

**CONSUMER MORTGAGE COALITION
CREDIT UNION NATIONAL ASSOCIATION
INDEPENDENT COMMUNITY BANKERS OF AMERICA
MORTGAGE BANKERS ASSOCIATION
NATIONAL ASSOCIATION OF FEDERAL CREDIT UNIONS**

October 24, 2016

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

Re: Docket No. CFPB-2016-0039
RIN 3170-AA63
Proposal on Disclosures of Records and Information

Dear Ms. Jackson:

The undersigned trade associations appreciate this opportunity to submit comments to the Consumer Financial Protection Bureau (“CFPB”) on its proposed amendments to regulations governing disclosures of records and information, including confidential supervisory information (“CSI”) and confidential investigative information (“CII”). The amendments would change existing policy by loosening the limits on agencies eligible to receive CSI and at the same time constrain regulated entities from sharing information about their own investigations by the CFPB.

We cannot support these changes as proposed. As a general matter, we do not believe the CFPB has articulated sufficiently any need for these changes. We also believe that the new approach to sharing CSI contravenes the governing statute and that the limits on CII raise constitutional concerns. Considering these points, we strongly urge the CFPB to withdraw the proposed amendments and reconsider these important issues.

Overview

The CFPB proposes to loosen the requirements for agencies that may be allowed access to CSI to include agencies that have ***no jurisdiction*** over the subject financial institution. The governing statute, however, limits the CFPB’s authority to disclose “confidential

supervisory information” to a “prudential regulator or other agency *having jurisdiction* over a covered person or service provider[.]”¹

The proposal also would restrict individual entities that are the subject of a Civil Investigative Demand (“CID”) from voluntarily disclosing the receipt of a CID, which is CII. The need for both these changes is not articulated. Moreover, they have not been the position of the Bureau in the past and differ from the position of other agencies. Importantly, considering that the proposed limit on CII constrains free speech, it raises constitutional concerns.

The Statute Prohibits Disclosures to Agencies That Lack Jurisdiction

The statutory language that the CFPB proposes to reconstrue, 12 U.S.C. § 5512(c)(6), regarding its disclosure of information is quite straightforward. The relevant language reads as follows:

(B) ACCESS BY THE BUREAU TO REPORTS OF OTHER REGULATORS

(i) EXAMINATION AND FINANCIAL CONDITION REPORTS

Upon providing reasonable assurances of confidentiality, the Bureau shall have access to any report of examination or financial condition made by a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider, and to all revisions made to any such report.

(ii) PROVISION OF OTHER REPORTS TO THE BUREAU

In addition to the reports described in clause (i), a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider may, in its discretion, furnish to the Bureau any other report or other confidential supervisory information concerning any insured depository institution, credit union, or other entity examined by such agency under authority of any provision of Federal law.

(C) ACCESS BY OTHER REGULATORS TO REPORTS OF THE BUREAU

(i) EXAMINATION REPORTS

Upon providing reasonable assurances of confidentiality, a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider shall have access to any report of examination made by the Bureau with respect to such person, and to all revisions made to any such report.

(ii) PROVISION OF OTHER REPORTS TO OTHER REGULATORS

In addition to the reports described in clause (i), the Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.

¹ 12 U.S.C. § 5512(c)(6)(C)(ii).

Each reference to a non-CFPB agency in clauses (C)(i) and (C)(ii) refers only to agencies **with jurisdiction**. Nevertheless, under the CFPB’s new reading, when the clauses are considered together, “with jurisdiction” apparently has been reinterpreted to mean “with or without jurisdiction.” We do not believe this interpretation is well founded.

Also, these provisions are not logically linked, so that if any one of them were repealed, the meaning of the others would not change. They do not mean something different when read individually than when read in conjunction with each other.

The CFPB’s Explanation

The CFPB explains:

In addition, in amending this subpart, the Bureau intends to codify its revised interpretation of 12 U.S.C. 5512(c)(6). The Bureau has previously interpreted 12 U.S.C. 5512(c)(6)(C)(ii), which discusses discretionary disclosure of confidential supervisory information to certain agencies with ‘jurisdiction,’ to set forth a positive grant of authority that limits the Bureau’s discretion to disclose confidential supervisory information under the rules authorized by 12 U.S.C. 5512(c)(6)(A). The Bureau now believes that the better interpretation of 12 U.S.C. 5512(c)(6)(C)(ii), when read in context with 12 U.S.C. 5512(c)(6)(B) and 12 U.S.C. 5512(c)(6)(C)(i), is that it establishes part of an information-sharing regime with a limited set of other agencies. Aside from mandatory disclosure requirements in 12 U.S.C. 5512(c)(6)(C)(i), the regime does not limit the Bureau’s discretion to draft rules related to the disclosure of confidential supervisory information. The Bureau proposes accounting for its revised interpretation in 12 CFR 1070.43(b)(1), which addresses the Bureau’s discretionary disclosure of confidential information to other agencies.²

