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CFPB Finalizes Rule to Monitor Small Business Lending Practices

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On March 30, 2023, the Consumer Financial Protection Bureau (CFPB) issued its long-awaited small business lending rule, which requires companies issuing a wide array of commercial credit products to small businesses to begin collecting and reporting demographic and lending data to CFPB. In remarks accompanying the release, CFPB Director Rohit Chopra highlighted research indicating that women and minority small business owners were not able to access credit during the pandemic and expressed hope that the rule will enable the government to take a data-driven approach to ensuring that the credit needs of all communities are being met.

Lenders with at least 2,500 covered originations in both 2022 and 2023 will be obligated to comply with the rule by October 1, 2024. Slightly smaller volume lenders have until April 1, 2025, to come into compliance, and ultimately, on January 1, 2026, all lenders originating at least 100 transactions in each of the prior two years must come into compliance.

Expansive set of institutions offering variety of small business lending products will be subject to rule

As a general matter, the collection and reporting obligations apply to bank and nonbank lenders taking applications and originating "covered" transactions. A transaction is generally "covered" if it is an extension of credit to a business that had $5 million or less in gross annual revenue for its preceding fiscal year. Thus, the rule sweeps in closed-end loans, lines of credit, business credit cards and online credit products. The CFPB also concludes that merchant cash advance products – arrangements that are not necessarily loans but that could constitute extensions of credit under the Equal Credit Opportunity Act (ECOA) – are subject to the rule. However, purchases of credit transactions are not covered by the rule, and the CFPB also has excluded factoring and leasing arrangements, among other things.

Under the rule, covered lenders will be required to compile and report information about the demographics of a small business applicant's ownership, including whether the business applicant is minority-, women- or LGBTQI+-owned, as well as the ethnicity, race and sex of the applicant's principal owners. Other required application-level information includes the type of credit product offered, credit pricing, types of guarantees, loan term, credit purpose, amount of money applied for and the action taken on the application by the institution. The collection and reporting requirement attaches to any "covered application," defined as "an oral or written request for a covered transaction that is made in accordance with procedures used by a financial institution for the type of credit requested." However, the CFPB generally has excluded requests for reevaluation, extension or renewal on existing business credit accounts from data collection requirements.

CFPB will be on lookout for institutions with inadequate procedures for collecting demographic data

The CFPB's rule was accompanied by a separate policy statement indicating that the CFPB will focus supervisory and enforcement activities on ensuring lenders do not discourage applicants from providing responsive data – in particular, the mandated demographic data requests. While the rule sets forth general requirements that requests for such data be prominent and easy to respond to, the CFPB notes that "compliant lenders will seek to maximize the collection of responses from applicants and minimize missing or erroneous data." To enforce compliance, the CFPB indicates that it will compare lender response rates across institutions of similar size, type, geographic reach or other factors to assess whether low response rates – such as applicants routinely indicating they do not wish to provide demographic information – indicate discouragement or failure to maintain proper collection procedures.

What to expect

Compliance dates for the new rule may seem far away, but lenders of all sizes will be required to take significant actions to achieve compliance. If the Home Mortgage Disclosure Act – the mortgage industry's data collection and reporting corollary – is any indication, small business lenders will have to revise application and processing procedures and enhance systems of record to ensure complete and accurate collection of the required data points. Lenders' sales forces also will need significant training on data collection, and in particular, on how to ensure applicants are not being dissuaded from providing demographic information. Accurate submission of data to the CFPB portal also will require care, with vendors likely popping up to assist in the scrubbing and formatting of data to comply with CFPB standards.

Lenders also will need to establish (or augment) fair lending compliance programs to consider the ramifications of collecting demographic and geographic data. The CFPB will undoubtedly utilize this wealth of data, as it has done in the mortgage markets, to understand levels of service to protected class applicants, as well as levels of service to businesses located in minority communities.

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