G to Part 1002—Instructions for Collecting and Reporting Ethnicity, Race, and Sex of Small Business Applicants' Principal Owners Under Subpart B.

* * *

~~***Race Information via Visual Observation and/or Surname if the Applicant Declines To Provide Information or Does Not Respond***~~

~~17. If an applicant does not provide any ethnicity, race, or sex information for any of its principal owners or declines to provide all of the requested ethnicity, race, or sex information, and during the application process the financial institution meets in person with at least one principal owner of that applicant, the financial institution must collect the ethnicity and race of the principal owner(s) with whom it meets on the basis of visual observation and/or surname. For example, assume a financial institution provides electronic data collection forms to applicants, and an applicant fails to complete and submit the data collection form. Assume that the financial institution is not permitted to report based on previously collected data. Also, assume that the financial institution meets in person with two of the applicant's four principal owners at the same time during the application process. The financial institution reports the ethnicity and race information for the two principal owners it met with in person based on visual observation and/or surname. Additionally, as noted in Instruction 21, the financial institution reports that it is reporting this information based on visual observation and/ or surname. The financial institution reports that the applicant did not provide sex information for these two principal owners. It also reports that the applicant did not provide ethnicity, race, and sex information for the other two principal owners. For additional information on when a financial institution has or has not met in person with a principal owner, see comment 107(a)(20)–10.~~

Appendix B

SIDE-BY-SIDE: INTERPRETATION § 100.104(B) AND REG C COMMENT 4(A)(6)[30]

Proposed interpretation § 1002.104(b)	Regulation C official comment 4(a)(6)
4. *Credit secured by certain investment properties.*	4. ***Investment properties*.**
The term "covered credit transaction" does not include an extension of credit that is secured by 1-4 individual dwelling units, that the applicant (or one or more of the applicant's principal owners) does not, or will not, occupy.	
A financial institution should determine whether the property to which the covered credit transaction or application relates is or will be used as an investment property.	Section 1003.4(a)(6) requires a financial institution to identify whether the property to which the covered loan or application relates is or will be used as an investment property.
For purposes of this comment, a property is an investment property if the applicant or one or more of the applicant's principal owners does not or will not occupy the property.	For purposes of § 1003.4(a)(6), a property is an investment property if the borrower does not, or the applicant will not, occupy the property.
For example, if an applicant purchases a property, does not occupy the property, and generates income by renting the property, the property is an investment property for purposes of this comment.	For example, if a person purchases a property, does not occupy the property, and generates income by renting the property, the property is an investment property for purposes of § 1003.4(a)(6).
Similarly, if an applicant purchases a property, does not occupy the property, and does not generate income by renting the property, but intends to generate income by selling the property, the property is an investment property.	Similarly, if a person purchases a property, does not occupy the property, and does not generate income by renting the property, but intends to generate income by selling the property, the property is an investment property for purposes of § 1003.4(a)(6).
A property is an investment property if the applicant does not or will not occupy the property, even if the applicant does not consider the property as owned for investment purposes.	Section 1003.4(a)(6) requires a financial institution to identify a property as an investment property if the borrower or applicant does not or will not occupy the property, even if the borrower or applicant does not consider the property as owned for investment purposes.
For example, if a corporation purchases a property that is a dwelling under § 1002.102(j), that it does not occupy, but that is for the long-term residential use of its employees, the property is an investment, even if the corporation considers the property as owned for business purposes rather than investment purposes, does not generate income by renting the property, and does not intend to generate income by selling the property at some point in time.	For example, if a corporation purchases a property that is a dwelling under § 1003.2(f), that it does not occupy, but that is for the long-term residential use of its employees, the property is an investment property for purposes of § 1003.4(a)(6), even if the corporation considers the property as owned for business purposes rather than investment purposes, does not generate income by renting the property, and does not intend to generate income by selling the property at some point in time.
If the property is for transitory use by employees, the property would not be considered a dwelling under § 1002.102(j).	If the property is for transitory use by employees, the property would not be considered a dwelling under § 1003.2(f). *See* comment 2(f)-3.

[30] Sentences are displayed as separate paragraphs to facilitate comparison. There are no paragraph breaks in the originals.