

# The Banking Law Journal

Established 1889

An A.S. Pratt® PUBLICATION

SEPTEMBER 2017

**EDITOR'S NOTE: DECISIONS, DECISIONS...**

Victoria Prussen Spears

**FORESEEABLE HARM IS NOT ENOUGH: SUPREME COURT REJECTS  
ELEVENTH CIRCUIT'S RELAXED INTERPRETATION OF PROXIMATE  
CAUSE FOR LENDING DISCRIMINATION CLAIMS**

Tara L. Elgie, Jarrett L. Hale, Gregory G. Hesse, and Adam C. Ragan

**U.S. SUPREME COURT NARROWLY HOLDS THAT FILING OF TIME-BARRED PROOF  
OF CLAIM DOES NOT VIOLATE FDCPA, BUT LEAVES DOOR OPEN TO  
APPLICATION OF THE ACT IN OTHER CIRCUMSTANCES**

Justin F. Paget and Tara L. Elgie

**SUPREME COURT REVERSES *JEVIC* STRUCTURED DISMISSAL THAT  
DEVIATED FROM BANKRUPTCY CODE'S PRIORITY SCHEME**

Nicholas F. Kajon

***LYONDELL CHEMICAL COMPANY*: LITIGATION TRUST'S FRAUDULENT CONVEYANCE  
CLAIMS FAIL**

Stephen D. Zide and Rachael L. Ringer

**CIRCUIT SPLIT DEVELOPING OVER MODIFICATION OF MORTGAGES ON MIXED-USE  
PROPERTIES**

Jarrett L. Hale, Haley A. Hendrix, Tara L. Elgie, and Gregory G. Hesse

**RIGHTS OF FOREIGN CURRENCY CREDITORS IN ENGLISH INSOLVENCY PROCEEDINGS**

Jonathan Lawrence

**U.S. TREASURY DEPARTMENT REPORT ON CORE PRINCIPLES FOR REGULATING  
THE UNITED STATES FINANCIAL SYSTEM**

Oliver I. Ireland and Anna T. Pinedo

**OCC GUIDANCE SUGGESTS FLEXIBILITY FOR THIRD-PARTY RISK MANAGEMENT**

Oliver I. Ireland, Barbara R. Mendelson, Nathan D. Taylor, Jeremy R. Mandell,  
and Calvin D. Funk

**DATA COLLECTION FOR SMALL BUSINESS LENDING: HOW MUCH IS ENOUGH?**

Melanie H. Brody, Jeffrey P. Taft, and Tori K. Shinohara

# THE BANKING LAW JOURNAL

---

VOLUME 134

NUMBER 8

September 2017

---

|  |     |
|--|-----|
| <b>Editor's Note: Decisions, Decisions . . .</b><br>Victoria Prussen Spears  | 419 |
| <b>Foreseeable Harm Is Not Enough: Supreme Court Rejects Eleventh Circuit's Relaxed Interpretation of Proximate Cause for Lending Discrimination Claims</b><br>Tara L. Elgie, Jarrett L. Hale, Gregory G. Hesse, and Adam C. Ragan | 422 |
| <b>U.S. Supreme Court Narrowly Holds that Filing of Time-Barred Proof of Claim Does Not Violate FDCPA, But Leaves Door Open to Application of the Act in Other Circumstances</b><br>Justin F. Paget and Tara L. Elgie              | 429 |
| <b>Supreme Court Reverses <i>Jevic</i> Structured Dismissal That Deviated from Bankruptcy Code's Priority Scheme</b><br>Nicholas F. Kajon  | 433 |
| <b><i>Lyondell Chemical Company</i>: Litigation Trust's Fraudulent Conveyance Claims Fail</b><br>Stephen D. Zide and Rachael L. Ringer   | 439 |
| <b>Circuit Split Developing over Modification of Mortgages on Mixed-Use Properties</b><br>Jarrett L. Hale, Haley A. Hendrix, Tara L. Elgie, and Gregory G. Hesse   | 445 |
| <b>Rights of Foreign Currency Creditors in English Insolvency Proceedings</b><br>Jonathan Lawrence   | 451 |
| <b>U.S. Treasury Department Report on Core Principles for Regulating the United States Financial System</b><br>Oliver I. Ireland and Anna T. Pinedo  | 456 |
| <b>OCC Guidance Suggests Flexibility for Third-Party Risk Management</b><br>Oliver I. Ireland, Barbara R. Mendelson, Nathan D. Taylor, Jeremy R. Mandell, and Calvin D. Funk   | 462 |
| <b>Data Collection for Small Business Lending: How Much Is Enough?</b><br>Melanie H. Brody, Jeffrey P. Taft, and Tori K. Shinohara   | 466 |

