

December 21, 2018

***By electronic delivery to:***  
**[www.regulations.gov](http://www.regulations.gov)**

The Honorable Kathleen Kraninger  
Director  
Bureau of Consumer Financial Protection  
1700 G Street, NW  
Washington, DC 20552

Re: Notice and Request for Information, Bureau Data Collections, 83 Fed. Reg.  
49,072 (Sept. 28, 2018) [Docket No. CFPB-2018-0031]

Dear Director Kraninger:

The American Bankers Association<sup>1</sup> (ABA) appreciates the opportunity to comment on the Bureau of Consumer Financial Protection's (Bureau) request for information on the overall efficiency and effectiveness of the Bureau's data governance program and its data collections.<sup>2</sup> We welcome another opportunity to comment through the Request for Information (RFI) process on the Bureau's policies and procedures. This process has provided a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it carries out its important mission.

ABA's goal throughout the RFI process has been to provide constructive feedback on the Bureau's policies and procedures. Our intent is that the Bureau implement programs and policies that are transparent, fully consistent with the law, and are focused on promoting the interests of financial consumers in enjoying a strong, vibrant, and innovative market that offers the variety of financial products and services that consumers want.

## **I. Summary of Comment**

We support the decision to examine the Bureau's collection, use, and storage of data.<sup>3</sup> The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) gave the Bureau enormous authority and power over retail financial products, banks and others that provide these

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<sup>1</sup> The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

<sup>2</sup> Request for Information Regarding Bureau Data Collections, 83 Fed. Reg. 49,072 (noticed Sept. 28, 2018) [hereinafter, Bureau Data Collections RFI].

<sup>3</sup> See *Data Security, Privacy to Be Early Focus of CFPB's Kraninger*, ABA Banking J., Dec. 11, 2018 (available at: <https://bankingjournal.aba.com/2018/12/data-security-privacy-to-be-early-focus-of-cfpbs-kraninger/>).

products, and therefore over the people who use these products.<sup>4</sup> That authority includes sweeping power to demand data and other information of the entities it supervises. Because the Bureau's power to collect data is so broad, it is essential that the Bureau operate transparently in its collection and use of those data. We support the actions of your immediate predecessor, Acting Director Mulvaney, to increase accountability and transparency in the Bureau's activities, and we offer the following recommendations that build upon his work.<sup>5</sup>

We urge the Bureau to adopt safeguards to ensure that it does not use its authority to order the production of data that is overly broad, voluminous, or duplicative. These safeguards should include (a) an assessment of the benefits of obtaining the data as compared with the costs to regulated entities, other businesses, and consumers of providing the data; (b) consideration of whether the information sought could be obtained from another source more efficiently and with less cost; and (c) an assessment of whether the demand is narrowly written to obtain only the information and data the Bureau needs.

We also encourage the Bureau to exercise care when considering "reusing" data—i.e., using data collected for one purpose for a second, separate purpose. Although the reuse of data can reduce regulatory burden, the Bureau should exercise care to ensure that doing so does not compromise attorney-client privilege.

The data that the Bureau collects under its authorities play an important role in nearly every aspect of the Bureau's operations, particularly the Bureau's rulemakings. However, because much of these data are collected under the Bureau's supervisory authority, the Bureau withholds from the public the data collected, limiting the public's ability to evaluate, and where appropriate challenge, the Bureau's findings and policy decisions. To promote transparency and accountability, we urge the Bureau to make available to the public anonymized, de-identified data relied upon in its policy-making.

We also urge the Bureau to improve its accountability and transparency through faithful compliance with the Paperwork Reduction Act of 1995 (PRA)<sup>6</sup> and long-standing directives from the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) interpreting the PRA. Too often under prior leadership, the Bureau contravened the PRA and OIRA's directives by improperly using the "generic clearance process," which permits an agency to limit public review. Despite OIRA's clear statement that the generic clearance process should be used only when the collection is non-substantive in nature, the Bureau frequently used

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<sup>4</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (July 21, 2010). For more detailed analysis of the Bureau's authorities to require information and gather data, see *Examining the Consumer Financial Protection Bureau's Mass Data Collection Program: Hearing Before the H. Fin. Svcs. Comm.'s Subcomm. on Oversight & Investigations* (Dec. 16, 2015) (testimony of Wayne A. Abernathy, Am. Bankers Ass'n), <https://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-wabernathy-20151216.pdf>.

<sup>5</sup> See Sarah O'Brien, *Mulvaney Pitches His Revamp of Consumer Protection Agency to Congress*, CNBC, Apr. 11, 2018, <https://www.cnbc.com/2018/04/11/mulvaney-pitches-congress-his-revamp-of-consumer-protection-agency.html> (quoting Acting Director Mulvaney as stating, in a congressional hearing, that it is "important that we bring some transparency and accountability to this bureau").

