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May 8, 2023

Spencer W. Clark
Treasury PRA Clerk
U.S. Department of the Treasury
1500 Pennsylvania Avenue NW
Washington, DC 20220

RE: Emergency Capital Investment Program Initial Supplemental Report and Quarterly Supplemental Report (Docket No. TREAS-DO-2022-0013/Doc. No. 2023-08061)

Dear Mr. Clark:

The Credit Union National Association (“CUNA”) represents America’s credit unions and their more than 135 million members. On behalf of our members, we are writing to express our deep concern regarding certain provisions in the proposed Quarterly Supplemental Report (QSR). CUNA applauds the Emergency Capital Investment Program (ECIP) and its goals to encourage investment in small businesses and low-income and underserved communities. CUNA welcomes Treasury’s efforts to assess the success of the ECIP through reporting, however, if the QSR is finalized as proposed, the burden and risks posed to ECIP-awardee credit unions far outweighs the benefits of the data sought by Treasury and, for some, the benefits of the ECIP award itself. CUNA urges Treasury in the strongest possible terms to not finalize a requirement for ECIP-awardee credit unions to implement the collection, storage, and reporting of actual demographic data on all loans.

Background

The ECIP was authorized by the *Consolidated Appropriations Act of 2021*.¹ Under the program, Treasury is authorized to provide \$8.70 billion in capital to community development financial institutions (CDFIs) and minority depository institutions (MDIs).² Seventy-seven credit unions received awards under the ECIP. Of those, four are MDI credit unions, 55 are CDFI credit unions, and 18 are both MDI and CDFI credit unions. Credit unions represent 45.29% of ECIP participants. ECIP-awardee credit unions enter into subordinated debt agreements with Treasury which allow for a reduction in the dividend or interest rate payable in on the debenture instruments.³ ECIP-awardee credit unions are required to submit an Initial Supplemental Report to establish their

¹ Public Law 116-260, Sec. 522 (Dec. 27, 2020); 12 U.S.C. §4703a *et al.*

² 12 U.S.C. §4703a(d)(3).

³ 12 U.S.C. §4703a(d)(5)(B), (d)(6).

baseline amount of qualified lending, followed by ongoing QSRs to document an increase in lending to targeted communities in order to qualify for these reductions.

On March 27, 2023, Treasury published a request for comment on the proposed QSR under the *Paperwork Reduction Act* (PRA).⁴ Treasury published the proposed QSR instructions (QSR Instructions)⁵ and schedules (QSR Schedules)⁶ on its website for review in connection with the request for comment. Under the PRA, Treasury must seek public comment on the proposed collection of information and certify to OMB that it has undertaken efforts to reduce the burden of collection.⁷ A notice and request for comment under the PRA does not require Treasury to explain the policy goals of specific inclusions in the QSR, to assess costs of implementing procedures to comply with the information collection, to summarize its prior research in requiring a collection, or to respond to previously received comments or input.

General Comments

Most concerning, the QSR Instructions would require credit unions to have “processes in place to attempt to collect the data necessary to complete all the fields” in the QSR, including customers’ demographic data, including race and ethnicity, in Schedule C.⁸ Credit unions do not have to require their members to self-identify their demographic data.⁹ However, if members refuse to do so, the QSR mandates credit unions to collect the information using methods permitted by the *Home Mortgage Disclosure Act* (HMDA) or the Community Development Financial Institution (CDFI) Fund.¹⁰ Information cannot be obtained through the use of proxies, as is currently done regarding applications to the CDFI Fund. This therefore appears to refer solely to the reporting of race or ethnicity information on the basis of visual observation or surname as permitted by HMDA. For reasons detailed in this letter, many of which have been recognized by other regulators, this requirement poses significant litigation, compliance, reputation, market, and operational risk to ECIP-awardee credit unions. The risk is such that more than one credit union has characterized the requirement as essentially impossible to meet and a poison pill for the program.

In addition to the issues surrounding the demographic data collection, multiple ECIP-awardee credit unions have expressed that the requirement to report striated area median income (AMI) levels in Schedule C is also extremely difficult. Schedule C requires ECIP-awardee credit unions to report the number and amount of loans they originate for borrowers across three AMI tiers: 50% or below of AMI; 51-80% of AMI, or 81-100% of AMI.¹¹ Credit union systems reportedly do not

⁴ Emergency Capital Investment Program Initial Supplemental Report and Quarterly Supplemental Report, 88 Federal Register 18223 (Mar. 27, 2023).

