

December 14, 2020

Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552
Transmitted Electronically

To whom it may concern:

This letter provides comments from the Equipment Leasing and Finance Association (ELFA) to the Consumer Financial Protection Bureau's (CFPB) "Outline of Proposals Under Consideration and Alternatives Considered," associated with the Small Business Advisory Review Panel for the CFPB's small business lending data collection rulemaking under Section 1071 of Dodd-Frank and issued on September 15, 2020.

Rather than reiterate many of the recommendations that we have made in the past, we are incorporating our comment letter submitted to the CFPB by ELFA in December of 2017 as an attachment to this letter and emphasizing several key points that are warranted in light of the outline of proposals. The attached letter also includes a background of ELFA and the equipment finance industry broadly.

Summary

A summary of the key points raised in these two letters follows:

- The CFPB should adopt the two-step reporting process outlined in ELFA's 2017 comments. ELFA believes this will not only produce the best information but it will also be the most efficient methodology for all participants, the government, obligors, and obligees. If the CFPB does not adopt some variant of this reporting process, the CFPB should:
 - Develop an optional form –with input from industry–that financial institutions can use to collect customer data, with clarity that the customer is solely responsible for accuracy; and
 - Clearly define "feasibility" in restricting access to customer information by loan officers and underwriters.
- The CFPB should adopt a simple, revenue-based definition of small business. The CFPB proposal of a \$1M ceiling for revenue is reasonable, although a significantly lower ceiling is supported by the existing administrative record and would capture a significant majority of small business lending.
- Asset specific financing should be exempt because it is drastically different than the cash loan and line of credit facilities that were the seminal focus of §1071.

- Financing to publicly traded companies and large loans (e.g., loans greater than \$100,000 or if the aggregate exposure exceeds \$250,000) to all businesses should be specifically exempted.
- Vendor finance and dealer transactions should be exempted because of the inherent difficulties associated with information collection by non-affiliated entities.
- The size-based exemption levels contemplated in the CFPB proposal need to be raised significantly to be meaningful.
- In the absence of much broader exemptions, staged implementation of Section 1071 is advisable.
- The CFPB should take great care in publishing any 1071 information due to the privacy and anti-competitive factors inherent in this data. Many borrowers want their finances kept confidential for a myriad of reasons and competition on a variety of factors is critical to efficiently providing credit to small businesses. If this information is made public, it will cause many borrowers to decline to provide the information creating a skewed and unreliable database. It will also inevitably cause greater competition on headline rates, if the CFPB requires rate disclosure, at the expense of other factors in the financing such as servicing. This would also open the door to rate manipulation through down payment adjustments and the like.

These points are expanded upon below and in the attached letter. ELFA stands ready to respond to any questions the CFPB may have about any of these matters.

Reporting Structure

ELFA would like to reiterate its belief that a reporting structure should be created that will allow for the collection of Section 1071 information in a manner that is most efficient for not only the covered financial institutions, but also the reporting borrowers. Inasmuch as the public policy goal of any regulatory process should be accomplished in the most efficient manner possible for both the regulator and the private sector, ELFA believes that the reporting process that it proposed in 2017 is the most efficient structure and facilitates the achievement of that goal. Additionally, over the long term, the accuracy of the data reported through the ELFA-recommended reporting process will be superior to one where information is collected by the covered financial institutions repeatedly with each transaction, thereby providing a significant benefit to the CFPB's oversight of small business commercial lending.

Additionally, as the CFPB is aware, there have always been several highlighted issues that will make it very difficult for financial institutions to comply with Section 1071. ELFA believes that these issues would be greatly simplified or alleviated by implementing the ELFA-recommended reporting structure. Specifically, our reporting structure (1) eliminates the need for a financial institution to create a firewall between its loan officers and credit underwriters, (2) eliminates the need for the CFPB to address the issue of whether or not a financial institution may rely upon a borrower's attestations

regarding the accuracy of the information it provides, and (3) lastly, and possibly most importantly, not having financial institutions collect the demographic information in the first instance eliminates the potential for the information to be used by the financial institution inappropriately or illegally, as well as borrowers' perception that it may be so used.

Definition of Small Business

ELFA has proposed several definitions for what we believe to be truly small businesses in the past, and we stand by those proposals. Based on a 2017 CFPB study, a level as low as \$100,000 would still capture credit provided to 76% of all businesses. However, we would emphasize that simplicity is key here no matter what threshold is set. The CFPB should adopt a standard that is based on revenue and revenue alone, and while ELFA recommended a lower threshold in 2017, it believes that one million dollars per year is a reasonable level.

