



October 24, 2016

*Via Electronic Mail*

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1275 First Street NE  
Washington, DC 20002  
**Docket No. CFPB–2016–0039, RIN 3170–AA63**

Re: Comments in Response to the Notice of Proposed Rulemaking –  
Amendments Relating to Disclosure of Records and Information.

Ladies and Gentlemen:

The Clearing House Association L.L.C., the American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, the Housing Policy Council, and the U.S. Chamber of Commerce (collectively, the “**Associations**”)<sup>1</sup> appreciate the opportunity to comment on the amendments proposed by the Consumer Financial Protection Bureau (the “**Bureau**”) to (i) the procedures used by the public to obtain information from the Bureau under the Freedom of Information Act, the Privacy Act of 1974, and in legal proceedings, and (ii) its rule regarding the confidential treatment of information

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<sup>1</sup> See Annex 1 for descriptions of Associations.

obtained from persons in connection with the exercise of its authorities under federal consumer financial law (the “**Proposal**” or the “**NPR**”).<sup>2</sup>

The Bureau proposes to amend its rules related to information and records disclosure in order to “clarify, correct, and amend certain provisions based on its experience over the last several years” in exercising its authority to regulate consumer financial products and services and protecting and disclosing information related thereto.<sup>3</sup> The Bureau states that, since its creation, it “has sought to provide maximum protection for confidential information, while ensuring its ability to share or disclose information to the extent necessary to achieve its mission.”<sup>4</sup>

We appreciate the Bureau’s recognition of the importance of providing maximum protection to sensitive information and its efforts to provide additional clarity and transparency regarding its information protection and disclosure practices. However, we believe that certain of the Bureau’s proposed amendments would inappropriately and unnecessarily expand the universe of entities that could receive protected information. Any such expansion would exceed the applicable statutory limits on the Bureau’s authority to share confidential information and, if adopted, could lead to inappropriately broad disclosure of confidential information that may significantly damage institutions supervised by the Bureau—including a potential breach of a supervised institution’s legal privileges should the materials be shared beyond the scope contemplated by Section 1828(x) of the Federal Deposit Insurance Act (the “**FDI Act**”). Because these aspects of the Proposal would do significant harm while providing few, if any, corresponding benefits to the Bureau in carrying out its statutory mandate, we urge the Bureau to remove them from any final rule or procedures.

More generally, we also believe that several of the Bureau’s rules on confidentiality create unwarranted compliance risks for supervised institutions without furthering the policies that promote the confidentiality regime. In order to ensure compliance, institutions seek greater clarity as to how they should handle supervisory and other confidential information in the possession of the institutions.

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<sup>2</sup> 81 Fed. Reg. 58,310, “Amendments Relating to Disclosure of Records and Information” (Aug. 24, 2016).

<sup>3</sup> NPR 58,310.

<sup>4</sup> NPR 58,310. The Bureau’s Inspector General has articulated the importance of information security to the Bureau’s ability to meet its mission. *See* OIG Memorandum to Director Cordray, “2016 List of Major Management Challenges for the CFPB,” (September 29, 2016), *available at* <https://oig.federalreserve.gov/reports/cfpb-major-management-challenges-sep2016.pdf>.

Part I of this letter provides an executive summary of our comments, while Parts II through VI identify our core concerns with the Proposal, recommend specific changes to address those concerns and identify several aspects of the Proposal and the Bureau's practices regarding confidential information disclosure more broadly that merit further clarification.

## I. EXECUTIVE SUMMARY

➤ **The Bureau's Proposal would significantly expand its authority to share confidential information with third parties in ways that exceed its statutory authority to do so in contravention of Congressional intent.**

- The Bureau's Proposal would exceed statutory limitations on its authority to share confidential supervisory information ("CSI"),<sup>5</sup> which authorizes sharing only with those agencies "having jurisdiction" over a person or service provider. By permitting the sharing of information with a much broader universe of entities—that is, with any "[a]gency to the extent that the disclosure of the information is relevant to the exercise of the [agency's] statutory or regulatory authority"—the Proposal would contravene Congress's unambiguous statutory language and the legal confidentiality framework it creates.
- In addition, the Bureau's proposed introduction of an exceedingly broad and ambiguous definition of the term "agency" and other changes would further expand the universe of entities with which the Bureau may share CSI, which is again contrary to the language and design of the statute and Congressional intent.

