

January 7, 2022

Comment Intake—Section 1071 Small Business Lending Data Collection  
Bureau of Consumer Financial Protection  
1700 G Street NW  
Washington, DC 20552

RE: Docket No. CFPB-2021-0015 - Small Business Lending Data Collection under the Equal Credit Opportunity Act

The Center for LGBTQ Economic Advancement & Research and interACT: Advocates for Intersex Youth thank the agency for the opportunity to comment on the Bureau of Consumer Financial Protection's (CFPB) proposed revisions<sup>1</sup> to Regulation B to implement changes to the Equal Credit Opportunity Act (ECOA)<sup>2</sup> under Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).<sup>3</sup>

The Center for LGBTQ Economic Advancement & Research is a research and advocacy organization that supports fair and equal financial capacity and access for LGBTQI+ households, organizations, and communities. Founded in 2006, interACT: Advocates for Intersex Youth is the nation's leading voice for the human rights of children born with intersex traits. Our organizations produce research, information, and advocacy to support greater equity for LGBTQI+ communities.

Our comments address the CFPB's proposal to collect principal owner's sex and the Bureau's request for comment as to whether and how to collect principal owners' sexual orientation and gender identity.<sup>4</sup> We urge the Bureau to require the collection of principal owners' sexual orientation and gender identity, separately from and in addition to their sex. These data are critical to enforcing civil rights protections and better understanding the experiences of LGBTQI+ applicants who seek access to small business credit and lending.

### **1. LGBTQI+ People and Businesses Need More Equitable Access to Credit and Fair Lending Protections**

LGBTQI+ people and businesses need more equitable access to credit, and effective fair lending protections for LGBTQI+ credit applicants are direly needed.

In 2019, more than a third of LGBT adults who applied for credit had their applications rejected, 1.5x more often than non-LGBT adults who applied for credit.<sup>5</sup> LGBT women and Black LGBT adults were even more likely to have their applications rejected. More than half of Black LGBT adults had been turned down, 1.4x more often than for non-LGBT Black adults.<sup>6</sup>

Despite the current deficit of SOGI data collection in federal fair lending data, nonprofit and academic studies have shown that LGBTQI+ people experience discrimination in credit. In separate studies, the

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<sup>1</sup> CFPB, Small Business Lending Data Collection under the Equal Credit Opportunity Act, (September 1, 2021) [https://files.consumerfinance.gov/f/documents/cfpb\\_section-1071\\_nprm\\_2021-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_section-1071_nprm_2021-09.pdf) (hereinafter: Proposed Rule)

<sup>2</sup> 15 U.S.C. 1691 et seq.

<sup>3</sup> 2 Pub. L. 111-203, tit. X, section 1071, 124 Stat. 1376, 2056 (2010), codified at ECOA section 704B, 15 U.S.C. 1691c-2.

<sup>4</sup> Proposed Rule, *supra* note 1 at 460.

<sup>5</sup> CLEAR, The Economic Wellbeing of LGBT Adults in the U.S. in 2019, 20 (June 2021) <https://lgbtq-economics.org/research/lgbt-adults-2019/>

<sup>6</sup> *Id.*

National Community Reinvestment Coalition and scholars at Iowa State analyzed Home Mortgage Disclosure Act (HMDA) data. Both studies found that same-sex couples were denied home loans more often than differently-sexed couples of similar financial and credit quality and received loans with higher interest rates and fees.<sup>7</sup> The Iowa State study also showed that loans in neighborhoods with a higher density of LGBTQI+ people also received higher interest and fees regardless of applicants' sexuality—suggesting that loans in LGBTQI+-dense neighborhoods may be affected by reverse-redlining (i.e., discriminatory higher interest and costs).<sup>8</sup>

