

January 6, 2022

Comment Intake—Section 1071 Small Business Lending Data Collection  
Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, DC 20552  
Submitted via *regulations.gov*

**RE: Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B) (CFPB-2021-0015)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Bureau of Consumer Financial Protection (the “Bureau”) on its above-captioned Proposed Rule, which would amend its existing Regulation B<sup>1</sup> to implement changes made to the Equal Credit Opportunity Act (the “ECOA”)<sup>2</sup> by Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Section 1071”).<sup>3</sup> See 86 Fed. Reg. 56,356 (Oct. 08, 2021).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on discrimination and stigma experienced by lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of SOGI information on population-based surveys.<sup>4</sup>

We write in response to the Bureau’s request for “comment on whether and, if so, how its collection of principal owners' sex should incorporate sexual orientation and gender identity in light of the recent Supreme Court decision in *Bostock v. Clayton County* and the Bureau's subsequent ECOA interpretive rule.”<sup>5</sup> In particular, we write in support of the Bureau amending its proposal to explicitly include the collection of SOGI measures within the present rulemaking, and of it doing so consistent with its proposals for other data to be collected and with the

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<sup>1</sup> 12 C.F.R pt. 1002.

<sup>2</sup> 15 U.S.C. §§ 1691–1691f.

<sup>3</sup> 15 U.S.C. § 1691c–2.

<sup>4</sup> See, e.g., GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

<sup>5</sup> 86 Fed. Reg. at 56,358 (internal citations omitted).

practices of other federal agencies collecting SOGI information, including the U.S. Census Bureau through its Household Pulse Survey.

In Part I, we briefly review the scope and purposes of both the ECOA and Section 1071, noting that together they grant the Bureau broad authority for including the collection of SOGI data within the present rulemaking. In Part II, we provide a review of relevant existing research on LGBT people, including on their demographics, experiences with discrimination, and observed disparities when compared to non-LGBT people—including from studies on the impact of the COVID-19 pandemic—in support of such regulatory activity by Bureau to effectuate the specific purposes of Section 1071. Finally, in Part III, we offer technical recommendations on how the Bureau might require that such data be collected by covered entities, as informed by our past research on the collection of SOGI information through surveys and other instruments.

## **I. The Bureau has the Regulatory Authority to Mandate the Collection of SOGI Information**

Together, the texts of Section 1071 and the ECOA provide the Bureau with a broad grant of authority through which it could issue regulations requiring the collection of SOGI information.

Congress has long granted the Bureau the broad authority to issue regulations intended to implement the guarantees of the ECOA,<sup>6</sup> including by having it oversee the collection of data by covered entities that would allow for compliance with and enforcement of the Act.<sup>7</sup> Section 1071 amended the ECOA with an additional data collection component, requiring that financial institutions collect, report, and make public certain information concerning credit applications made by women-owned, minority-owned, and small businesses, as to be set out in the Bureau’s regulations.<sup>8</sup> More specifically, entities must “inquire whether the business is a women-owned, minority-owned, or small business,” and must collect and maintain “the race, sex, and ethnicity of the principal owners of the business; and any additional data that the Bureau determines would aid in fulfilling the purposes of [Section 1071].”<sup>9</sup> Congress provided two such purposes: to “facilitate enforcement of fair lending laws” like the ECOA, and to “enable communities, governmental entities, and creditors to identify business and community development needs and opportunities for women-owned, minority-owned, and small businesses.”<sup>10</sup>

The ECOA provides several guarantees and protections for consumers in the context of credit and lending.<sup>11</sup> Among these, it makes it unlawful for “any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of certain

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<sup>6</sup> 15 U.S.C. §§ 1691b(a) (“The Bureau shall prescribe regulations to carry out the purposes of [the ECOA] . . . as in the judgment of the Bureau are necessary or proper to effectuate the purposes of [the ECOA], to prevent circumvention or evasion thereof, or to facilitate or substantiate compliance therewith.”).

<sup>7</sup> 15 U.S.C. § 1691b(d) (“Pursuant to Bureau regulations, entities making business or commercial loans shall maintain such records or other data relating to such loans as may be necessary to evidence compliance with [the ECOA] or enforce any action pursuant to the authority of this chapter.”).

<sup>8</sup> 15 U.S.C. § 1691c–2(b).

<sup>9</sup> 15 U.S.C. §§ 1691c–2(b)(1), (b)(2).

<sup>10</sup> 15 U.S.C. § 1691c–2(a).

<sup>11</sup> 15 U.S.C. § 1691.

motivating factors.<sup>12</sup> The ECOA has seen various amendments since its enactment in 1974—including to expand the bases under which discrimination by covered creditors is prohibited beyond simply sex and marital status—<sup>13</sup> and has been described as a “key civil rights law” by the Bureau in its Fair Lending Reports to Congress.<sup>14</sup>

In 2020, the U.S. Supreme Court decided in *Bostock v. Clayton County* that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>15</sup> encompasses SOGI discrimination.<sup>16</sup> The Court’s reasoning in *Bostock* is premised on general principles applicable to contexts outside of employment,<sup>17</sup> including credit and lending as the Bureau acknowledged in its recent interpretive rule on the ECOA and Regulation B.<sup>18</sup> Additionally, a longstanding body of caselaw has found that Title VII matters are instructive for interpreting analogous provisions in the ECOA specifically,<sup>19</sup> consistent with its legislative history<sup>20</sup> and the Bureau’s own treatment and interpretation of the ECOA prior to *Bostock*.<sup>21</sup> Therefore, in the aforementioned interpretive rule, the Bureau noted its view that “the ECOA and Regulation B prohibition against discrimination on the basis of ‘sex’” includes “discrimination or discouragement” based on SOGI, including “discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes, and discrimination based on an applicant’s associations.”<sup>22</sup>

Given that the ECOA is fully understood to prohibit SOGI discrimination, it would be consistent with the Bureau’s grants of authority to require that SOGI measures be included in the

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<sup>12</sup> 15 U.S.C. § 1691(a).