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<sup>5</sup> The Proposal defines confidential supervisory information as: "(1) [r]eports of examination, inspection and visitation, non-public operating, condition, and compliance reports, supervisory letter, or similar document, and any information contained in, derived from, or related to such documents; (2) [a]ny documents, materials, or records, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Agency in the exercise of supervisory authority over a financial institution, and any information derived from such documents, materials, or records; (3) [a]ny communications between the CFPB and a supervised financial institution or a Federal, State, or foreign government agency related to the CFPB's supervision of the institution; (4) [a]ny information provided to the CFPB by a financial institution for purposes of detecting and assessing risks to consumers and to markets for consumer financial products or services pursuant to 12 U.S.C. 5414(b)(1)(C), 5515(b)(1)(C), or 5516(b), or to assess whether an institution should be considered a covered person, as that term is defined by 12 U.S.C. 5481, or is subject to the CFPB's supervisory authority; and/or (5) [i]nformation that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8)." Proposed 12 C.F.R. § 1070.2(j).

- **The Proposal raises significant safety and soundness, litigation, and reputational concerns for banks subject to Bureau supervision.**
  - By inappropriately expanding the universe of entities that may receive CSI from the Bureau, the Proposal would create meaningful and unnecessary disincentives for banks and other parties to openly communicate with the Bureau, a critical element of effective bank supervision, while providing no corresponding benefit to the Bureau’s supervision and enforcement efforts.
  - In addition, the Bureau’s assertion that it has the authority to transfer privileged information submitted under Section 1828(x) of the FDI Act to other agencies outside the scope of this statute (including to law enforcement agencies) may undermine or endanger the submitting institution’s otherwise applicable legal privileges, including the attorney-client privilege, thereby potentially exposing the institution to increased safety and soundness, litigation, and reputational risks.
  
- **The Bureau should not expand its current approach to sharing CSI.**
  - The Bureau has not conducted a thorough analysis of the risks associated with expanded disclosure of CSI, which include supervisory, litigation, and reputational risks, and which we believe far surpass any perceived benefits of the Proposal and weigh in favor of retaining the Bureau’s current, more limited approach to sharing CSI.
  
- **The Bureau should, at a minimum, incorporate sound disclosure practices into the regulation.**
  - If, notwithstanding, the Bureau proceeds with seeking to expand its authority to share CSI with a significantly expanded range of entities as contemplated in the Proposal, it should identify and codify in its revised regulation a formal policy and practice of sharing CSI only in very limited circumstances, including a requirement that the person requesting disclosure successfully demonstrate, among other things, a substantial need for the requested information that outweighs the Bureau’s need to maintain its confidentiality.
  - When the Bureau proposes to disclose CSI relating to a covered person or service provider to any entity—including to Congress—(other than federal or state financial supervisory agencies with jurisdiction over the supervised entity or, in certain cases, the Attorney General of the United States) the Bureau should provide the entity with notice and a reasonable opportunity to object in order to allow the entity to redact or remove sensitive information, including non-public personally identifiable customer information (“NPPI”), that is not responsive to the request and should not be disclosed.
  
- **The Proposal is inconsistent with the Gramm-Leach-Bliley Act’s consumer privacy protections.**

- By inappropriately expanding the universe of entities with which the Bureau may share confidential information, the Proposal could effectively facilitate the sharing of sensitive consumer information in a manner that is inconsistent with Regulation P, which implements Subtitle A of Title V of the Gramm-Leach-Bliley Act (“GLBA”) and thereby reflects Congress’s considered view of the appropriate protections that should be afforded to consumers.
- Further, the Proposal would allow the Bureau to share confidential information, including personal information about non-U.S. individuals, in a manner that may be inconsistent with non-U.S. privacy rules and be likely to draw serious objections from the European Union (“EU”) and other foreign jurisdictions.

➤ **Other modifications should be made to the Proposal.**

- The proposed shifting of disclosure authority from the General Counsel to the Associate Director for Supervision, Enforcement, and Fair Lending (“Associate Director”) poses a potential conflict of interest and should be eliminated or modified to also require the approval of the General Counsel; and
- The Bureau’s proposal to make it an independent violation for “any person” in possession of confidential information (not limited to CSI) to fail to notify the Bureau “immediately” upon discovery of an improper disclosure would result in shifting the burden of notification to innocent bystanders of a potential violation who may be ill-equipped to make difficult determinations of what confidential information is and what constitutes an improper disclosure thereof and should be removed.