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Matthew T. Burke at ..... (800) 252-9257

Email: ..... matthew.t.burke@lexisnexis.com

Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844

Outside the United States and Canada, please call ..... (518) 487-3385

Fax Number ..... (800) 828-8341

Customer Service Website ..... <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940

Outside the United States and Canada, please call ..... (937) 247-0293

---

ISBN: 978-0-7698-7878-2 (print)

ISBN: 978-0-7698-8020-4 (eBook)

ISSN: 0005-5506 (Print)

ISSN: 2381-3512 (Online)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

---

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Sheshunoff is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2017 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

*An A.S. Pratt® Publication*

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**Steven A. Meyerowitz**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**Victoria Prussen Spears**

*Senior Vice President, Meyerowitz Communications Inc.*

Barkley Clark  
*Partner, Stinson Leonard Street  
LLP*

John F. Dolan  
*Professor of Law  
Wayne State Univ. Law School*

David F. Freeman, Jr.  
*Partner, Arnold & Porter LLP*

Satish M. Kini  
*Partner, Debevoise & Plimpton  
LLP*

Douglas Landy  
*Partner, Milbank, Tweed,  
Hadley & McCloy LLP*

Paul L. Lee  
*Of Counsel, Debevoise &  
Plimpton LLP*

Givonna St. Clair Long  
*Partner, Kelley Drye & Warren  
LLP*

Jonathan R. Macey  
*Professor of Law  
Yale Law School*

Stephen J. Newman  
*Partner, Stroock & Stroock &  
Lavan LLP*

Bimal Patel  
*Partner, O'Melveny & Myers LLP*

David Richardson  
*Partner, Dorsey & Whitney*

Heath P. Tarbert  
*Partner, Allen & Overy LLP*

Stephen B. Weissman  
*Partner, Rivkin Radler LLP*

Elizabeth C. Yen  
*Partner, Hudson Cook, LLP*

Regional Banking Outlook  
James F. Bauerle  
*Keevican Weiss Bauerle & Hirsch  
LLC*

Intellectual Property  
Stephen T. Schreiner  
*Partner, Goodwin Procter LLP*

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices. Copyright 2017 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer.Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258 (phone). Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only

the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 230 Park Ave, 7th Floor, New York, NY 10169.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

# Data Collection for Small Business Lending: How Much Is Enough?

*Melanie H. Brody, Jeffrey P. Taft, and Tori K. Shinohara\**

*The authors of this article discuss the Consumer Financial Protection Bureau's first major step toward fulfilling its statutory obligation to implement the small business lending data collection requirement of the Dodd-Frank Wall Street Reform and Consumer Protection Act.*

The U.S. Consumer Financial Protection Bureau (“CFPB” or “Bureau”) took its first major step toward fulfilling its statutory obligation to implement the small business lending data collection requirement of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Following a Los Angeles field hearing during which Director Richard Cordray emphasized the importance of small businesses to the U.S. economy and the need for these businesses—particularly those owned by women and minorities<sup>1</sup>—to have access to financing, the Bureau issued two documents: a white paper<sup>2</sup> setting out the “limited information” the Bureau currently has about “key dimensions of the small business lending landscape” and a Request for Information (“RFI” or “Small Business Lending RFI”) designed to enhance its understanding of how small business lending works.<sup>3</sup>

As mortgage lenders subject to the Home Mortgage Disclosure Act (“HMDA”) can attest, data collection obligations can create enormous compliance burdens and significant enforcement risk for lending institutions. Perhaps more importantly, the data elements that the Bureau ultimately requires in its rulemaking will serve as the foundation for fair lending examinations and