<sup>13</sup> The protection now applies on the bases of “race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); because all or part of the applicant’s income derives from any public assistance program; or because the applicant has in good faith exercised any right under [the ECOA].” *Id.*

<sup>14</sup> CFPB, FAIR LENDING REPORT OF THE BUREAU OF CONSUMER FINANCIAL PROTECTION 8 (2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_2020-fair-lending\\_report\\_2021-04.pdf](https://files.consumerfinance.gov/f/documents/cfpb_2020-fair-lending_report_2021-04.pdf).

<sup>15</sup> 42 U.S.C. § 2000e-2(a).

<sup>16</sup> 140 S. Ct. 1731 (2020).

<sup>17</sup> *Bostock* at 1738 (noting the Court’s deference to the “ordinary public meaning” of the terms contained within Title VII—in particular, its prohibition on discrimination “because of . . . sex”—in determining whether SOGI discrimination is encompassed within said terms).

<sup>18</sup> Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14,363, 14,365 (Mar. 16, 2021) (noting that, “consistent with the Court’s analysis in the *Bostock* opinion, this conclusion can be based on ‘no more than the straightforward application of legal terms with plain and settled meanings.’”).

<sup>19</sup> *See, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000) (“[i]n interpreting the ECOA, this court looks to Title VII case law, that is, to federal employment discrimination law.”); *Lewis v. ACB Bus. Servs. Inc.*, 135 F.3d 389 (6th Cir. 1998) (applying Title VII’s burden-shifting regime to the ECOA); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890 (1st Cir. 1992) (same); *but see Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712 (7th Cir. 1998) (rejecting application of the Title VII burden-shifting model under the ECOA).

<sup>20</sup> S. Rep. No. 94-589, 94th Cong., 2d. Sess., 4–5 (1976) (noting that “judicial constructions of anti-discrimination legislation in the employment field . . . are intended to serve as guides in the application of this Act . . .”).

<sup>21</sup> Letter from Richard Cordray, Director, Bureau of Consumer Fin. Prot., to Michael Adams, CEO, Servs. & Advocacy for GLBT Elders at 7 (Aug. 30, 2016), <https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf> (providing the Bureau’s position that “the prohibition of sex discrimination in ECOA and Regulation B affords broad protection against credit discrimination on the bases of gender identity and sexual orientation, including but not limited to discrimination based on actual or perceived nonconformity with sex-based or gender-based stereotypes . . .”).

<sup>22</sup> 86 Fed. Reg. at 14,366.

collections of data it administers through its regulations—both those made specifically under Section 1071 and its general grant under the ECOA itself—as a means of checking compliance with and enforcing against violations of it and other fair lending laws that may contain a similar prohibition. Additionally, the grant under Section 1071 would support the required collection of SOGI information by covered entities to the extent that the Bureau could utilize such data to inform our understanding of “business and community development needs and opportunities for . . . small businesses.”<sup>23</sup> As described below, existing research on LGBT people suggests that LGBT-owned small businesses may indeed have particularized needs and experiences that such a collection of data would likely allow the Bureau to be able to identify, consistent with that grant of authority.

## **II. Existing Research on LGBT People Suggests a Need for Data on LGBT-Owned Small Businesses**

In the Proposed Rule, the Bureau reflects on the importance of the data collection mechanism this rulemaking will establish once finalized, describing it as “the first comprehensive database of small business credit applications in the United States.”<sup>24</sup> In particular, the Bureau highlights that while existing research already shows that “minority-owned small businesses face particular obstacles, as do those that are women-owned, [] the current lack of comprehensive, quantitative data has made it difficult to understand the extent of these obstacles and address them with responsive policy.”<sup>25</sup> Similarly, in its most recent Semiannual Regulatory Agenda, the Bureau characterizes this rulemaking as “critical to enabling the Bureau to protect small business owners, including from unlawful discrimination, in their access to and use of credit[,]” with such access being “especially important as the nation works to rebuild the economy in light of the COVID-19 pandemic and resulting economic impacts.”<sup>26</sup>

A longstanding body of research reflects that LGBT people report ongoing experiences with public and private discrimination in the United States, as well as economic and other disparities when compared to their non-LGBT peers that are often related to their SOGI and such experiences with discrimination and other forms of stigma. However, despite our expanding knowledge on LGBT people’s experiences in the United States in various areas, we remain greatly limited in our understanding of their experiences within the specific context of their attempts to access credit, and in particular when they are doing so as small business owners. Many of these limitations are driven by the fact that seemingly none of the government-administered data collections related to small businesses require the collection of SOGI information, including none of those currently managed by the Bureau itself.<sup>27</sup> For example, the

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<sup>23</sup> 15 U.S.C. § 1691c–2(a).

<sup>24</sup> 86 Fed. Reg. at 56,356.

<sup>25</sup> 86 Fed. Reg. at 56,356–57.

<sup>26</sup> CFPB, SEMIANNUAL REGULATORY AGENDA 3 (2021),

[https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble\\_3170\\_CFPB.pdf](https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Preamble_3170_CFPB.pdf).

<sup>27</sup> See 12 C.F.R. § 1002.13 (noting the demographic elements creditors are currently required to collect by the Bureau, with SOGI not being among those to be collected).

