



CENTER FOR CAPITAL MARKETS
C O M P E T I T I V E N E S S

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June 19, 2013

The Honorable Richard Cordray
Director
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Dear Director Cordray:

I am writing with respect to the increasing number of requests by representatives of the Consumer Financial Protection Bureau (Bureau) that companies subject to the Bureau's regulatory authority provide huge quantities of data regarding individual consumers' financial transactions on an ongoing, real-time basis. We first raised this issue in our February 14 letter to you. It has since been the subject of a *Bloomberg News* report and of questions asked by several Senators during your April 23 appearance before the Senate Committee on Banking, Housing, and Urban Affairs.

We agree with you that data is important in determining whether there is a sound basis for regulation and how regulation should be structured, and recognize that Congress conferred specific authority on the Bureau to collect data to inform the Bureau's use of its regulatory authority. The exercise of this data collection authority, however, requires great care and clear guidelines to ensure all data collection is conducted in a responsible manner, and in full compliance with the law.

To date, the Bureau's lack of transparency around its data collection efforts makes it very difficult to evaluate the prudence and the legality of the collection process; the strength of the security measures the Bureau is taking to protect consumers' data; the extent to which personally identifiable information is being collected, stored, analyzed, or shared; the extent to which such requests are being fully coordinated at senior levels of the Bureau to avoid redundancy; and the cost burden imposed on, and potential liability exposure incurred by companies subject to the Bureau's requests.

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Based on your public statements, it appears that these demands may violate specific limits on the Bureau's authority set forth in the Dodd-Frank Act:

- The statute requires that the Bureau issue an order or regulation in order to collect this information, but the Bureau has done neither.
- The statute restricts the Bureau's ability to collect consumers' personally-identifiable information, but it is not clear that the Bureau has in place appropriate safeguards to ensure compliance with that limitation.

Moreover, compliance with the Bureau's demands not only imposes significant costs on companies—because the Bureau's specifications require companies to reconfigure existing data files and bear the expense of providing those files to the Bureau on a continuing basis—but also threatens companies with reputational damage, and perhaps litigation exposure, because of significant questions about the Bureau's ability to maintain the confidentiality of this information as well as the Bureau's legal authority to require companies to provide it.

I urge you to address these issues expeditiously, transparently, and in detail. It is the right thing to do given the concern and confusion about the Bureau's data collection efforts. Only a full accounting will clear the air. In addition, because it appears the Bureau is requesting this data during the supervision process—which the statute properly makes confidential—companies are effectively put to the choice of complying with questionable demands by government, and potentially exposing their customers' confidential information to public disclosure, or refusing to comply and running the risk that the Bureau will take formal or informal supervisory or enforcement action against the company for failing to comply. Moving these data collection programs into the daylight will ensure they are properly overseen and accountable to the Congress and the American people.

Background and Questions

As the *Bloomberg News* article reported, the Bureau has issued multiple demands for data regarding individual consumer transactions in a variety of different areas.¹ Most significantly, we understand that the Bureau is directing at least some credit card issuers to provide—on a real-time, continuous basis—a monthly summary of cardholder transactions on an account-by-account basis. We have heard from companies that the scope may range from dozens to as many as hundreds of pieces of data for each consumer on at least a monthly (and perhaps more frequent) basis.

We also understand that the Bureau either has implemented or is planning to implement a data system that assigns an identifier to each individual and requires all companies submitting data regarding that individual to tag the data with the same identifier (the consumer's name is not requested). If this is true, it will allow the Bureau to construct a profile of each individual consumer's financial activities by grouping together all of that consumer's credit card transactions.

In addition, we are told that the Bureau may be seeking to expand these requests to include additional categories of financial data, such as mortgage or other loan transactions. If the Bureau does take this step, that will enable the Bureau to construct even more detailed profiles of individuals' financial activities.

This partial description of the Bureau's data collection program is based on feedback from regulated companies, published news reports, and limited public statements from Bureau officials, but the lack of transparency around the Bureau's data collection efforts leaves unanswered a number of very important questions, including:

1. How many/which data fields are being requested?
2. Is each company asked for the same fields?

¹ See Carter Dougherty, *U.S. Amasses Data on 10 Million Consumers as Banks Object* (Apr. 17, 2013), available at <http://www.bloomberg.com/news/print/2013-04-17/u-s-amasses-data-on-10-million-consumers-as-banks-object.html>.

