

BankDirector

Breakout 3:  
**Section 1071:  
Understanding the  
Final Rule and  
Compliance Impacts**

**Bill Franks**

*TruStage Compliance  
Solutions*

**Kendall Van Ameyde**

*TruStage Compliance  
Solutions*

#BBTF23



# Understanding The Small Business Lending Data Collection Rule (Section 1071)

Presented By:

TruStage™ Compliance Solutions



*No Legal Advice or Attorney-Client Relationship: These materials have been prepared for general information purposes and are not legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship.*



# About the Presenter

## Bill Franks

Product Specialist and Counsel



M: 616.340.6628  
E: [Bill.Franks@trustage.com](mailto:Bill.Franks@trustage.com)

Bill Franks has been with TruStage Compliance Solutions since September 2019 and is responsible for ensuring that the content of TruStage Compliance Solutions' lending products comply with federal and state laws and regulations and industry best practices. Before joining TruStage, Bill was assistant in-house counsel with a community bank in West Michigan and prior to that was in private practice for 13 years, representing financial institutions and businesses in the areas of banking and commercial lending, state and federal compliance and licensing, and commercial litigation. Bill graduated with a B.A. in Political Science and Philosophy from the University of Michigan and obtained his J.D. from the University of Wisconsin Law School, *cum laude*, and was elected to the Order of the Coif.

# About the Presenter

## Kendall Van Ameyde

Product Specialist and Counsel



☎: 800.968.8522  
✉: [Kendall.VanAmeyde@trustage.com](mailto:Kendall.VanAmeyde@trustage.com)  
m

Kendall Van Ameyde has been with TruStage Compliance Solutions since November 2021 and is responsible for ensuring that the content of TruStage Compliance Solutions' lending products create enforceable legal instruments and comply with federal and state laws and regulations, other governing authority requirements, and industry best practices. Before joining TruStage, Kendall was an attorney in appellate practice and civil matters, including veterans' law and business law. While in law school, Kendall served as Executive Editor of the *Michigan State Law Review* and worked for the Michigan Department of Attorney General in the Corporate Oversight Division. Kendall graduated with a B.S. in Political Science and minor in Business from Grand Valley State University, *summa cum laude*, and obtained her J.D. from Michigan State University College of Law, *magna cum laude*.

# Overview

- The Dodd-Frank Act and Section 1071
- Brief History of Section 1071 Rulemaking
- Summary of Final Rule
  - Key Definitions
  - Data Collection Requirements
  - Firewall
  - Sample Data Collection Form
  - Website Notice & Publication of Data
  - Compliance Timeline
  - Recording Requirements
- Next Steps/Helpful Resources
- Industry Reaction

# The Dodd-Frank Act and Section 1071

In 2010, Congress enacted the Dodd-Frank Act to “promote the financial stability of the United States by improving accountability and transparency in the financial system.”<sup>1</sup>

Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act (ECOA) to require financial institutions to compile, maintain, and submit to the Consumer Financial Protection Bureau (CFPB) certain data on applications for credit for women-owned, minority-owned, and small businesses.<sup>2</sup>

# The Dodd-Frank Act and Section 1071

Section 1071 has two statutory purposes:

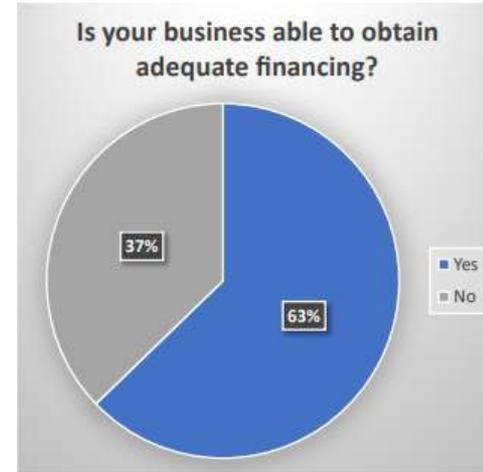
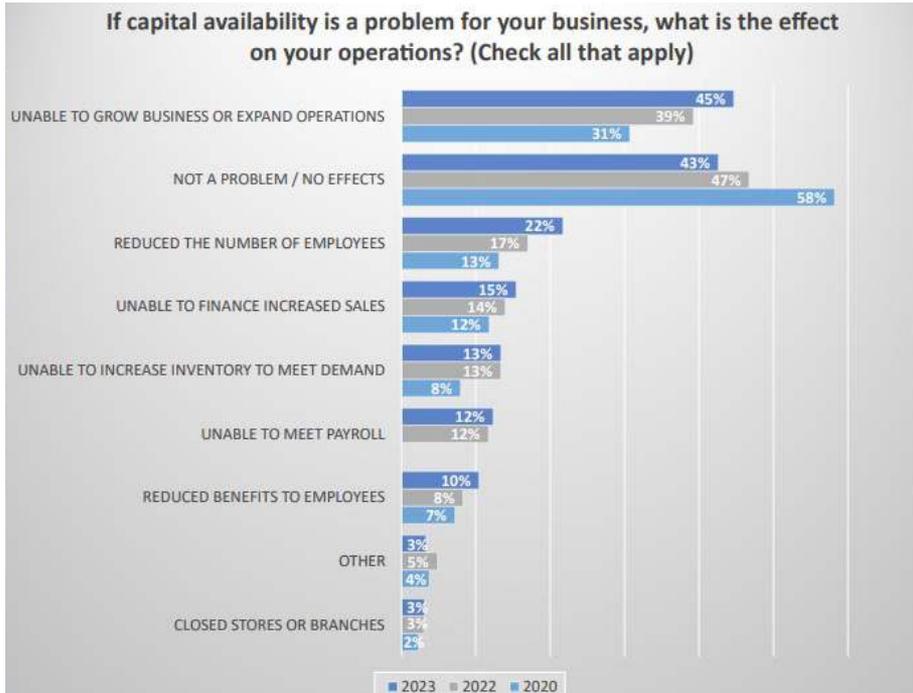
1. Facilitating enforcement of fair lending laws; and
2. Enabling communities, governmental entities, and creditors to identify business and community development needs and opportunities for women-owned, minority-owned, and small businesses. <sup>3</sup>

Section 1071 gives the CFPB authority to adopt exceptions and exemptions as the CFPB deems necessary or appropriate to carry out these purposes. <sup>4</sup>

# The Dodd-Frank Act and Section 1071

- Policymakers and stakeholders want to know whether small businesses can access affordable credit and what disparities may exist.
- Small businesses drive economic growth and job creation. Small businesses create approximately two out of every three jobs.
- An estimated 10 million people are employed by women-owned companies, generating nearly \$1.8 trillion in revenue each year. <sup>5</sup>
- In 2020 there were an estimated 140,918 African-American owned businesses with \$14.1 billion in annual revenues. <sup>6</sup>

# The Dodd-Frank Act and Section 1071



Source: National Small Business Association (NSBA) 2023 NSBA Economic Report<sup>7</sup>

# Brief History of Section 1071 Rulemaking

- **May 2019:** A California community group initiated a lawsuit against the CFPB in the Northern District alleging the CFPB unlawfully withheld and unreasonably delayed agency action by failing to implement Section 1071. <sup>8</sup>
- **February 2020:** Settlement was reached. <sup>9</sup>
- **December 2020:** CFPB issued a SBREFA panel report summarizing its efforts and suggestions for a proposed rule. <sup>10</sup>
- **September 2021:** CFPB issued the NPRM. <sup>11</sup>
- **January 2022:** NPRM comment period expired. <sup>12</sup>
- **July 2022:** CFPB stipulated to issuing a final rule by March 31, 2023. <sup>13</sup>
- **March 30, 2023:** CFPB issued the Final Rule. <sup>14</sup>

# Summary of the Final Rule

The Final Rule adds new Subpart B to Regulation B to implement Section 1071 and requires: “A covered financial institution shall compile and maintain data regarding covered applications from small businesses.”<sup>15</sup>

The Final Rule provides:

- Key definitions;
- Instructions for collecting, reporting, and retaining data;
- A sample data collection form; and
- Safe harbors for bona-fide errors.