U.S. Census Bureau’s Small Business Pulse Survey<sup>28</sup> and Annual Business Survey<sup>29</sup> do not collect any SOGI information. As a result, while the federal government maintains official estimates on the number and various characteristics of small businesses that are minority-owned and women-owned, it has no ability to do the same for LGBT-owned small businesses as its estimates are derived from Annual Business Survey data.<sup>30</sup>

Similarly, to the extent that we have research on the experiences of LGBT people attempting to access credit derived from government sources, this is often limited to those that collect demographic data about same-sex couples who are cohabitating.<sup>31</sup> While helpful in generating knowledge about an estimated 2 million LGBT adults,<sup>32</sup> relying on these surveys would leave gaps in our knowledge about the experiences of the nearly 9 million LGBT adults who are not living in same-sex, cohabitating couple households.<sup>33</sup> And, this is often accomplished through a marital status question,<sup>34</sup> which may further narrow information to a more limited group of LGBT people.

Given these limitations, below we offer a brief review of existing demographic research on LGBT people, as well as research on their experiences with discrimination in contexts outside of credit, that suggest LGBT small business owners or would-be business owners should be covered by Section 1071’s data collection requirements. Similarly, we also note our recent research on the greater economic impacts of the COVID-19 pandemic on LGBT people of color compared to other groups, which parallel the Bureau’s finding that hardships related to the COVID-19 pandemic “fall disproportionately on individuals, families, and small businesses in

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<sup>28</sup> U.S. CENSUS BUREAU, SMALL BUSINESS PULSE SURVEY PHASE 7 QUESTIONNAIRE, <https://www2.census.gov/data/experimental-data-products/small-business-pulse-survey/small-business-pulse-survey-questionnaire.pdf> (last visited Jan. 6, 2022). Notably, however, this survey does not ask any demographic questions of respondents whatsoever. *Id.*

<sup>29</sup> *About the Annual Business Survey (ABS)*, U.S. CENSUS BUREAU (Oct. 08, 2021), <https://www.census.gov/programs-surveys/abs/about.html> (noting that respondents are asked about their sex, race, ethnicity, and veteran status).

<sup>30</sup> *Annual Business Survey Release Provides Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses*, U.S. CENSUS BUREAU (Jan. 28, 2021), <https://www.census.gov/newsroom/press-releases/2021/annual-business-survey.html>; see also Andrew W. Hait, Number of Women-Owned Employer Firms Increased 0.6% From 2017 to 2018, U.S. CENSUS BUREAU (Mar. 29, 2021), <https://www.census.gov/library/stories/2021/03/women-business-ownership-in-america-on-rise.html>.

<sup>31</sup> These examples include a number of surveys managed by the U.S. Census Bureau, including the American Community Survey, the American Housing Survey, and the Current Population Survey. See U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY SURVEY 3 (2020), <https://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2020/quest20.pdf?#> (noting that respondents may indicate that the second person in the shared survey is their “same-sex husband/wife/spouse”); U.S. CENSUS BUREAU, 2019 AMERICAN HOUSING SURVEY INSTRUMENT ITEMS 29 (2019), <https://www2.census.gov/programs-surveys/ahs/2019/2019%20AHS%20Items%20Booklet.pdf?#> (same); U.S. CENSUS BUREAU, BASIC CPS ITEMS BOOKLET DEMOGRAPHIC ITEMS 4, <https://www2.census.gov/programs-surveys/cps/techdocs/questionnaires/Demographics.pdf> (last visited Jan. 5, 2022) (same).

<sup>32</sup> Williams Institute Scholars, Comment Letter on Proposed Basic Demographic Items for the Current Population Survey (March 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf>.

<sup>33</sup> *Id.*; see also Jeffrey M. Jones, *One in 10 LGBT Americans Married to Same-Sex Spouse*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329975/one-lgbt-americans-married-sex-spouse.aspx> (providing recent estimates from Gallup that 7.1% of LGBT adults live with a same-sex domestic partner, while 9.6% are married to a same-sex spouse).

<sup>34</sup> See, e.g., examples discussed *supra* note 31.

communities of color.”<sup>35</sup> Finally, we conclude this section with a review of available research about LGBT people and same-sex couples attempting to access credit, and which suggests that LGBT small businesses owners seeking to access credit may have similar experiences with discrimination and challenges in access to credit.

#### A. Estimates on LGBT Adults in the United States

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.<sup>36</sup> Younger people are more likely than older people to identify as LGBT, including 9.1% of millennials (born 1981–1996) and 15.9% of Generation Z (born 1997–2002).<sup>37</sup> We estimate that approximately 11 million adults in the U.S. identify as LGBT.<sup>38</sup> This includes approximately 1.4 million adults who are transgender.<sup>39</sup>

LGBT adults in the U.S. reflect the demographic diversity of the country as a whole. For example, drawing from Gallup Daily Tracking data collected between 2015 and 2017, we’ve previously estimated that 58% of LGBT adults are female.<sup>40</sup> Similarly, we estimate that 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, and 5% as more than one race.<sup>41</sup>

Over 7.7 million LGBT adults live in states without explicit statutory protections against SOGI discrimination in credit.<sup>42</sup> Only thirty states have enacted analogues to the federal ECOA in their own efforts to address credit discrimination.<sup>43</sup> While all thirty bar sex discrimination in credit, only half explicitly prohibit SOGI discrimination.<sup>44</sup> Notably, even if each of the remaining fifteen state analogues of the ECOA which explicitly prohibit sex discrimination—but not SOGI discrimination—were to be interpreted consistent with *Bostock*, we estimate that only an additional 2,530,000 LGBT adults would gain protection from credit discrimination under state law.<sup>45</sup> This would still leave over 5 million LGBT adults in the United States without protection from credit discrimination under state law.<sup>46</sup>

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<sup>35</sup> CFPB, *supra* note 26.

<sup>36</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>. More recent data collected by Gallup following our study indicate that this percentage has risen to 5.6% of the U.S. adult population. Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), <https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx>.

<sup>37</sup> Jones, *supra* note 36.

<sup>38</sup> CONRON & GOLDBERG, *supra* note 36.

<sup>39</sup> CONRON & GOLDBERG, *supra* note 36.

