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November 25, 2024

Congressional Research Service
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R48281

CRS REPORT
Prepared for Members and
Committees of Congress

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SUMMARY

R48281

November 25, 2024

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Consumer-Style Protections for Small Businesses: Issues and Options for Congress

Small businesses rely on financing to manage their finances, increase inventory, and expand their business operations. Small business lending from banks remains well below pre–Great Recession levels, and as a result of those changes, nonbank financial companies—including financial technology companies ("fintechs")—have filled much of the void. While these nonbank financial institutions offer some operational advantages over more traditional lenders, they might present some novel risks associated with their nontraditional financing terms and relatively higher pricing.

Consumers have a number of federal protections in the financial marketplace. These protections have limited applicability to small business markets, and some have argued that such protections should apply to small businesses. As a result, congressional, state-level, and regulatory attention has focused on potentially expanding consumer-style protections to small businesses. This report details a handful of the most prominent consumer protections and the extent to which federal and state policymakers have either enacted or proposed changes to consumer-style protections for small businesses. Below is a basic primer on each and their applicability to small businesses:

- The **Truth in Lending Act (TILA)** requires standardized consumer disclosures at origination of the cost of credit and other potentially relevant information. It provides additional protections, including ability-to-repay requirements for mortgages and credit cards. TILA has limited applicability to small businesses.
- The **Fair Debt Collection Practices Act (FDCPA)** regulates debt collectors' communications with consumers, what types of disclosures are required, and consumers' rights in debt collection. It offers no protection for small business loans.
- The **Equal Credit Opportunity Act (ECOA)** prohibits discrimination in credit transactions on the basis of race, sex, religion, and other factors. It applies to small business loans, but some complexities remain.
- The **Fair Credit Reporting Act (FCRA)** establishes consumers' rights in credit reports and scores, required disclosures, and permissible uses of credit reports. It does not apply to small businesses except in limited cases.

This report further presents some of the relevant policy issues and trade-offs presented to Congress and other policymakers considering extending consumer-style protections to small businesses. Any additional protection would likely increase compliance costs for financial institutions, which may constrain access to credit for small businesses. Small business lending may be particularly sensitive to higher compliance costs than other financial services are. Congress may want to establish one federal standard, which could preempt the growing state-by-state small business protections. Other considerations include the level of current stress in the small business market, business owners using personal sources of credit as a substitute for business loans, and the extent to which financial institutions might voluntarily implement consumer-style protections.

Congress may weigh the costs and benefits of changes in protections for small businesses. In the 118th Congress, bills have been introduced that would expand the coverage of TILA to small business credit (H.R. 4192/S. 2021); amend ECOA to repeal, delay, or revise a CFPB-issued rulemaking, required by Section 1071 of the Dodd-Frank Act, that mandates the collection of small business demographic information at origination (S.J.Res. 32, Section 502 of H.R. 8773, H.R. 1806/S. 1159, H.R. 8338, and H.R. 2423); and expand some of FCRA's protections to business credit (H.R. 3071/S. 1371).

Contents

Figures

Tables

Contacts

Introduction

Consumers have a number of federal protections within the financial marketplace, including required disclosure of pricing terms; prohibitions of unfair, deceptive, or abusive practices; and bans on discrimination against borrowers from protected classes. In general, many of those provisions do not extend to small businesses when they act as consumers by applying for, acquiring, and being denied loans intended to support their businesses. This report discusses the current state of small business protections and proposals to change those protections by state and federal policymakers.

Additional consumer protections might benefit small businesses by providing additional information on the pricing and products offered and protections in cases of adverse decisions or events. There are trade-offs for their extension to small businesses, as they may be ineffective or costly. Further, financial institutions may already be providing some of the disclosures that are required to be provided to consumers to small businesses on a voluntary basis.

The health and welfare of small businesses are an issue of long-standing interest to Congress.[1] The 118th Congress has introduced a number of different bills discussed in the section entitled "An Overview of Current Consumer Finance Protections and Their Applicability to Small Business" to modify these protections and alter the role that regulators should play in small business lending markets.

This report provides a brief background on small business financing and a comparison of small businesses to consumers. It examines four important consumer protections, examines their applicability to small businesses, and discusses state and federal action to modify small business protections under these provisions. Finally, the report examines some of the trade-offs facing Congress.

Background

Importance of Small Business Financing

According to the Small Business Administration (SBA) Office of Advocacy, 46% of total private sector jobs and 39% of private sector payroll are in small businesses.[2] SBA research also showed that from 1995 to 2021, small businesses created 17.3 million net new jobs, nearly double those created by large businesses (10.3 million).

Small businesses rely on financing to expand their operations, increase inventory, and deal with unexpected expenses. This financing is vital for their continued growth, but small businesses face challenges in this marketplace. Small businesses are often unstable, with roughly a quarter of all firms failing in their first year and roughly half of all firms failing in the first five years.[3] A 2019

[1] For example, see CRS Report R40985, *Small Business: Access to Capital and Job Creation*, by Robert Jay Dilger and Anthony A. Cilluffo.

[2] SBA, Office of Advocacy, "Frequently Asked Questions," March 2023, p. 1, https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf.

[3] Bureau of Labor Statistics, "Table 7. Survival of Private Sector Establishments by Opening Year, Total Private," October 25, 2023, https://www.bls.gov/bdm/us_age_naics_00_table7.txt.

survey by CB Insights, a market intelligence company, found that the most cited reason for startup failure was that they ran out of money and failed to raise new capital.[4]

New/Changing Sources of Small Business Financing

Relative to before the Great Recession that occurred from 2007 to 2009, small business financing from banks and credit unions is still depressed.[5] As a result of this change—and the fact that nonbanks possess other advantages, including their speed—small businesses have increasingly obtained credit from nonbank sources, including from financial technology companies ("fintechs"), supplier financing, factoring, equipment leasing, and merchant cash advances.[6] While nonbank financing for small businesses declined during the pandemic, it remains more important than before the Great Recession.