⁵ Instructions for the Quarterly Supplemental Report for Credit Unions (QSR Instructions) (Mar. 27, 2023), available at https://home.treasury.gov/system/files/136/QSR_Instructions_CU_30_day.pdf.

⁶ Quarterly Supplemental Report Schedules for Credit Unions (QSR Schedules) (Mar. 27, 2023), available at https://home.treasury.gov/system/files/136/QSR_Instructions_CU_30_day.pdf.

⁷ 44 U.S.C. §3501 *et al.*

⁸ QSR Instructions, section I.G., p.10.

⁹ *Id.*

¹⁰ *Id.*

¹¹ QSR Schedules, Sch C1 People.

currently contain the functionality to automatically calculate and store individual borrower AMI percentages in the manner required by the QSR Schedule. While AMI measurements may be consulted in a mortgage context, they are not commonly considered in other types of lending and non-mortgage lending systems are not configured to pull, calculate, or store this information for reporting. This calculation would need to be done manually. One ECIP-awardee credit union suggested that perhaps Treasury could create an ease-of-use tool to assist with this.

The Statutory Language Is Insufficient to Eliminate Fair Lending Risk Regarding the Collection of Demographic Data.

As Treasury has cited, the *Consolidated Appropriations Act of 2021* contains a statutory provision stating that ECIP-awardee credit unions may collect demographic data for the sole purpose of monitoring compliance with the program.¹² The statute makes clear that an ECIP-awardee may collect information without violating section 701(a)(1) of the *Equal Credit Opportunity Act* (ECOA).¹³ It further specifies that neither the Consumer Financial Protection Bureau (CFPB) nor any Federal agency can take adverse action against an ECIP-awardee credit union related to that collection of demographic information. However, this statutory protection does not provide credit unions with sufficient infrastructure to undertake collection without exposing the credit union to unacceptable levels of risk.

In its Quarterly Supplemental Report Frequently Asked Questions (QSR FAQs), Treasury indicates that ECIP-awardee credit unions are not required collect information on a “particular transaction that it reasonably believes would not fall within any of the categories of Qualified Lending.”¹⁴ This guidance opens the door to credit unions choosing not to inquire about the demographic data of a borrower based on assumptions made regarding a borrower’s race or ethnicity. For example, a loan officer could decline to collect information about the race of an applicant he or she presumes to be White. This could result in applicants of perceived color experiencing more friction in the lending process by completing additional steps to provide (or refuse to provide) invasive demographic information and White-presenting applicants of color being exposed to colorism-based discrimination. While the statute may protect ECIP-awardees who collect information against adverse action from the CFPB or other federal agencies, it is not clear that it would protect credit unions in connection with discrimination based on not collecting information.

The statute also does not provide credit unions with protection against individual or class action lawsuits brought under ECOA’s private right of action.¹⁵ Further, it is not at all clear that the federal carve out would protect credit unions against state laws that are parallel to ECOA and that directly make reference to exceptions in ECOA. Credit unions attempting compliance with the requirement would likely expose themselves to significant litigation at the state and Federal level.

¹² 12 U.S.C. §4703a(k).

¹³ 15 U.S.C. §1691(a)(1).

¹⁴ Quarterly Supplemental Report Frequently Asked Questions (QSR FAQ), Question 3.3 (Apr. 12, 2023).

¹⁵ 15 U.S.C. §1691e.

Even if a credit union were to eventually succeed in winning that litigation on the basis of the statute, the potential reputational damage, financial cost, and loss of member resources is simply not an acceptable risk to most ECIP-awardee credit unions.

Treasury Must Work with the CFPB and NCUA to Establish a Framework Prior to Implementing a Requirement to Collect Demographic Data.

While the statutory carve out cited by Treasury may provide some protection for credit unions that attempt to collect the information against regulatory action related to the act of collection itself, it does not address the compliant methods of collection, the appropriate language to use during collection. Nor does it address how information should be appropriately stored or shared throughout the lending process. Treasury indicates that credit unions seeking to design a compliant framework for collecting demographic data on other types of loans should simply cross-apply the existing framework for HMDA and the CDFI certification process.