<sup>6</sup> Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501 et seq.).

this process to obtain approval for collections that raise substantive or policy-related issues without providing notice to the public or seeking comment.

In addition, because the Bureau's vast data collections—particularly the detailed, loan level mortgage data it collects—are an attractive target for hackers, we encourage the Bureau to implement recommendations made by the Office of Inspector General for the Federal Reserve System (IG) to address the vulnerabilities in the Bureau's information security program. The Bureau should take seriously the privacy concerns raised by the IG and the significant risk that individual consumer data that the Bureau releases publicly in de-identified form can be re-identified.

These reforms will promote efficiency, transparency, and accountability. The Bureau will be encouraged to evaluate and weigh the burdens imposed by its data gathering against the likely value of the information to be gained. In addition, the reforms will facilitate meaningful public engagement with the Bureau's collection and use of data, which, in turn, will promote public discourse that results in improved policy making.

## **II. The Bureau Should Reform Its Use of Section 1022 Orders**

In support of its duty “to monitor for risks to consumers” in markets for consumer financial products or services, Congress gave the Bureau broad authority, under Section 1022 of the Dodd-Frank Act, “to gather information . . . regarding the organization, business conduct, markets, and activities” of any person that offers or provides a consumer financial product or service, or any service provider to such company.<sup>7</sup> Accordingly, the Bureau may “require covered persons and service providers . . . to file with the Bureau . . . annual or special reports, or answers in writing to specific questions” regarding the topics listed above.<sup>8</sup>

With this broad authority, the Bureau has demanded information and data from regulated entities on 13 occasions, according to the report the Bureau released simultaneous with this request for information.<sup>9</sup> In several instances, the information and data requested were voluminous. These include the following:

- In 2018, the Bureau ordered an undisclosed number of institutions to provide millions of data points regarding one of their loan portfolios. One ABA member reports that *after* the bank negotiated with the Bureau to narrow the demand, responding to the request cost the bank more than \$1 million.
- In each of 2013, 2015, and 2017, the Bureau ordered an undisclosed number of institutions to produce credit card-related data for the preceding five years. One ABA member reported the following regarding its experience with these demands:

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<sup>7</sup> 12 U.S.C. § 5512(c)(4)(A) (2012).

<sup>8</sup> *Id.* § 5512(c)(4)(B)(ii).

<sup>9</sup> Bureau of Consumer Fin. Protection (Bureau), *Sources and Uses of Data at the Bureau of Consumer Fin. Prot.* 152-98 (2018), [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp\\_sources-uses-of-data.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_sources-uses-of-data.pdf) [hereinafter, *Bureau Sources and Uses of Data*].

- For the 2013 demand, the bank reported that a team of 8-10 bank employees spent considerable time over a 2- to 3-month period to determine how responsive data would be accessed from the bank's systems, to "pull" responsive data from those systems, and to review the dataset prior to transferring it to the Bureau.
- For the 2015 demand, the Bureau asked the bank to provide account-level data reflecting each promotion the bank offered to its customers over the preceding five years. To comply with the demand, the bank tasked one senior analyst to devote 100% of the analyst's time over a 6- to 8-month period to retrieve, format, and review the data. Ultimately, the bank produced 4 to 5 terabytes of data reflecting the approximately 20 million promotions it offered each year.
- For the 2017 demand, the Bureau asked the bank in late June of that year to produce data in early August. One bank employee devoted 100% of his time during that period to respond to the demand, which required the bank to use 4 terabytes of space in its warehouse to assemble and manage the data prior to the bank's production of those data to the Bureau.

Although recipients of a Section 1022 order sometimes seek to negotiate the scope of the order with the Bureau, the recipient ultimately has little, if any, leverage to narrow the order's scope. Recipients of a Section 1022 order that did not maintain the data in the form the Bureau demanded had to incur significant expense to generate the data requested.

We urge the Bureau to adopt a policy (after giving the public the opportunity to comment) to govern its use of Section 1022 orders to promote accountability, efficiency, and fairness in the Bureau's exercise of its market monitoring responsibilities. First, prior to issuing an order under Section 1022, the Bureau should assess the benefits to the Bureau of the information demanded as compared with the costs that will be incurred by the order's recipient(s) to produce that information. Such an internal analysis would be consistent with Director Kraninger's goal to make "robust use of cost benefit analysis"<sup>10</sup> and could be modeled after the cost benefit analysis that is required to be conducted when the Bureau prescribes a rule.<sup>11</sup> The Bureau should also consider whether the information sought could be obtained from another source more efficiently and with less cost.