LGBTQI+ communities need fair access to affordable credit to help them recover and rebuild from the pandemic. During the pandemic, LGBTQI+ people and businesses have struggled more financially than their non-LGBTQ counterparts. The Movement Advancement Project reports that 52% of LGBTQ adults experienced one or more serious financial problems in the previous few months—such as paying utilities, affording medical care, or paying consumer debts according to data collected by NPR and the Harvard T.H. Chan School of Public Health.<sup>9</sup>

LGBTQI+-owned small businesses play a crucial role in community development and creating wealth and employment opportunities in their communities.<sup>10</sup> According to the National LGBT Chamber of Commerce (NGLCC), its member LGBTQ businesses created more than 33,000 jobs and added \$1.7 trillion to the U.S. economy in 2016.<sup>11</sup> Fair access to credit is critical for small businesses to start and grow: Small businesses with access to business loans are more likely to hire more employees and expand their inventories to meet demand than those without credit.<sup>12</sup>

## **2. Collecting Sexual Orientation and Gender Identity Information in Small Business Lending Is Necessary and Would Enhance the Ability of the CFPB To Enforce ECOA**

The CFPB recognized in an interpretive rule earlier this year that unlawful discrimination based on “sex” under ECOA includes discrimination based on sexual orientation and gender identity,<sup>13</sup> consistent with the U.S. Supreme Court’s ruling in *Bostock v. Clayton County*.<sup>14</sup> The purpose of Section 1071 is to “facilitate enforcement of fair lending laws” including ECOA and to help “identify business and community development needs and opportunities of women-owned, minority-owned, and small businesses.”<sup>15</sup> Collecting sexual orientation and gender identity (SOGI) data will consequently enhance

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<sup>7</sup> Jason Richardson & Karen Kali, Same-Sex Couples And Mortgage Lending, NAT’L CMTY. REINVESTMENT COAL. (June 22, 2020) <https://ncrc.org/same-sex-couples-and-mortgage-lending/>; Hua Sun & Lei Gao, *Lending Practices to Same Sex Borrowers*, PROCEEDINGS NAT’L ACAD. SCI. 116 (May 2019) <https://doi.org/10.1073/pnas.1903592116>

<sup>8</sup> Hua Sun & Lei Gao, *supra* note 5.

<sup>9</sup> Movement Advancement Project, *The Delta Variant & the Disproportionate Impacts of COVID-19 on LGBTQ Households in the U.S. Results from an August/September 2021 National Poll* (November 2021) <https://www.lgbtmap.org/file/2021-report-delta-impact-v2.pdf>

<sup>10</sup> CFPB, *Final Report of the Small Business Review Panel on the CFPB’s Proposals Under Consideration for the Small Business Lending Data Collection Rulemaking*, (December 2020)

<sup>11</sup> NGLCC, *America’s LGBT Economy 2016 Snapshot*, 8-10 (2017) <https://nglcc.org/sites/default/files/%5BREPORT%5D%20NGLCC%20Americas%20LGBT%20Economy%20.pdf>

<sup>12</sup> NAT’L SMALL BUS. ASSOCIATION, *2016 Year-End Economic Report* (February 2017) <http://www.nsba.biz/wpcontent/uploads/2017/02/Year-End-Economic-Report-2016.pdf>

<sup>13</sup> CFPB, *Equal Credit Opportunity (Regulation B); Discrimination on the Bases of Sexual Orientation and Gender Identity* (March 09, 2021) [https://files.consumerfinance.gov/f/documents/cfpb\\_ecoa-interpretive-rule\\_2021-03.pdf](https://files.consumerfinance.gov/f/documents/cfpb_ecoa-interpretive-rule_2021-03.pdf)

<sup>14</sup> *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020) (Holding that discrimination based on sexual orientation and gender identity are unlawful forms of discrimination based on sex under Title VII of the Civil Rights Act.)

<sup>15</sup> 15 U.S.C. 1691c–2(a)

the agency's ability to enforce ECOA fully to protect LGBTQ businesses and identify needs and opportunities for LGBTQ small businesses.

