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National Association of Federally-Insured Credit Unions

May 8, 2023

Spencer W. Clark
Treasury PRA Clearance Officer
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

RE: **Agency Information Collection Activities; Submission for OMB Review; Comment Request; Emergency Capital Investment Program Initial Supplemental Report and Quarterly Supplemental Report**
(Docket No. CFPB-2023-0002)

Dear Mr. Clark:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the data collection published by the U.S. Department of the Treasury (Treasury) that will be used to assess compliance with Emergency Capital Investment Program (ECIP) requirements. NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 135 million consumers with personal and small business financial service products. NAFCU supports the purpose of the ECIP program and the important role credit union participants play as Main Street conduits for ECIP funding. However, collection of detailed demographic information through the proposed Quarterly Supplement Report (QSR) in the absence of meaningful guidance will pose legal risks to credit unions and cause significant operational disruption.

To mitigate unreasonable reporting burdens, reduce potential legal risks, and encourage efficient deployment of ECIP funds, Treasury should not require collection of demographic information for non-mortgage loans. At a minimum, Treasury should consider extending the grace period for reporting to align with the Consumer Financial Protection Bureau's (CFPB) rule implementing small business lending data collection.

General Comments

Prior to the first round of ECIP awards, Treasury allowed applicants to assess lending to LMI and Other Targeted Populations using estimates and did not prescribe specific methodologies for completing the Initial Supplemental Report (ISR) or the initial application. Instead, Treasury instructed applicants using estimates to provide "supporting documentation that indicates which figures used for FY 2019 and FY 2020 are estimated and provide the methodology and information used to make such estimates."[1] At no point during the initial application stage was there any discussion of using sanctioned methodologies for collecting demographic information when completing Schedules A and B of the ISR.

Discussion of demographic reporting requirements for ECIP participants also appeared in an FAQ; however, this document did contain specific methodological requirements or include any prohibition on the use of statistical proxies.[2] The FAQ stated that "[r]eporting requirements will be set forth in the ECIP investment term sheets and investment agreements."[3] However, the term sheet provided to credit union ECIP applicants did not reference approved methodologies for collecting demographic information.[4]

A February 2022 draft of the proposed Initial Supplemental Report for insured depository institutions was similarly silent on the issue of using particular methodologies or the use of statistical proxies.[5] Slides included in an accompanying webinar merely noted that "[a]pplicants are asked to provide a narrative explanation of the methodology used to generate the data in the report."[6]

The use of specific, approved methodologies for collecting demographic information was not discussed until Treasury published a draft of the Quarterly Supplemental Report (QSR) data collection on June, 30 2022—approximately six months after announcing first round ECIP awards.[7] The shift to more complex procedures to measure qualified lending relative to the first-round ISR methods for establishing baseline levels of qualified lending means that credit unions will need to shift attention away from the actual distribution of ECIP funds to target communities in order to develop new compliance programs. The more demanding reporting requirements also risk burdening credit unions with potential litigation risk that was never factored into initial ECIP strategies or cost estimates.

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[1] *See* Treasury, Application Instructions and Materials (August 20, 2021), *available at* https://home.treasury.gov/system/files/136/ECIP-Application-Materials.pdf
[2] *See* Treasury, ECIP Revised and Expanded FAQs (August 20, 2021), *available at* https://home.treasury.gov/system/files/136/Highlights-of-final-approved-Application-on-8-11-2021.pdf
[3] *Id*.
[4] *See* Treasury, Subordinated Debt Term Sheet for Credit Unions (August 21, 2021), *available at* https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/emergency-capital-investment-program.
[5] *See* Treasury, Instructions for the Initial Supplemental Report for Insured Depository Institutions, Bank Holding Companies, and Savings and Loan Holding Companies (February 15, 2022*), available at* https://home.treasury.gov/system/files/136/ECIP-Reporting-ISR-instructions-Banks-and-HoldCos-DRAFT-2-15-2022.pdf?mc_cid=c5edb7180c&mc_eid=0d75340473.
[6] Treasury, ECIP Webinar Slides on Legal Agreements and Draft Initial Supplemental Report, 25 (February 25, 2022), *available at* https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/emergency-capital-investment-program.
[7] *See* Treasury, Instructions for the Quarterly Supplemental Report for Credit Unions, 10 (June 20, 2022), *available at* https://home.treasury.gov/system/files/136/ECIP-Reporting-QSR-Instructions-Credit-Unions_06302022.pdf.

Uncertainty regarding the scope of the ECOA safe harbor may increase exposure to potential legal risks when collecting QSR demographic information.