Moreover, when preparing a Section 1022 order, the Bureau should consider whether the order is narrowly written to obtain only the information that the Bureau needs to fulfil its market

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<sup>10</sup> See *Nominations: Hearing Before the Sen. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 2 (statement of Kathleen Kraninger, nominee to be Director of the Bureau of Consumer Fin. Protection), <https://www.banking.senate.gov/imo/media/doc/Kraninger%20Testimony%207-19-183.pdf>.

<sup>11</sup> In prescribing a rule, the Dodd-Frank Act requires the Bureau to "consider—(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and (ii) the impact of proposed rules on covered persons . . . ." 12 U.S.C. § 5512(b)(2)(A).

monitoring responsibilities<sup>12</sup> and to obtain that information in the least burdensome way possible.<sup>13</sup>

The order should be prepared by Bureau personnel who have experience with the line of business and are knowledgeable about (and respectful of) the systems that banks and other financial institutions use to store and report data in that line of business. When the Bureau demands information from multiple institutions, it should consult with the recipients and modify the data requests as necessary to ensure that the data are reportable by all institutions regardless of the institution's core processing system. Although we understand that the Bureau may engage with the recipient on the scope of a Section 1022 order, such engagement varies considerably based on the Bureau personnel involved with the matter. A process analogous to a "meet and confer" should be formalized in the Bureau's policy and required of Bureau staff when issuing a Section 1022 order.

In addition, the policy should provide due process protections for recipients of a Section 1022 order. Unlike federal law governing subpoenas—which provides authority for the recipient to ask a court to quash or modify the subpoena—Section 1022 does not provide a formal process to challenge or limit the breadth of the order. The Bureau should create such a process; it would encourage Bureau staff to limit the information demanded to that which the Bureau needs to fulfil its market monitoring responsibilities.

### **III. The Bureau Should Exercise Care Not to Order a Production of Data that Is Overly Broad, Voluminous, or Duplicative**

The Bureau's authority under Section 1022 to demand information from the entities it supervises is one of several authorities the Bureau possesses to demand data from financial institutions. Under the Dodd-Frank Act, the Bureau has broad powers to demand data from the institutions it supervises<sup>14</sup> and, when it suspects wrongdoing, from any entity that the Bureau believes has information relevant to the alleged violation of consumer financial law, through its power to issue a Civil Investigative Demand.<sup>15</sup> These powers are expansive; as with Section 1022 orders, the Bureau should exercise constraint and not order the production of data that is overly broad, voluminous, or duplicative.

As described more fully in ABA's comment letter on the Bureau's RFI on its supervision program, our members report that Bureau examiners demand data that they do not use, creating unnecessary expense, wasting both Bureau and bank resources, and frustrating bank compliance

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<sup>12</sup> See Letter from Thomas Stratmann, Mercatus Center Scholar, Geo. Mason Univ., to U.S. Rep. Scott Garrett, R-N.J., 1 (Jan. 23, 2014) (available at <https://www.mercatus.org/system/files/StratmannCFPBStatisticMethods.pdf>) (asserting that the Bureau "is collecting much more data than necessary to conduct a valid statistical analysis of consumer financial markets").

<sup>13</sup> These requirements could be modeled off analogous requirements in the Regulatory Flexibility Act (RFA). The RFA requires that the Bureau, prior to issuing a proposed rule, conduct an initial regulatory flexibility analysis that describes "any significant alternatives to the proposed rule," among other requirements of the RFA. See 5 U.S.C. § 603(d)(1)(B).

<sup>14</sup> See 12 U.S.C. § 5515(b).

<sup>15</sup> See *id.* § 5562.

staff who must devote time to responding to the demands. Banks also reported that the initial requests may be followed by one or more supplemental requests, often for data that the bank has provided already. Overly tight deadlines for responding to these supplemental requests are not uncommon.

Banks have also expressed frustration that the Bureau and the prudential regulators do not coordinate data demands, frequently resulting in the agencies' demanding the same information but in different formats. Banks are then obliged to reformat the data, expending significant time and cost.<sup>16</sup>

Although banks' recent examination experiences have generally been more positive than earlier experiences, there is a continuing need for tailoring of examination data and information demands. Many of our recommendations for reform of the Bureau's use of Section 1022 orders apply to the data demands that the Bureau makes during the supervisory process.<sup>17</sup> Specifically, the Bureau should assess the costs and benefits of any data demanded in connection with an examination prior to issuing the demand, consider whether the data sought could be obtained from another source more efficiently and with less cost, and (if the Bureau decides to proceed with the demand) consider whether the demand is narrowly written to fulfil its supervisory responsibilities and to obtain the data sought in the least burdensome way possible.