The collection of racial and ethnic information under HMDA is conducted under a complex regulatory framework found in the implementing regulations for ECOA and HMDA, Regulations B and C respectively. This framework includes model forms for the collection of information,¹⁶ clarity about what portions of those forms may be altered and how,¹⁷ instructions on the operational context in which the information can be requested,¹⁸ instructions as to how to present the questions to the applicant,¹⁹ mandatory signage regarding the availability of collected data,²⁰ and an annually updated guide regarding implementation of this framework that runs more than 350 pages.²¹ This framework was specifically designed for mortgage lending, which is the most extensively regulatory type of consumer lending and typically represents the single largest personal financial transaction the vast majority of consumers engage in. It is not appropriate or reasonable to expect ECIP-awardee credit unions to be able to simply project mortgage lending forms, processes, procedures, trainings, and systems capabilities onto all types of loans.

Further, not all ECIP-awardee credit unions may report under HMDA. According to the Federal Financial Institution Examination Council (FFIEC) Modified Loan/Application Register (LAR) data for the year 2022,²² only 31 of the 77 ECIP-awardee credit unions²³ submitted a LAR file. This indicates that 59.74% of ECIP-awardee credit unions did not submit HMDA data in 2022.²⁴ This could be for many reasons—these credit unions may do mortgage lending with a Credit Union

¹⁶ 12 C.F.R. Part 1002, App. B.

¹⁷ *Id.* at §2.

¹⁸ 12 C.F.R. Part 1003, App. B, §§1, 3.

¹⁹ *Id.* at §2.

²⁰ 12 C.F.R. §1003.5(b); 12 C.F.R. Part 1003, Supp. I, comment 5(b)-3.

²¹ Federal Financial Institution Examination Council (FFIEC), Guide to HMDA Reporting: Getting It Right!, 2023 Edition (Mar. 23, 2023), available at <https://www.ffiec.gov/hmda/pdf/2023Guide.pdf>.

²² FFIEC Data Publication, Modified Loan/Application Register (LAR) (2022), available at <https://ffiec.cfpb.gov/data-publication/modified-lar/2022>.

²³ Treasury, Full List of ECIP Participants (March 2023), available at https://home.treasury.gov/system/files/136/ECIP_Participants_March_2023.xlsx.

²⁴ CUNA Analysis.

Service Organization (CUSO) or other partner who handles the collection and submission of HMDA data. They could do their own mortgage lending but not in sufficient quantities to cross the reporting thresholds in the HMDA regulation.²⁵ Or these credit unions may simply not do mortgage lending. Regardless of the reason, Treasury is now asking these ECIP-awardee credit unions to understand and implement a complex and demanding regulatory structure they have not previously been required to comply with.

Further, mortgage lending is simply not analogous to other types of loans. Different types of loans have different inbound routes to a credit union, levels of interaction with applicants, and degrees of friction and disclosure. Indirect lending provides a clear example of where this approach falls short. Indirect lending relationships exist in different forms, but a common arrangement involves a credit union contracting with a merchant to originate loans at the point of sale, such as an auto dealer, using credit union underwriting criteria and subject to credit union oversight and quality control.²⁶ Indirect auto lending is exceedingly common among credit unions and provides critical way to assist members in accessing affordable loans to ensure they have a car. Other indirect lending relationships allow a third-party vendor such as a CUSO or other outside party to perform activities related to indirect lending including underwriting, servicing, repossession, or insurance processing.²⁷

When concerns regarding indirect lending have been raised to Treasury, credit unions were told to call Treasury directly to obtain information on a case-by-case basis. This is not sufficient. In an indirect lending context, dealers have the ability to decline to work with lenders. Where credit unions may be seen to be collecting information improperly or requiring dealers to implement processes that they are not comfortable with, they may simply be dropped as a lender.