➤ **Important clarifications are needed on multiple issues raised by the Proposal and the Bureau’s existing rules regarding confidential information more generally.**

- Because institutions are increasingly concerned about (i) the compliance risks they need to manage with respect to their own internal handling of supervisory information, and (ii) assisting in maintaining the viability of the bank examination privilege, the Bureau should provide clarification regarding certain points in this rulemaking proceeding, including the following:
  - Further guidance regarding the type of information that will be considered to be “derived” from CSI and included in the definition of CSI;
  - Explicit permission for persons who are the subject of investigations to consult with other persons who may have relevant information; and
  - An acknowledgment that disclosure by entities pursuant to their securities law disclosure obligations will not be deemed a violation of confidentiality rules.

**II. THE BUREAU’S PROPOSAL TO SIGNIFICANTLY EXPAND ITS SHARING OF CONFIDENTIAL INFORMATION WITH THIRD PARTIES EXCEEDS ITS STATUTORY AUTHORITY.**

- A. The Bureau’s Proposal would expand its authority to share confidential information with third parties in ways that exceed its statutory authority to do so in contravention of Congressional intent.**
- 1. The Bureau’s proposal to eliminate the unambiguous statutory requirement that an agency have “jurisdiction” over the financial institution to receive CSI would exceed the Bureau’s statutory authority.**

The Dodd–Frank Wall Street Reform and Consumer Protection Act (“**Dodd-Frank Act**”) requires the Bureau to share its examination reports, when requested, with “a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider.”<sup>6</sup> Section 1022(c)(6)(C)(ii) of the Dodd-Frank Act then provides that 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 CSI concerning such person examined by the Bureau under the authority of any other provision of Federal law.”<sup>7</sup>

The Bureau’s current regulation regarding discretionary release to government agencies mirrors the statute and permits the Bureau to disclose confidential information (other than CSI) when the information is “relevant to the agency’s statutory or regulatory authority,” but to disclose CSI only to the narrower spectrum of federal or state agencies that have “jurisdiction over a supervised financial institution.”<sup>8</sup> The Bureau had previously explained that it had adopted this interpretation because it “*assumed that the provision prohibited disclosure by the Bureau to agencies that lack ‘jurisdiction.’*”<sup>9</sup> In other words, the Bureau read the statutory language for what it is: an express limitation on the Bureau’s authority to release supervisory information only to those agencies with jurisdiction over the supervised entity.

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<sup>6</sup> 12 U.S.C. § 5512(c)(6)(C)(i).

<sup>7</sup> 12 U.S.C. § 5512(c)(6)(C)(ii).

<sup>8</sup> 12 C.F.R. § 1070.43(b)(1).

<sup>9</sup> See NPR 58,317 (emphasis added), *citing* 76 FR 45372, 45373–75 (Jul. 28, 2011); 78 FR 11484, 11496 (Feb. 15, 2013); the Bureau has interpreted its statutory authority to share confidential information on a discretionary basis with “a prudential regulator or other agency having jurisdiction over a covered person or service provider” to include “State attorneys general.” See 76 Fed. Reg. 45,372; CFPB Bulletin 12-01; and 78 Fed. Reg. 11,484, 11,496 (February 15, 2013). ABA, CBA, FSR, and Mortgage Bankers Association (“MBA”) previously advised the Bureau that its statutory authority to share confidential information with State attorneys general is limited to “circumstances where the state AG exercises authority to enforce an applicable law within a judicial process and such disclosure relates to the AG’s exercise of that authority.” See Comment submitted by the ABA, CBA, FSR, and MBA re: Docket No. CFPB-2011-0003, Disclosure of Records and Information (Sept. 26, 2011).