These products might offer some advantages for businesses: They might offer faster access to funding, offer more flexibility, and expand access to credit to borrowers unable to obtain loans from banks. Despite these potential advantages, these options might present risks that are less present under a traditional relationship lending with a community bank. Some forms of nonbank lending might feature more difficult-to-understand terms in the case of revenue-based financing, while some nonbanks might offer higher-cost loans, making repayment of these loans potentially more difficult.[7] Banks might currently provide better protections than do nonbanks due their relatively longer history of implementing and complying with consumer protection regulations.

How Are Small Businesses Similar to and Different from Consumers?

A key component of this issue is whether the rationales for protecting consumers also apply to small businesses. If so, expanding such regulatory framework might be desirable, but if not, the status quo might be sufficient.

Most small businesses are very small.[8] According to the SBA Office of Advocacy, 82% of all small business firms have no employees (i.e., the owner is the only employee), and 2% of SBA-

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[4] CB Insights, "The Top 12 Reasons Startups Fail," August 3, 2021, https://www.cbinsights.com/research/report/startup-failure-reasons-top/.

[5] Such declines from banks were not spread evenly across geography and were disproportionately felt in rural areas and areas where bank branches closed from mergers. For more about changes in small business lending from banks around the Great Recession, see Karl Schneider et al., "Small Business Lending and the Great Recession," Consumer Financial Protection Bureau, January 2020, https://files.consumerfinance.gov/f/documents/cfpb_data-point_small-business-lending-great-recession.pdf; Rebel A. Cole, *Bank Lending to Rural vs. Urban Firms in the United States Before, During, and After the Great Financial Crisis*, SBA, Office of Advocacy, May 5, 2020, https://advocacy.sba.gov/wp-content/uploads/2020/05/REPORT-Cole-Rural-and-Urban-Lending_pd.pdf; Hoai-Luu Q. Nguyen, "Are Credit Markets Still Local? Evidence from Bank Branch Closings," *American Economic Journal: Applied Economics*, vol. 11, no. 1 (January 2019).

[6] Nonbanks offer consumer finance products or services but do not have traditional bank or credit union charters and are subsequently less regulated, in general, at the federal level.

[7] Brett Barkley and Mark E. Schweitzer, "The Rise of Fintech Lending to Small Businesses: Businesses' Perspectives on Borrowing," Federal Reserve Bank of Minneapolis, June 2020, https://www.minneapolisfed.org/institute/working-papers/wp20-03.pdf.

[8] Definitions of *small business* vary and are outside of the realm of this report. For more on this topic, see page 3 of CRS Report R47788, *Section 1071: Small Business Lending Data Collection and Reporting*, coordinated by Darryl E. Getter.

defined small businesses have more than 20 employees.[9] The SBA defines *small business* using a combination of the number of employees and annual receipts based on the industry. The SBA's definition of *small business* for certain industries can include relatively large, sophisticated companies with up to 1,500 employees.

Smaller and oftentimes less financially sophisticated small businesses might be susceptible to making unwise financial decisions based on asymmetric information. According to a Federal Reserve study, small business borrowers that use online lenders "tend to be smaller 'mom & pops' … that are very consumer-like in their approach to financing" with "limited financial expertise."[10] These borrowers complained that their loan products were often difficult to understand without clear disclosures of pricing information.

On the other hand, some have argued that the average small business's resources, bargaining power, and financial wherewithal is more sophisticated than the average consumer and there is less of a need for consumer-style protections as a result.[11] Businesses have distinct credit uses and different loan products and may have access to more sophisticated financial advice than consumers do and might compare multiple product types with different financing vehicles. For example, traditional annual percentage rates (APRs) do not neatly work for sales-based financing.[12]

Businesses often take on risk, including financing as a means of profit maximization. In contrast, risk in consumer finances is not perceived in the same manner, as it can lead to distinct negative outcomes with limited profitability upside. Therefore, some argue that this risk tolerance should be reflected in potential protections associated with the different product types. A complicating factor is that a small business owner's personal and business finances are often intertwined, meaning small business financing outcomes can directly impact consumers' overall financial picture.[13]

An Overview of Current Consumer Finance Protections and Their Applicability to Small Business

Consumers have a number of federal protections in the financial marketplace. Broadly, they fall into three categories: (1) *standardized consumer disclosures* that help explain product terms; (2)

[9] SBA, Office of Advocacy, "2023 Small Business Profile," https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-US.pdf.

[10] Barbara J. Lipman and Ann Marie Wiersch, *Uncertain Terms: What Small Business Borrowers Find When Browsing Online Lender Websites*, Board of Governors of the Federal Reserve System, December 2019, https://www.federalreserve.gov/publications/files/what-small-business-borrowers-find-when-browsing-online-lender-websites.pdf.

[11] Kelly W. Cline, "After All This Time: An Analysis of the Recent Trend to Extend Truth-in-Lending-Style Disclosures to Commercial-Financing Transactions," *Campbell Law Review*, vol. 45, no. 2 (2023).

[12] Cole Harmonson, "Comment Letter—Intent to Make Preemption Determination under the Truth in Lending Act (Regulation Z)," American Factoring Association, January 20, 2023, https://www.regulations.gov/comment/CFPB-2022-0070-0010.