In order to establish compliant and functional frameworks for the collection of demographic data across in a variety of lending contexts, the involvement of the CFPB and NCUA is necessary and appropriate. Treasury has indicated it is in discussions with these regulators regarding what compliance might look like. However, establishing the requirement before this framework is in place is putting the cart before the horse. Treasury, NCUA, and CFPB must collaborate on an appropriate framework, and only once that is finalized and credit unions are able to assess a reasonable timeline for implementation of that framework and whether the forms that are subject to this notice and comment are reasonable.

Treasury and the CFPB should jointly conduct a full rulemaking process that seeks to first understand various lending contexts, to identify the processes that best achieve understanding for consumers in providing the information, and to build practicable and operational frameworks based on that input that does not violate ECOA or Regulation B. ECIP-awardee credit unions need the publication of this guidance from the CFPB so that lending partners, like dealers, are able to

²⁵ See 12 C.F.R. §1003.3(c)-(d).

²⁶ NCUA, Letter to Credit Unions 10-CU-15 (Mar. 2010), available at <https://ncua.gov/regulation-supervision/letters-credit-unions-other-guidance/indirect-lending-and-appropriate-due-diligence>.

²⁷ *Id.*

establish their own requirements and manage their own levels of risk associated with doing business with ECIP-awardee credit unions. Further, this clarity from the CFPB would also provide a basis for reasonable examination procedures for the NCUA. The participation of the CFPB and NCUA is critical to providing certainty for auditors, insurers, Supervisory Committees, and others tasked with ensuring an individual credit union's compliance with consumer protection requirements and safety and soundness.

The Requirement to Collect Demographic Data on All Loans Will Harm Member Trust in ECIP-Awardee Credit Unions.

When consumers shop for a mortgage loan, they experience the same forms and inquiries regarding their race and ethnicity information at every lender they speak with. Many credit unions report that consumers are sometimes put off by the request initially. Seeing formal regulatory language, posted HMDA signs, and having the same experience across all lenders leads consumers to understand and accept that these inquiries are Federal requirements and not driven by an intention to discriminate.

The regulatory framework to obtain data through HMDA makes these requests ubiquitous and legitimizes them in the eyes of consumers. Treasury is requiring ECIP-awardee credit unions to proceed without those protections or any consumer-facing messaging. Treasury's requirements would apply to only a small number of credit unions in markets spread across the country. Many credit unions will be the only lender in their market requesting this information on non-mortgage loans. According to Treasury's most recent list of ECIP participants,²⁸ eight of the 36 states and territories have only one ECIP participant.²⁹ This means these participants will be the only organization in their entire state collecting this information on non-HMDA loans. When a borrower for a non-mortgage loan is asked about their race and ethnicity, it will be a relatively-unique experience within their community. Reports of this experience to other lenders or third-parties will likely result in mischaracterizing the request as discrimination based on race or ethnicity to consumers. This is simply an unacceptable outcome for credit unions.

In preparation for rulemakings on HMDA following the passage of the Dodd-Frank Act, a series of public hearings were held to elicit feedback on improvements for Regulation C. In three of four of those hearings, panelists repeatedly emphasized the reluctance of applicants to provide demographic information and the challenges financial institutions face in collecting that information.³⁰ In finalizing the 2015 HMDA rule, the CFPB specifically modified the introductory paragraph in the sample data collection form in Appendix B to improve the explanation to

²⁸ Treasury, Full List of ECIP Participants (March 2023), available at https://home.treasury.gov/system/files/136/ECIP_Participants_March_2023.xlsx.

²⁹ Tongass Federal Credit Union in Alaska; Members Credit Union, Inc. in Connecticut; Community First Guam Federal Credit Union in Guam; Kauai Federal Credit Union in Hawaii; Afena Federal Credit Union in Indiana; University Financial Corp., GBC in Minnesota; Clearwater Federal Credit Union in Montana; and Sessetson-Wahpeton Federal Credit Union in South Dakota.