Notwithstanding the Equal Credit Opportunity Act (ECOA), the ECIP statute specifically authorizes collection of demographic information from borrowers and applicants for the purpose of monitoring compliance with ECIP program requirements.[8] While the ECIP provides a safe harbor under federal law, it does not address the potential applicability of state law equivalents of ECOA that may grant a private right of action.[9]

To the extent the CFPB is authorized to address potential inconsistencies between state laws and the parameters of ECIP reporting, Treasury should coordinate with the CFPB to ensure that credit unions are fully protected from potential legal liability when collecting demographic information to facilitate compliance with ECIP program requirements. Although the purpose of the ECIP is to encourage lending in low- and moderate-income communities, the collection of demographic information from borrowers presents inherent risks.

Borrowers may be unaccustomed to sharing demographic information for non-mortgage loans. Additionally, confusion regarding the purpose of ECIP-related inquiries may invite unwarranted litigation. Treasury should address those risks with greater specificity and clarity before it compels additional information collection.

Treasury must provide greater specificity with regard to acceptable methods for collecting demographic information and consider changes to the scope of reporting.

Treasury has advised ECIP participants that demographic data can be supplemented with information collected for the purpose of Home Mortgage Disclosure Act (HMDA) compliance and CDFI reporting or certification requirements. However, Treasury has also warned participants that they may not rely on statistical proxies, "even if such proxies are accepted for the purposes of compliance with the Home Mortgage Disclosure Act or CDFI Fund certification or reporting requirements."[10] While HMDA data may be useful for assembling demographic information related to mortgage loans, other types of loans (e.g., indirect auto loans) do not have origination systems designed for collecting borrowers demographic data and developing such systems will correspond with significant costs.

Even if developing data collection systems and procedures were feasible in the short period proposed by Treasury, lack of meaningful guidance would present its own separate challenge. In an FAQ, Treasury advises participants to rely on borrower self-identification but does not specify

[8] See 12 U.S.C. § 4703a(k).
[9] See 15 U.S.C. § 1691d(f); see e.g., Illinois Human Rights Act, 775 ILCS 5/4-104 (Illinois recognizes a safe harbor for three types of credit-related information collections under the state's anti-discrimination law, but does not provide a carve out for programs structured like ECIP).
[10] Treasury, Instructions for the Quarterly Supplemental Report for Credit Unions, 10 (March 21, 2023).

procedures for how to ask for the data and does not clarify what legal safe harbors (if any) can be extended to third parties who may also be involved in the information collection process.

Developing procedures for collecting demographic information for all types of qualified lending listed in the QSR will require significant time, correspond with additional legal risk in the absence of more detailed guidance, and could result in serious operational disruption for credit union ECIP participants. Credit unions that applied for ECIP funding may not have factored these costs into their plans to deploy funds in LMI communities and this could ultimately impact the efficacy of the ECIP program as a whole. Although Treasury has proposed a grace period during which "Treasury will not consider the QSR to be inaccurate or incomplete solely on the basis of a lack of demographic data," a period of approximately one year is unlikely to provide sufficient time for developing the data collection processes and methodologies needed.[11]

As a point of comparison, the CFPB's final rule implementing small business lending data collection has given covered financial institutions a much longer period to develop procedures for gathering demographic information from small business owners and borrowers.[12] A covered financial institution that originated at least 500 covered credit transactions for small businesses in each of calendar years 2022 and 2023 must comply with the CFPB's final rule beginning April 1, 2025. The CFPB also recognizes that smaller entities may need additional time. Under the final rule, a covered financial institution that originated at least 100 covered credit transactions for small businesses in each of calendar years 2022 and 2023 has until January 1, 2026 to comply with the data collection rule.

At a minimum, NAFCU recommends Treasury extend the QSR reporting grace period for non-HMDA mortgage loans to align with the longer end of the CFPB's phased approach for implementing its small business data collection rule. A more appropriate solution, given the potential costs, disruption and risks discussed above, would be for Treasury to not require detailed reporting of demographic information for non-mortgage loans in the QSR. The use of HMDA and CDFI data coupled with reasonable estimates—similar to how first round ECIP participants completed the ISR—will provide adequate information to Treasury for assessing qualified lending activity, monitoring compliance, and ensuring that the goals of the ECIP program are met.

Conclusion

NAFCU appreciates the opportunity to comment on the proposed ECIP QSR information collection. If we can answer any questions or provide you with additional information, please do not hesitate to contact me at 703-842-2266 or amorris@nafcu.org.

[11] *Id*.
[12] *See* CFPB, Small Business Lending under the Equal Credit Opportunity Act (Regulation B) (March 30, 2023), available https://files.consumerfinance.gov/f/documents/cfpb_1071-final-rule.pdf.

Sincerely,

Andrew Morris
Senior Counsel for Research and Policy