Contrary to the unambiguous statutory language and framework, the Bureau now proposes to eliminate this important distinction between CSI and other confidential information and to have the ability to share CSI to the same extent it now shares confidential information that is not supervisory information. The Bureau would remove impermissibly the statutory limitation on the Bureau’s authority to share CSI only with those agencies “having jurisdiction” over a person or service provider, and thus permit such sharing with “an Agency to the extent that the disclosure of the information is relevant to the exercise of the Agency’s statutory or regulatory authority.”<sup>10</sup> In seeking to amend this disclosure standard, the Bureau offers as an explanation that it has now determined that the relevant statutory language is “ambiguous,” and that, when read in connection with the part of the statute authorizing the Bureau to receive CSI from “a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider,” it creates “an information-sharing regime with a limited set of agencies.”<sup>11</sup> The Proposal thus would amend the Bureau’s regulation to codify what the Bureau describes as a “more reasonable” interpretation that would allow the Bureau to disclose CSI to “agencies that do not have jurisdiction [over a covered person or service provider], so long as such disclosure is relevant to the exercise of the agency’s statutory or regulatory authority.”<sup>12</sup> The Bureau cites its general authority to “draft confidentiality rules”<sup>13</sup> as providing it with sufficient discretion to make such amendment, rather than looking to the specific language in Section 1022(c)(6)(C).

This proposed deletion of a critical statutory limitation and collapsing of the two different standards is contrary to the plain language of the statute and the parameters that Congress established allowing the Bureau to share information with other agencies. Nothing in the statute would permit the sharing of CSI with agencies that do not have jurisdiction over the financial institution, as the Bureau now proposes.

Even if the statutory language were ambiguous, which we assert it is not, the proposed interpretation set forth by the Bureau is not reasonable when viewed in light of the statutory language and framework and Congressional intent, as described further below.<sup>14</sup>

## **2. The Proposal would establish an ambiguous and overly broad definition of “agency.”**

In addition to eliminating the statutory requirement that an agency have “jurisdiction” over a covered person or service provider in order to be able to receive CSI about such

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<sup>10</sup> Proposed 12 C.F.R. § 1070.43(b)(1). Agencies receive *Chevron* deference with respect to their statutory interpretations only where the statutory language is ambiguous and the agency’s interpretation reflects a reasonable interpretation of the statute. *See Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707 (2015).

<sup>11</sup> NPR 58,318.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; 12 U.S.C. § 5512(c)(6)(A).

<sup>14</sup> *See* footnote 10, *supra*.

person or entity, the Proposal would add a definition of the term “agency” to the regulation and thereby further expand the universe of entities with which the Bureau may share CSI. The Proposal would define “agency” to include “a Federal, State, or foreign governmental authority or an entity exercising governmental authority.”<sup>15</sup> Coupled with the change to eliminate the jurisdiction requirement, the rule would permit the Bureau to share confidential information with “foreign regulators and certain entities that exercise governmental authority, such as registration and disciplinary organizations like state bar associations.”<sup>16</sup>

The Dodd-Frank Act, which allows the Bureau to share its examination reports with “a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider,” and then authorizes discretionary disclosure of CSI “to a prudential regulator *or other agency having jurisdiction over a covered person or service provider . . . under . . . law*,” indicates that Congress intended to authorize the Bureau to share CSI on a discretionary basis with prudential regulators and “other” agencies with supervisory or enforcement jurisdiction over the relevant entity, namely, supervisory and regulatory authorities.<sup>17</sup> Nowhere does the statute mention non-U.S. agencies or quasi-governmental authorities.

Further, other than the reference to state bar associations, the Bureau gives no further indication as to any limitation to the types of entities that could be captured by the term “an entity exercising governmental authority.” This excessively broad catch-all could potentially include a limitless universe of entities, such as medical societies,<sup>18</sup> national associations of state regulatory bodies (such as insurance or utility commissioners)<sup>19</sup> or municipal entities, including housing or transportation authorities.<sup>20</sup> Additionally, this expansive catch-all term raises critical information security concerns, because non-governmental entities, in particular those that are relatively small, may not have the requisite protections in place that are necessary to keep extremely sensitive information confidential. Moreover, we note that the expansive definition of “Agency” exceeds the scope contemplated by Section 1828(x) of the FDI Act and has the potential to result in a breach of the submitting institution’s privilege.<sup>21</sup>

We are concerned that the proposed expansion of the Bureau’s ability to share CSI with a broad range of “agencies” not having “jurisdiction” over covered persons or service providers could lead to safety and soundness concerns, unwarranted litigation and reputation risks, and stifle the open communications between financial institutions and the Bureau that

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<sup>15</sup> Proposed 12 C.F.R. § 1070.2(a).

