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## DFA Section 1071 Readiness

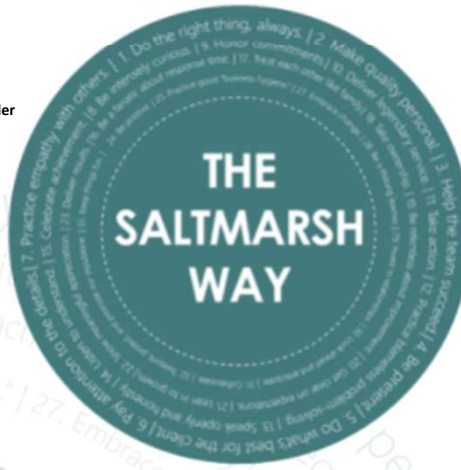
FBA 38<sup>th</sup> Annual Consumer Compliance Conference  
Kristen Stogniew, Esq, Shareholder



**Forbes**



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## Agenda



Status (as of 2/28/2025), scope of rule, institutional coverage and effective date



§ Requirements of Statute (§1071, 15 USC 1691c-2) and Final Rule (published at 88 FR 35150, codified at Reg. B, 12 CFR 1002 - Subpart B)

? Interactive - Questions & comments at ANY TIME

*DISCLAIMER: The information presented here or stated by the speaker(s) or others at Saltmarsh is **not to be considered legal advice nor a replacement for reading the applicable statute, regulation, official interpretation, commentary, supplemental information, or regulatory guidance or publication** related to the subject matter discussed or contained herein.*

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**ABA BANKING JOURNAL**  
From the American Bankers Association

TOPICS ▾ NEWSBYTES PODCASTS MAGAZINE ▾

## Compliance question of the month: February 2025

What is the status of 1071?

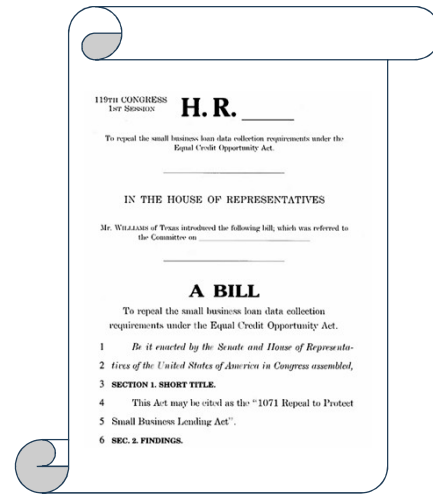
<https://bankingjournal.aba.com/2025/02/compliance-question-of-the-month-february-2025/>

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## Litigation/congressional status - as of 2/27/2025

1. 12/30/2023 Congress passed Joint Resolution disapproving the CFPB's final rule; President Biden vetoed 12/2023
2. Texas Bankers et al v. CFPB (4/26/2023)
  - 5/16/2024 SCOTUS ruled CFPB funding is constitutional.
  - Remaining basis is under the Administrative Procedures Act -CFPB exceeded its statutory authority.
  - Count II asks to nullify all data points in excess of those listed in the statute (they do not further statute's purpose)
  - Counts III and IV seeks to nullify the entire Rule (CFPB did not consider and respond to comments or costs to small banks and consumers; their analysis was unreasonable, illogical and inconsistent)
  - 2/3/2025 court granted motion to stay compliance deadlines pending further order (only as to plaintiffs and intervenors - TBA, IBAT, ABA, ICBA, CUNA)
3. 6/25/2024 CFPB published interim final rule, moving 1071's effective date back 290 days.
4. 6/28/2024 SCOTUS overturned the "Chevron" deference doctrine, which required lower courts to "defer" to regulatory agencies' interpretations of vague statutes so long as their interpretation is "reasonable".