This simplicity is especially important because, contrary to popular belief, annual revenue is not a data element that is collected by ELFA members in many small business transactions. To be forced to cross reference revenue figures with NAICS codes for every transaction is time intensive and costly with little evident value to the data collection effort.

Additionally, we would like to note that the definition of small business will need to accommodate two scenarios. The first is start-ups that may have no previous-year revenue but will not be a small business in their first year of operations. The second is subsidiaries, and other entities that are not independently owned and operated, such as special purpose entities and equipment holding companies for large contractors. Both situations should be exempted.

Vendor and Dealer Finance

Many ELFA members provide financing to customers in situations where the original credit application was collected, not by the financial institution, but rather by the seller of the equipment being financed (referred to in the equipment finance space as "vendor finance"). Oftentimes, particularly for smaller transactions, the only information collected by the seller of the equipment as part of the application process is the name and address of the borrower. This information is then forwarded by the seller to the financial institution, which in turn then makes its credit decision based upon widely available commercial credit databases.

If the CFPB requires the collection of Section 1071 information for each vendor finance transaction, this will multiply by many times the amount of data points which are presently collected in the normal course of business. These transactions are often credit-decided in a matter of minutes to a few hours; therefore, the addition of the 1071 fields will significantly slow the transaction and increase the costs of the vendor program (and, thus, the financing charges to the borrower). Setting aside the cost factors, the time

difference between collecting two data fields in the current normal course of business and 10 or more once Section 1071 is in place will prove to be a strong disincentive for borrowers to supply the optional 1071 information. Requiring a finance company to ascertain whether the customer is a minority-owned, woman-owned or small business is a gigantic logistical hurdle that will be costly to overcome initially and there will be ongoing significant costs with every transaction. These additional costs may result in the vendor finance model becoming uneconomic in some market segments. Requiring financial institutions to collect this information will change the very nature and convenience of vendor financing, result in higher costs for end user customers and ultimately likely fewer finance companies to provide financing due to likely market exits.

ELFA would also note that in recently enacted FinCEN rules regarding collection of beneficial ownership information, the Treasury Department recognized the distinct nature of vendor finance and inserted a specific exemption into its rules (see 31 C.F.R. S1010.230(h)(1)(iv)).

In areas of the economy where equipment dealers are the primary point of interaction with customers it is often a similar situation. A customer will enter an equipment dealer seeking to purchase a tractor and wish to seek financing, or alternatively, a customer may seek to lease the tractor for a period of time. This financing is provided by the captive finance arm of the manufacturer of the tractor. Again, it creates a situation where the entity providing the financing has no direct interaction with the customer outside of the actual credit decision. Tasking the finance company in that instance with ascertaining whether a business is a small business, or a woman or minority-owned business, is again costly and adds significantly to the complexity of the transaction leading to small business borrowing cost going up.

Accordingly, ELFA recommends that the CFPB include the following exemptions to Section 1071:

- i. Instances in which the credit was applied for in order to finance the purchase or leasing of equipment and the purchase price for such equipment will be remitted directly by the financial institution to the vendor or lessor of the equipment, or
- ii. Instances in which the credit was initially applied for at a business entity other than the financial institution which will be making the credit decision, and such business entity and financial institution are not affiliates.

ELFA would also note that if CFPB chooses to not adopt these exemption recommendations but did adopt our recommended reporting structure, there would be only one additional data point required, i.e., the small business borrower identification number assigned by the CFPB. This would greatly reduce the amount of additional information required to be collected at the point of sale and would greatly streamline these transactions.

Borrower Attestation

Should the CFPB decide to require financial institutions to collect Section 1071 information as part of each covered transaction rather than adopt the ELFA-recommended reporting structure, it is critical that the financial institution be permitted to rely upon the information provided by the borrower. ELFA supports the CFPB proposal to allow financial institutions to have ownership status be only self-reported by the borrower. We are concerned however about the concept of reporting verified information under the small business status. We believe this will add significant burden to financial institutions attempting to comply with these provisions.