12 U.S.C. 5512(c)(6)(A) provides the Bureau with broad discretion to draft rules regarding the confidential treatment of information. We think the better view is that Congress did not intend 12 U.S.C. 5512(c)(6)(C)(ii) to restrict that discretion. The language in subparagraph (C)(ii) is permissive—it says ‘the Bureau may, in its discretion’ disclose confidential supervisory information to certain agencies. Notably, Congress did not include any restrictive language, such as ‘the Bureau may only’ make certain disclosures. Understanding subparagraph (C)(ii) as a limit to the Bureau’s discretion requires, essentially, reading the word ‘only’ into text where it does not exist.³

This interpretation of 12 U.S.C. § 5512(c)(6) appears to construe the plain language of the statute to mean the opposite of what it says. Even though Congress limited the CFPB’s disclosures of CSI under the statute to agencies “with jurisdiction,” under this

² 81 Fed. Reg. 58310, 58310-11 (August 24, 2016).

³ 81 Fed. Reg. 58310, 58317 (August 24, 2016).

interpretation, the CFPB can disclose information to agencies without jurisdiction because Congress, in subparagraph (A), gave the CFPB authority to write rules “regarding the confidential treatment of information” the CFPB obtains. Subparagraphs (B) and (C), however, are plainly limits on (A). Had (A) meant the CFPB may share CSI with agencies that have no jurisdiction, (C) would have no meaning whatsoever.

The CFPB takes the position that because the statute does not say the CFPB may disclose information “only” to agencies with jurisdiction, “Congress did not include any restrictive language[.]” However, the phrase agencies “with jurisdiction” necessarily restricts permissible disclosures to agencies **with jurisdiction**. Congress did not need to use the word “only” because it used different language that has the same meaning.

The CFPB’s interpretation does not reconstrue (C)(ii); rather, it seems to ignore (C) entirely.

It is reasonable for Congress to authorize agencies with jurisdiction to share information. The CFPB is never the only regulator with jurisdiction over a covered person. When multiple agencies have jurisdiction, sharing information can make sense by, for example, reducing duplicative examinations. But sharing CSI with agencies that have no regulatory jurisdiction cannot reduce regulatory burden and cannot limit duplicative regulation.

The Proposed Regulatory Amendment

From the issuance, the CFPB proposes to incorporate its new interpretation into a regulation amended as follows:

(b) Discretionary disclosure of confidential information to ~~government~~ agencies.

*(1) Upon receipt of a written request that contains the information required by paragraph (b)(2) of this section, the CFPB may, in its ~~sole~~ discretion, disclose confidential information to ~~an Federal or State~~ agency to the extent that the disclosure of the information is relevant to the exercise of the agency’s statutory or regulatory authority ~~or, with respect to the disclosure of confidential supervisory information, to a Federal or State agency having jurisdiction over a supervised financial institution.~~*⁴

Under this proposal, if a covered person A, operating in only one state, sells one financial product in that state, any regulator in this country, or overseas, where consumers purchase the same product might find information about A’s sales of that product “relevant” to their statutory or regulatory authority. This is overbroad.

⁴ 12 C.F.R. § 1070.43(b), as it would be amended.

The Proposal that Agencies Include Nonagencies

The CFPB not only proposes to provide CSI to agencies that have no jurisdiction, but it also proposes to define agencies to include any “entity” exercising governmental authority including “nonagencies.” The proposed definition is:

“Agency means a Federal, State, or foreign governmental authority, or an entity exercising governmental authority.”⁵

Under this proposed definition, the CFPB would permit itself to share CSI and other confidential information (including confidential investigative information and confidential complaint information⁶) with foreign governments and any manner of government entities, foreign and domestic.

This construction is limitless, and includes many entities that have absolutely no need whatsoever for the CFPB’s confidential information.