³⁰ Home Mortgage Disclosure (Regulation C), 79 Fed. Reg. 51731, 51776 (Aug. 29, 2014).

applications as to why their financial institution is collecting their demographic information.³¹ The Bureau cited comments in the rulemaking process that expressed that clear, plain language explanations are necessary are to make the applicant feel comfortable in responding.³² In finalizing the language, the CFPB stated “[t]he Bureau believes that the explanation provided to applicants by financial institutions should clearly state why their demographic information is being collected and for what purposes such information is requested by the Federal government.”³³

The Bureau further required modified the title of the sample data collection form from “Information for Government Monitoring Purpose,” which it determined may discourage applicants from providing information to “Demographic Information of Applicant and Co-Applicant.”³⁴ The Bureau also required that financial institutions inform applicants that “Federal law requires collection of their demographic information in order to protect consumers and to monitor compliance with Federal statutes that prohibit discrimination against applicants on the basis of ethnicity, race, and sex” to clarify for applicants that the information is being collected to protect them from discrimination, and not so that the financial institution can base its credit decision on the information.³⁵

The Bureau made these changes because it recognized the truth from hearing panelists and commenters that applicants that when questions are asked regarding their demographic information in the context of a loan transaction, they become suspicious that the financial institution may be discriminating against them. Further, the Bureau took appropriate steps to address these concerns by safe harbor forms and language to assure the applicant that the information is being collected in compliance with Federal law, and not simply due to the lender’s desire to know. HMDA also requires posted signage.³⁶ These regulatory compliance structures formalize the requirements and provide nervous applicants with a clear, believable explanation as to why this information is being requested. Further, if they make applications to other lenders, they will be asked the same questions and receive the same forms, reinforcing the idea that the information request is not malicious.

Even so, some applicants do refuse to provide racial and ethnic data. HMDA requires loan officers to assess race and ethnicity demographic data through visual observation and surname,³⁷ a practice widely loathed by credit union staff. In the context of HMDA reporting, one credit union reported that a loan officer guessed the applicant’s ethnicity and race based on visual observation incorrectly, causing the applicant distress.³⁸ The applicant stated they did not provide the information purposefully as they come from a multiethnic family, and that they self-identify

³¹ Home Mortgage Disclosure (Regulation C), 80 F.R. 66127, 66192 (Oct. 29, 2015).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 66193.

³⁶ 12 C.F.R. §1003.5(b); 12 C.F.R. Part 1003, Supp. I, comment 5(b)-3.

³⁷ 12 C.F.R. §1003.4(a)(10)(i); 12 C.F.R. Part 1003, App. B, §§10, 12.

³⁸ Comments of the CUNA, Home Mortgage Disclosure Act Rule Assessment, Comment CFPB-2021-0018-0031 (Jan. 20, 2022), available at <https://www.regulations.gov/comment/CFPB-2021-0018-0031>.

differently than was guessed. The applicant indicated they found the assumptions made by the loan officer to be racist and rude. The loan officer apologized, explained the requirement, and was put in the position of assuring the member of their lack of racist intent. Other credit unions shared similar stories and indicated the explanations regarding government requirements are not always accepted, and sometimes applicants abandon the application entirely as a feeling of mistrust and a suspicion of racism has been established.³⁹ Some credit unions felt it exposed their institutions to litigation concerns and reputational risk. Even if the existence of the legal requirement might ultimately protect the credit union from loss in court, the loss of trust from their membership and potential harm to their reputation in their community due to accusation of discrimination is extremely concerning.⁴⁰

The requirement may seem harmless to regulators in the mission to gathering important data, but the reality of putting it into practice is troubling for loan officers who find it upsetting and in contravention with a credit union's mission and commitment to diversity, equity, and inclusion. One credit union described the requirement as "forcing a loan officer to put on a 'racist hat' for a minute," in order to guess at the applicants race and ethnicity based on their visual appearance.⁴¹ Others described the requirement as "counter-intuitive" and "odd," considering that the goals of Federal regulation should be to eliminate discrimination, rather than encouraging loan offices to become proficient in guessing the race of individuals based on their physical appearance or surname.⁴²

While this requirement remains present in the implementing regulations of HMDA, it is notable in the Bureau's recently finalized Small Business Lending rule (Final Small Business Rule),⁴³ they have eliminated the requirements to collect ethnicity and race via visual observation or surname.⁴⁴ In discussing this decision, the Bureau cited commenter assertions that the requirement to assess ethnicity and race via visual observation or surname "would impair customer relationships, citing small business lending as more relationship-dependent than other forms of credit."⁴⁵ The Bureau also cited a comment stating "that because banks are more likely to have ongoing interactions with a small business owner than someone seeking a mortgage, offense taken from visual observation or surname analysis would be more detrimental."⁴⁶ Regarding agricultural lenders, the Bureau stated the requirement "would be negatively received by applicants" who "might perceive the notice as an indication that the lender intends to or must contradict the applicant's wishes."⁴⁷ In summarizing these concerns, the Bureau stated:

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ CFPB, Small Business Lending under the Equal Credit Opportunity Act (Final Small Business Rule) (Mar. 30, 2023), available at https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf.