The Bureau should also exercise extreme care when contemplating issuing a Civil Investigative Demand (CID). As described more fully in ABA's comment letter in response to the Bureau's RFI on CIDs, these demands result in enormous cost and disruption to the entity that receives the demand, which often must expend thousands of hours in employee time and incur significant legal fees to retain outside counsel to respond to the CID.<sup>18</sup> The Bureau should issue a CID only as a last resort, after the Bureau's Supervision staff has sought the information demanded, and after carefully considering the benefits that would be provided by that information weighed against the burdens that would be imposed on the recipient of the order. The Bureau should also be more flexible on agreeing to modifications to CIDs and extensions of time for the recipient to comply with the demand.

#### **IV. The Bureau Should Exercise Care When Considering Reusing Data**

The Bureau acknowledges that data collected for one purpose (e.g., supervision or enforcement) has been reused by the Bureau for other purposes, such as rulemaking.<sup>19</sup> On the one hand, the

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<sup>16</sup> ABA's comment letter in response to the Bureau's RFI on its supervision program contains examples provided by banks of the Bureau's overly broad data demands issued during the supervisory process; these examples are located on page 5 of the letter. See Nessa Feddis & Rick Freer, Am. Bankers Ass'n, to J. Michael Mulvaney, Acting Dir., Bureau 5 (May 17, 2018) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/cl-Bureau-RFI-Supervision20180517.pdf>).

<sup>17</sup> See Part II of this letter, *supra*.

<sup>18</sup> See Letter from Virginia O'Neill, Am. Bankers Ass'n, to J. Michael Mulvaney, Acting Dir., Bureau (Apr. 24, 2018) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-CID20180424.pdf>) [hereinafter, 2018 ABA CID Letter].

<sup>19</sup> See *Bureau Sources and Uses of Data*, *supra* note 9, at 40-52.



“reuse” of data can reduce regulatory burdens;<sup>20</sup> however, each time the Bureau considers reusing data, it should exercise care to ensure that the data can properly be reused.

For example, as described in ABA’s comment letter on CIDs, when the Bureau decides to move a matter from its Office of Supervision to its Office of Enforcement, Enforcement should not require the entity to reproduce the record it has already produced pursuant to a supervisory request.<sup>21</sup> Instead, Supervision and Enforcement should coordinate to have the appropriate documents transferred between offices. Importantly, the Bureau should ensure that Enforcement does not receive privileged materials that the entity may have shared with Supervision. Such materials are not available to Enforcement when it initiates an investigation and should not be available to Enforcement when it inherits documents.

When the Bureau is considering reusing data collected by Supervision or Enforcement in rulemaking, it should take care that the source and breadth of the data fully and accurately reflect the market that the Bureau seeks to regulate. In addition, when the Bureau seeks to aggregate data collected from multiple entities, it should ensure that the data collected are properly aggregable. For example, entities could interpret a demand for “foreclosure date” to mean different points in time in the foreclosure process. Consequently, the Bureau must be specific in its demands if it seeks to aggregate data received from multiple entities.

## **V. The Bureau Should Be Transparent About its Use of Data in Rulemakings**

The Administrative Procedure Act mandates that an “agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .”<sup>22</sup> However, past Bureau practices have undermined the public’s ability to provide feedback on the Bureau’s data collections and to comment on the conclusions the Bureau drew from that data, which significantly limited the public’s ability to participate meaningfully in the Bureau’s rule making processes.

### **a. The Bureau Should Permit Public Review of Anonymized Data Used in Support of its Policymaking**

The Bureau acknowledges that it relies heavily on the data it collects through its supervisory authorities to support the policy decisions it makes through its rulemakings.<sup>23</sup> However, the Bureau does not provide access to these data, even in anonymized, de-identified form. Without access to data in this form, the public is largely unable to review and, as appropriate, challenge

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<sup>20</sup> See 12 U.S.C. § 5511(b)(3) (one objective of the Bureau is to “reduce unwarranted regulatory burdens”).

<sup>21</sup> See 2018 ABA CID Letter, *supra* note 18, at 3.

<sup>22</sup> 5 U.S.C. § 553(c) (2012) (emphasis added).

<sup>23</sup> See U.S. Gov’t Accountability Office, GAO-14-758, *Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced* 17 (2014) (available at: <https://www.gao.gov/assets/670/666000.pdf>) (“CFPB staff told us that most of the CFPB’s large-scale data collections were conducted under its supervisory authorities.”); *id.* at 18 (“[Bureau staff] said they interpret [Section 1022] as permitting them to use information gathered as part of the supervisory process for other purposes, including market monitoring.”); *id.* (“CFPB staff collect some consumer financial data from individual entities through the examination process, also under the agency’s supervisory authorities.”).

the Bureau's conclusions, limiting opportunities for informed public discourse that improves policy-making.