---

\* Melanie H. Brody (mbrody@mayerbrown.com) is a partner at Mayer Brown LLP and a member of the Consumer Financial Services group, concentrating her practice on federal and state government enforcement matters. Jeffrey P. Taft (jtaft@mayerbrown.com) is a partner at the firm focusing his practice on bank regulation, bank receivership and insolvency issues, payment systems, consumer financial services, cybersecurity/privacy issues, and anti-money laundering laws. Tori K. Shinohara (tshinohara@mayerbrown.com) is an associate at the firm and a member of the Consumer Financial Services group.

<sup>1</sup> <https://www.consumerfinance.gov/aboutus/newsroom/prepared-remarks-cfpb-director-richardcordray-small-business-lending-field-hearing>.

<sup>2</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_KeyDimensions-Small-Business-Lending-Landscape.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_KeyDimensions-Small-Business-Lending-Landscape.pdf).

<sup>3</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_RFI\\_Small-Business-Lending-Market.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_RFI_Small-Business-Lending-Market.pdf). (published at 82 Fed. Reg. 22318 (May 15, 2017)).

enforcement in the small business lending space.<sup>4</sup> Because the Bureau's work on this issue is in its early stages, there is still opportunity for interested stakeholders to contribute to the Bureau's understanding of the small business lending market.

## SECTION 1071 OF THE DODD-FRANK ACT AND SMALL BUSINESS LENDING DATA

Section 1071 of the Dodd-Frank Act amended the Equal Credit Opportunity Act to require institutions that receive credit applications from women-owned, minority-owned or small businesses to collect certain information about the requested credit and applicants and to deliver that information to the Bureau annually.<sup>5</sup> Section 1071 requires the Bureau to "prescribe rules and issue guidance" to implement this requirement and, importantly, authorizes the Bureau to adopt exceptions and "conditionally or unconditionally" exempt any institution or class of institutions from having to comply. Although Section 1071 became effective on July 21, 2011, the Dodd-Frank Act's designated transfer date, the CFPB issued public guidance assuring that it would not expect compliance until after it had issued implementing regulations.<sup>6</sup>

The primary purpose of Section 1071 is to facilitate fair lending enforcement in the small business space.<sup>7</sup> Unlike mortgage lenders, who for decades have had to collect and report race, ethnicity and other information about home loan applicants, small business lenders typically do not collect or retain demographic information about their customers. Although the Bureau can and has brought fair lending actions against non-mortgage lenders<sup>8</sup> by using proxying method-

---

<sup>4</sup> Although the Bureau is still in the pre-rule stage of its data collection rulemaking, small business lending is already a significant focal point for the CFPB. In its most recent Fair Lending Report, the Bureau highlighted small business lending as an area of emerging fair lending risk, and also one of the Bureau's fair lending priorities for the coming year. See [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704\\_cfpb\\_Fair\\_Lending\\_Report.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Fair_Lending_Report.pdf).

<sup>5</sup> 15 U.S.C. § 1691o-2.

<sup>6</sup> See Letter from Leonard Kennedy to Chief Executive Officers of Financial Institutions under Section 1071 of the Dodd-Frank Act (April 11, 2011), *available at* <https://s3.amazonaws.com/files.consumerfinance.gov/f/2011/04/GC-letter-re-1071.pdf> ("In light of inquiries we have received regarding the timing of financial institutions' obligations under section 1071, we have reviewed the statutory text, purpose, and legislative history and conclude that their obligations, including for information collection and reporting, do not arise until the Bureau issues implementing regulations and those regulations take effect.").

<sup>7</sup> 15 U.S.C. § 1691c-2.

<sup>8</sup> See <https://www.consumerfinance.gov/policycompliance/enforcement/actions>.

ologies to impute borrower race, ethnicity and gender,<sup>9</sup> the Bureau's use of proxies has generated considerable controversy,<sup>10</sup> and there is no dispute that fair lending risks can be evaluated more reliably with actual data.