We respectfully urge the CFPB not to expand the definition of “agency” as the number of entities that could request confidential information would be enormous. The CFPB should consider both the implications for institutions’ confidential information and the burden it could create for CFPB staff if the number of requests, and scope of requests, for confidential information increase drastically.

First Amendment Concerns

As indicated, the proposal would also limit entities’ ability to disclose CID CII information without first getting permission from the CFPB. We strongly oppose this component of the proposal and urge the CFPB not to adopt it. It would prohibit CID recipients from disclosing the CID to a number of parties who are legally entitled to it. For example, a CID recipient could not disclose its receipt of a CID to its counterparties under financing agreements, loan sales agreements, and purchase and sale agreements, which routinely require such disclosures. Perhaps disclosure would be permissible if these parties fit the § 1070.42(b)(2) definition of service provider or contractor, but these are undefined terms. The proposal would also prohibit disclosing the receipt of the CID to trade associations, journalists, and elected officials, among others. Neither the Federal Trade Commission (“FTC”) nor the Securities Exchange Commission (“SEC”) restricts disclosures of this type.⁷

The component raises important First Amendment concerns that we believe the CFPB must address before moving forward. Some federal agencies have attempted to limit

⁵ Proposed 12 C.F.R. § 1070.2(a).

⁶ The regulation defines confidential information to include CSI, confidential investigative information, and confidential complaint information. 12 C.F.R. § 1070.2(g).

⁷ See, e.g., 16 C.F.R. § 2.9 (FTC) and 17 C.F.R. § 203.7 (SEC).

entities' ability to discuss information in the past and multiple courts have rejected such efforts.⁸ The CFPB must describe how its process is different from these previous efforts rejected by courts and explain more clearly how this restriction aligns with its mission.

In addition, the CFPB did not include in this proposal a process that an entity could need to follow in order to get the CFPB's permission to share information. It is important that stakeholders have an opportunity to comment in such a process. Should the CFPB wish to move forward, we believe it is appropriate for the CFPB to reissue this proposal with additional information about the reasoning for and the scope of this restriction and the permission process.

Information Security Concerns

The proposal does not align with the growing need for greater information security. Government agencies at all levels are the subject of frequent cyber-attacks and, unfortunately, not all agencies are able to protect confidential information under necessary data security standards. Sharing CSI with agencies that do not have jurisdiction will only increase the opportunity for breaches.

We are aware that the same regulation provides that would-be recipients of CSI must provide the CFPB with:

“A certification that the agency will maintain the requested confidential information in confidence, including in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity, as well as any additional conditions or limitations that the CFPB may impose.”⁹

We are concerned however that a mere certification of this type to maintain the security of information will be inadequate. CSI often contains sensitive financial information of companies and individuals. Protection of sensitive financial and personal consumer information must be a primary goal of the federal government, especially in light of the recent and widespread public- and private-sector cyber-security breaches

Our concern is especially elevated in light of a recent Inspector General report finding that the CFPB has difficulty “ensuring the security of contractor-operated information systems.”¹⁰ If the CFPB were to share CSI information with a government agency or a government entity, there does not appear to be any mechanism in place to ensure the recipient has taken the appropriate steps to prevent data breaches, or to resolve breaches when they occur.

⁸ See, e.g., *Doe v. Mukasey*, 549 F.3d 861, 876-83 (2d Cir. 2008); *In Re National Security Letter*, 930 F. Supp. 2d 1064, 1073-78 (N.D. Cal. 2013).

⁹ 12 C.F.R. § 1070.43(b)(5).

¹⁰ [*OIG Report on the CFPB's Information Security Management Practices Pursuant to Section 406 of the Cybersecurity Act of 2015*](#) at 6 (August 12, 2016).

Moreover, CSI, once in the hands of a domestic or foreign agency or entity, can be anticipated to be re-disclosed to other agencies and entities that have no jurisdiction. Once the CSI has been shared, we do not believe the proposed amendments provide a meaningful way for the CFPB to prevent its further transmission.

Conclusion

We respectfully request that the CFPB consider these comments and withdraw its proposal. We urge the CFPB not to disclose confidential information to agencies unless they have jurisdiction over the subject covered person, as Congress directed. The definition of agency should be limited to federal or state government agencies in this country. Finally, constraining entities from releasing information on CIDs raises profound concerns and should be reconsidered as well.

Thank you for your consideration of these comments.

Sincerely,

Consumer Mortgage Coalition
Credit Union National Association
Independent Community Bankers of America
Mortgage Bankers Association
National Association of Federal Credit Unions