⁴⁴ Final Small Business Rule, p.472.

⁴⁵ *Id.* at 467.

⁴⁶ *Id.*

⁴⁷ *Id.*

[T]he Bureau is mindful, consistent with the comments it received, that much of the lending to small businesses in smaller communities and in underserved and rural areas occurs through relationship banking that involves more frequent and more personal contact with applicants. The Bureau is also mindful of concerns raised by lenders that rely on in-person engagement that their customer relationships may be negatively impacted by customer discomfort with a visual observation and surname data collection requirement, particularly during initial implementation of this final rule. The Bureau also acknowledges the concerns expressed by commenters that bank employees may feel uncomfortable making ethnicity and race determinations on the basis of visual observation or surname.⁴⁸

Recognizing the very real stakes for small business lenders, particularly those in smaller communities and underserved and rural areas, the Bureau declined to finalize a requirement to obtain ethnic and racial data via visual observation and surname.⁴⁹ Instead, the Bureau opted to require lenders to establish reasonable procedures to collect the information, to establish sample data collection forms with plain language explanations, and to launch its own public awareness campaign to educate small business owners in order to improve willingness to provide the information.⁵⁰

The CFPB has ever desire to obtain complete and accurate demographic data regarding small business lending. However, based on its deep experience with HMDA, its extensive research prior to finalizing the rule, and evaluation of the public comments received during the rulemaking process, the Bureau also recognizes the potential significant damage to the consumer relationship that the rule could pose, particularly to underserved communities. Treasury owes the same level of consideration and research with regard to ECIP-awardee credit unions. This is especially given their relative isolation in their individual markets and the amplified importance of relationship banking for CDFIs seeking to serve the most vulnerable communities. Treasury would be risking this damage to consumer trust across all loan types and without providing the sample forms or plain language explanations that the CFPB has recognized as critical to building trust with consumers in obtaining this information. CUNA urges Treasury in the strongest possible terms to undertake a more robust, interagency planning and implementation process before requiring that credit unions collect, store, and report this information.

The Requirement to Obtain Demographic Data May Have Significant Implications for the Cost of Credit For ECIP-Awardee Credit Union Members

If a credit union were to ignore the litigation, compliance, and reputational risk associated with implementing these requirements, the operational costs associated with doing so could be enormous. Credit unions often use a different loan origination systems (LOSs) for consumer and open-ended loans compared to their mortgage lending. Collecting, storing, and reporting on this

⁴⁸ *Id.* at 472.

⁴⁹ *Id.* at 428.

⁵⁰ *Id.*

information for all loans would likely involve an overhaul of multiple systems, potentially at tremendous cost to credit unions.

It is common for CFPB-implemented regulation to drive the market and the creation of new software platforms. In the Final Small Business Rule, the Bureau recognized that larger financial institutions are often at the tip of the compliance spear, being the first to work directly with vendors to implement and perform testing.⁵¹ Smaller financial institutions often benefit from larger financial institutions initiating this process and testing. However, the market for those solutions to meet compliance obligations is very large and the guidance provided by Bureau rules is very detailed.

Given the small number of ECIP-awardees who would be obligated to comply with these requirements, the lack of guidance provided in how to implement the requirements, and the breadth of products that would need to be covered, it seems likely that the number of software solutions created to address Treasury's requirements would be small and the cost of these solutions would be very expensive. Without an industry-wide effort for compliance, the 77 ECIP-awardee credit unions will be left to bear the entire cost of the designing and building of data collection and reporting systems that must integrate with third-party systems. And they must do it in an incredibly short time, which will only further inflate the cost.