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**HB Introduced 2/4/2025,  
would repeal 1071 from the  
DFA**

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## Final Rule contents

- .101 Purpose & Scope
- .102 Definitions
- .103 Covered applications
- .104 Covered credit transactions and excluded transactions
- .105 Covered financial institutions and exempt institutions
- .106 Business and small business
- .107 Compilation of reportable data
- .108 Firewall
- .109 Reporting of data to the Bureau
- .110 Publication of data and other disclosures
- .111 Recordkeeping
- .112 Enforcement
- .113 Severability
- .114 Effective date, compliance date, and special transition rules

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## §1002.114 Institutional Coverage and Compliance Dates

Whether you are subject to the rule in any given year depends on whether you made 100 or more covered originations in each of the prior 2 calendar years

- Asset size, and location in MSA are not relevant
- Once you meet the thresholds you immediately become subject to that tier's effective date below, or January 1 of the following year, whichever is later
- You are allowed to begin collecting data 12 months prior to compliance date, however, you must collect business status and principal owner data, and comply with other substantive provisions (except that reporting the data is optional)

### Rule Effective Dates: **TOLLED FOR ABA AND ICBA MEMBERS**

**Tier 1 = July 18, 2025** - made at least **2,500** covered originations in 2022 and 2023 (or 2023 and 2024)

**Tier 2 = January 16, 2026** - made at least **500** but less than 2,500 covered originations in 2022 and 2023 (or 2023 and 2024).

**Tier 3 = October 18, 2026** - made at least **100** covered originations in 2022 and 2023 (or 2023 and 2024, or 2024 and 2025)

Collected data is submitted by June 1 of the following year.

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§1071 (g)(2): EXCEPTIONS.— The Bureau, by rule or order, may adopt exceptions to any requirement of this section and may, conditionally or unconditionally, exempt any financial institution or class of financial institutions from the requirements of this section, as the Bureau deems necessary or appropriate to carry out the purposes of this section.

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## §1002.104 Covered originations for determining compliance date

### A "covered credit transaction" was that **made** by the FI

- An extension of business credit, that is not otherwise excluded...
  - "Designated" as business purpose, not "personal" or "consumer"
  - Includes "refinancings" as defined by TILA
  - Loans or participations purchased are excluded
  - HMDA-reportable loans are excluded, whether you are a HMDA reporter or not. (In other words, do not include permanent loans that are secured by a dwelling for the purpose of home purchase, home improvement, or refinance, but DO count temporary, bridge, or other short-term loans (CFPB FAQ Institutional coverage #8))
- ...to a "small business"
  - A business concern with \$5 million or less in gross annual revenue (GAR) for its prior fiscal year
  - Revenue threshold adjusts every 5 years
  - Excludes non-profits and governmental entities, by definition
  - Includes sole proprietorships
  - Can rely on applicant's representations of GAR, but if you verified that GAR you must use the verified/updated value

### For institutional coverage:

- Do not count applications that were not originated
- Do not count renewals, modifications or extensions - even if new money was advanced

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## §1002.104 Covered originations for determining compliance date

➤ If you don't have reasonable access to precise or approximate information as to whether your borrowers are "small businesses" ....(i.e., you must review paper loan files, archived paper or scanned records in digital archives, or obtain from third parties), you may:

- Ask every borrower prior to closing during the timeframe **10/1/2023 - 12/31/2023** or **10/1/2024 - 12/31/2024** whether it had GAR over \$5 million and then annualize (x4) the number of loans and applying this number to 2022 and 2023 (or 2023 and 2024, respectively).
- Can assume every covered origination for business customers in 2022 and 2023 (or 2023 and 2024) is to a small business.
- Or...can use any other reasonable, written methodology.

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## Change Management

- The formality of change management process should be commensurate with the bank's size, complexity, and risk profile
- The compliance & BSA functions should be involved in the due diligence and monitoring of new, modified, or expanded products or services
- The entire lifecycle of a product or service should be considered - before, during and after implementation - to determine that actions taken have achieved planned results
- Banks should anticipate and respond timely to changes in applicable laws and regulations, market conditions, and products and services offered by evaluating the change and implementing responses across affected lines of business

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## What is “compliance” and why should we care?



...I believe banks of all sizes can not only grow, but thrive and set themselves apart from their competition by foundationally having a robust compliance management program, that compliments and partners closely with the functional areas they support.