# Final Rule (Key Definitions)

“**Covered financial institution**” means a financial institution that originated at least **100** covered originations for small businesses in each of the two preceding calendar years. <sup>16</sup>

“**Financial institution**” means any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity. <sup>17</sup>

“**Covered credit transaction**” means, unless excluded, an extension of business credit. <sup>18</sup>

“**Small Business**” means a business with gross annual revenue for its preceding fiscal year of \$5 million or less, excluding governmental entities or non-profit entities (since they don't satisfy the SBA's definition of small business concern). This may be adjusted for inflation every five years beginning 2030. <sup>19</sup>

“**Covered application**” means an oral or written request for a covered credit transaction that is made in accordance with procedures used by a financial institution for the type of credit requested. “Covered Application” does not include: (1) Reevaluation, extension, or renewal requests on an existing business credit account, unless the request seeks additional credit amounts; (2) Inquiries and prequalification requests. The **commentary** adds that some solicitations, firm offers of credit, and credit line increases, where the borrower does not request the credit are not covered applications. <sup>20</sup>

# Final Rule (Key Definitions)

The term “**covered credit transaction**” does not include:<sup>21</sup>

- **Trade credit.** A financing arrangement wherein a business acquires goods or services from another business without making immediate payment in full to the business providing the goods or services.
- **Home Mortgage Disclosure Act (HMDA)-reportable transactions.** A covered loan, or application therefore, as defined by Regulation C, 12 CFR 1003.2(e).
- **Insurance premium financing.**
- **Public utilities credit.**
- **Securities credit.**
- **Incidental credit.**
- The **commentary** also clarifies that factoring, leases, consumer-designated credit used for business or agricultural purposes, purchases of a credit transaction, purchases of an interest in a pool of credit transactions, and purchases of a partial interest in a credit transaction (such as through a loan participation agreement) are not covered credit transactions.<sup>22</sup>

# Final Rule (Data Collection Requirements)

The CFPB has published a Filing Instructions Guide for 2024.

Each year, the CFPB will publish an updated Filing Instructions Guide describing the filing process, the data fields to be reported, the validation requirements for filing, and a summary of resources to help filers.<sup>23</sup>

# Final Rule (Data Collection Requirements)

Institution Generated Data	Applicant Credit Information	Applicant Demographic Data
<ul style="list-style-type: none"><li>• <b>Unique Identifier</b></li><li>• <b>Application Date</b></li><li>• <b>Action Taken</b> (i.e., approved, denied, originated, incomplete, etc.)</li><li>• <b>Action Taken Date</b></li><li>• <b>Application Method</b> (e.g., in-person, phone, mail, online)</li><li>• <b>Application Recipient</b> (e.g., direct or through a third party)</li></ul>	<ul style="list-style-type: none"><li>• <b>Credit Type</b> (i.e., product, guarantees, loan term)</li><li>• <b>Credit Purpose</b></li><li>• <b>Amount Applied For</b></li><li>• <b>Census Tract</b></li><li>• <b>Gross Annual Revenue</b></li><li>• <b>Amount Approved</b> (if applicable)</li><li>• <b>3-Digit NAICS Code</b> (industry classification)</li><li>• <b>Number of Workers</b> (i.e., full-time, part-time, seasonal, contractors, etc.)</li><li>• <b>Time in Business</b></li><li>• <b>Number of Principal Owners</b> (i.e., 0-4)</li><li>• <b>Denial Reasons</b> (if applicable)</li><li>• <b>Pricing Information</b> (i.e., interest rate, origination charges, broker fees, prepayment penalties, etc.)</li></ul>	<ul style="list-style-type: none"><li>• <b>Minority-owned Status</b></li><li>• <b>Women-owned Status</b></li><li>• <b>LGBTQI+-owned Status*</b></li><li>• <b>Principal Owners' Ethnicity, Race, and Sex</b></li></ul>

The CFPB has published a complete [Data Points Chart](#) with additional details for each data point.<sup>24</sup>

# Final Rule (Data Collection Requirements)

Financial institutions may rely on information from the applicant, or appropriate third-party sources, when compiling data. But if the financial institution verifies applicant-provided data, it must report the verified data.<sup>25</sup>

Financial institutions may reuse previously collected data if: (i) the data were collected within the 36 months; and (ii) the financial institution has no reason to believe the data are inaccurate.<sup>26</sup>

Financial institutions cannot verify an applicant's responses to the Final Rule's required inquiries regarding the applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses, or about the principal owners' ethnicity, race, or sex. These data points must be reported based solely on an applicant's responses to the covered financial institution's inquiries.<sup>27</sup>

# Final Rule (Data Collection Requirements)

A covered financial institution shall...“maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response.”