<sup>40</sup> *LGBT Demographic Data Interactive*, WILLIAMS INST. (January 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

<sup>41</sup> *Id.*

<sup>42</sup> KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST. LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf>.

<sup>43</sup> CHRISTY MALLORY, LUIS A. VASQUEZ & CELIA MEREDITH, WILLIAMS INST., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* 16 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>.

<sup>44</sup> *Nondiscrimination Laws – Credit*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws/credit](https://www.lgbtmap.org/equality-maps/non_discrimination_laws/credit) (last visited Jan. 5, 2022).

<sup>45</sup> *See id.*; MALLORY, VASQUEZ & MEREDITH, *supra* note 43.

<sup>46</sup> MALLORY, VASQUEZ & MEREDITH, *supra* note 43.

## B. Discrimination and Disparities Reported by LGBT Adults in the U.S.

In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>47</sup> The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”<sup>48</sup> And with respect to transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”<sup>49</sup>

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades (in some places more than others), ample research confirms that anti-LGBT violence, stigma, and discrimination remain widespread, and that certain disparities only continue to widen, in particular when factoring in the compounding effects of discrimination faced along intersectional dimensions of race, ethnicity, and sex, alongside SOGI.

The Williams Institute conducted two large LGBTQ-specific<sup>50</sup> population-based national surveys through the NIH-funded Generations and TransPop studies on sexual and gender minority people, respectively.<sup>51</sup> Using these data, we found that, as adults, more than one-third of LGBTQ people have been hit, beaten, or physically or sexually assaulted; been robbed or had property stolen; or had an object thrown at them.<sup>52</sup> Similarly, more than half of LGBTQ people report having experienced threats of violence, and approximately 3 out of 4 having been verbally insulted or abused.<sup>53</sup> Looking more broadly at adverse life events, we found that 48% percent of transgender people, 39% of GBQ cisgender men, and 38% of LBQ cisgender women had been fired or been denied a job at least once as adults.<sup>54</sup> These findings are consistent with a 2021 study conducted by the Williams Institute, including one drawing from data collected in May of 2021—following both the start of the COVID-19 pandemic and the Court’s decision in

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<sup>47</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>48</sup> *Baskin v. Bogan*, 766 F.3d 648, 663 (7<sup>th</sup> Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

<sup>49</sup> *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

<sup>50</sup> Consistent with the literature on sexual and gender minority people, “LGBTQ”—with the Q representing questioning or queer—is often used to capture individuals, generally youth, who identify their SOGI using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their SOGI and can identify as queer. *See, e.g., 6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer*, WILLIAMS INST. (Jan. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release>. However, few studies relevant to this comment include measures to allow for the identification and analysis of LGBT adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing sexual and gender minority adults unless supported by the underlying study.

<sup>51</sup> ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O’NEILL, WILLIAMS INST., *LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPop STUDIES 1* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

<sup>52</sup> *Id.* at 17–18.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 19.

*Bostock*—which found that one-third (31.1%) of LGBT respondents reported experiencing discrimination or harassment based on their SOGI in the workplace within the past five years.<sup>55</sup>

Turning to economic and other disparities observed among LGBTQ people within our national dataset, we found that—prior to the pandemic—LGBTQ people were more likely to report unemployment when compared to the national average (8.1% vs. 4.1%, at the end of 2017).<sup>56</sup> Similarly, LBQ cisgender women (48.3%) and transgender people (47.7%) were more likely than GBQ cisgender men (31.5%) to be living in a low-income household, with all three groups reporting rates higher than that of the general U.S. population (30.4%).<sup>57</sup> Additionally, we found that 16.9% of non-transgender sexual minority adults report having experienced homelessness in their lifetimes, compared to 6.2% of the general population.<sup>58</sup> LGBTQ people reported experiencing a number of stressful events in the year prior to the survey, including 29.4% who reported a “major financial crisis,” declaring bankruptcy, or being unable to pay bills on time more than once.<sup>59</sup>

Our recent research on the impact of the COVID-19 pandemic on U.S. adults suggests that LGBT adults, particularly LGBT people of color and gender minority people, have been disproportionately experiencing its negative economic effects.<sup>60</sup> For example, in one study, we found that LGBT respondents were more likely than their non-LGBT counterparts to be laid off (12.4% vs. 7.8%) or furloughed (14.1% vs. 9.7%) from their jobs; to report problems affording basic household goods (23.5% vs. 16.8%); and to report problems paying their rent or mortgage (19.9% vs. 11.7%).<sup>61</sup> LGBT people of color were more than twice as likely to report that their ability to pay for household goods got worse (28.7% vs. 14.2%) and were over three times as likely to report that their ability to pay their rent or mortgage (26.3% vs. 8.8%) got worse as compared to non-LGBT White people.<sup>62</sup> More than half (63.1%) of LGBT people of color reported being very concerned about their ability to pay their bills, as compared to 42.4% of

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<sup>55</sup> BRAD SEARS, CHRISTY MALLORY, ANDREW R. FLORES & KERITH J. CONRON, WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 13 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>56</sup> MEYER, WILSON & O’NEILL, *supra* note 51, at 11.

<sup>57</sup> *Id.* at 10–11.

<sup>58</sup> BIANCA D.M. WILSON, SOON KYU CHOI, GARY W. HARPER, MARGUERITA LIGHTFOOT, STEPHEN RUSSELL & ILAN H. MEYER, WILLIAMS INST., HOMELESS AMONG LGBT ADULTS IN THE US 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>. Similarly, data from the largest community survey of transgender adults in the United States to date indicate that approximate 30% of transgender adults have experienced homelessness in their lifetimes. KATHRYN O’NEILL, BIANCA D.M. WILSON & JODY L. HERMAN, WILLIAMS INST., HOMELESS SHELTER ACCESS AMONG TRANSGENDER ADULTS: FINDINGS FROM THE 2015 U.S. TRANSGENDER SURVEY 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Homeless-Shelter-Nov-2011.pdf>.