### **3. Specific Recommendations for Collecting Data on Sex, Gender Identity, Sexual Orientation, and Variations of Sex Characteristics**

The Bureau's proposal included a proposed question to collect applicants' sex, as well a request for comments regarding whether and how to collect data on sexual orientation, gender identity, and variations of sex characteristics

**The Bureau should consider established methodological research and best practices for demographic data collection on LGBTQI+ populations.** There is now two decades worth of research and evaluation of demographic measures that should inform the Bureau's work. In 2003 the Ford Foundation convened a multidisciplinary panel of experts, known collectively as the Sexual Minority Assessment Research Team (SMART), to identify the best scientific approaches to gathering data on sexual orientation.<sup>16</sup> The SMART group published a report in 2009 to provide guidance on how to structure and ask survey questions that measure sexual orientation and best practices for analyzing sexual orientation data. Between 2011 and 2013 the Williams Institute at the UCLA School of Law convened the Gender Identity in U.S. Surveillance (GenIUSS) group, a multi-disciplinary and multi-institutional group of experts to increase population-based data about transgender people and other gender minorities by advancing the development of sex and gender-related measures for population-based surveys.<sup>17</sup> The GenIUSS report recommends "including measures of self-reported assigned sex at birth and current gender identity" because this "'two step' approach appears the most likely to have high sensitivity, as well as high specificity, with adults" in distinguishing transgender and gender minority respondents from cisgender respondents.<sup>18</sup> More recently, the National Academies of Sciences, Engineering, and Medicine published a report summarizing existing work on LGBTQI+ data collection and recommending all federal agencies consider adding measures to identify LGBTQI+ populations.<sup>19</sup>

As the CFPB observes in its proposal, the Census Bureau employed a "two-step" method for collecting sex and gender identity information in its Household Pulse Survey.<sup>20</sup> The Household Pulse Survey and other population-based surveys have demonstrated their approach's efficacy and usefulness in data collection to create disaggregated data, albeit in a different context and with different methods of administration. At this time, we recommend that the Bureau explore a similar "two-step" method for collecting sex and gender identity data.

**CFPB should conduct user testing to determine the effectiveness of demographic measures in this context.** While the approaches we recommend have demonstrated effectiveness in a number of settings, this new data collection presents a different context and different methods of administration than, for example, population-based health surveys. For example, CFPB may wish to consider:

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<sup>16</sup> SMART, *Best Practices for Asking Questions about Sexual Orientation on Surveys*, THE WILLIAMS INST. AT UCLA L. SCH. (November 2009) <https://williamsinstitute.law.ucla.edu/publications/smart-so-survey/>

<sup>17</sup> The GenIUSS Group. (2014). *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, THE WILLIAMS INST. AT UCLA L. SCH. <https://williamsinstitute.law.ucla.edu/publications/geniuss-trans-pop-based-survey/>

<sup>18</sup> *Id.* at 16.

<sup>19</sup> National Academies, *Understanding the Well-Being of LGBTQI+ Populations*, (Washington, DC: Nat'l Acad. Press 2020).

<sup>20</sup> 5 U.S. Census Bureau, Phase 3.2 Household Pulse Survey (undated), [https://www2.census.gov/programssurveys/demo/technical-documentation/hhp/Phase\\_3.2\\_Household\\_Pulse\\_Survey\\_FINAL\\_ENGLISH.pdf](https://www2.census.gov/programssurveys/demo/technical-documentation/hhp/Phase_3.2_Household_Pulse_Survey_FINAL_ENGLISH.pdf).