Procedures that are “reasonably designed to obtain a response” shall include provisions for the following:

- The initial request for applicant-provided data occurs prior to notifying an applicant of final action taken on a covered application;
- The request for applicant-provided data is prominently displayed or presented;
- The collection does not have the effect of discouraging an applicant from responding to a request for applicant-provided data; and
- Applicants can easily respond to a request for applicant-provided data.

Financial institutions must maintain procedures to identify and respond to potential discouragement and low response rates. <sup>28</sup>

# Final Rule (Multiple co-applicants)

If a covered financial institution receives an application for a covered credit transaction from multiple applicants that are not affiliates, and at least one of those applicants is a small business, the financial institution must treat the application as a single reportable application from one of the small business applicants.

A covered financial institution must establish consistent procedures for designating a single small business as the applicant for data collection and reporting purposes in situations where there are multiple small business applicants for a covered credit transaction, such as reporting data on the first small business listed on an application form.<sup>29</sup>

# Final Rule (Firewall)

An employee of a covered financial institution (or its affiliate) shall not have access to the demographic data of the applicant's principal owners, if that employee or officer is involved in making any determination concerning that applicant's covered application. <sup>30</sup>

This requirement does not apply to an employee if:

1. the financial institution determines it is not feasible to limit that employee's access; and
2. the institution provides the required notice under 1002.108(d). <sup>31</sup>

# Final Rule (Firewall)

The notice under 1002.108(d) must be in substantially the same language as follows:

**“One or more employees or officers involved in making a determination concerning your application may have access to the information provided in this form. However, FEDERAL LAW PROHIBITS DISCRIMINATION on the basis of your answers on this form. Additionally, we cannot discriminate on whether you provide this information.”** <sup>32</sup>

# Sample data collection form

Federal law requires that we request the following information to help ensure that all small businesses applying for loans and other kinds of credit are treated fairly and that communities' small business credit needs are met.

One or more employees or officers involved in making a determination concerning your application may have access to the information provided on this form. However, **FEDERAL LAW PROHIBITS DISCRIMINATION** on the basis of your answers on this form. Additionally, we cannot discriminate on the basis of whether you provide this information.

While you are not required to provide this information, we encourage you to do so. Importantly, our staff are not permitted to discourage you in any way from responding to these questions.

**Filling out this form will help to ensure that ALL small business owners are treated fairly.**

## Business ownership status

Please indicate the business ownership status of your small business. For the purposes of this form, your business is a minority-owned, women-owned, or LGBTQI+-owned business if one or more minorities,\* women, or LGBTQI+ individuals (i) directly or indirectly own or control more than 50 percent of the business AND (ii) receive more than 50 percent of the net profits/losses of the business.

### What is your business ownership status?

(Check one or more of the options below)

- Minority-owned business
- Women-owned business
- LGBTQI+-owned business
- or –
- None of these apply
- or –
- I do not wish to provide this information

\*Minority means Hispanic or Latino, American Indian or Alaska Native, Asian, Black or African American, or Native Hawaiian or Other Pacific Islander. A multi-racial or multi-ethnic individual is a minority for this purpose.

## Number of principal owners

For purposes of this form, a principal owner is any individual who owns 25 percent or more of the equity interest of a business. A business might not have any principal owners if, for example, it is not directly owned by any individuals (i.e., if it is owned by another entity or entities) or if no individual directly owns at least 25 percent of the business.

### How many principal owners does your business have? (Check one)

- 0
- 1
- 2
- 3
- 4

## Demographic information about principal owners

As a reminder, applicants are not required to provide this information but are encouraged to do so. We cannot discriminate on the basis of any person's ethnicity, race, or sex/gender. Additionally, we cannot discriminate on the basis of whether you provide this information.