<sup>59</sup> MEYER, WILSON & O’NEILL, *supra* note 51, at 20.

<sup>60</sup> See also Thom File & Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html> (noting the U.S. Census Bureau’s similar findings, based on data collected during the initial waves of the Household Pulse Survey that included SOGI measures).

<sup>61</sup> BRAD SEARS, KERITH J. CONRON & ANDREW R. FLORES, WILLIAMS INST., THE IMPACT OF THE FALL 2020 COVID-19 SURGE ON LGBT ADULTS IN THE US 3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf>.

<sup>62</sup> *Id.* at 10.

LGBT White and 33.2% of non-LGBT White people.<sup>63</sup> A second study drawing from that same dataset found that older LGBT people (ages 45 and older) are more likely to report experiencing the economic impacts of the pandemic than older non-LGBT people (ages 45 and older).<sup>64</sup> Similarly, analyzing data collected by the U.S. Census Bureau through its Household Pulse Survey between June and October 2021, we found that transgender people were three times more likely than cisgender people to report facing food insufficiency during the pandemic.<sup>65</sup> Indeed, we found that,

[a]cross several indicators of socioeconomic status, larger proportions of transgender adults were disadvantaged as compared to their cisgender counterparts. Nearly half (48.0%) of transgender adults had a high school education or less, 13.9% were in the workforce, but not working for pay in the last 7 days, nearly a third (30.7%) were living at or below the federal poverty level (FPL), and nearly half (48.7%) reported difficulty paying for usual household expenses, including but not limited to “food, rent or mortgage, car payments, medical expenses, student loans, and so on” in the last 7 days.<sup>66</sup>

### *C. Specific Research on LGBT People and Credit*

While limited, existing research does suggest that, throughout their lives, LGBT adults will face challenges in attempting to access credit and across the broad range of credit-related activities.<sup>67</sup> For example, some same-sex couples report being denied lines of credit and home sales solely because of their SOGI.<sup>68</sup> Studies have shown that these couples are more likely to be charged higher rates for mortgages even when approved.<sup>69</sup> And, research has tied these experiences to lower homeownership rates observed among same-sex couples and LGBT people when compared to different-sex couples and non-LGBT people.<sup>70</sup> Below, we discuss various studies indicating that LGBT people face widespread discrimination and other challenges related to their ability to access credit, and which suggests that data collected on LGBT small business owners attempting to access credit may reveal similar experiences and outcomes.

A recent study from the Center for LGBTQ Economic Advancement & Research (“CLEAR”) looked at data from the Federal Reserve Board’s Survey of Household Economic

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<sup>63</sup> *Id.*

<sup>64</sup> CHRISTY MALLORY, BRAD SEARS & ANDREW R. FLORES, WILLIAMS INST., COVID-19 AND LGBT ADULTS AGES 45 AND OLDER IN THE US 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-45-May-2021.pdf>.

<sup>65</sup> KERITH J. CONRON & KATHRYN K. O’NEILL, WILLIAMS INST., FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC 3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf>.

<sup>66</sup> *Id.*

<sup>67</sup> *See generally* ADAM P. ROMERO, SHOSHANA K. GOLDBERG & LUIS A. VASQUEZ, WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 19–23 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 23.

<sup>70</sup> *Id.* at 11–13.

Decisionmaking, which began including SOGI measures as of 2019.<sup>71</sup> Using those data, CLEAR found that evidence that LGBT people appear less likely to be able to access credit in the United States, including that,

LGBT households were more likely to have applied for credit in the previous 12 months (44.5% vs. 39.5%). . . . More than one in three LGBT consumers who had submitted applications were turned down for credit in the previous 12 months (35.1%), whereas only one in five (21.3%) non-LGBT consumers were turned down. LGBT consumers were also 1.25 times more likely to have been approved for credit but not given as much credit as they wanted. More than one in six LGBT consumers who had applied for credit were given less than they had applied for (18.4%), as compared to 14.5% of non-LGBT consumers.<sup>72</sup>

Additionally, LGBT households in the study “were 1.25x more likely to be unbanked or underbanked” than non-LGBT households (23.0% vs. 18.0%)<sup>73</sup> and LGBT adults were “nearly 2x more likely to indicate their [credit] scores were ‘poor’ or ‘very poor’ as compared to non-LGBT adults (16.1% vs. 8.2%).”<sup>74</sup> Consistent with research on intersectional discrimination in other contexts, CLEAR found that race and sex appeared to compound the impacts of SOGI here as well. LGBT female adults reported being denied access to credit they had applied for in the last year more often than non-LGBT female adults (37.5% vs. 23.9%).<sup>75</sup> Likewise, more than half of Black LGBT adults applying for credit were turned down, and were more likely to report such experiences than their non-LGBT peers (58.3% vs. 41.7%).<sup>76</sup> Similarly, female LGBT households were even more likely to report being unbanked or underbanked (27.0%, compared to 20.1% of female non-LGBT households), with Black and Hispanic LGBT households reporting even higher rates (46.9% and 37.6%, respectively).<sup>77</sup>

Researchers have previously looked at homeownership as a metric for whether same-sex couples and LGBT people more broadly are able to access credit. For example, Institute scholars previously estimated homeownership among same-sex and different-sex couple-headed households in the United States, using nationally representative data on household composition and homeownership collected through the American Community Survey collected between 2015 and 2017, and found that “63.8% of same-sex couples reported owning their home (with an additional 0.5% under contract), compared with 75.1% of different-sex couples. Among those who owned their homes, same-sex couples were more likely than different-sex couples to be carrying a mortgage (77% vs. 68.2%, respectively).”<sup>78</sup> According to our separate analysis of representative data from 35 states, nearly half (49.8%) of LGBT adults own their homes,

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<sup>71</sup> SPENCER WATSON ET AL., CLEAR, THE ECONOMIC WELL-BEING OF LGBT ADULTS IN THE U.S. IN 2019 (2021), <https://lgbtq-economics.org/wp-content/uploads/2021/06/The-Economic-Well-Being-of-LGBT-Adults-in-2019-Final-1.pdf>.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> *Id.* at 1.