[13] Arthur B. Kennickell et al., "Small Businesses and Small Business Finance During the Financial Crisis and the Great Recession: New Evidence from the Survey of Consumer Finances," *Measuring Entrepreneurial Businesses: Current Knowledge and Challenges*, vol. 14, no. 1 (September 2017), pp. 291-349; Emily Wavering Corcoran et al., *2023 Report on Employer Firms: Findings from the 2022 Small Business Credit Survey*, Fed Small Business, March 2023, https://www.fedsmallbusiness.org/reports/survey/2023/2023-report-on-employer-firms.

prohibitions against *unfair, deceptive, or abusive acts*; and (3) *fair lending laws* that prohibit discrimination on the basis of sex, race, religion, and among various other factors.[14] Other substantive provisions include outlining consumer rights under credit reporting or debt collection and ability-to-repay requirements for mortgages, among other provisions. These protections are designed to improve consumer outcomes, give consumers more information on their financing options, and provide additional protections in case of adverse outcomes in credit decisions or delinquencies.

Largely, consumer protections do not cover credit offered to small or large businesses in the same manner as consumer transactions. This section and **Table 1** detail four federal consumer protection laws and their applicability, if any, to small businesses. Each of these laws is described in more detail in the sections below. Although the list is not comprehensive, these laws were selected for their perceived importance or recent actions at the federal or state level to expand these protections to small businesses.

Table 1. Selected Federal Protection for Small Business by Consumer Finance Regulation

Consumer Finance Regulation	Summary of Regulation	Federal Protection for Small Businesses?
Truth in Lending Act (TILA) (15 U.S.C. §§1601 et seq.)	Requires standardized consumer disclosures with information such as APRs. Provides additional protections including ability-to-repay requirements for mortgages and credit cards.	No, except for limited requirements, such as the unauthorized use liability, which limits an individual's liability for unauthorized use of a credit card to $50.
Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. §§1692 et seq.)	Regulates debt collectors' communications with consumers, what types of disclosures and required, and consumers' rights in debt collection.	No.
Fair Credit Reporting Act (FCRA) (15 U.S.C. §§1681 et seq.)	Establishes the consumers' rights in credit reports and scores, required disclosures, and permissible uses of credit reports.	No, except in limited circumstances, where a business is a sole proprietor and denied on the basis of a personal credit score.
Equal Credit Opportunity Act (ECOA) (15 U.S.C. §§1691 et seq.)	Prohibits discrimination in credit transactions on the basis of race, sex, religion, and other characteristics.	Yes.

Source: CRS.

In the absence of additional protections at the federal level, some states have enacted additional consumer-style protections for small businesses, with policymaking highly concentrated in California. These recently enacted laws range in scope and potential impact. This section also discusses proposed, recently implemented federal regulatory, and/or legislative actions to change these protections for small businesses.

[14] These descriptions of consumer protections in the financial marketplace come from CRS Report R45813, *An Overview of Consumer Finance and Policy Issues*, by Cheryl R. Cooper.

Truth in Lending Act (TILA)

Overview of TILA and Applicability to Small Businesses

TILA (15 U.S.C. §§1601 et seq.) requires lenders to disclose standardized information for various financing products at the time of origination.[15] In addition, TILA mandates periodic statements and ability-to-repay requirements for open-end credit and mortgages, among other provisions.[16] These TILA disclosures are intended to help consumers make informed decisions and prevent potentially predatory lending. The Consumer Financial Protection Bureau (CFPB) has rulemaking authority for TILA and shares supervisory and enforcement powers with a number of other regulators.

TILA applies to most forms of consumer lending, including mortgages, auto loans, credit cards, and payday loans. TILA covers loans under $69,500, excluding those made for housing.[17] With a few exceptions, TILA does not apply to credit extended primarily for business, commercial, or agricultural purposes.[18] One exception is that business credit cards are often covered by the unauthorized use liability, which limits cardholder liability for unauthorized use to $50.[19] Additionally, similar to consumer cards, a business credit card cannot be issued on an unsolicited basis, meaning it requires an application or a renewal associated with the account.[20]

State Legislation or Rulemakings

Eight states, identified in **Table 2** below, have implemented commercial financing disclosure laws similar to the federal TILA to commercial credit transactions. These state laws broadly require the disclosure of the financing terms, cost of credit, and timeline for repayment.

Some key aspects of these state TILA-style commercial credit disclosures laws are as follows:

- These laws entirely exempt commercial financing by depository institutions and are targeted at nonbanks. Only New York and California specifically include coverage of banks' nonbank subsidiaries.
- Sales-based financing and merchant cash advance (MCA) are a major focus of these disclosure laws.[21] All of these laws include coverage of MCAs, and three of the laws exclusively target these products. According to the CFPB, MCA products represented less than 1% of the small business financing market in 2017, but MCA originations have more than doubled from 2014 to 2019.[22]

[15] For a more thorough overview of TILA, see CRS In Focus IF12769, *Overview of the Truth in Lending Act*, by Karl E. Schneider.

[16] See 12 C.F.R. §§1026.51 (ability-to-repay for credit cards), 12 C.F.R. §1026.43 (ability-to-repay for mortgages), 12 C.F.R. §1026.7 (periodic statements for open-end credit), and 12 C.F.R. §1026.41 (periodic statements for mortgages).

[17] 12 C.F.R. §1026.3(b).

[18] 15 U.S.C. §1603(1).

[19] 1026 C.F.R. §12(b).

[20] 1026 C.F.R. §12(a).