### SMALL BUSINESS LENDING RFI

The Small Business Lending RFI is designed to increase the CFPB's admittedly limited understanding of the current small business lending marketplace; the Bureau characterizes the RFI as its "first step" in implementing Section 1071.<sup>11</sup> The RFI requests information on the following topics.

### SMALL BUSINESS DEFINITION

A critical aspect of the Bureau's 1071 rulemaking will be how the rule defines the term "small business." Not only will the definition determine which loans will ultimately become the subject of fair lending scrutiny, it also will be among the factors that influence how challenging it will be for institutions to interpret and comply with the rule.

There are many definitions of the term "small business." Section 1071 indicates that small business has the same meaning as the term "small business concern" in the federal Small Business Act. The Small Business Act authorizes the Small Business Administration ("SBA") to establish size standards, and the SBA has developed multiple standards, including widely used industry-specific standards that are used to determine eligibility for federal contract and loan assistance programs. The Small Business Act also allows the SBA to approve size standards developed by other federal agencies that meet certain requirements.<sup>12</sup>

The CFPB wants to explore an alternative definition of "small business" that would align with current small business lending practices and work in the context of an information gathering rule. Common factors currently used to classify business size include annual revenue, industry, loan size, aggregate credit exposure or some combination of these factors.<sup>13</sup> In the RFI, the CFPB notes

---

<sup>9</sup> [http://files.consumerfinance.gov/f/201409\\_cfpb\\_report\\_proxy-methodology.pdf](http://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf).

<sup>10</sup> See *Unsafe at Any Bureaucracy: CFPB Junk Science and Indirect Auto Lending*, Report Prepared by the Republican Staff of the Committee on Financial Services, U.S. House of Representatives (Nov. 24, 2015).

<sup>11</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_RFI\\_Small-Business-Lending-Market.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_RFI_Small-Business-Lending-Market.pdf).

<sup>12</sup> See 15 U.S.C. § 632(a)(2)(C).

<sup>13</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_RFI\\_Small-Business-Lending-Market.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_RFI_Small-Business-Lending-Market.pdf).



that under almost any definition of “small business,” a large percentage of women-owned and minority-owned businesses would be covered.

The RFI poses a series of questions about how lenders currently define “small business” and asks commenters to describe what potential burdens and challenges may arise if the Bureau were to adopt SBA standards.

## DATA POINTS

Section 1071 specifies the data fields that financial institutions must collect and report:

- Application number;
- Application date;
- Credit type and purpose;
- Amount applied for;
- Amount approved;
- Type of action taken and action taken date;
- Census tract of the principal place of business;
- Applicant’s gross annual revenue in the last fiscal year;
- Race, sex and ethnicity of the principal business owners; and
- Any other data that the Bureau determines would aid in fulfilling the purposes of Section 1071.<sup>14</sup>

The Bureau plans to “explore how to best implement the statutorily-mandated data points” and whether to supplement these data points with a “limited number of discretionary data points” that, among other things, could “reduce the possibility of misinterpretations or incorrect conclusions” arising from more limited data.

The reference to a “limited” number of supplemental data points appears designed to alleviate concerns about the possibility of the Bureau imposing a burdensome, HMDA-like rule that would require enormous and costly implementation efforts. At the same time, the Bureau recognizes that if it does not have sufficient data to explain underwriting and pricing outcomes, it could wind up investigating potential fair lending claims that could have been ruled out if it had the right information at the outset.

The RFI poses questions about several data-related topics, including the data elements and standards that small business lenders currently use, the potential

---

<sup>14</sup> 15 U.S.C. § 1691c-2.

technological and other challenges presented by the rule and how the CFPB can help mitigate them, variations in data collection across products and by application disposition, what data elements would reduce incorrect conclusions or misinterpretations, and challenges associated with obtaining demographic information about principal owners.

The Section 1071 rulemaking will have major business process ramifications for small business lenders, many of which have not previously needed to gather and report detailed, loan-level information to the government. The rule also will increase regulatory scrutiny in the small business lending space, both in terms of data accuracy audits and fair lending compliance evaluations. For all of these reasons, small business lenders and other interested stakeholders should consider engaging closely with the Bureau on the RFI's data-related questions. Effective industry input can go a long way toward lessening the forthcoming compliance obligations and regulatory risks.

