Approaching Deadlines for Compliance with Rule 1071 Fair Lending Requirements and Challenges to Enforcement

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Authors:

Emilia R. Rubin
Jerry J. Ruiz
Nancy Eff Presnell

On March 30, 2023, the Consumer Financial Protection Bureau (CFPB) issued a final rule under Regulation B ("Rule 1071") that implements the federal Equal Credit Opportunity Act (ECOA). Rule 1071 is issued pursuant to Section 1071 of the Dodd Frank Act, which requires covered financial institutions to collect and report data to the CFPB from credit applications for small businesses, including women-owned and minority owned businesses. The purpose behind Rule 1071 is to facilitate the enforcement of fair lending laws by the CFPB and other agencies and to identify community development needs. To meet this goal, covered financial institutions will be required to collect and annually report certain data points on applications for credit for small businesses, including applications for women-owned, minority-owned, and small businesses.

While compliance dates were previously stayed pending ongoing litigation, the CFPB since issued an interim final rule in June 2024 extending the compliance dates to begin in June 2025. Covered institutions with the largest volume of covered lending transactions (referred to as "Tier 1 institutions") must begin collecting data for reporting the following year. The cutoffs for each tier of financial institution are discussed below.

Who Is Impacted?

The rule is applicable to "covered financial institutions"—i.e., any financial institutions originating at least 100 covered credit transactions for small businesses in each of the two preceding calendar years—which will have to fulfill reporting requirements. Financial institutions are those entities engaged in financial activity, and this applies to both chartered depository institutions and non-depository lenders. "Covered credit transactions" include loans, lines of credit, credit cards, merchant cash advances, and credit

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products used for agricultural purposes.

Small businesses are defined under the rule as those with $5 million or less gross annual revenue. This gross annual revenue can be aggregated with that of affiliates.

Compliance and Scope

Section 1002.107(a)(1) through (20) of the rule outlines the data institutions must collect on covered transactions. Some of these data points include: credit type, purpose, requested amount, application date, approval/denial date, the types and amounts of certain fees charged, whether the applicant is a minority-owned, women-owned, and/or LGBTQI+-owned business, and the ethnicity, race, and sex of the applicant's principal owners.

It is important to note that, while there is no obligation to verify applicant-provided information, Rule 1071 requires covered institutions to maintain procedures "reasonably designed" to collect applicant-provided information. Reasonably designed procedures are those designed to maximize data collection and minimize missing or erroneous data. Institutions will also be required to report any "low response rate" for applicant-provided data under section 1002.107(c)(4), as this could indicate an institution is discouraging applicants from responding.

Compliance Dates and Filing Deadlines

The new compliance dates and deadlines for submitting the first filing are based upon "tiers" determined by the volume of originated covered transactions in each of calendar years 2022 and 2023.

- Tier 1 institutions (those with at least 2,500 originations) must start collecting data in compliance with the rule on July 18, 2025, and submit their first report on June 1, 2026.
- Tier 2 institutions (those with at least 500 originations) must begin collecting data by January 16, 2026, and submit their first filing by June 1, 2027.
- Tier 3 institutions (those with at least 100 originations) must begin collecting data by October 18, 2026, and submit their

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filing by June 1, 2027.

Challenges to Enforcement

Although Rule 1071 has been finalized, President Trump has issued several executive orders in the start of his term that seem to conflict with portions of the rule. These include an order to federally recognize only two sexes, male and female, and an order requiring executive agencies to terminate diversity, equity and inclusion (DEI) programs, regulations, policies, and mandates. While executive orders do not immediately stay the compliance deadlines or do away with Rule 1071 itself, the new leadership at the CFPB has begun requesting emergency pauses in litigation challenging the rule, and may agree to further stay compliance dates.

The CFPB could seek to amend the rule in the future, impacting the data points financial institutions will have begun collecting. The rule may also be overturned pursuant to the Congressional Review Act. To this end, on February 4, 2025, Rep. Roger Williams of Texas introduced a bill to repeal Dodd Frank section 1071 in its entirety. Additionally, further cases could be brought challenging the rule under the Civil Rights Act or the recent U.S. Supreme Court decision in *Students for Fair Admissions, Inc. v. Harvard*.

However, these challenges to enforcement may not occur before the first reporting deadlines, if at all—thus, the best course of action may be for covered financial institutions making small business loans to prepare for compliance with Rule 1071 as it currently stands.

Key Takeaways

Despite the uncertainty brought on by ongoing developments concerning Rule 1071, the compliance dates have not yet been stayed. As these dates draw near, small business lenders will need to carefully consider not only what data they are collecting and how it is collected, but also what their data shows about their fair lending compliance efforts. Even through the uncertainty, the rule remains, and covered financial institutions should prepare accordingly. Beginning to collect data and detect any disparities now can ensure your institution will have better results to report in

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the future.

If you would like to discuss how the new reporting requirement may impact your institution, or other fair lending concerns, please contact the authors or any member of Frost Brown Todd's Consumer Financial Services and Consumer Protection team.

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