[21] Some observers think MCA poses especially high risk. For example, a *Wall Street Journal* article flagged MCA financing arrangements as potentially risky for small businesses with high financing costs, which some argue has led to a disproportionate number of bankruptcies. Becky Yerak, "An Easy Financing Source Pushes Some Small Businesses into Bankruptcy," *Wall Street Journal Pro: Bankruptcy*, February 19, 2024.

[22] CFPB, *Key Dimensions of the Small Business Lending Landscape*, May 2017, p. 21, https://files.consumerfinance.gov/f/documents/201705_cfpb_Key-Dimensions-Small-Business-Lending-(continued...)

- All of these state commercial credit laws have been implemented since 2022, indicating a growing interest in small business financing disclosures at the state level.
- Other states—such as Maryland, Illinois, and Missouri—have contemplated similar legislation. Some would target MCAs, and others would address a broader range of commercial financing.[23]

Table 2. State Commercial Financing Disclosure Laws

State	Implementation Date	Institutional Coverage	Transaction Threshold
New York	August 2023[a]	Exempts depository institutions (DIs—i.e., banks and credit unions) and their subsidiaries.	$2,500,000 or less
California	December 2022[b]	Exempts DIs but not their nonbank subsidiaries.	$5,000 to $500,000
Kansas	July 2024[c]	Exempts DIs and their subsidiaries.	$500,000 or less
Florida	January 2024[d]	Exempts DIs and their affiliates and subsidiaries.	$500,000 or less
Georgia	January 2024[e]	Exempts DIs and their affiliates and subsidiaries.	Less than $500,000
Utah	January 2023[f]	Only MCAs.	$1,000,000 or less
Virginia	July 2022[g]	Only MCAs.	Less than $500,000
Connecticut	July 2024[h]	Only MCAs.	$250,000 or less

Source: CRS.

a. S5470B, Session Year 2019-2020 (New York, 2019), https://www.nysenate.gov/legislation/bills/2019/S5470.

b. SB 1235, Session Year 2017-2018 (California, 2018), https://legiscan.com/CA/text/SB1235/id/1794182.

c. SB 345, Session Year 2023-2024 (Kansas, 2024), https://kslegislature.org/li/b2023_24/measures/documents/sb345_enrolled.pdf.

d. CS/HB 1353, Session Year 2022-2024 (Florida, 2023), https://www.flsenate.gov/Session/Bill/2023/1353/BillText/er/PDF.

e. SB 90, Session Year 2023-2024 (Georgia, 2023), https://www.legis.ga.gov/api/legislation/document/20232024/219440.

f. SB183, Session Year 2022 (Utah, 2022), https://le.utah.gov/xcode/Title7/Chapter27/C7-27_2022050420220504.pdf.

g. HB 1027, Session Year 2022 (Virginia, 2022), https://lis.virginia.gov/cgi-bin/legp604.exe?221+sum+HB1027.

h. SB 1032, Session Year 2023. (Connecticut, 2023), https://legiscan.com/CT/text/SB01032/2023.

CFPB Preemption Decision

Under some consumer protection laws, including TILA, the CFPB is expressly authorized to determine if a state law is preempted or overridden by the federal statute. In a preemption

Landscape.pdf; CFPB, "Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)," 88 *Federal Register* 35154, May 31, 2023.

[23] Onyx IQ, "MCA Disclosure Laws Map," 2024, https://onyxiq.com/commercial-financing-disclosure-laws/.

determination released March 2023, the CFPB argued that these state TILA-style disclosure laws were not preempted by existing federal TILA law.[24]

This determination specifically addressed the New York and California laws, which have different APR calculations from the federal standard. Federal TILA explicitly *excludes* participation or membership fees and application charges from APRs, whereas these state laws explicitly *include* those provisions. This means identical consumer and business loans with nonzero unavoidable fees from these categories would have different APRs under federal TILA than under these state-based commercial disclosure laws. Some industry groups—such as the Revenue Based Finance Coalition and the Independent Community Bankers of America—disagreed with this assessment for the California and New York laws, which they argue materially differed from TILA in their calculation of APR and finance charges.[25] These industry groups argued that this discrepancy should have led the CFPB to preempt these laws. Overall, in the comments to this determination, there was little dispute that states *could* extend TILA-style disclosures in some form to commercial loans.

Federal Legislation or Rulemakings

Extending TILA to commercial transactions would require an act of Congress. As the CFPB noted in its preemption decision, "commercial financing transactions to businesses—and any disclosures associated with such transactions—are beyond the scope of TILA's statutory purposes, which concern consumer credit."

Bills introduced in the 118th Congress would expand TILA to small business financing. H.R. 4192/S. 2021 would extend TILA's provisions to commercial lending for new financing of less than $2.5 million. Unlike laws passed at the state level, the bill would also mandate disclosures for banks as well as nonbanks and require the CFPB to undertake a new rulemaking. This law would provide alternative disclosures for MCAs and factoring transactions.

Fair Debt Collection Practices Act (FDCPA)

Overview of FDCPA and Applicability to Small Businesses

The FDCPA (15 U.S.C. §§1692 et seq.) regulates collection agencies and debt collectors' communications with consumers, disclosure requirements, and consumers' rights in debt collection.[26] The FDCPA aims to eliminate abusive practices by debt collectors and provide consumers with rights in debt collection. The CFPB shares enforcement powers over the FDCPA

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[24] CFPB, "Truth in Lending; Determination of Effect on State Laws (California, New York, Utah, and Virginia)," 88 *Federal Register* 19214, March 31, 2023.