## FINANCIAL INSTITUTIONS ENGAGED IN BUSINESS LENDING

Section 1071 defines a “financial institution” as “any partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity that engages in any financial activity.”<sup>15</sup> As part of the RFI, the Bureau seeks to understand better the various players in the small business lending industry and obtain feedback from stakeholders on appropriate coverage for the Bureau's small business lending data collection rule.<sup>16</sup> The Bureau is also interested in the extent to which small business lending has shifted from depository institutions to alternative lenders and the roles of lending marketplaces, brokers, dealers and other third parties in the small business lending application process.<sup>17</sup>

Significantly, the RFI asks whether the Bureau should exempt certain classes of institutions from the data collection rule and whether there are data sources available that would help the Bureau evaluate potential exemptions. Small business lenders should consider whether there is a basis for arguing for their exemption from the rule and whether there is persuasive information that could be presented to support a proposed exemption.

---

<sup>15</sup> 15 U.S.C. § 1691c-2(h)(1).

<sup>16</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_RFI\\_Small-Business-Lending-Market.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_RFI_Small-Business-Lending-Market.pdf).

<sup>17</sup> <https://www.consumerfinance.gov/aboutus/newsroom/prepared-remarks-cfpb-director-richardcordray-small-business-lending-field-hearing>.

## ACCESS TO CREDIT AND FINANCIAL PRODUCTS OFFERED TO BUSINESSES

The Bureau requests information related to obstacles faced by small businesses in obtaining access to credit, as well as information about the various financial products and services available to these businesses. The CFPB estimates that loans, lines of credit and credit cards comprise approximately three-quarters of the non-equity financing market. The Bureau is interested in obtaining information related to the products offered to small businesses and potential obstacles that small businesses—particularly women- and minority-owned businesses—face in obtaining access to credit.<sup>18</sup>

The CFPB also is interested in whether there is more or less access to credit for a small business based on its type of business or geographic location. The Bureau's interest in geography and access to credit in the context of small business lending is unsurprising given the Bureau's focus on access to credit and mortgage redlining issues in recent years.

## PRIVACY CONCERNS

Section 1071 permits the Bureau to delete or modify data before it is released to the public to protect privacy interests. In connection with data collection related to small business lending, the Bureau is interested in understanding the privacy concerns related to the potential disclosure of the small business lending data elements that are outlined in Section 1071 and in exploring options which protect borrower and applicant privacy, as well as the confidentiality interests of financial institutions.<sup>19</sup>

## RAMIFICATIONS FOR SMALL BUSINESS LENDERS

The Bureau believes that small business lending data collection will help fill gaps in its understanding of the small business lending landscape and help identify potential fair lending concerns related to small business lending, including lending to women- and minority-owned small businesses.<sup>20</sup> And although the Bureau acknowledges that “there are costs associated with any data collection which have to be weighed against the benefits,”<sup>21</sup> any final rule

---

<sup>18</sup> [http://files.consumerfinance.gov/f/documents/201705\\_cfpb\\_RFI\\_Small-Business-Lending-Market.pdf](http://files.consumerfinance.gov/f/documents/201705_cfpb_RFI_Small-Business-Lending-Market.pdf).

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

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

<sup>21</sup> *Id.*

regarding small business data collection will impose a significant burden on small business lenders.

With respect to fair lending compliance, there are additional complexities and nuances associated with small business lending that limit the ability to use statistics to identify potential fair lending violations. For example, unlike mortgage lending, small business lending often involves more subjective underwriting and small business lenders' processes for documenting their credit decisions may be less formal. Although the Bureau seems to recognize that there are differences between small business lending and mortgage lending by their nature,<sup>22</sup> using small business lending data for fair lending analyses may have significant limitations. Institutions should consider whether and how to raise these issues with the Bureau as it proceeds with the Section 1071 rulemaking.

---

<sup>22</sup> <https://www.consumerfinance.gov/aboutus/newsroom/prepared-remarks-cfpb-director-richardcordray-small-business-lending-field-hearing>.