- whether and how it may be possible to replicate the third, confirmation step of the “two-step” approach in this context, which has elsewhere proven important to ensuring data quality;
- whether different wording, definitions of terms, or explanation of the purpose of these questions may be most effective in this setting (e.g. wording of the gender identity question stem); and

whether a different question structure may be most effective in this context, such as a sex question based on gender identity and a separate transgender-status question.<sup>21</sup>

Accordingly, CFPB should conduct its own testing with potential users to identify any needed refinements. This approach is supported by recent Executive Orders and guidance from the Office of Information and Regulatory Affairs (OIRA).<sup>22</sup>

**Best practices continue to evolve, and CFPB should coordinate with other agencies to refine and improve measures in future years.** While our recommendations for this proposed data collection are based on currently established measures, best practices for collecting data on gender and LGBTQI+ populations continue to evolve. Going forward, CFPB should work with OMB, the Equitable Data Working Group, and federal statistical agencies to review, promote, fund, and conduct methodological research, and to identify and refine best practices tailored to this data collection. These agencies have been directed to advance this work under recent executive orders.<sup>23</sup> The National Academies of Sciences, Engineering, and Medicine are also expected to issue a report in the coming weeks or months with practice and research recommendations for measures of sex, sexual orientation, gender identity, and variations of sex characteristics.<sup>24</sup> The National Institutes for Health also continue to fund methodological research, including a current project focused on expanded sex, SOGI, and intersex measures.<sup>25</sup> Based on these recommendations and its own experience from pretesting and the initial fielding of this data collection, for example, CFPB may find it appropriate to consider alternate wording, definitions of terms,

*i. Specific Recommendations for Collecting Applicants’ Sex Assigned at Birth*

We applaud that the CFPB seeks to collect information related to sex expansively in its proposed rule. However, we believe the agency should reconsider its proposed approach to collecting principal owner’s

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<sup>21</sup> To date, less methodological research exists on this approach, though some scholars have suggested that it might be more appropriate than asking for sex assigned at birth in certain non-medical, administrative contexts. CDC’s Behavioral Risk Factor Surveillance System (BRFSS), the Youth Risk Behavior Surveillance System (YRBS), use such an approach, which is premised in part on providing (or being able to provide, in in-person administration) a definition of being transgender to help ensure accuracy. A similar approach is also employed on the Federal Employee Viewpoint Survey.

<sup>22</sup> Executive Order 14058 of December 13, 2021 (Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government); Executive Order 13707 of September 15, 2015 (Using Behavioral Science Insights To Better Serve the American People); Office of Information and Regulatory Affairs Memorandum of August 9, 2012 (Testing and Simplifying Federal Forms).

<sup>23</sup> Executive Order 14020 of March 8, 2021 (Establishment of the White House Gender Policy Council); Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government).

<sup>24</sup> Nat’l Academies of Sciences, Engineering, and Medicine, *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health* (Last Visited: January 06, 2022) <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health>.

<sup>25</sup> <https://isgmh.northwestern.edu/2021/11/22/project-recognize-grant-will-restructure-sex-sexual-orientation-and-gender-identity-data-collection/>.

sex by adding an option for “I prefer to self-describe” (with the option to write in additional information) in addition to “male” and “female.”<sup>26</sup>

**Collecting sex data via self-response may not be effective or administrable for this type and scale of data collection.** Although the financial institution would report the additional information as free-form text to the Bureau under the proposal, we are concerned that free-form text will require substantial effort on the part of the Bureau (and advocates, if such text is made publicly available) to distinguish transgender people and gender minorities in the data from “false positives,” i.e. respondents who accidentally choose to self-describe even though male or female would have been appropriate. As such we recommend that the Bureau does not allow the applicant to write in their sex, either with or without answer options for male or female.

Consistent with the GenIUSS group’s recommendations for a “two-step” approach to ask respondents their sex assigned at birth, and separately their current gender identity,<sup>27</sup> we suggest that the Bureau ask the following question regarding principal owners’ sex:

***Sex Assigned at Birth***

*What sex were you assigned at birth, on your original birth certificate? (Check one)*

- *Male*
- *Female*
- *I do not wish to provide this information*

In view of the fact that most vital records and medical systems in the U.S. currently only assign individuals to the sex categories “male” or “female” at birth, which is then recorded on their birth certificate, we think these are the appropriate options for applicants to choose from with regard to identifying their sex assigned at birth.<sup>28</sup> Because birth certificates only permit a single gender marker we also think that an applicant should be restricted from designating more than one category for the principal owners’ sex.