A primary barrier to public access to the data the Bureau collects is the agency's application of its privacy regulation (Disclosure Rule)<sup>24</sup> to data collected under Section 1022 of the Dodd-Frank Act. In the Disclosure Rule, the Bureau defined as "confidential supervisory information" any data or information gathered pursuant to a Section 1022 order.<sup>25</sup> This permits the Bureau to publish findings and conclusions about the data, but significantly limits the public's ability to review and evaluate the data and comment on the Bureau's findings. A broad range of conclusions can be drawn from a single dataset. Without access to anonymized, de-identified data, the public is unable to evaluate the Bureau's conclusions and policy choices.

For example, the Bureau used its authority under Section 1022 to demand overdraft-related data from a group of large banks (each with assets exceeding \$10 billion). According to the Bureau, the data are representative of the more than 40 million consumer accounts held at the banks studied.<sup>26</sup> On three occasions (2013, 2014, and 2017), the Bureau published analyses of the data it collected, in reports ranging from 23 to 72 pages in length.<sup>27</sup> Each analysis presented selected data points. For example, the 2014 report presented the median amount of a transaction paid into overdraft but omitted other data points that could be viewed as more illuminating to policy-makers and the public—namely, the mean amount of a transaction paid into overdraft.<sup>28</sup> Because the Bureau did not disclose the anonymized, de-identified data, the validity of the Bureau's data findings could not be reviewed—let alone tested—by the public.

By contrast and in illustration of the point, in completing the statutorily required study of arbitration agreements, the Bureau published significantly more data. The Bureau published a 728-page report that included the total number (and payout amount) of class action settlements it reviewed and the total number of class members in those settlements.<sup>29</sup> From these data, the

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<sup>24</sup> Disclosure of Records and Information, 83 Fed. Reg. 46,075 (Sept. 12, 2018) (codified at 12 C.F.R. pt. 1070).

<sup>25</sup> See *id.* § 1070.2(i)(iv) (defining "Confidential supervisory information as including "Any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services . . . .").

<sup>26</sup> Bureau of Consumer Fin. Prot., *Data Point: Frequent Overdrafters* 7 (Aug. 2017) (available at: [http://files.consumerfinance.gov/f/documents/201708\\_cfpb\\_data-point\\_frequent-overdrafters.pdf?utm\\_campaign=ABA-Newsbytes-080717-HTML&utm\\_medium=email&utm\\_source=Eloqua](http://files.consumerfinance.gov/f/documents/201708_cfpb_data-point_frequent-overdrafters.pdf?utm_campaign=ABA-Newsbytes-080717-HTML&utm_medium=email&utm_source=Eloqua)) [hereinafter, 2017 Data Point].

<sup>27</sup> The Bureau produced three separate reports examining different aspects of overdraft:

- 1) a "white paper of initial data findings" of its study of certain large banks' overdraft programs (2013);
- 2) a "data point" on consumers' use of overdraft at that same group of large banks (2014); and
- 3) a second "data point" on frequent users of overdraft (2017).

See Bureau, *CFPB Study of Overdraft Programs: A Whitepaper of Initial Data Findings* (June 2013) (available at: [http://files.consumerfinance.gov/f/201306\\_cfpb\\_whitepaper\\_overdraft-practices.pdf](http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf)); Bureau, *Data Point: Checking Account Access* (July 2014) (available at: [http://files.consumerfinance.gov/f/201407\\_cfpb\\_report\\_data-point\\_overdrafts.pdf](http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf)) [hereinafter, 2014 Data Point]; 2017 Data Point, *supra* note 26.

<sup>28</sup> See 2014 Data Point, *supra* note 27, at 5.

<sup>29</sup> Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) § 8*, at 27-28 (2015) (available at: [https://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf)).



public, including ABA, could calculate the average recovery provided to members who participated in class actions. The report also provided the average and median grants of relief on claims that were resolved through arbitration.<sup>30</sup> Based in part on these data, ABA and others—including Congress—were able to challenge the basis for the Bureau’s policy decision to prohibit class action waivers.<sup>31</sup>

As ABA has expressed on many occasions, the Bureau should provide access to the anonymized, de-identified data used in support of the Bureau’s rulemaking and adequate time for the public to evaluate and comment on the research.<sup>32</sup> By doing so, the Bureau will clearly demonstrate its commitment to the rigorous, fact-based analysis that the Dodd-Frank Act requires. Non-confidential, non-proprietary data should be publicly disclosed, assuming such disclosure does not conflict with consumers’ privacy interests. When the Bureau relies on data that were provided by a financial institution in confidence (such as in a supervisory or enforcement context) or that is otherwise proprietary, the Bureau should consult with the institution to determine how to provide public access to those data.