ELFA believes that the CFPB should only require the reporting of borrower information provided directly by the borrower. Further, we believe that no verification standard should be utilized for any information reported under this Section. Requiring financial institutions to invest the time and resources it would take to verify any 1071 information that a customer agrees to voluntarily provide would not only greatly increase the borrowing costs for small businesses but will inevitably result in a number of financial institutions to exit the small business lending marketplace (most notably smaller financing sources who account for a significant portion of loans made to small businesses).

Exemption Sizes and Staged Compliance

ELFA believes that, if the CFPB truly wants to provide meaningful exemptions for both depository and non-depository institutions, the exemptions contemplated by the CFPB proposal need to be increased significantly. ELFA has many members which are small businesses themselves that would not be exempted by the exemption levels contemplated in the outline. Based on CFPB data issued in 2017, we believe that the vast majority of small business lending would still be subject to the rule at significantly higher exemption levels. ELFA's December 2017 letter provides exemption levels that we believe would be reasonable.

Additionally, and especially if the current contemplated exemption levels are contained in the final rule, we believe that the CFPB should rely upon a staged reporting structure, such that larger institutions are required to report first, with smaller institutions being required to report at a later date. ELFA believes that it would be entirely reasonable for the CFPB to issue a 1071 rule that covered only the largest financial institutions for the first year or two, and then utilize the lessons learned in that roll-out to undergo another regulatory process that would capture more of the universe, assuming the data warranted that effort.

Lender of Record

ELFA is concerned about the portion of the proposal regarding financial institutions that are not the lender of record. In the equipment finance space, it is not always known by a financial institution whether, for any given credit application, there is

an origination. Additionally, we believe that a structure that collects all declinations, but only one approval in a situation where multiple financial institutions consider the application, is a recipe for a highly skewed snapshot of credit underwriting results in the small business lending market.

It is very common for applications in the equipment finance market to be sent to multiple financial institutions. For example, while one application may be approved by several financial institutions, the applicant may decide to pay cash instead of financing its acquisition or decide to lease the equipment. We read the proposal such that no approvals would be recorded in that situation, which, if a correct reading, will cause the database to significantly and artificially show a disproportionate number of credit denials versus approvals. Accordingly, ELFA believes that if a financial institution receives a covered application, the application should be subject to reporting regardless of whether the financial institution ends up being the lender of record.

Privacy; Anti-Competitive Concerns

ELFA believes that the CFPB must take advantage of the significant flexibility that Congress has provided it in the public reporting of the information collected under Section 1071. We believe that, as the SBREFA record shows, many small business customers simply do not want their financial information made public. This is for any number of legitimate reasons. Accordingly, we believe that the CFPB should publicly report such information on a geographic scale such that it is not possible to attribute any specific transaction to a specific borrower. In some geographic areas, this may mean reporting by county, but in other, less populous areas, this may mean reporting by state.

Additionally, ELFA is concerned about the anti-competitive effects that the public reporting of much of the Section 1071 information may have. In many transactions, the underlying rate is only one factor in terms of the approval or declination of the transaction. If a financial institution can determine the rate being offered by its competitors (which pricing information competitors are for the most part otherwise prohibited from sharing under applicable law), that may provide the financial institution a competitive advantage by allowing it to then offer a better rate than its competitors in the applicable geographic area. Again, because rate is only one factor a borrower considers when deciding on its lender, this may lead customers to select a lender based on rate only, without consideration for factors such as documentation terms and conditions and quality of customer service. Moreover, the availability of such pricing information may just as easily result in a lender charging a rate higher than it otherwise would, absent having such information (again defeating the purpose of the long-standing general prohibition on the sharing of pricing information among competitors).

Furthermore, many segments of the equipment finance market are moving towards bundled transactions (i.e., where services are included as part of the financing package) and may have varying rates based upon, for example, equipment/service usage. In that type of transaction, rate is again only one factor in the transaction and, therefore,

we are very concerned that regardless of the structure the CFPB utilizes for reporting the 1071 information for such transaction, the reporting will not capture the true economics of the transaction.

Conclusion

ELFA has appreciated the collegial relationship that we have built with the CFPB over the last 10 years. We stand ready to work with you as this regulatory process moves forward in the coming years. Should you have any questions about the specific proposals in this letter please contact Andy Fishburn, ELFA's Vice President of Federal Government Relations at afishburn@elfaonline.org or 202-238-3419.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Ralph Petta".

Ralph Petta
President and CEO

Attachments: ELFA Comments in Response to Docket No. CFPB-2017-0011, Request for Information Regarding the Small Business Lending Market