We agree with the Bureau’s proposal that financial institutions should be prohibited from reporting sex based on visual observation, surname, or any basis other than the applicant-provided information. Visual observations regarding the gender expression of applicants would inevitably rely upon sex stereotypes as a basis to draw conclusions regarding their sex, leading to inaccurate determinations of applicants’ sex, gender identity, or sexual orientation on the part of financial institutions.

***ii. Specific Recommendations for Collecting Applicants’ Gender Identity***

We urge the Bureau to require financial institutions to ask applicants their current gender identity. Collecting principal owners’ gender identity data will enhance the Bureau’s and the public’s ability to enforce ECOA for transgender people and gender minorities, consistent with the purposes of section 1071.

Consistent with the GenIUSS group’s “two-step” approach, we recommend that the Bureau ask the following question regarding principal owners’ gender identity:

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<sup>26</sup> Proposed Rule, supra note 1 at 463.

<sup>27</sup> GenIUSS Report, supra note 17 at 16.

<sup>28</sup> Although some states have enabled transgender and gender minorities to update their birth certificate and identity records with an X marker. See US Birth Certificates, Non-Binary Birth Certificates and State IDs: Full Guide (Last Visited: January 06, 2022) <https://www.usbirthcertificates.com/articles/gender-neutral-birth-certificates-states>

### ***Current Gender Identity***

*Do you currently describe yourself as male, female or transgender? (Check all that apply)*

- *Male*
- *Female*
- *Transgender*
- *I do not wish to provide this information*

We think that these options are understandable for an audience that may vary widely in age as well as English proficiency. Because a person may identify with more than one gender category, we recommend that applicants be allowed to select as many options as they choose.

**Asking applicants this second gender identity question will facilitate the identification of transgender and gender minorities in the data**, by comparing an individuals' sex assigned at birth and their current gender identity. Applicants whose current gender identity differs from their sex assigned at birth would include transgender people and other gender minorities, whereas those whose gender identity is the same as their sex assigned at birth would be cisgender applicants. Additionally, this question would enable the Bureau and researchers to disaggregate transgender people into transgender men and transgender women based on their responses, and to distinguish them from other gender minorities.

**We recommend the Bureau include an answer option for “Nonbinary / Genderqueer / Gender nonconforming.”** The percent of adults in the U.S. who identify as nonbinary, genderqueer, or gender nonconforming has increased significantly in the past decade. According to research from the Williams Institute, 1.2 million adults in the U.S. identify as nonbinary—or about 11% of LGBTQ adults 18-60 years old.<sup>29</sup> Nonbinary identification was found to be particularly prevalent among younger adults: 76% of nonbinary adults were between 18-29 years old.<sup>30</sup> These individuals may not identify as male, female, or transgender, but are an important and growing segment of the LGBTQI+ community that should be distinguished.

**We do not recommend that the Bureau provide an open-response option for individuals to describe their gender-identity.** We recognize that many other gender identities and communities exist in addition to those names in the above response options, and that an open-response option may be the best approach in some settings—particularly where detailed analysis and reporting of open responses is feasible. On the other hand, such analysis is time-intensive to undertake and open responses to gender identity can be challenging to categorize, and as a result this data is often discarded, reducing the sample size, the statistical power in a study, and also potentially contributing to errors in classification.<sup>31</sup> Given the purpose, scale, and complexity of the proposed data collection, as well as the potential that CFPB may be unable or may simply not prioritize devoting resources to analysis of open responses, we recommend avoiding this approach at this time.