Further, because mortgage lending is the most extensively-regulated type of consumer lending and because of the significant training, structure, and protections in place, it is also the most expensive type of loan to obtain. Creating parallel frameworks for other types of loans will directly increase the cost associated with those loans. Further, these requirements may mean credit unions are less competitive in their market, as is likely to happen in the indirect auto lending context as described above. Credit union plans for ECIP awards did not include this type of significant outlay on compliance, systems, and implementation costs. If implemented, it is likely that it will significantly harm ECIP-awardee market presence and increase the cost for products and services to the communities the ECIP is intended to assist.

The Timeline for Implementation of Demographic Data Requirements Is Not Reasonable.

Treasury has indicated that quarterly reporting for each quarter through June 30, 2024 will not be considered inaccurate or incomplete based on missing demographic data.⁵² Therefore, ECIP-awardee credit unions must establish and implement procedures for the collection of demographic data across all loan types no later than July 1, 2024. This collected demographic data for the second half of 2024 must be included in Schedule C for calendar year 2024, which will be due concurrently with the Call Report for the quarter ending March 31, 2025.⁵³ This timeline permits ECIP-awardee credit unions 15 months to design compliance and legal processes for the collection of data with no regulatory or examiner guidance or safe harbor options, obtain changes to the operating systems

⁵¹ Final Small Business Rule at 610.

⁵² QSR FAQ, Question 3.4.

⁵³ QSR Instructions, p.4.

from their vendors or design and build out their own systems, conduct due diligence of new systems and third-parties if necessary, design trainings for a extremely broad swatch of credit union staff to conduct highly sensitive conversations that could pose significant damage to the relationship with members, establish secure systems to store extremely sensitive data to maintain its integrity and confidentiality, and implement other risk-based procedures to minimize attendant risk, such as reasonably isolating this data from other credit union operations.

For comparison, the 2015 changes to HMDA were published in the Federal Register on October 28, 2015. Financial institutions did not begin collection under the new rule until January 1, 2018,⁵⁴ a full 26 months after the rule was finalized. In finalizing the Final Small Business Rule, the CFPB allowed for implementation periods that were tiered based on asset size, the absolutely shortest of which was 18 months, and the longest was 33 months.⁵⁵ The Bureau discussed its reasons for the tiered implementation timeline:

The Bureau gives credence to a set of three major factors commenters cited in requesting additional time, beyond 18 months, to comply with the rule (whether from 24 months to 3.5 years): the need to purchase or upgrade compliance software (including time to find and perform due diligence on vendors, purchase software, integrate compliance software with other systems, and test all of these); the need to create or adjust policies and procedures to comply with the rule; the need to train and, in some cases, hire staff to use the new software and implement the policies and procedures to collect data.⁵⁶

It the Final Small Business Rule, the Bureau thoroughly discussed its recognition that smaller financial institutions face particular difficulties that justify providing them additional time to comply with the rule. The Bureau recognized that smaller financial institutions are “at the mercy of their software vendors and other third-party providers” whereas a large bank may simply develop in-house compliance software.⁵⁷ It must be noted that the Bureau offered compliance periods of 24 months for HMDA and 33 months for the Final Small Business Rule when these requirements were being applied to *only one line of lending*. This means that credit unions were implementing changes to only one line of systems, procedures, forms, and conducting training only for those staff that work on those loans. Treasury is proposing that procedures be implemented across all types of lending – an exponentially larger task.

In addition to system requirements, credit unions would also need to conduct highly-sensitive and intensive training on how to safely obtain this information for an extremely broad class of employees. They also would need to implement new forms, processes, and procedures across all loan product lines, including those that involve third parties. Additionally, as the credit union would now be storing significant quantities of highly sensitive information, they would likely also

⁵⁴ CFPB, HMDA Rule Key Dates Timeline (2015-2020), available at https://files.consumerfinance.gov/f/documents/201709_cfpb_hmda-key-dates-timeline.pdf.

⁵⁵ Final Small Business Rule at 608.

⁵⁶ *Id.* at 609-610.

⁵⁷ *Id.* at 610.

need to implement additional protection for the safety and confidentiality of this information, requiring significant changes to their privacy and information security policies. Credit unions would have to design all these structures themselves or conduct vendor due diligence on third-party solutions and obtain legal opinions regarding their compliance as there is no guidance from the CFPB or NCUA regarding what is sufficient. Credit unions estimate that these changes could take between five and ten years, depending on individual credit union's size, sophistication, and the loan products offered.