Please fill out one sheet for each principal owner.

### 1 Are you Hispanic or Latino?

(i.e., What's your ethnicity? (Check one or more))

- Hispanic or Latino
  - Cuban
  - Mexican
  - Puerto Rican
  - Other Hispanic or Latino (Please specify your origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on):  
\_\_\_\_\_
- Not Hispanic or Latino
- or –
- I do not wish to provide my ethnicity

### 2 What is your sex/gender?

(Please specify):

- or –
- I do not wish to provide my sex/gender

### 3 What is your race?

(Check one or more)

- American Indian or Alaska Native (Please specify the name of your enrolled or principal tribe):  
\_\_\_\_\_
- Asian
  - Asian Indian
  - Chinese
  - Filipino
  - Japanese
  - Korean
  - Vietnamese
  - Other Asian (Please specify your race, for example, Cambodian, Hmong, Laotian, Pakistani, Thai, and so on):  
\_\_\_\_\_
- Black or African American
  - African American
  - Ethiopian
  - Haitian
  - Jamaican
  - Nigerian
  - Somali
  - Other Black or African American (Please specify your race, for example, Barbadian, Ghanaian, South African, and so on):  
\_\_\_\_\_
- Native Hawaiian or Other Pacific Islander
  - Guamanian or Chamorro
  - Native Hawaiian
  - Samoan
  - Other Pacific Islander (Please specify your race, for example, Fijian, Tongan, and so on):  
\_\_\_\_\_
- White
- or –
- I do not wish to provide my race

# Website Notice & Publication of Data

Pursuant to 1002.110(c), a financial institution must provide a statement on their website using the following, or substantially similar, language:

**“Data about our small business lending are available online for review at the Consumer Financial Protection Bureau’s (CFPB’s) website at <https://www.consumerfinance.gov/data-research/small-business-lending/>. The data show the geographic distribution of our small business lending applications; information about our loan approvals and denials; and demographic information about the principal owners of our small business applicants. The CFPB may delete or modify portions of our data prior to posting it if doing so would advance a privacy interest. Small business lending data for many other financial institutions are also available at this website.”** <sup>34</sup>

The CFPB will make available to the public the data submitted by financial institutions on an annual basis. And has stated it does not intend to publish only aggregate data compilations. <sup>35</sup>

# Compliance Timeline

Financial institutions will determine if they are a covered financial institution annually by counting their number of covered originations and must begin complying with the Final Rule beginning either October 1, 2024, April 1, 2025, or January 1, 2026.<sup>36</sup>

A “covered origination” is a covered credit transaction the financial institution originated to a small business.

The [Small Business Lending Rule Info Sheet](#) and the [Small Entity Compliance Guide](#) provide detailed information and examples on the compliance timeline and a summary of the Final Rule’s requirements.<sup>37</sup>

# Compliance Timeline

Three compliance “tiers” based on transaction volume:

Date Covered FI Must Begin Collecting Data	Number of Covered Originations	Deadline for Covered FI to Report First Year Data to CFPB
October 1, 2024 (18 months)	At least 2,500 in both 2022 and 2023	June 1, 2025
April 1, 2025 (24 months)	At least 500 in both 2022 and 2023; and at least 100 in 2024	June 1, 2026
January 1, 2026 (33 months)	At least 100 in both 2022 and 2023; and at least 100 in 2024 and 2025	June 1, 2027

38

# Recording Requirements

The final rule has recordkeeping requirements

- Retain copies of small business lending application registers and other evidence of compliance for at least three years. <sup>39</sup>
- It also includes a requirement to maintain an applicant's responses to the final rule's required inquiries regarding an applicant's minority-owned, women-owned, and LGBTQI+-owned business statuses and regarding principal owners' ethnicity, race, and sex separate from the rest of the application and accompanying information. <sup>40</sup>

# Next Steps

This rule is going to require changes to your loan origination process. If you have not already done so, consider forming a working group that consists of your Lending, Credit, IT, Compliance, Legal, and Financial Reporting departments to assess the Final Rule and answer the following questions:

- Are you a covered financial institution and what is your compliance timeline?
- What data are you capturing today compared to the rule?
- Do you need to change how you capture and store data?
- Does your platform provider offer support for the data collection and reporting?
- How will you extract the data for reporting to the CFPB?
- How will you build the firewall to limit access to the demographic data?
- What new staff training will be needed?