### ***iii. Specific Recommendations for Collecting Applicants' Sexual Orientation***

We also urge the Bureau to require financial institutions to ask applicants their sexual orientation. Collecting principal owners' sexual orientation data will enhance the Bureau's and the public's ability to

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<sup>29</sup> Bianca D.M. Wilson, *Nonbinary LGBTQ Adults in the United States*, THE WILLIAMS INST. AT UCLA L.SCH. (June 2021) <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>

<sup>30</sup> *Id.*

<sup>31</sup> *See, infra*, notes 32-34.

enforce ECOA for lesbians, gays, bisexuals, and other sexual minorities, consistent with the purposes of section 1071.

The SMART report notes that self-identification of respondents' sexual orientation is particularly important for social and economic studies, as compared to questions regarding individuals' behavior or attraction. Consistent with their recommendations, and in alignment with the Household Pulse Survey,<sup>32</sup> we suggest the Bureau ask the following question regarding principal owners' sexual orientation:

***Sexual Orientation***

*Which of the following best represents how you think of yourself? (Check one)*

- *Gay or Lesbian*
- *Bisexual*
- *Straight, that is not gay or lesbian*
- *I do not wish to provide this information*

**We do not recommend the Bureau include an option for applicants to provide an open response for their sexual orientation, because it may limit the usefulness of data for fair lending enforcement.**

The SMART report authors note that a major defect with answer options that allow individuals to self-describe their sexual orientation is that “the data on those individuals is often discarded, which can reduce the sample size and lower the power in a study.”<sup>33</sup> This is because it is “generally impossible to categorize the respondents' sexual orientation, even if the survey includes an open-ended follow-up response,” and the recoding of open-ended responses is time intensive and unlikely to be undertaken by many analysts.<sup>34</sup> Additionally, including a self-identification option may increase the number of false positives (i.e. choosing to self-identify their sexual orientation, when heterosexual would have been appropriate)—because some people do not know what the terms “straight” or “bisexual” mean and some heterosexuals do not believe they have a sexual orientation or have not thought about the issue—which would also impair the usefulness of data.<sup>35</sup>

The SMART report also observes that although some people with same-sex attraction or behavior might choose an “other” option than gay, lesbian, or bisexual to describe their orientation that this subpopulation is small and that these people most likely would still choose the terms gay, lesbian, or bisexual if they were the only options provided.<sup>36</sup> As such, including an option for applicants to self-describe their sexual orientation might reduce the number of identifiably LGB applicants included in the data, and reduce the usefulness of the data in identifying disparities for LGB applicants.

***iv. Specific Recommendations for Collecting Data on Variations in Sex Characteristics***

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<sup>32</sup> Household Pulse Survey, *supra* note 19.

<sup>33</sup> SMART Report, *supra* note 16 at 9.

<sup>34</sup> *Id.*

<sup>35</sup> SMART Report, *supra* note 16 at 8; See, Jonathan Katz, *THE INVENTION OF HETEROSEXUALITY* (Univ. of Chi. Press 2007)

<sup>36</sup> SMART Report, *supra* note 16 at 8.

CFPB should also work to add a question, for the initial year or for future years, regarding variations of sex characteristics. People with variations in sex characteristics may comprise as much as 1.7% of the population,<sup>37</sup> and face documented but understudied social and health disparities.<sup>38</sup>

Though intersex traits themselves are perfectly healthy, many intersex youth have experienced “normalizing” genital or sterilizing surgeries in infancy or early childhood, with lasting impacts on their health.<sup>39</sup> Intersex students often face harassment, discrimination, and privacy infringements at school, as well as curricula that erase or stigmatize bodies like theirs.<sup>40</sup> These experiences contribute to educational, health, and other disparities, which may affect economic opportunities.<sup>41</sup> In addition, increasing visibility of intersex people and of the natural diversity of sex characteristics—due both to individuals’ coming out, community advocacy, and political debates about gender diversity—could make small business owners with intersex traits more vulnerable to discrimination. In addition, the Justice Department’s *Title IX Legal Manual* recognizes that Title IX’s prohibition on sex discrimination includes discrimination based on sex characteristics, including intersex traits.<sup>42</sup> The same reasoning clearly applies under the language of the ECOA.

