

October 24, 2016

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

**Re: Amendments Relating to Disclosure of Records & Information
Docket No. Bureau-2016-0039; RIN 3170-AA63**

Dear Ms. Jackson:

The American Financial Services Association (“AFSA”)¹ appreciates the opportunity to comment on this proposed rule issued by the Consumer Financial Protection Bureau (the “Bureau”). We will address the provisions in the proposed rule relating to the Freedom of Information Act (“FOIA”) and the disclosure of confidential information.

I. FOIA Requests

AFSA members have a keen interest in the outcome of this rulemaking as FOIA presents an important opportunity to gain insight into the Bureau’s motivation and actions. AFSA is concerned with the number of FOIA requests that have been rejected. We ask that the Bureau follow the current requirements and provide the promised openness that the proposed rule seeks to provide. Sadly, the reality has been different. Below are some examples of the Bureau’s all too common pattern of denying FOIA requests.

- *Information about the metrics used to support claims of disparate impact: Denied*

A 2013 Bulletin entitled “Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act” relating to whether and under what circumstances auto lenders are liable under the legal doctrines of both disparate treatment and disparate impact. The Bureau refused to provide the data making it virtually impossible for an entire segment of lenders to construct compliance programs to prevent discrimination.²

- *Information about focus groups used to support policy claims: Denied*

A 2015 Bureau report entitled “Consumer Voices on Credit Reports and Scores” claimed consumer focus groups showed participants “expressed confusion, frustration, and uncertainty” about their credit ratings. A FOIA request seeking information about the groups and the process and parameters used to select the groups was denied.³

¹ Founded in 1916, the American Financial Services Association (“AFSA”) is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

² FOIA Request #Bureau-2014-140-F

³ *Benjenk v. Bureau*; U.S. District Court for the District of Columbia, (No. 1:2015-cv-01115)

- *Information about the Bureau’s effort to regulate auto dealers: Denied*

On several occasions, the National Automobile Dealers Association requested documents acknowledging that the agency intended to regulate the auto finance market through enforcement action—despite a lack of statutory authority. These requests were denied, including access to a leaked document readily available to the public.⁴

- *Information about the Bureau’s political activity: Denied*

A FOIA request seeking Bureau staff communication regarding political parties, elected political figures, congressional committees, congressional testimony and congressional activities including hearings, investigatory activities or subpoenas was denied.⁵

- *Information about mismanagement of Bureau headquarters remodeling: Denied*

After the costs of renovating the Bureau’s main building ballooned from \$55 million to \$145 million, the *Washington Examiner* filed a FOIA—and only received 15 of 350 relevant pages resulting in litigation.⁶

As evidenced by the examples above, the Bureau’s record in providing open government is not encouraging. However, for the purpose of this rulemaking process, AFSA assumes that the drafters are sincere in their intentions to seek modest improvements to the letter of the FOIA process—if not in the actual operation of the Bureau as it responds to requests.

II. The Disclosure of Confidential Information

A. The Proposed Rule Unnecessarily Liberalizes the Disclosure of Confidential Supervisory Information

The Bureau’s unique role as a regulator of financial institutions while simultaneously acting in the capacity of a law enforcement agency presents challenges relating to the treatment of Bureau-related confidential supervisory information. Previously, the Bureau published standards relating to the sharing of confidential supervisory information similar to those articulated by federal banking regulators of insured depository institutions.

In this context, existing rules provide that the Bureau may disclose confidential supervisory information “in an administrative or court proceeding to which the Bureau is a party.” Also, the existing rules permit the Bureau to disclose confidential supervisory information to “prudential regulators or other agencies having jurisdiction” over the company to which the information relates.

As drafted, Subparagraph (a)(4) is amended to provide that the Bureau could disclose confidential information “in or related to an administrative or court proceeding to which the Bureau is a party,” presumably allowing the Bureau to disclose such information prior to the commencement or after the conclusion of a proceeding. The draft removes a jurisdictional limitation which if made final, allows the disclosure of confidential supervisory

⁴ FOIA Request #Bureau-2016-012-F

⁵ *The Daily Caller News Foundation v. Bureau*, U.S. District Court for the District of Columbia, (No. 1:15-cv-01125)

⁶ *The Washington Newspaper Publishing Company LLC v. Consumer Financial Protection Bureau*, U.S. District Court for the District of Columbia, (No. 1:14-cv-00444)

information to agencies that do not have jurisdiction, so long as such disclosure is “relevant to the exercise of the agency’s statutory or regulatory authority.”