Data should be anonymized and de-identified with respect to both the entities providing the data and the individual consumers whose data are reported. The Bureau should also exercise care to ensure that the data are not reasonably capable of being re-identified. Because of the importance of the de-identification process, the Bureau should seek public comment on the process it will use to de-identify and anonymize data it publishes.

#### **b. The Bureau Should Not Use the Paperwork Reduction Act’s Generic Clearance Process for Policy-Related Collections**

Under past leadership, the Bureau avoided public scrutiny of its data collection efforts by making extensive and impermissible use of the Paperwork Reduction Act’s (PRA) “generic clearance” process. Typically, the PRA requires a Federal agency to provide two opportunities for public comment when seeking to conduct a survey or other data collection involving 10 or more entities.<sup>33</sup> This requirement advances the PRA’s purpose to maximize a collection’s utility and benefit to the public by affording the public the opportunity to comment on the collection’s methodology and any other issues raised by the collection.<sup>34</sup>

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<sup>30</sup> *Id.* § 5, at 13.

<sup>31</sup> See Letter from Nessa Feddis, Am. Bankers Ass’n, et al., to Richard Cordray, Dir., Bureau (Aug. 22, 2016) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/joint-trades-arbitration-comment-letter.pdf>).

<sup>32</sup> See, e.g., Letter from Shaun Kern, Am. Bankers Ass’n, to J. Michael Mulvaney, Acting Dir., Bureau of Consumer Fin. Protection 10-11 (June 7, 2018) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/cl-RFI-Rulemaking20180607.pdf>).

<sup>33</sup> 44 U.S.C. § 3506(c)(2)(A) (establishing initial, 60-day comment period); *id.* § 3507 (establishing second, 30-day comment period).

<sup>34</sup> See *id.* §§ 3501(2) & 3501(4) (stating that the PRA was enacted to “ensure the greatest possible public benefit from and maximize the utility of information” collected by the Federal government, and to “improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society”).

The Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), the agency charged with PRA compliance oversight, permits a government agency to use a more streamlined and expedited PRA review process, the "generic clearance process," if the collection does "not raise substantive or policy issues."<sup>35</sup> In these instances, once the agency provides opportunities for public comment on a broad collection topic (the generic clearance), and OIRA grants its approval, subsequent individual surveys made under that generic clearance may be "reviewed on an expedited basis and are generally not required to undergo further comment."<sup>36</sup> OIRA has provided three examples of non-controversial, non-substantive information collections that are appropriate for this expedited review: "customer satisfaction surveys, focus group testing, and website usability surveys."<sup>37</sup>

Under former Director Cordray, on multiple occasions the Bureau used the generic clearance process to avoid public scrutiny of proposed information collections involving substantive policy matters. For example, in 2011, the Bureau obtained a generic clearance for the "Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials."<sup>38</sup> The Bureau conducted 13 information collections under this generic clearance, on the following topics: prepaid products, mortgage origination and servicing, debt collection, credit card rewards, overdraft, and small dollar lending.<sup>39</sup> *Each* of these topics had been the subject of *active or expected* rulemaking; however, for all but one of the collections, the Bureau *certified*,

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<sup>35</sup> Memorandum from Cass R. Sustein, Adm'r, for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies 5 (Apr. 7, 2010) (available at: [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRAPrimer\\_04072010.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf)) [hereinafter, OIRA April 2010 Memo]; John D. Graham, Adm'r, Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, Exec. Office of the President, *Guidance on Agency Survey & Statistical Information Collections* 6 (Jan. 20, 2006) (available at: [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/pmc\\_survey\\_guidance\\_2006.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf)).

<sup>36</sup> See OIRA April 2010 Memo, *supra* note 35, at 5.

<sup>37</sup> *Id.*

<sup>38</sup> Office of Info. & Regulatory Affairs, *Generic Clearance for Development and/or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials*, OMB Control No: 3170-0022, [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201206-3170-002](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201206-3170-002).

<sup>39</sup> The topics of the 13 information collections conducted under the "Model Forms" generic clearance were:

- "Prepaid Interview Testing Phase 2";
- "Pilot Study of Mortgage eClosings and CFPB Educational Materials";
- "Debt Collection Disclosure Focus Groups";
- "Credit Cards Rewards and Deferred Interest Products Focus Groups";
- "Debt Collection Disclosure Forms Focus Groups and User Experience Study (Round 2)";
- "Testing of Model Bankruptcy Periodic Forms for Mortgage Servicing";
- "Overdraft Opt-In Model Form Testing";
- "Debt Collection Disclosure Testing: Consumer Bill of Rights";
- "Pre-Paid Disclosure Forms User Testing (Interviews)";
- "Mortgage Servicing";
- "Consumer Focus Groups Relating to Prepaid Products Rulemaking and Model Form Development";
- "Unmoderated Usability Testing of the Mortgage Closing Product"; and
- "Small Dollar Lending Rule Disclosure Testing (Payday)".