I achieve this by ensuring that all front line staff, middle management and senior level executives have a solid baseline understanding of regulatory risk. I educate my business partners on why complying with federal regulations and laws will not only reduce litigation, regulatory and reputation risks but help maintain an organization that focuses on understanding and serving a customer's financial needs.

**Amanda McNally**  
UDAAP/Fair Banking Expert, Educator and Speaker

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## §1071– Purpose

(a) Purpose - The purpose of this section is to facilitate enforcement of fair lending laws and enable communities, governmental entities, and creditors to identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses...

(e) (2) Itemization - The information compiled...shall be itemized in order to clearly and conspicuously disclose...

*(the statutory data points)*...and

...(H) any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

(g) Bureau action:

(1) In general - The Bureau shall prescribe such rules and issue such guidance as may be necessary to carry out, enforce, and compile data pursuant to this section...

Compare to §1094 (HMDA)...which did not have a purpose statement and required additional collection of “such other information as the Bureau may require.”

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## §1071 – Information gathering

(b) INFORMATION GATHERING.—Subject to the requirements of this section, in the case of any application to a financial institution for credit for women-owned, minority-owned, or small business, the financial institution shall—

- (1) inquire whether the business is a women-owned, minority-owned, or small business, without regard to whether such application is received in person, by mail, by telephone, by electronic mail or other form of electronic transmission, or by any other means, and whether or not such application is in response to a solicitation by the financial institution; and
- (2) maintain a record of the responses to such inquiry, separate from the application and accompanying information...

(c) RIGHT TO REFUSE.—Any applicant for credit may refuse to provide any information requested pursuant to subsection (b) in connection with any application for credit.

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## §1002.103 - Covered applications for data collection

- Oral or written request for a covered credit transaction that is made by a small business in accordance with “procedures” used by a financial institution for the type of credit requested
  - not just the written procedures but the ones actually followed
- Excluded:
  - a reevaluation, extension, or renewal request on an existing business credit account, unless the request seeks additional credit amounts
    - so, a request for business line increase, made in accordance with your procedures for that, is covered
  - inquiries and prequalification requests
    - even if lender’s action turned it into an application requiring a denial notice

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**§1071 Data to be collected**

1. application number
2. date application received
3. type of credit
4. purpose of credit
5. amount applied for
6. amount approved
7. type of action taken
8. date of action taken
9. census tract
10. business Gross Annual Revenue (GAR)
11. race, sex, and ethnicity of the principal owners
12. any additional data that the Bureau determines would aid in fulfilling the purposes of this section.

**§1002.017 Additional data points**

1. application method
2. application recipient
3. type of guarantees
4. loan term
5. denied reasons
6. pricing information:
  1. Fixed interest rate; or margin, index, initial rate period, index name
  2. Total origination charges
  3. Broker fees
  4. Initial annual charges
  5. Additional costs for merchant or sales-based financing
  6. Prepayment penalties
7. NAICS code
8. number of workers
9. time in business
10. business minority-owner, women-owned or LGBTQI+ status
11. ethnicity, race and sex of the principal owners
12. number of principal owners

FI can reuse previously collected data for items in blue that were collected within 36 months prior to the current application, or for GAR that was collected within the same calendar year as the current application, **and** for which the FI has no reason to believe the data are inaccurate

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## Sample data collection form

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Federal law requires that we request the following information to help ensure that all small businesses applying for loans and other kinds of credit are treated fairly and that communities' small business credit needs are met.

One or more employees or officers involved in making a determination concerning your application may have access to the information provided on this form. However, **FEDERAL LAW PROHIBITS DISCRIMINATION** on the basis of your answers on this form. Additionally, we cannot discriminate on the basis of whether you provide this information.

While you are not required to provide this information, we encourage you to do so. Importantly, our staff are not permitted to discourage you in any way from responding to these questions.

**Filling out this form will help to ensure that ALL small business owners are treated fairly.**

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## Business ownership status

Please indicate the business ownership status of your small business. For the purposes of this form, your business is a minority-owned, women-owned, or LGBTQI+-owned business if one or more minorities,\* women, or LGBTQI+ individuals (i) directly or indirectly own or control more than 50 percent of the business AND (ii) receive more than 50 percent of the net profits/losses of the business.