3. Has there been a process to determine if each of the fields is needed in order to support the Bureau's congressionally authorized functions, and have you reviewed these fields to make sure that they cannot be used to re-identify personally identifiable data?
4. How frequently are companies required to send this data?
5. Has the Bureau implemented a system of identifiers for individual consumers that enable it to aggregate an individual's accounts and thereby construct a profile of all of the individual's borrowing activities?
6. Is the Bureau seeking similar individual account or transaction-level data—again on a continuous, ongoing basis—regarding mortgages and other types of consumer loans and other consumer financial transactions?
7. What is the legal authority for the Bureau's collection of this data? Why has the Bureau chosen not to use a transparent process—such as issuance of a rule or order—as the statute appears to require, so that the Bureau's data demands and its justification for those demands and security procedures to protect the data would be: (a) available to the public; (b) subject to due process protections, including review by a court if appropriate; and (c) applied equally across similarly-situated businesses?
8. Can the Bureau share this data with other Federal agencies? State agencies? Non-government researchers?
9. How is this data being warehoused and at what cost?
10. What policies, procedures and ongoing training has the Bureau put into place to prevent even an attempt at re-identification of depersonalized data and to prevent unauthorized access by Bureau personnel, contractors, or other persons whose job responsibilities do not require access to such data? What is the third-party oversight mechanism for ensuring that these policies and procedures are adhered to by Bureau employees? Beyond training and third-party oversight, has the Bureau instituted a whistle-blower program to

ensure that employees can report efforts to re-identify data and if so to whom are such communications sent?

Lack of Statutory Authority

You testified at the April 23 hearing that the Bureau’s reason for collecting this data is to be able “to do the kind of very meticulous cost-benefit analysis [Congress wants] us to do as we write rules, so we can get them right.” You also stated that “[w]e have an interest in making sure that the studies and reports Congress is asking us to do to help inform your policy decisions, which is the law that we follow, are on sound grounds and that we can see over time whether the objectives you’re trying to achieve are being achieved.”²

The statute specifically addresses the Bureau’s authority to collect data for use in connection with rulemaking and the preparation of reports to Congress. The Bureau may

“require covered persons and service providers participating in consumer financial services markets to file with the Bureau, under oath or otherwise, ***in such form and within such reasonable period of time as the Bureau may prescribe by rule or order***, annual or special reports, or answers in writing to specific questions, furnishing information [regarding the organization, business conduct, markets, and activities of covered persons and service providers], as necessary for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress.” Section 1022(c)(4)(B), 12 U.S.C. § 5512(c)(4)(B) (emphasis added).

Congress’s decision to require the Bureau to issue an order or rule in order to require companies to provide this information has three important purposes:

² You repeated these explanations several times during the hearing, for example: “You all want us to write rules where we have careful assessment of costs and benefits. If we don't have data and information about what -- what the impacts in these markets are, we can't do that. We can't do our job. And I think you would be quite dissatisfied with us and rightly so.”

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(1) businesses burdened by these requirements can obtain judicial review of requests that are beyond the Bureau's authority, unjustifiably burdensome, or otherwise improper; (2) the obligation to provide data will be public, so that Congress and other interested parties may assess the legitimacy of the Bureau's interest and burden imposed by such requirements; and (3) the Bureau must explain, and potentially justify in court, any distinctions in requests targeting specific businesses or types of businesses.³

The Bureau has not issued an order or a regulation imposing upon businesses an obligation to provide account-level data on an ongoing basis. Because it has failed to comply with this statutory requirement, we believe the Bureau's data demands are unlawful.

I hope you will recognize this reality and—to the extent the Bureau wishes to require the provision of this data—that you will utilize the transparent processes specified in the statute for the imposition of such an obligation.⁴

Violation of Prohibition Against Collection of Personally-Identifiable Information

With respect to the collection of information for use in rulemaking and preparing reports to Congress—the purposes identified in your April 23 testimony—the statute flatly bars the Bureau from “obtain[ing] records from covered persons and service providers participating in consumer financial services markets for purposes of

³ The statute also authorizes the Bureau to collect already-available information (including, presumably, by purchasing information) and to request that information be provided voluntarily through “surveys and voluntary interviews” (Section 1022(c)(4)(A), 12 U.S.C. § 5512(c)(4)(A))—but the issue here involves data that the Bureau is demanding from companies subject to its regulatory authority, not the Bureau's purchases of information from third parties or its use of information obtained through voluntary participation in surveys.