For these reasons, CFPB should seek to collect data on variations of sex characteristics, to identify intersex business owners and barriers they may face. Although this population may be comparable in size to some other LGBTQI+ subpopulations, a recent National Academies consensus study noted that “[p]opulation-based data on intersex populations are generally not available at all,” calling this “a significant gap in terms of identifying and understanding the well-being of intersex populations.”<sup>43</sup> That report recommended that federal agencies should develop, evaluate, and consider implementing measures to identify intersex populations across federal data collection efforts.<sup>44</sup> Measures exist for this purpose, though there has been

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<sup>37</sup> Blackless, M., et al., How Sexually Dimorphic Are We? Review and Synthesis, *Am. J. Hum. Biol.* 12:151 (2000).

<sup>38</sup> Rosenwohl-Mack A, et al., A national study on the physical and mental health of intersex adults in the U.S., *PLoS ONE* 5(10):e0240088 (2020); Zeeman, L., & Aranda, K., A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance, *Int. J. Environ. Res. Public Health*, 17:6533 (2020); National Academies, *Understanding the Well-Being of LGBTQI+ Populations*, (Washington, DC: Nat’l Acad. Press 2020).

<sup>39</sup> National Academies of Sciences, Engineering, and Medicine, *Understanding the Well-Being of LGBTQI+ Populations*, 380 (National Academies Press, 2020) (concluding that like conversion therapy, “elective genital surgeries on children with intersex traits who are too young to participate in consent are dangerous to the[ir] health and well-being”).

<sup>40</sup> Jack D. Simons, Jose-Michael Gonzalez & Melissa Ramdas, Supporting Intersex People: Effective Academic and Career Counseling, 14 *J LGBTQ ISSUES COUNS.* 91-209 (2020); Brief of interACT: Advocates for Intersex Youth, et al., as *Amicus Curiae* in Support of Respondent, Gloucester County School Board v. G.G. ex rel. Grimm, No. 16-273 (U.S. Mar. 2, 2017); interACT, *What We Wish Our Teachers Knew* (2018), <https://interactadvocates.org/wp-content/uploads/2018/07/BROCHURE-interACT-Teachers-final.pdf>.

<sup>41</sup> Mandy Henningham & Tiffany Jones, Intersex students, sex-based relational learning & isolation, *SEX EDUC.* (2021), DOI: 10.1080/14681811.2021.1873123; Rosenwohl-Mack A., et al., A national study on the physical and mental health of intersex adults in the U.S., 15 *PLoS ONE* e0240088 (2020); Tiffany Jones, The needs of students with intersex variations, 16 *SEX EDUC.* 602 (2016).

<sup>42</sup> US Department of Justice, Title IX Legal Manual (Aug. 2021), <https://www.justice.gov/crt/title-ix#Bostock> (“The reasoning in these interpretations applies with equal force to discrimination against intersex people”).

<sup>43</sup> National Academies, *Understanding the Well-Being of LGBTQI+ Populations*, 53, 67 (Washington, DC: Nat’l Acad. Press 2020).

<sup>44</sup> *Id.* at 401-02.

relatively less methodological research in this area.<sup>45</sup> A forthcoming Academies report will make further recommendations to advance intersex data collection.<sup>46</sup>

CFPB should consider adding sex characteristics question based on these recommendations. If CFPB determines it is not feasible do so for the initial year of this data collection, we strongly urge that CFPB, in coordination with OMB and other federal agencies, work to add such a measure in future years, including by conduct, funding, or promoting research or evaluation efforts for this purpose.

#### **4. The CFPB Should Add Definitions and Data Collection for LGBTQ-owned Businesses**

We urge that the Bureau require financial institutions to ask loan applicants whether their business is an LGBTQ-owned business. Data about lending availability to LGBTQ-owned businesses will enhance the ability to enforce fair lending laws to protect them from discrimination in credit, and identify credit needs for LGBTQ-owned businesses.