[25] Deveron Gibbons, "RE: Intent to Make Preemption Determination Under the Truth in Lending Act (Regulation Z) (Docket No. CFPB-2022-0070)," Revenue Based Finance Coalition, January 18, 2023, https://downloads.regulations.gov/CFPB-2022-0070-0008/attachment_1.pdf; Michael Emancipator, "RE: [Docket No. CFPB-2022-0070] Intent to Make Preemption Determination Under the Truth in Lending Act (Regulation Z)," Independent Community Bankers of America, January 20, 2023, https://downloads.regulations.gov/CFPB-2022-0070-0011/attachment_1.pdf.

Separately, the Small Business Finance Association argued that the California law was unconstitutional because it violated financing firms' First Amendment rights. See *Small Business Finance Association v. Clothilde Hewlett* (District Court for the Central District of California 2023). Ultimately, this litigation was unsuccessful, and this law remains in effect.

[26] For more on debt collection market generally, see CRS Report R46477, *The Debt Collection Market and Selected Policy Issues*, by Cheryl R. Cooper. For more specific information on the CFPB's debt collection regulations, see CRS Insight IN11590, *CFPB Finalizes Two New Debt Collection Regulations*, by Cheryl R. Cooper.

with the Federal Trade Commission (FTC). Since 2012, the CFPB has issued 66 public enforcement actions against financial institutions for noncompliance with the FDCPA.

The FDCPA applies to debt "primarily for personal, family, or household purposes" and does not apply to commercial debt.[27]

State Legislation or Rulemakings

California enacted SB 1286 in September 2024 to provide FDCPA-like protections to small businesses through the California-state Rosenthal Fair Debt Collection Practices Act (known as the Rosenthal Act).[28] The Rosenthal Act prohibits debt collectors and creditors, including the original financial institutions, from engaging in unfair and deceptive practices for consumer debt.

States can impose greater protections for consumers in debt collection markets by, for example, imposing more restrictive rules on telephone call frequency.[29] There has been no explicit preemption decision from the CFPB on states regulating commercial debt collection.

Federal Legislation or Rulemakings

Expanding the FDCPA to commercial transactions would require an act of Congress. In its 2022 annual report on the FDCPA to Congress, the CFPB flagged potentially concerning practices by debt collectors against businesses but noted that its mandate for FDCPA enforcement did not cover commercial transactions.[30]

Introduced in the 117th Congress, H.R. 6814 would have extended the FDCPA to small businesses for financing agreements less than $5 million. This bill did not receive any action and has not been introduced in the 118th Congress.

Fair Credit Reporting Act (FCRA)

Overview of FCRA and Applicability to Small Businesses

The FCRA (15 U.S.C. §§1681 et seq.) establishes consumers' rights in credit reports and scores and requires certain disclosures.[31] The FCRA defines the types of information that can be included in credit reports and allows consumers to ask for their credit scores and obtain all of the information in their credit reports that ultimately create credit scores.[32] Consumers also have the right to dispute any inaccuracies in their reports.[33] The CFPB has rulemaking authority under the

[27] CFPB, "What Laws Limit What Debt Collectors Can Say or Do?," April 30, 2023, https://www.consumerfinance.gov/ask-cfpb/what-laws-limit-what-debt-collectors-can-say-or-do-en-329/.

[28] SB 1286, Session Year 2023-2024 (California, 2024), https://legiscan.com/CA/text/SB1286/id/2988067.

[29] See 15 U.S.C. §1692n and CFPB, "Debt Collection Rule FAQs," October 1, 2021, https://www.consumerfinance.gov/compliance/compliance-resources/other-applicable-requirements/debt-collection/debt-collection-rule-faqs/.

[30] CFPB, *Fair Debt Collection Practices Act: CFPB Annual Report 2022*, March 2022, https://files.consumerfinance.gov/f/documents/cfpb_fdcpa_annual-report-congress_04-2022.pdf.

[31] CFPB, *CFPB Consumer Laws and Regulations; Fair Credit Reporting Act*, October 2012, https://files.consumerfinance.gov/f/documents/102012_cfpb_fair-credit-reporting-act-fcra_procedures.pdf.

[32] 12 C.F.R. §1022.42.

[33] 12 C.F.R. §1022.43.

FCRA. The CFPB, the FTC, banking regulators, and other federal agencies share enforcement authority over the FCRA.[34]

Small businesses often use either personal and commercial credit reports to obtain commercial credit. Despite that, the FCRA generally applies only to consumers and consumer credit reports. The FCRA exempts commercial credit reports and most instances of using personal credit reports for business lending, with some limited exceptions.[35] Specifically, an FCRA adverse action notice, which provides a borrower with a reason for denial of a loan, might apply to a business loan if the borrower is a sole proprietor and the adverse action was taken as a result of a consumer credit report.[36]

State Legislation or Rulemakings

There has not been any legislation enacted at the state level to expand the FCRA to small businesses. States can impose greater protections in consumer reporting markets to expand FCRA authorities by, for example, forbidding credit reporting agencies from including arrest records or evictions in consumer reports.[37] There has been no explicit preemption decision from the CFPB on states legislating commercial credit reports.

Federal Rulemakings and Legislation

In March 2023, the FTC launched an inquiry into business credit reports and mandated that five major credit bureaus provide "detailed information about their products and processes" to better understand the challenges small businesses face in the credit reporting market.[38]

Bills have been introduced in the 118th Congress that would expand small businesses' rights in the business credit score market. For example, H.R. 3071/S. 1371 would require that credit reporting agencies promptly report small business data breaches and prohibit these agencies from charging small businesses to access their credit reports in the event of a breach.