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 19.

<sup>78</sup> ROMERO, GOLDBERG & VASQUEZ, *supra* note 67, at 12.

compared to 70.1% of non-LGBT adults.<sup>79</sup> Another study, analyzing data from a representative sample of adults aged 24–32 in 2008, found that among females, sexual minorities were less likely to be homeowners than heterosexual women, and that women who were sexual *and* racial minorities reported the lowest rates of homeownership.<sup>80</sup> Among males, sexual minorities were also less likely to be homeowners than their heterosexual counterparts.<sup>81</sup> Recent studies suggest that homeownership is particularly low among transgender people: one study analyzing the first nationally representative sample of transgender adults found that only a quarter (25%) reported being homeowners, compared to 58% of cisgender adults.<sup>82</sup>

Access to mortgage financing greatly impacts many people’s ability to purchase a home.<sup>83</sup> Research suggests that denials of access to financing based on one’s SOGI—in addition to related acts of discrimination and other factors, such as higher rates of poverty reported among LGBT people—<sup>84</sup> may partially explain why lower homeownership rates are being observed among same-sex couples and LGBT people specifically.<sup>85</sup> Importantly, however, acts of SOGI discrimination do not have to actually occur to have an impact on LGBT people’s ability to access credit, as research has shown that even the expectation of discrimination can deter LGBT people from becoming homeowners.<sup>86</sup>

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<sup>79</sup> KERITH CONRON, WILLIAMS INST., FINANCIAL SERVICES AND THE LGBTQ+ COMMUNITY: A REVIEW OF DISCRIMINATION IN LENDING AND HOUSING. TESTIMONY BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-US-House-Financial-Services-Oct-2019.pdf>. Our findings reflect those of other studies’ from both population-based and non-representative samples. For example, according to a 2018 survey of LGBT adults (aged 22–72) conducted by Freddie Mac, 49% of respondents reported owning their home, compared to a 64% homeownership rate among the general U.S. population that year. FREDDIE MAC, THE LGBT COMMUNITY: BUYING AND RENTING HOMES 3 (2018), [http://www.freddiemac.com/fmac-resources/research/pdf/Freddie\\_Mac\\_LGBT\\_Survey\\_Results\\_FINAL.pdf](http://www.freddiemac.com/fmac-resources/research/pdf/Freddie_Mac_LGBT_Survey_Results_FINAL.pdf).

<sup>80</sup> Kerith J. Conron, Shoshana K. Goldberg & Carolyn T. Halpern, *Sexual Orientation and Sex Differences in Socioeconomic Status: A Population-Based Investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1016, <https://pubmed.ncbi.nlm.nih.gov/30190439>.

<sup>81</sup> *Id.*

<sup>82</sup> ILAN H. MEYER ET AL., WILLIAMS INST. FINDINGS FROM A U.S. TRANSGENDER POPULATION STUDY, PRESENTATION AT THE UNITED STATES PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH CONFERENCE, WASHINGTON, D.C.

<sup>83</sup> JOINT CTR. FOR HOUSING STUDIES OF HARV. U., THE STATE OF THE NATION’S HOUSING 3 (2019), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2019.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf).

<sup>84</sup> See M. V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>; M. V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S. Population*, 37 POPULATION RESEARCH & POL’Y REV. 667 (2018), <https://link.springer.com/article/10.1007/s11113-018-9457-5>; see also Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, 73 INDUSTRIAL & LABOR RELATIONS REV. 573 (2020), <https://doi.org/10.1177%2F0019793920902776>; see generally BIANCA D.M. WILSON, M.V. LEE BADGETT & ALEXANDRA-GRISSSELL H. GOMEZ, WILLIAMS INST., “WE’RE STILL HUNGRY” – LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>.

<sup>85</sup> ROMERO, GOLDBERG & VASQUEZ, *supra* note 67, at 11–13.

<sup>86</sup> See generally ROMERO, GOLDBERG & VASQUEZ, *supra* note 67, at 21; NAT’L ASS’N OF GAY & LESBIAN REAL ESTATE PROFS., LGBT REAL ESTATE REPORT 2019–20 (2019), <https://naglrep.com/wp-content/uploads/2019/03/2019-naglrep-lgbt-real-estate-report.pdf> (noting that, among members of the National Association of Gay and Lesbian Real Estate Professionals surveyed, 58% of respondents believed that their LGBT clients’ fear of experiencing discrimination during the buying process had an impact on LGBT homeownership levels).

Two recent studies on mortgage lending have suggested that these lower rates of homeownership may be directly tied to discrimination. The first study<sup>87</sup>—analyzing data collected pursuant to the Home Mortgage Disclosure Act (“HMDA”) and from Fannie Mae—found that compared to different-sex borrowers of similar profiles, same-sex borrowers experienced a 3% to 8% lower approval rate.<sup>88</sup> Further, among the loans approved, same-sex borrowers were charged higher interest and/or fees, equivalent to between \$8.6 million and \$86 million more in interest and fees over time.<sup>89</sup> Such decisions were made by creditors despite a lack of statistical evidence that same-sex borrowers presented a greater level of risk than comparable different-sex borrowers.<sup>90</sup> Instead, both sets of borrowers were found to present similar risks of default, and same-sex borrowers in fact presented *lower* prepayment risk.<sup>91</sup> The second study<sup>92</sup>—analyzing over 5 million applications for mortgages backed by the Federal Housing Administration (“FHA”) utilizing data made available through the HMDA—found that same-sex male couples of every racial configuration were significantly less likely to have their applications accepted compared to White heterosexual couples,<sup>93</sup> even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.<sup>94</sup> This occurred despite loans being FHA-insured and, therefore, carrying limited risk to lenders, regardless of any underlying characteristics of the applicants.<sup>95</sup> Same-sex female couples of every racial configuration were found to be either statistically indistinguishable from White heterosexual couples or in some cases were treated more favorably.<sup>96</sup> Race was found to play a role, as,

black-male pairs [were] the least likely to be approved (-7.5 percentage points [than the White heterosexual baseline]), followed by the interracial pairs of black male/white male (-6.8), white male/black male (-4.3) and white male pair (-2.5). Interestingly, the exact same pattern holds for female pairs. From the least to most likely to be approved are black female pairs, followed by interracial black female/white female and white female/black female pairs, and white female pairs.<sup>97</sup>