The identity of these agencies is undefined and, without any jurisdictional nexus, presumably would permit the disclosure of confidential supervisory information to a broad array of actors ranging from foreign governments to quasi-governmental agencies such as self-regulatory organizations.

AFSA believes disclosing this information without specific safeguards as to the identity and type of agencies as well standards for the use and continued protection of the confidentiality of shared information is an unnecessary and risky expansion of this practice.

B. Information Collected by the Bureau in its Market Monitoring Function Should be Exempt from FOIA Disclosure

The Bureau engages in a wide variety of activities under the general rubric of “market monitoring” — including obtaining a staggering 4% of all credit reports; account data representing 85 to 90% of all credit card accounts; and other datasets from numerous sources.^{7 8} This data-mining operation is, according to *Investors Business Daily*, one of 12 operated by the Bureau and the information is housed on unsecured cloud servers which the Bureau’s own Inspector General found had “not yet fully implemented a number of privacy control steps and information security practices.”⁹ In sum, the Bureau is collecting information covering over half a billion customer accounts in a risky manner. Now, the Bureau proposes to exempt information gained in this dubious undertaking from the definition of confidential supervisory information.

The current definition of confidential supervisory information includes “any information provided to the Bureau by a financial institution to enable the Bureau to monitor for risks to consumers in the offering or provision of consumer financial products or services,” *i.e.*, information provided to the Bureau in its market monitoring capacity. The proposed rule removes this language and replaces it with language defining confidential supervisory information, in part, as information obtained “for purposes of detecting and assessing risks to consumers and to markets for consumer financial products or services pursuant” to the Bureau’s supervisory authority. Thus, information collected by the Bureau in pursuit of its market monitoring function would not be exempt from FOIA disclosure as confidential supervisory information.

Such information would have to be subject to another FOIA exemption to be exempt from disclosure, and these other, non-confidential supervisory information, exemptions – such as confidential financial information – are much more subjective and open to interpretation by the Bureau with its demonstrated hostility to business interests.

⁷ House Subcommittee on Financial institutions & Consumer Credit: *Hearing Examining the Consumer Financial Protection Bureau’s Collection and Use of Consumer Data*; Bureau responses to Chairman capito and Vice Chairman Duffy (July 9, 2013)

⁸ Ironically, the extent of this program is only known because of an FOIA filed by Judicial Watch. Retrieved at: <http://www.judicialwatch.org/press-room/press-releases/jw-obtains-records-detailing-obama-administrations-warrantless-collection-of-citizens-personal-financial-data/>

⁹ *Obama Spying On Consumers Without Security Protections*, Investor’s Business Daily (October 13, 2015) retrieved at <http://www.investors.com/politics/editorials/ig-warns-cfpb-not-protecting-millions-credit-card-accounts-from-hackers/>

C. Misdirected Complaints Should Subject to Confidentiality Protections

The Bureau operates a consumer complaint portal known as the “Consumer Response System”—which has been cited by its own Office of Inspector General as containing “several noticeable inaccuracies”¹⁰ while press reports note numerous errors.¹¹

These deficiencies include flaws in data collection, duplicative complaints, complaints assigned to the wrong industry, and disseminating unverified data. Given the issues,¹² AFSA welcomes the revision to Section 1070.2(h) relating to “confidential consumer complaint information” which clarifies that misdirected complaints submitted to the Consumer Response System in cases where the Bureau lacks jurisdiction are to be classified under confidentiality rules and subject to confidentiality protections. We believe this is an important safeguard to prevent reputational damage for companies named in erroneously filed complaints as described above.

III. Conclusion

AFSA thanks the Bureau for the opportunity to comment on the proposed rule. Please feel free to contact me with any questions at 202-466-8616 or bhimpler@afsamail.org.

Sincerely,



Bill Himpler

Executive Vice President

American Financial Services Association

¹⁰ *Opportunities Exist to Enhance Management Controls Over the CFPB’s Consumer Complaint Database*, OIG Audit Report 2015-FMIC-C-016

¹¹ Witkowski, Rachel, “*Errors Abound in CFPB’s Complaint Portal*” *American Banker*, November 17, 2015

¹² Josh Adams, PhD, *Methodological and Analytical Limitations of the CFPB Consumer Complaint Database*, ACA International (May 2016) retrieved at <http://www.acainternational.org/files.aspx?p=/images/13111/aca-wp-methodological.pdf>