Equal Credit Opportunity Act (ECOA)

Overview of ECOA and Applicability to Small Businesses

ECOA (15 U.S.C. §§1691 et seq.) prohibits discrimination in credit transactions on the basis of race, age, sex, and national origin, among other factors.[39] The CFPB has primary rulemaking authority under ECOA and shares enforcement authorities with the Office of the Comptroller of

[34] 15 U.S.C. §1681s.

[35] In general, 88% of borrowers used their personal credit scores to obtain small business financing due to the relative unavailability and complexity of obtaining a business credit score.

[36] National Association of Federally Insured Credit Unions, "Adverse Action Notice Requirements for Business Credit Applicants," August 17, 2020, https://www.nafcu.org/compliance-blog/adverse-action-notice-requirements-business-credit-applicants.

[37] 15 U.S.C. §1681s(e). See also CFPB, "The Fair Credit Reporting Act's Limited Preemption of State Laws," 87 *Federal Register* 41042-41046, July 11, 2022.

[38] FTC, "FTC Launches Inquiry into Small Business Credit Reports," press release, March 16, 2023, https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-launches-inquiry-small-business-credit-reports.

[39] CFPB, *CFPB Consumer Laws and Regulations: Equal Credit Opportunity Act (ECOA)*, June 2013, https://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_ecoa-combined-june-2013.pdf.

the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, National Credit Union Administration, FTC, and Department of Justice.[40]

ECOA applies to a variety of loans, including credit cards, student loans, mortgages, and personal loans. ECOA protections *apply* to commercial credit, including traditional loans and credit cards.[41] The CFPB has previously filed a consent order for violations of ECOA against American Express for potential discriminatory lending practices within the business credit card market.[42]

State Legislation or Rulemakings

There has not been any recently enacted legislation or rulemakings specifically focused on modifying ECOA standards for small business lending at the state level.

Federal Legislation or Rulemakings

One of the historical challenges with enforcing ECOA in the small business market is determining the race, sex, and ethnicity of small businesses, as those data points were generally illegal to collect.[43] The CFPB has traditionally used race, ethnicity, and gender proxies to estimate demographics in small business examinations, with some degree of uncertainty.[44]

Section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act required that financial institutions collect demographic information of small businesses to measure more precisely race, ethnicity, and sex, which would facilitate ECOA examinations. In March 2023, the CFPB finalized the Section 1071 rule, which, if implemented, would mandate this demographic data collection and public reporting of small business loans, similar to those found under the Home Mortgage Disclosure Act for mortgages.[45] This rule may strengthen the ECOA enforcement in small business lending, but many complexities remain.[46] This rule is scheduled to be phased in beginning with the highest volume lenders in June 2026.

The 118th Congress previously passed S.J.Res. 32, which would have used the Congressional Review Act to repeal the Section 1071 rule. However, President Biden vetoed the resolution, and a vote to override the presidential veto failed. Section 502 of H.R. 8773, the FY2025 Financial Services and General Government appropriations bill, as reported by the House Committee on Appropriations, would prohibit the CFPB from implementing the Section 1071 rule.[47]

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[40] 15 U.S.C. §1691c.

[41] 12 C.F.R. §1002.1.

[42] CFPB, *Consumer Financial Protection Bureau, Consent Order, In re American Express Centurion Bank, File No. 2017-CFPB-0016, 2017 BL 295200*, 2017.

[43] For more on this, see CRS Report R47788, *Section 1071: Small Business Lending Data Collection and Reporting*, coordinated by Darryl E. Getter.

[44] CFPB, *Using Publicly Available Information to Proxy for Unidentified Race and Ethnicity*, September 2014, https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf.

[45] For more on the Section 1071 rulemaking, see CRS Report R47788, *Section 1071: Small Business Lending Data Collection and Reporting*, coordinated by Darryl E. Getter.

[46] Undertaking fair lending exams in small business can be more difficult than in standard consumer exams. For example, small businesses are from a variety of industries, some of which have a higher chance of failure or growth potential, which can influence the underwriting process and complicate the fair lending exams. Previous research from SBA found a gradually increasing share of borrowers not reporting their race, which could happen under Section 1071 in the future as well. A high share of applicants with missing demographic data might lead to concerns regarding the validity of the collected race data and could undermine fair lending analysis.

[47] For more on the FY2025 FSGG bill pertaining to the CFPB, see CRS Insight IN12409, *Financial Services and*
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Other legislation in the 118th Congress would delay the implementation of or modify the compliance provisions in Section 1071. H.R. 1806/S. 1159 would limit compliance with the rule to financial institutions with 500 annual loan applications (currently 25) and define *small business* as those with less than $1 million in annual revenue (currently $5 million). The bill would also provide an institution with three years to comply with any new rule issued by the CFPB and an additional two-year safe harbor from enforcement actions. H.R. 8338, a larger bill on small-dollar lending and revising CFPB regulations, has very similar provisions. H.R. 1806/S. 1159 has not seen action in Congress, while H.R. 8338 was ordered to be reported by the House Committee on Financial Services. Separately, H.R. 2423 would exempt entities under the Farm Credit System from reporting demographic data to the CFPB, instead allowing them to voluntarily report demographic data to the Farm Credit Administration.

Issues Facing Congress

Are Small Businesses in Need of Further Protection?