Taken alone, this body of research itself suggests that LGBT-owned small businesses may have particularized needs or otherwise require tailored opportunities that are informed by their SOGI, though support for such lines of inquiry can also be found elsewhere. For example, LGBT

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<sup>87</sup> Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PROC. NAT’L ACAD. SCI. U.S.A. 9293, <https://www.pnas.org/content/pnas/116/19/9293.full.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 9294.

<sup>90</sup> *Id.* at 9300.

<sup>91</sup> *Id.* at 9301.

<sup>92</sup> J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1 (2019), <https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination>.

<sup>93</sup> *Id.* at 53.

<sup>94</sup> *Id.* at 5.

<sup>95</sup> *Id.* at 35.

<sup>96</sup> *Id.* at 54.

<sup>97</sup> *Id.* at 53. As noted by the study authors, these findings suggest the existence of a statistically significant “primary applicant” effect when same-sex couples apply for FHA-backed mortgages, wherein an interracial same-sex couple appears more likely to have their application approved when the White partner is the primary applicant as opposed to the Black partner. *Id.*

people have long reported experiences with family rejection;<sup>98</sup> per its 2016 Annual Survey of Entrepreneurs, the Small Business Administration found that 64.4% of small businesses began using personal and family savings, and 8.7% used personal family assets rather than the principal owner's savings,<sup>99</sup> suggesting a need for research on whether and how LGBT people are able to begin small businesses without access to that type of family support.<sup>100</sup> Additionally, existing research noting disparities along multiple lines of marginalization (e.g., race and sex and sexual orientation) suggests that any data collected through this rulemaking will be limited in its utility unless it can allow for the identification of individuals who may be experiencing discrimination or other barriers to credit access due to specific multiply-held identities.

### III. The Bureau Should Mandate SOGI Data Collection Here Consistent with Existing Best Practices

Consistent with the purposes of Section 1071, the Bureau notes in the Proposed Rule that the data it would have entities collect once finalized will be “critical to help regulators and the public identify and address fair lending concerns . . . for *all* small businesses within the scope of the rule, including those that are owned by women and minorities.”<sup>101</sup> And, similarly, that such collected data is meant to “bring particular attention to the underserved parts of the small business market that have traditionally faced the greatest obstacles to success . . . to help small businesses drive inclusive and equitable growth.”<sup>102</sup>

Existing research on federal implementation of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive, and would therefore provide such information if asked.<sup>103</sup> Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.<sup>104</sup> Questions measuring sexual orientation have been included on federal surveys for over two decades,<sup>105</sup> including in large-scale, population-based

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<sup>98</sup> See, e.g., SOON KYU CHOI, BIANCA D.M. WILSON, JAMA SHELTON & GARY J. GATES, WILLIAMS INST. WITH TRUE COLORS FUND, *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS* (2015) <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-Update-Jun-2015.pdf>.

<sup>99</sup> *Shining a Light on Small Business Lending*, CFPB, <https://www.consumerfinance.gov/about-us/small-business-lending/> (last visited Jan. 6, 2022).

<sup>100</sup> See generally *Nearly Eighty Percent of LGBTQ Small Business Owners Expect to Make a Full Recovery in 2022, According to LGBTQ Small Business Owner Financial Health Survey*, NGLCC (June 7, 2021), <https://www.nglcc.org/press-release/nearly-eighty-percent-lgbtq-small-business-owners-expect-make-full-recovery-2022> (noting that, among respondents to the first LGBTQ Small Business Owner Financial Health Survey—administered by CNBC, First in Business Worldwide, and Acorns—78% of LGBTQ small business owners do not have a business succession plan in place).

<sup>101</sup> 86 Fed. Reg. at 56,356.

<sup>102</sup> 86 Fed. Reg. at 56,356–57.

<sup>103</sup> See, e.g., Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, 9 PLOS ONE 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4157837/pdf/pon0107104.pdf>.

<sup>104</sup> See, e.g., Nancy Bates et al., *Are Sexual Minorities Hard-to-Survey? Insights from the 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey*, 35 J. OFFICIAL STATS. 709 (2019), <https://sciendo.com/article/10.2478/jos-2019-0030>.

<sup>105</sup> See FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, *CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN*

surveys administered by the U.S. Census Bureau and other agencies.<sup>106</sup> Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both sexual orientation and gender identity questions over the last decade.<sup>107</sup> The federal government has long engaged in its own review of best practices for the measurement of SOGI, including through its Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.<sup>108</sup> The federal government has also supported research on this topic, including by funding the research of an ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine focused on SOGI-related methodological issues.<sup>109</sup>

However, the Bureau’s proposal if implemented as currently written would not require the uniform collection of SOGI information by covered entities, despite research suggesting same is necessary, appropriate, and possible under Section 1071 and the ECOA. The Bureau has indicated that it is considering several means through which it could facilitate the collection of such information, including by asking about SOGI through its existing question on sex; by having financial institutions “ask separate questions regarding sex, sexual orientation, and gender identity”; by inquiring whether the “principal owner identifies as LGBTQ+”; and/or by attempting to specifically measure LGBTQ+-owned business status “similar to the way it is proposing to collect minority-owned business status and women-owned business status . . .”<sup>110</sup> Below, we offer recommendations for how the Bureau’s current proposal could be amended to allow for the collection of such SOGI information, consistent with our expertise on best practices for doing so in the context of population-based surveys.