### What is your business ownership status?

(Check one or more of the options below)

- Minority-owned business**
- Women-owned business**
- LGBTQI+-owned business**  
– or –
- None of these apply**  
– or –
- I do not wish to provide this information**

\*Minority means Hispanic or Latino, American Indian or Alaska Native, Asian, Black or African American, or Native Hawaiian or Other Pacific Islander. A multi-racial or multi-ethnic individual is a minority for this purpose.

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## Number of principal owners

For purposes of this form, a principal owner is any individual who owns 25 percent or more of the equity interest of a business. A business might not have any principal owners if, for example, it is not directly owned by any individuals (i.e., if it is owned by another entity or entities) or if no individual directly owns at least 25 percent of the business.

### How many principal owners does your business have? (Check one)

- 0
- 1
- 2
- 3
- 4

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## Demographic information about principal owners

As a reminder, applicants are not required to provide this information but are encouraged to do so. We cannot discriminate on the basis of any person's ethnicity, race, or sex/gender. Additionally, we cannot discriminate on the basis of whether you provide this information.

Please fill out one sheet for each principal owner.

### 1 Are you Hispanic or Latino?

i.e., What's your ethnicity? (Check one or more)

- Hispanic or Latino**
- Cuban
- Mexican
- Puerto Rican
- Other Hispanic or Latino (Please specify your origin, for example, Argentinean, Colombian, Dominican, Nicaraguan, Salvadoran, Spaniard, and so on):

- Not Hispanic or Latino**

– or –

- I do not wish to provide my ethnicity**

### 2 What is your sex/gender?

(Please specify):

– or –

- I do not wish to provide my sex/gender**

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**3 What is your race?**  
(Check one or more)

**American Indian or Alaska Native** (Please specify the name of your enrolled or principal tribe):  
\_\_\_\_\_

**Asian**

Asian Indian  
 Chinese  
 Filipino  
 Japanese  
 Korean  
 Vietnamese  
 Other Asian (Please specify your race, for example, Cambodian, Hmong, Laotian, Pakistani, Thai, and so on):  
\_\_\_\_\_

**Black or African American**

African American  
 Ethiopian  
 Haitian  
 Jamaican  
 Nigerian  
 Somali  
 Other Black or African American (Please specify your race, for example, Barbadian, Ghanaian, South African, and so on):  
\_\_\_\_\_

**Native Hawaiian or Other Pacific Islander**

Guamanian or Chamorro  
 Native Hawaiian  
 Samoan  
 Other Pacific Islander (Please specify your race, for example, Fijian, Tongan, and so on):  
\_\_\_\_\_

**White**  
- or -

I do not wish to provide my race

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## §1002.107 Time and manner of collection/discouragement

- (b) In most cases, FI may rely on information from the applicant, or appropriate third-party sources, when compiling data. If the financial institution verifies applicant-provided data, however, it shall report the verified data
- (c) FI shall not discourage an applicant from responding to requests for applicant-provided data and shall otherwise maintain procedures to collect such data at a time and in a manner that are reasonably designed to obtain a response, which requires:
- i. initial request occurs prior to notifying applicant of final action taken
  - ii. request is prominently displayed or presented
  - iii. the collection does not have the effect of discouraging an applicant from responding to a request for applicant provided and
  - iv. applicants can easily respond to request
- (d) FI shall maintain procedures to identify and respond to indicia of potential discouragement, including low response rates for applicant-provided data

## §1002.111 Recordkeeping

- Must maintain business status and principal application data separate separately from the rest of the application and accompanying information
- In reporting the LAR, maintaining the LAR, and maintaining the separate record of business applicant status and principal shareholder data, FI shall not include any name, specific address, telephone number, email address, or any other personally identifiable information concerning any individual who is, or is connected with, an applicant

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## §1071 and §1002.108 Firewall

“Where **feasible**, no loan underwriter or other officer or employee of a FI or its affiliate, **involved in making any determination** concerning an application for credit shall have access to any information provided by the applicant...”