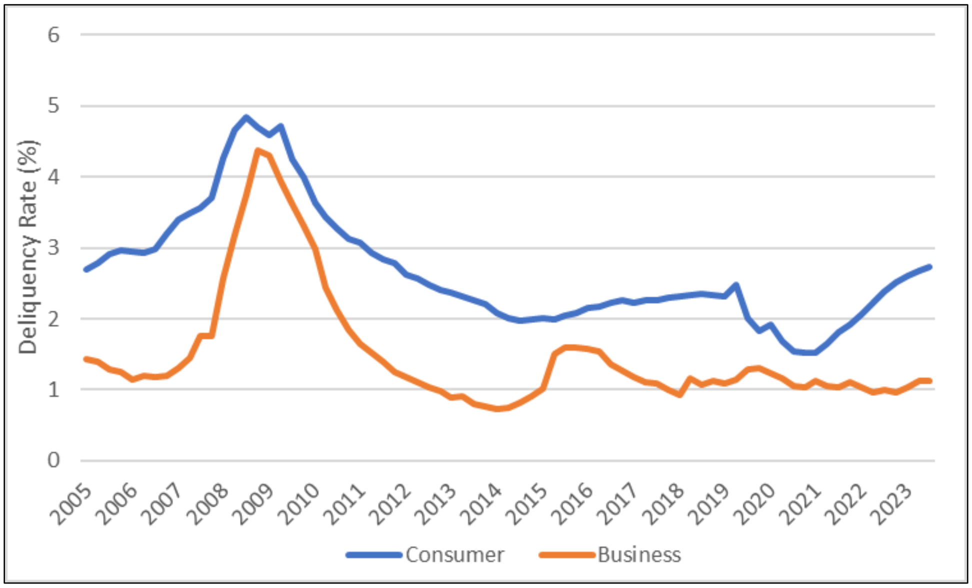
Delinquencies

Widespread delinquencies by small businesses might be an indication of a need for more consumer-style protections. Evidence in this area is mixed, with some notable differences between trends at banks and nonbanks. According to the Federal Reserve, as of the second quarter of 2024, the delinquency rate of all business loans at commercial banks was lower at (1.1%) than personal loans (2.7%),[48] consistent with a common trend over the past 20 years of data (**Figure 1**). Furthermore, business delinquencies have been fairly stable since about 2017, while consumer delinquencies have risen in recent years. However, these disparities could be a result of tighter commercial bank lending standards for business loans, more financial wherewithal on the part of businesses relative to consumers, or other factors. It could also mean that consumer protections are relatively less important in determining delinquencies and that such adverse outcomes are more closely tied to macroeconomic performance.

General Government FY2025 Appropriations: CFPB's Funding and Structure Provisions, by Karl E. Schneider and David H. Carpenter.

[48] Board of Governors of the Federal Reserve System, *Delinquency Rate on Consumer Loans, All Commercial Banks*, August 19, 2024, https://fred.stlouisfed.org/series/DRCLACBS.

Figure 1. Delinquency Rate by Loan Type: All Commercial Banks



Source: Board of Governors of the Federal Reserve System, *Delinquency Rate on Consumer Loans, All Commercial Banks*, August 19, 2024, https://fred.stlouisfed.org/series/DRCLACBS.

Note: This analysis does not account for nonbank lending sources and business loans including those made to larger businesses.

While the current delinquency rates for business loans in commercial banks show few current indications of stress that might require additional regulation, default rates on business loans made by fintechs spiked during the COVID-19 pandemic. For example, in March 2020, 22% of OnDeck's small business loans were non-paying, relative to 7.6% in the fourth quarter of 2019.[49] This elevated delinquency rate might be driven by borrower risk—those riskier borrowers might be eligible for and receive only fintech lending as opposed to traditional bank financing. There is debate in academic research regarding whether fintech firms are better at predicting credit default risk in the small business and consumer lending markets.[50]

Voluntary Consumer Protections

Financial institutions might already be voluntarily putting into place some of these protections that are not required by federal law for small businesses. For example, APR disclosures required by TILA for consumer transactions are present in many popular business credit cards.[51] Regardless of any federal protections, consumers may prefer these voluntary APR disclosures to better compare the relative cost of credit across multiple products. In 2019, the Federal Reserve

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[49] Itzhak Ben-David et al., *Why Did Small Business FinTech Lending Dry Up During the COVID-19 Crisis?*, National Bureau of Economic Research, Working Paper no. 29505, November 2022, p. 33, https://www.nber.org/papers/w29205. Comparing default rates in commercial banks and fintechs during the pandemic might require closer examination of the Paycheck Protection Program and other factors that could have made differences in small business delinquencies.

[50] Giulio Cornelli et al., "The Impact of Fintech Lending on Credit Access for U.S. Small Businesses," *Journal of Financial Stability*, vol. 73 (August 2024); Marco Di Maggio and Vincent Yao, "Fintech Borrowers: Lax Screening or Cream-Skimming?," *Review of Financial Studies*, vol. 34, no. 10 (October 2021), pp. 4565-4618; Paul Beaumont et al., "Collateral Effects: The Role of FinTech in Small Business Lending," *Proceedings of the EUROFIDAI-ESSEC Paris December Finance Meeting 2022*, August 29, 2023.

[51] See, for example, Capitol One, "Explore Your Business Credit Card Options," https://www.capitalone.com/small-business/credit-cards/; JP Morgan Chase, "Business Credit Cards," https://creditcards.chase.com/business-credit-cards.

found mixed results in terms of product cost disclosures for online lenders, with about half of traditional loans featuring APRs on publicly available webpages.[52] Financial institutions might be putting commercial loans through similar regulatory screening as consumer loans to, for example, prevent abusive acts and practices for reputational or small business welfare reasons.