*Id.* At OIRA's webpage for the "Model Forms" generic clearance, select "All" to view this list of information collections conducted under the clearance.

“Information gathered will not be used for the purpose of substantially informing influential policy decisions.”<sup>40</sup> To our knowledge, the Bureau did not provide notice to the public or seek comment on any of these collections.

There are strong policy reasons why a generic clearance is an inappropriate mechanism for collecting information on a substantive or policy issue. The prohibition ensures that the public can provide feedback on any collection that may be relied upon for rulemaking or other policymaking, thereby maximizing the utility of information collected and promoting “accountability[] and openness in Government and society.”<sup>41</sup> Methodological decisions—such as the number of frequent users of the financial product or service being studied and how survey questions are phrased—significantly impact the data generated. However, as stated above, once OIRA approves a generic clearance request, individual collections within the generic clearance are reviewed on an expedited basis and generally without public comment.<sup>42</sup> Therefore, it is critical that use of the generic clearance process be limited to the types of collections identified in OIRA’s guidance, namely “voluntary, low-burden, and uncontroversial collections,” including “methodological testing, customer satisfaction surveys, focus groups, contests, and website satisfaction surveys.”<sup>43</sup>

To prevent future improper use of the generic clearance process, the Bureau should provide notice to the public whenever it requests approval, under a generic clearance, of an individual information collection on a topic of a current or likely future subject of rulemaking. It is plausible that the Bureau may believe that a requested collection concerns an issue that is non-substantive and not related to policy, even though the subject of the request is listed on the agency’s rulemaking agenda. In cases such as these, public notice of the request would provide members of the public who disagree with the agency’s assessment of policy relevance with an opportunity to comment on the proposed collection.<sup>44</sup>

More broadly, we encourage the Bureau to respect the PRA’s intent that the public receive notice and opportunity for comment when an agency seeks to collect information from the public. Under prior leadership, the Bureau made requests for data to nine large banks on one occasion in 2012, and to fewer than 10 large credit card issuers on another occasion in 2014, for no apparent reason other than to avoid PRA requirements. There may be times when the Bureau needs information from only nine (or fewer) entities to fulfil its responsibilities; such decision should

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<sup>40</sup> The collection related to “Mortgage Servicing” did not include this certification. In the documents the Bureau submitted to OIRA for this collection, the Bureau did not explain why the certification was not included.

<sup>41</sup> See 44 U.S.C. § 3501(4).

<sup>42</sup> OIRA 2010 Memo, *supra* note 36, at 5.

<sup>43</sup> Memorandum from Cass R. Sustein, Adm’r, for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies 1 (May 28, 2010) (available at: [https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRA\\_Gen\\_ICRs\\_5-28-2010.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf)).

<sup>44</sup> For additional background on the Bureau’s past abuse of the generic clearance process, see Letter from Jonathan Thessin, Am. Bankers Ass’n, & Steven I. Zeisel, Consumer Bankers Ass’n, to Howard Shelanski, Adm’r, Office of Info. & Regulatory Affairs, & Dominic Mancini, Deputy Adm’r, Office of Info. & Regulatory Affairs (July 13, 2016) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/cl-PRA-ConsumerEngage2016.pdf>).

be driven by the purpose of the collection request, not by a desire to avoid application of the PRA to the request.

## **VI. The Bureau Should Continue to Evaluate and Remediate its Data Security Vulnerabilities**

The Bureau collects vast amounts of data through its supervisory, enforcement, rulemaking, and other statutory authorities. Two of these large-scale data collections—the Home Mortgage Disclosure Act (HMDA) and the National Mortgage Database—include detailed, loan level (and in the case of the National Mortgage Database, borrower-specific) information, making them an attractive target for hackers. Data breaches in the private and public sector have resulted in millions of consumers having their privacy invaded and exposed to financial fraud. To protect consumers, it is incumbent that the Bureau maintain the highest level of data security.