⁴ Even if the Bureau were to try to claim that it is demanding this information pursuant to its supervision authority—in contradiction of your April 23 testimony—it still would lack the statutory authority to do so. *First*, the Bureau could not avoid the rule/order requirement by asserting that it is also collecting the information for “supervision purposes.” That would render meaningless Congress's requirement of an order or rule, because the Bureau could claim a dual purpose in every case and avoid the transparency and judicial review requirements that Congress intended to impose. *Second*, to the extent the Bureau requires nondepository institutions “to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers” it must do so by issuing a regulation—the preceding subparagraph states that “[t]he Bureau shall *prescribe rules to facilitate supervision* of [nondepository institutions subject to supervision] and assessment and detection of risks to consumers,” making clear that any such requirement must be imposed through a rule. Section 1024(b)(7) (A) &(B), 12 U.S.C. § 5514(b)(7)(A) & (B) (emphasis added).

gathering or analyzing the personally identifiable financial information of consumers.”
Section 1022(c)(4)(C), 12 U.S.C. § 5512(c)(4)(C).⁵

You have taken the position that the Bureau is not obtaining personally identifiable information because an individual’s name and address are not attached to the information received by the Bureau. But the critical question is the extent to which the Bureau has protections in place that will prevent the linkage of this information to an individual’s personal identity—given the clear restrictions on the Bureau’s authority in this area. Neither you nor the Bureau have given any assurances regarding this extremely important question.

Cost Burden and Potential Risk of Disclosure

The Bureau’s data demands will impose very significant costs on the businesses required to provide these huge quantities of information. As a threshold matter, the Bureau’s directives require that information be reformatted to the Bureau’s specifications, a process that imposes significant costs on companies. In addition, the Bureau’s requirement that this information be provided on an ongoing basis also produces substantial continuing costs.

Much more importantly, businesses have real concerns about the Bureau’s ability to safeguard this data. As you know, the Government Accountability Office has expressed concern about the security of the Bureau’s data and information systems.⁶ Companies that have inquired about the Bureau’s security procedures in connection with these data demands have also found that those procedures are below the standards in the industry.

⁵ The statute contains a second limitation on the Bureau’s collection and use of such information that applies to its supervision authority. Section 1022(c)(9)(A), 12 U.S.C. § 5512(c)(9)(A), provides that “[t]he Bureau may not obtain from a covered person or service provider any personally identifiable financial information about a consumer from the financial records of the covered person or service provider.” That limitation contains two exceptions, neither of which is applicable to these demands. *First*, if the consumer provides written permission for the disclosure—but the Bureau has not obtained such permission. *Second*, if the request is “specifically permitted or required under other applicable provisions of law” and complies with the standards for such government requests set forth in the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* There is no such specific authorization for the Bureau’s data demands, and even if there were, the Right to Financial Privacy Act limits the Bureau’s use of such information to its examination authority, *see* 12 U.S.C. § 3413(r), and your testimony makes clear that the Bureau plans to use this information for other purposes.

⁶ GAO, *Management Report: Opportunities for Improvement in the Bureau of Consumer Financial Protection’s Internal Controls and Accounting Procedures* (May 21, 2012), available at <http://gao.gov/assets/600/590993.pdf>.

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Companies that have been entrusted with their customers' confidential data take very seriously their obligation to protect that data against unauthorized release. Moreover, the brand damage and potential liability associated with such releases can be substantial. Companies often are sued by consumers claiming injury from the disclosure of confidential information—and consumers could argue in such litigation that a company violated the law by delivering data to the Bureau that the Bureau had no legal right to obtain.

The Bureau should not require companies to provide this sensitive data until it demonstrates that it has the legal authority to do so and, in addition, has the necessary security regime in place and obtained confirmation from the GAO that the Bureau's procedures are equivalent to those employed by the federal bank regulatory agencies and other similar government agencies.

Moreover, the governing statute permits the Bureau to impose information-reporting requirements that are “*necessary* for the Bureau to fulfill the monitoring, assessment, and reporting responsibilities imposed by Congress.” Section 1022(c)(4)(B), 12 U.S.C. § 5512(c)(4)(B) (emphasis added). Other agencies do not demand comprehensive data; they use a sampling approach. The Bureau has never explained why it cannot rely on the random-sampling approach utilized by a wide variety of federal agencies, from the SEC to NHTSA, to USDA.

Thank you for your consideration of these concerns. We would be happy to discuss them further with you or your staff.

Sincerely,

A handwritten signature in black ink that reads "David Hirschmann". The signature is written in a cursive, slightly slanted style.

David Hirschmann