# Helpful Resources

## Helpful Companion Resources and FAQs pages:

- Small Entity Compliance Guide: The guide and its supplemental explanations of many of the examples from the final rule's official commentary are helpful in answering both common operational questions and helping map out and guide their financial institution's small business lending programs.
- Small business lending rule FAQs on CFPB website: <https://www.consumerfinance.gov/compliance/compliance-resources/small-business-lending-resources/small-business-lending-collection-and-reporting-requirements/small-business-lending-rule-faqs/>
- Sample Data Collection Form: [https://files.consumerfinance.gov/f/documents/cfpb\\_sbl\\_sample-data-collection-form.pdf](https://files.consumerfinance.gov/f/documents/cfpb_sbl_sample-data-collection-form.pdf)
- Small Business Lending Rule Info Sheet: [https://files.consumerfinance.gov/f/documents/cfpb\\_sbl\\_info-sheet-regarding-compliance-dates.pdf](https://files.consumerfinance.gov/f/documents/cfpb_sbl_info-sheet-regarding-compliance-dates.pdf)
- Small Entity Compliance Guide: [https://files.consumerfinance.gov/f/documents/cfpb\\_small-business-lending-rule\\_small-entity-compliance-guide.pdf](https://files.consumerfinance.gov/f/documents/cfpb_small-business-lending-rule_small-entity-compliance-guide.pdf)

# Industry Reaction

**April 26, 2023**, the Texas Bankers Association (joined by the ABA) has filed a [Federal Lawsuit](#) in the Southern District of Texas against the CFPB alleging the new rule is burdensome and overreaching, creates harm to small business lenders and the economy, in addition to a claim that the CFPB is unconstitutionally funded (citing a recent decision in the 5th Circuit) and thus its rules are invalid and vacated as a result. <sup>40/41</sup>

**May 31, 2023**, a [Joint Resolution 66](#) was introduced by members of the House of Representatives disapproving of the Final Rule and seeking to nullify its force or effect. <sup>42</sup>

**July 31, 2023:** U.S. District Court [granted an injunction](#) on CFPB's Section 1071 Rule allowing lenders not to comply with the Rule to gather demographic data on small business borrowers while the U.S. Supreme Court weighs in on the agency's funding. The order also (1) directs the CFPB to immediately cease all implementation or enforcement of the Rule against the plaintiffs and their members, and (2) stays all deadlines for compliance with the Rule's requirements for the plaintiffs and their members until after the Supreme Court's final decision.

**August 15, 2023:** Texas federal district court granted the [unopposed emergency motion](#) of Texas First Bank (Texas First), Independent Bankers Association of Texas (IBAT), and Independent Community Bankers of America (ICBA) seeking leave to intervene in the lawsuit. Texas First, IBAT, and ICBA filed a [motion for preliminary injunction](#).

**August 15, 2023:** A Texas credit union and two credit union trade associations were [granted leave to intervene](#) in the lawsuit challenging the CFPB's final small business lending rule that is pending in a Texas federal district court. The [Unopposed Emergency Motion for Leave to Intervene](#) was filed by Rally Credit Union (Rally), a Texas-chartered credit union, the Credit Union National Association (CUNA), a national credit union trade association, and Cornerstone Credit Union League (CCUL), a regional credit union trade association.

**October 2023:** U.S. Supreme Court set to hear oral arguments on October 3, 2023, and a decision is expected by June 2024.

# Thank you.

## Contact

Bill Franks | Product Specialist and Counsel

[Bill.Franks@trustage.com](mailto:Bill.Franks@trustage.com)

Kendall Van Ameyde | Product Specialist and Counsel

[Kendall.VanAmeyde@trustage.com](mailto:Kendall.VanAmeyde@trustage.com)