Treasury Should Make the Collection of Data on Non-HMDA Loans Voluntary.

For all the reasons previously stated, Treasury should also make the requirement to collect actual demographic data on non-HMDA loans and report that data in Schedule C voluntary. If Treasury wants demographic data on loans of all types, it should accept proxy data in lieu of actual data.

Neither the Initial Supplemental Report nor the Securities Purchase Agreement indicated the ECIP-awardees may be *required* to implement processes to collect actual demographic data on all loans without the use of proxies. The use of proxies was clearly contemplated in the Initial Supplemental Report and credit unions had absolutely no indication this would be required. This requirement is incredibly burdensome, and implementation is excessively risky.

The statutory language regarding ECOA states “any low- and moderate-income community financial institution may collect data...” (Emphasis added.)⁵⁸ This fact and the Congressional intention was already detailed by the Community Development Bankers Association,⁵⁹ Inclusiv,⁶⁰ and Sones & White⁶¹ in 2022 comment letters to Treasury in response to the prior proposal. The statutory language clearly indicates a Congressional expectation that the collection of demographic data will be optional and protected—not mandatory. Indeed, no comments to the 2022 proposal argued that the requirement should be read otherwise or mandated as a requirement.

Further, because the statutory language is clearly permissive, no ECIP-applicant could have known they would be required to implement such a requirement. Obligating credit unions to accept this level of risk and obligation without notice, when they have already taken the money and would endanger their CDFI designation by failing to comply, is not reasonable. Multiple credit unions report they would have declined to apply for or accept the funds if this requirement had been disclosed in the application process. This fails as a measure of basic fairness in dealing with ECIP-awardees.

⁵⁸ 12 U.S.C. §4703a(k)(1).

⁵⁹ Comments of the CDBA Emergency Capital Investment Program Reporting, Comment TREAS-DO-2022-0013-0040, p.2 (Aug. 30, 2022), available at <https://www.regulations.gov/comment/TREAS-DO-2022-0013-0040>.

⁶⁰ Comments of Inclusiv, Comment TREAS-DO-2022-0013-0028, p.4 (Aug. 29, 2022), available at [file:///C:/Users/esullivan/Downloads/TREAS-DO-2022-0013-0028_attachment_1%20\(3\).pdf](file:///C:/Users/esullivan/Downloads/TREAS-DO-2022-0013-0028_attachment_1%20(3).pdf).

⁶¹ Comments of the CDBA Emergency Capital Investment Program Reporting, Comment TREAS-DO-2022-0013-0015, p.3 (Aug. 29, 2022), available at <https://www.regulations.gov/comment/TREAS-DO-2022-0013-0040>.

If Treasury wishes to pursue the goal of obtaining actual demographic data on all loans, it should work with the CFPB and NCUA to provide reasonable compliance guidance and examination expectations for ECIP-awardee credit unions so that credit unions can illustrate to their examiners, auditors, and membership that they are meeting their compliance obligations and not unduly exposing the credit union to litigation and reputational risk. Further, Treasury and the CFPB should jointly undertake a consumer-facing messaging campaign to make consumers aware that this information may be requested for their benefit and protection, in order to provide reasonable assurances to consumers that ECIP-awardee credit unions are not discriminating against them in complying with the requirement.

Conclusion

Thank you for this opportunity to comment on the Supplemental Report forms. CDFI-awardee credit unions simply should not be asked to formulate the processes and procedures for a massive new data collection requirement with no guidance from their examiners or rulemaking authorities, to bear the cost of designing these systems alone, to do so under an expedited timeline, and to be told they have no choice because they unknowingly agreed to it when they accepted ECIP funds. CUNA urges Treasury to reconsider the requirement to make demographic data collection in Schedule C mandatory. If you have questions, or if we can be of any assistance, please do not hesitate to contact me at (202) 503-7184 or esullivan@cuna.coop.

Sincerely,

A handwritten signature in black ink, reading "E. Sullivan". The signature is fluid and cursive, with the first letter "E" being large and stylized.

Elizabeth M. Sullivan
Senior Director of Advocacy & Counsel