Within this rulemaking, the Bureau is currently proposing that covered entities report on whether applicant small businesses are minority-owned or women-owned through two means, consistent with Section 1071’s mandates. First, by having their principal owners answer separate questions directly inquiring whether the entity is “minority-owned” or “women-owned”.<sup>111</sup> Second, through three demographics questions, measuring race, ethnicity, and sex respectively, that respondents will have the choice to answer.<sup>112</sup> Notably, the sex question would allow respondents to choose between “male” and “female” options, and/or to self-describe their sex; if respondents choose not to answer this question, covered entities are not permitted to engage in

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FEDERAL SURVEYS 3 (2016), [https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1\\_CurrentMeasures\\_08-16-1xnai8d.pdf](https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf).

<sup>106</sup> For example, the CDC through both the BRFSS and YRBS as detailed *supra* asks that respondents report their sexual orientation; the BRFSS also includes a question asking whether respondents identify as transgender. See 2019 BRFSS Survey Data and Documentation, CDC.GOV (Aug. 31, 2020), [https://www.cdc.gov/brfss/annual\\_data/annual\\_2019.html](https://www.cdc.gov/brfss/annual_data/annual_2019.html); Questionnaires | YRBS, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

<sup>107</sup> Williams Institute Scholars, *supra* note 32.

<sup>108</sup> See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGL.asp>.

<sup>109</sup> *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last visited Jan 5, 2022).

<sup>110</sup> 86 Fed. Reg. at 56,483.

<sup>111</sup> *Id.* at 56,536.

<sup>112</sup> *Id.* at 56,536–37.

visual identification to attempt to collect this information.<sup>113</sup> Additionally, to the extent that any respondents do self-describe their sex, the Bureau has proposed that such data be deleted from the public application-level data that will ultimately be made available for research.<sup>114</sup>

As the Bureau will already be directly inquiring about minority-owned and women-owned small business status through questions that both define those terms and allow respondents the simple choice of choosing to answer whether they are or are not such a business, we recommend that a similar approach be taken in collecting “LGBTQ-owned small business status.” Notably, the Supreme Court’s reasoning in *Bostock* does not require that a specific sexual orientation or gender identity be implicated for there to be impermissible SOGI discrimination—any such discrimination “because of . . . sex” is prohibited generally, meaning that this question could allow for the identification of businesses have who experienced actionable sex discrimination under ECOA without requiring information on the owner’s specifically held identities if they do not wish to disclose them, consistent with the Bureau’s proposal regarding race and ethnicity.

Of course and as discussed throughout this comment, existing research indicates that differences do exist along lines of race, ethnicity, and sex when coupled with SOGI, meaning that to the extent the Bureau desires to be able to meaningfully identify all possible business needs and opportunities for small businesses covered by Section 1071 and the ECOA, the Bureau should collect information on SOGI through its demographic questions as well. However, we note that sex, sexual orientation, and gender identity—though related—are ultimately intellectually distinct concepts, and so strongly recommend against attempting to capture information on all three through a singular question asking about respondents’ sex. Instead, we recommend usage of the following measures, which are substantially similar to those utilized by the U.S. Census Bureau’s Household Pulse Survey to create an aggregate LGBT group and ask separately about each construct:

	<b>Recommended SOGI Measures</b>	<b>Abbreviated SOGI Items (If full questions cannot be asked due to space constraints)</b>
<b>Construct</b>		
<b>Sex assigned at birth</b>	What sex were you assigned at birth, on your original birth certificate? <ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> </ul>	<b>Sex assigned at birth:</b> <ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> </ul>
<b>Gender identity</b>	Do you currently describe yourself as male, female, or transgender? <ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> <li>• Transgender</li> </ul>	<b>Gender identity:</b> <ul style="list-style-type: none"> <li>• Male</li> <li>• Female</li> <li>• Transgender</li> </ul>

<sup>113</sup> *Id.* at 56,482.

<sup>114</sup> *Id.* at 56,540.

	<b>Recommended SOGI Measures</b>	<b>Abbreviated SOGI Items (If full questions cannot be asked due to space constraints)</b>
<b>Sexual orientation</b>	Which of the following best represents how you think of yourself? <ul style="list-style-type: none"> <li>• Gay or lesbian</li> <li>• Straight, that is, not gay or lesbian</li> <li>• Bisexual</li> </ul>	<b>Sexual orientation:</b> <ul style="list-style-type: none"> <li>• Gay or lesbian</li> <li>• Straight (not gay or lesbian)</li> <li>• Bisexual</li> </ul>

To the extent that the Bureau has proposed allowing self-described sex as a means of capturing intersex status, we note that it is not recommended that researchers gather information about intersex status and differences in sex development or sex characteristics through a question on sex.<sup>115</sup> And, as the Bureau will be deleting all free-form responses, rather than analyzing or releasing same to the public, we recommend against the utilization of questions that would allow respondents to self-describe their sex, sexual orientation, or gender identity, and therefore prevent such respondents from being properly included within their respective subcategories for analysis by the Bureau and other researchers. As scholars with experience in measurement development and testing, we recommend assessing the performance of the SOGI questions, as well as other demographic items, on the proposed sample data collection form and making revisions as needed.

#### **IV. Conclusion**

Thank you for your consideration. Please direct any correspondence, including questions, to [vasquezl@law.ucla.edu](mailto:vasquezl@law.ucla.edu).

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<sup>115</sup> GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, *supra* note 4, at 41–43.

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