Increased Usage of Personal Financing for Small Businesses

The decline in small business lending from financial institutions since the beginning of the Great Recession has pushed businesses to increasingly use consumer credit through mortgages and personal credit cards, with previously discussed consumer protections. One study looking at a sample of 300,000 firms found that total business credit declined approximately $13,600 per firm between 2009 and 2018.[53] According to this study, these firms increasingly relied on personal credit, primarily mortgages, in response to new business credit constraints. There are risks with using these consumer products for business credit. Because a mortgage is secured against one's home, business failure or excess utilization could result in adverse consumer consequences.

If individuals are increasingly using personal sources of credit to finance their businesses, that might decrease the importance of additional consumer-style protections for small businesses. Alternatively, it could imply that the same protections should apply to different products that are being used for the same purpose.

State-by-State Protections

The rise of state legislation in some of these issue areas could complicate financial institution compliance with this new state-by-state legislation. Potentially, this regulatory regime may be more difficult and costly to comply with relative to one federal standard regulation, especially if that federal standard is relatively lax. Currently, the CFPB has issued a handful of previously discussed preemption decisions that have interpreted the degree to which states could enact additional protections at the state level. Some of these decisions could potentially be reversed in the future by different CFPB leadership. Congress could step in and create one national compliance regime for small business lending in the vein of these consumer regulations or preempt these state laws without implementing additional federal regulation.

Regulation, Compliance Costs, and Lending Activity

Expanding consumer-style protections to small businesses would likely increase compliance costs for financial institutions, which might be passed along to borrowers and potentially constrain future small business lending activity. Additional compliance costs might disproportionately negatively impact small business lending markets more than others.

The degree to which stricter regulations could have these adverse effects is the subject of a number of studies. Research by the Federal Reserve indicated that small business lending might be less profitable for banks than other banking products and thus might be more responsive to additional regulatory costs.[54] Some research indicates that the decline in bank small business

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[52] Lipman and Wiersch, *Uncertain Terms*.

[53] Julia Fonseca and Jialan Wang, "How Much Do Small Businesses Rely on Personal Credit?," CFPB, November 2022, https://files.consumerfinance.gov/f/documents/cfpb_2022-research-conference_session-6_fonseca-wang_paper.pdf.

[54] Ann Marie Wiersch and Scott Shane, "Why Small Business Lending Isn't What It Used to Be," Federal Reserve Bank of Cleveland, August 14, 2013, https://www.clevelandfed.org/publications/economic-commentary/2013/ec-
(continued...)

lending since the Great Recession was largely driven by new regulations pursuant to the Dodd-Frank Act. A study by academic economists links the new regulations from Dodd-Frank to financial institutions tightening credit for small business loans, which declined relative to larger commercial loans.[55] Other academic research indicates that large banks subject to new stress tests were more likely to reduce the number of small business loans and raise interest rates on those that were originated.[56] In contrast, research by the Government Accountability Office found that the effects of regulations since the Great Recession on small business lending by community banks were "modest" and that the economic environment and increased competition were the cause of declining loan numbers to small businesses.[57]

New regulatory costs for additional consumer-style protections for small businesses may be borne by the small businesses themselves or potentially their customers. As the CFPB stated during the Section 1071 rulemaking, "The Bureau expects that much of the variable cost component of ongoing costs would be passed on to small business borrowers in the form of higher interest rates or fees."[58] Even if the variable ongoing cost of compliance were minimal—as the CFPB argued was the case for Section 1071—there might be marginal borrowers that are no longer creditworthy or are priced out from the additional cost of regulation. Additional compliance requirements can also result in additional reputational risk or compliance costs for financial institutions associated with novel compliance, supervision, and enforcement activity.

These costs might be particularly high for smaller community banks, where the burden of regulation is disproportionately felt. According to the Conference of State Bank Supervisors, regulatory expenses as a share of total expenses are higher for smaller banks than for larger banks, which can more easily absorb additional compliance costs with existing compliance teams.[59]

201310-why-small-business-lending-isnt-what-it-used-to-be. The authors argue that the lower profitability in small business lending is because these loans "are banker-time intensive, are more difficult to automate, have higher costs to underwrite and service, and are more difficult to securitize."

[55] Michael D. Bordo and John V. Duca, *The Impact of the Dodd-Frank Act on Small Business*, National Bureau of Economic Research, Working Paper no. 24501, April 2018, https://www.nber.org/papers/w24501. Ultimately, the authors connect this contraction in small business loans to a broader decline in business formation.

[56] Kristle R. Cortés et al., "Stress Tests and Small Business Lending," *Journal of Financial Economics*, vol. 136, no. 1 (April 2020), pp. 260-279.

[57] Government Accountability Office, *Effect of Regulations on Small Business Lending and Institutions Appears Modest, but Lending Data Could Be Improved*, GAO-18-132, August 6, 2018, https://files.gao.gov/reports/GAO-18-312/index.html.

[58] CFPB, *Small Business Advisory Review Panel for Consumer Financial Protection Bureau Small Business Lending Data Collection Rulemaking*, September 15, 2020, p. 63, https://files.consumerfinance.gov/f/documents/cfpb_1071-sbrefa_outline-of-proposals-under-consideration_2020-09.pdf.

[59] William Dunkelberg and Jonathan Scott, "Community Bank Compliance Costs," Conference of State Bank Supervisors, https://www.csbs.org/sites/default/files/2018-12/CSBS%20Survey%20Report_COMPLIANCE%20COSTS.pdf. This work relies on cost estimates from the Conference of State Bank Supervisors's 2018 National Survey of Community Banks.

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