Recent reports by the Office of Inspector General for the Federal Reserve System and Bureau of Consumer Financial Protection (IG) have described continuing vulnerabilities in the Bureau’s information security program. In its 2018 annual independent audit of the Bureau’s information security program, the IG evaluated the Bureau’s program as operating overall at a level “3” on a scale of “1” to “5.”<sup>45</sup> The IG issued specific recommendations for the Bureau to strengthen its information security program in the areas of configuration management, identity and access management, and data protection and privacy. We encourage the Bureau to implement the IG’s recommendations expeditiously.<sup>46</sup>

Further, we underscore the importance of protecting consumer privacy. As we have written on several occasions, the Bureau’s use of “proposed guidance” to address the risk to consumer privacy presented by the expanded HMDA data contravenes the Dodd-Frank Act.<sup>47</sup> The proposed balancing of risk to consumers with the perceived benefits of public disclosure fails to consider adequately real threats to consumer privacy. Research has shown that re-identification is already highly possible, even using only the *current* public HMDA data.<sup>48</sup> It becomes a virtual certainty with the new data. We urge the Bureau to withdraw its proposed guidance and issue a

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<sup>45</sup> Office of the Inspector General for the Bd. of Governors of the Fed. Reserve Sys. & Consumer Fin. Protection Bureau, Audit Report 2018-IT-C-018, *2018 Audit of the Bureau’s Information Security Program 2* (Oct. 31, 2018), <https://oig.federalreserve.gov/reports/bureau-information-security-program-oct2018.pdf>.

<sup>46</sup> The Bureau’s vulnerability regarding identity and access management was also mentioned in the IG’s 2017 evaluation report, which found that the “Office of Enforcement’s sensitive information has not always been restricted to Office of Enforcement employees who needed access to that information to perform their assigned duties.” Office of the Inspector General for the Bd. of Governors of the Fed. Reserve Sys. & Consumer Fin. Protection Bureau, Evaluation Report 2017-SR-C-011, *The CFPB Can Improve Its Practices to Safeguard the Office of Enforcement’s Confidential Investigative Information i* (2017), <https://oig.federalreserve.gov/reports/cfpb-enforcement-confidential-investigative-information-may2017.pdf>. This vulnerability remains on the IG’s list of “Open Recommendations Made to the Bureau of Consumer Financial Protection.” See Office of the Inspector General for the Bd. of Governors of the Fed. Reserve Sys. & Consumer Fin. Protection Bureau, *Open Recommendations Made to the Consumer Financial Protection Bureau* (Oct. 31, 2018), <https://oig.federalreserve.gov/reports/bureau-open-recommendations.pdf>.

<sup>47</sup> See, e.g., Letter from Am. Bankers Ass’n et al. to Monica Jackson, Bureau of Consumer Fin. Protection (Nov. 24, 2017) (available at: <https://www.aba.com/Advocacy/commentletters/Documents/Joint-cl-HMDA112417.pdf>).

<sup>48</sup> *Id.* at 2.

formal rulemaking that is compliant with the Administrative Procedure Act (APA). Moreover, to guard against invasions of privacy, identity theft, and fraud, the Bureau should disclose the new 2018 data only in aggregate form, carefully designed to protect the privacy interests of individual consumers.

## **VII. The Bureau Should Not Require Banks to Provide Notices Regarding the Bureau's Use of their Data**

The Bureau's request for information also seeks comment on "[n]otice to consumers regarding use of data known to be related to them."<sup>49</sup> To the extent that the Bureau believes that consumers should receive information regarding the Bureau's use of their data, the Bureau—not a bank or other financial institution—should provide the notice. If the Bureau provides such notice, it should explain that entities it supervises or regulates may be required to report information, including sensitive customer information, to the Bureau; that consumers cannot decline to have their data provided ("opt out"); and that the Bureau has sole responsibility for the protection of the data once the Bureau receives it.

## **Conclusion**

ABA appreciates the opportunity to comment on the Bureau's data collections and data governance program. We urge the Bureau to reform its use of Section 1022 by seeking more targeted data and by providing recipients of a Section 1022 order with an opportunity to respond to the order. More broadly, we urge the Bureau to ensure that it does not use any of its statutory authorities to order a production of data that is overly broad, voluminous, or duplicative. We also urge the Bureau to make available to the public the anonymous, de-identified data the Bureau collects under its supervisory authority, so that the public can meaningfully engage with the Bureau's conclusions regarding those data and with the policy decisions that emanate from those data. We also urge the Bureau to adhere to the PRA's requirements, as interpreted by OIRA, and not to collect information using a generic clearance unless the collection is non-substantive in nature and not policy-related. In addition, we encourage the Bureau to continue to evaluate and remediate its data security vulnerabilities in light of the October 2018 report by the Federal Reserve's IG and to protect consumer privacy by withdrawing its proposed HMDA guidance and issuing a formal rulemaking that is compliant with the APA.

Sincerely,



Jonathan Thessin  
Senior Counsel, Center for Regulatory Compliance

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<sup>49</sup> Bureau Data Collections RFI, 83 Fed. Reg. at 49,073.