If FI determines (they) **should have access** ... the FI shall provide notice to the applicant of the access of the underwriter to such information, along with notice that the financial institution may not discriminate on the basis of such information.”

- This relates only to the applicant’s business status, and the principal owner’s GMI data
- “Involved in making any determination”...means “participating in a decision regarding the evaluation of the application...or the creditworthiness of the applicant...”
- It is “not feasible” to limit their access if “FI determines...[they]...should have access”
- “Should have access”...means “an employee or officer may need to collect, see, consider, refer to, or otherwise use the information to perform [their] assigned job duties”
- If you do not limit access, you need to notify each applicant when you request the data.

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## §1002.110 Publication of data

- Must make available to the public on your website, or otherwise upon request, a statement that your modified small business lending application register (LAR) will be available from the Bureau.
  - Must use language provided by the Bureau, or substantially similar language
  - Must be available when you submit the LAR and be maintained the notice for as long as the LAR retention period (3 years after submission)

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## §1002.112 – Enforcement (Exceptions)

b) Bona fide errors = Not a violation = An **unintentional** error in compiling, maintaining, or reporting data that occurred **despite the maintenance of “procedures** reasonably adapted to avoid such an error”.

- FI is *presumed* to maintain such procedures with respect to a given data field, if the number of errors found in a random sample for the field does not equal or exceed a threshold specified by the Bureau for this purpose in appendix F to this part.
- c) Safe harbors:
- application date within 3 business days of the actual application date
  - Incorrect census tract through correct use of the FFIEC or CFPB geocoding tool
  - Incorrect NAICS code that was
    - Obtained from applicant or an appropriate third-party source
    - Obtained by identifying the NAICS code itself, provided that the FI maintains procedures reasonably
    - adapted to correctly identify a 3-digit NAICS code
  - Incorrect determination of small business status, covered credit transaction, or covered application
    - Covers FI's collection of data where it properly should not have, so long as (at time it was collected) FI had a reasonable basis for believing that the application was covered.
    - Still need to maintain 107, 108, and 111

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## Grace Period - Policy Statement

- 88 FR 35458
- 12-month grace period for CFPB supervised institutions
- Does not intend to exercise CFPB enforcement and supervisory authorities, assuming good faith compliance efforts by financial institutions
- Allows time to diagnose and address unintentional errors
- Will only require resubmission for material errors
- Does not intend to assess penalties
- Attempts to discourage applicants from providing data would not be in good faith

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## Checklist

- ✓ Procedures for identifying covered transaction, covered application, and small business status
  - ✓ Application process
  - ✓ GAR process
  - ✓ Whether existing or new technologies can help with this
- ✓ Procedures for collecting data
  - ✓ from the applicant - in a time and manner that are reasonably designed to obtain a response
    - ✓ Prior to
  - ✓ from the loan
  - ✓ from data you may already have
  - ✓ Whether existing or new technologies can help with this
- ✓ Monitoring procedures, to include identification of potential discouragement

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## §1070 - Other definitions

(5) MINORITY-OWNED BUSINESS.—The term ‘minority-owned business’ means a business—  
(A) more than 50 percent of the ownership or control of which is held by 1 or more minority individuals; and

(B) more than 50 percent of the net profit or loss of which accrues to 1 or more minority individuals.

“(6) WOMEN-OWNED BUSINESS.—The term ‘women-owned business’ means a business—

“(A) more than 50 percent of the ownership or control of which is held by 1 or more women; and ‘(B) more than 50 percent of the net profit or loss of which accrues to 1 or more women.’

Minority has the same meaning as in section 1204(c)(3) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989

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## §1002.102 - Other definitions

- Applicant means any person who requests or who has received an extension of business credit from a financial institution
- LGBTQI+ individual includes an individual who identifies as lesbian, gay, bisexual, transgender, queer, or intersex.
- LGBTQI+-owned business means a business for which one or more LGBTQI+ individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.
- Minority-owned business means a business for which one or more American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, or Hispanic or Latino individuals hold more than 50 percent of its ownership or control, and for which more than 50 percent of the net profits or losses accrue to one or more such individuals.
- Principal owner means an individual who directly owns 25 percent or more of the equity interests of a business.

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