There is public and Congressional support to collect data about LGBTQ-owned businesses' ability to fairly access credit. In June 2021 the U.S. House of Representatives passed H.R. 1443, the LGBTQ Business Equal Credit Enforcement and Investment Act.<sup>47</sup> The Act would insert "LGBTQ-owned" after "minority-owned" in each place in ECOA where such term appears, and also insert a definition for an "LGBTQ-owned business" into ECOA.<sup>48</sup>

**We suggest that the Bureau to include in its final rule a definition for "LGBTQI+-owned businesses."** This definition should be worded similar to the existing statutory definitions for "women-owned" and "minority owned" businesses, and to the definition supplied by Congress in H.R. 1443. Consistent with recent practice and recommendations from the federal government and other experts, however, we recommend using "LGBTQI+."<sup>49</sup> Under such a definition, an "LGBTQI+-owned business" would mean "a business where (1) more than 50 percent of the ownership or control of which is held by one or more individuals self-identifying as lesbian, gay, bisexual, transgender, or queer, and (2) more than 50 percent of the net profit or loss accrues to one or more individuals self-identifying as lesbian, gay, bisexual, transgender, queer, or intersex." We recommend that the Bureau require financial institutions ask the following question regarding whether the applicants' business is an LGBTQ-owned business:

***LGBTQI+-owned business status***

*For the purposes of this form, an applicant is an LGBTQI+-owned business if one or more lesbian, gay, bisexual, transgender, queer, or intersex persons (i) directly or indirectly own or*

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<sup>45</sup> See, e.g., Rosenwohl-Mack A, et al., A national study on the physical and mental health of intersex adults in the U.S., *PLoS ONE* 5(10):e0240088 (2020); Zeeman, L., & Aranda, K., A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance, *Int. J. Environ. Res. Public Health*, 17:6533 (2020); Tamar-Mattis, S., et al., Identifying and Counting Individuals with Differences of Sex Development Conditions in Population Health Research, *LGBT Health*, 5(5):320 (2018).

<sup>46</sup> National Academies, Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health (accessed Dec. 10, 2021), <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health>.

<sup>47</sup> LGBTQ Business Equal Credit Enforcement and Investment Act, H.R. 1443, 117<sup>th</sup> Congress (2021) <https://www.congress.gov/117/bills/hr/1443/BILLS-117hr1443rfs.pdf>

<sup>48</sup> *Id.*

<sup>49</sup> See "Introduction." National Academies of Sciences, Engineering, and Medicine. 2020. Understanding the Well-Being of LGBTQI+ Populations. Washington, DC: The National Academies Press. doi: 10.17226/25877. See also Biden-Harris Administration Memorializes Transgender Day of Remembrance (Nov. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/20/biden-harris-administration-memorializes-transgender-day-of-remembrance/>.

*control more than 50 percent of the business and (ii) receive more than 50 percent of the net profits of the business.*

***Is the applicant an LGBTQI+-owned business?***

- *Yes*
- *No*
- *I do not wish to provide this information*

## **5. Conclusion**

We thank the CFPB again for the opportunity to comment on this important rulemaking. In summary, in collecting principal owners' sex, sexual orientation, and gender identity we suggest the CFPB ask principal owners three separate questions. We also believe the agency should also strongly consider adding questions to the questionnaire that ask principal owners whether they are intersex, and whether their business is an LGBTQI+-owned business. CFPB should also work with OMB, the Equitable Data Working Group, and federal statistical agencies to evaluate emerging best practices and refine measures over time.

For any questions regarding these comments, please feel free to contact Spencer Watson, Executive Director for CLEAR at [spencer@lgbtq-economics.org](mailto:spencer@lgbtq-economics.org) or 415-278-7358.

Sincerely,

Center for LGBTQ Economic Advancement & Research (CLEAR)  
interACT: Advocates for Intersex Youth