<sup>16</sup> NPR 58,311.

<sup>17</sup> Emphasis added. *See supra*, notes 6-7.

<sup>18</sup> *In re Goldrich*, 771 F.2d 28, 30 (2d Cir. 1985).

<sup>19</sup> *California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1086 (9th Cir. 2011).

<sup>20</sup> *Hancock Elecs. Corp. v. Washington Metro. Area Transit Auth.*, 81 F.3d 451, 453 (4th Cir. 1996).

<sup>21</sup> For a complete discussion of this point, see our analysis in part II.E.2 under *The Bureau should determine that it may not transfer privileged material submitted pursuant to 12 U.S.C. § 1828(x)*.



are critical to the ability of the Bureau to carry out its mission.<sup>22</sup> As described further below, effective bank regulation necessitates open communication between institutions and their regulators, which would be threatened if such communications were not subject to robust protections from disclosure. These protections are essential to banks' ability and willingness to communicate openly with the Bureau, in particular, given its special role, which differs from that of the prudential regulators, and the acute need for cooperation by banks to further the Bureau's stated mission.

Moreover, the Bureau has not attempted to justify its revised interpretation of the specific statutory language. With respect to the Bureau's proposed reversal of its prior interpretation regarding its authority to share CSI, the Bureau offers no explanation for why it has chosen to revise its interpretation at this time, and the limited rationale provided in support of its revised interpretation is insufficient to meet the requirements under the Administrative Procedure Act and recognized by the courts.<sup>23</sup> Rather, the Bureau simply asserts, without citing any examples, that the current rule has proven cumbersome and has impaired its ability to execute its statutory duties, and that the proposed revision "would better promote the Bureau's mission and overall effectiveness."<sup>24</sup> When creating a rule, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."<sup>25</sup>

Even assuming that the revised rule would enable the Bureau to better meet its mission, the Bureau has not purported to identify or weigh the potential dangers of such an expanded information-sharing regime against these supposed benefits. These well-recognized dangers include chilling the open communication critical to the relationship of trust between the regulator and regulated institutions and increasing litigation and reputational risk for financial institutions, as well as undermining the vitality of the bank examination privilege. In recognition of these dangers, the federal banking regulators have had a longstanding policy (which, as described further below, is frequently recognized by courts) that there is a "privilege" involved in CSI materials and that sharing such information with third parties can have a detrimental effect on the agency's ability to execute its duties, namely, by discouraging frank and open communications by the regulated entity with its regulators.

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<sup>22</sup> The Bureau's Inspector General has articulated the importance of information security to the Bureau's ability to meet its mission. *See supra*, note 4.

<sup>23</sup> *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("The requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position . . . the agency must show that there are good reasons for the new policy.") (emphasis in original).

<sup>24</sup> NPR 58,317.

<sup>25</sup> *Encino Motorcars v. Navarro*, 579 U.S. \_\_\_ slip op. at 9 (2016), citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

**B. The Bureau’s proposed expansion of its authority to share confidential information with third parties would contravene Congressional intent.**

The proposed expansion of the universe of “agencies” and other entities with which the Bureau may share CSI would be inconsistent with Congressional intent. Although the Bureau argues that the proposed change would “comport with the intent of the Dodd-Frank Act” because effective coordination and communication among agencies is essential for the Dodd-Frank Act’s regulatory framework to function as intended,<sup>26</sup> the Bureau offers little support for this general assertion, and we believe it could actually have the opposite effect in practice.

An examination of the legislative history of the Dodd-Frank Act demonstrates that when creating the Bureau, Congress was concerned about confidentiality and intended to place limits on the sharing of CSI by the Bureau. In a Senate debate in April 2010, Senator Chris Dodd, one of the chief architects of the Dodd-Frank Act, responded to certain talking points circulated by the Chamber of Commerce relating to the formation of the Bureau.<sup>27</sup> One of these talking points indicated that the proposed legislation would give the Bureau the authority to request and hold reports from any covered entity.<sup>28</sup> In responding to this concern, Senator Dodd specifically noted that “just as regulators today collect and share information about the *companies they oversee*, the [Bureau] will be able to collect information and share it with *other regulators*. There is nothing new about that at all.”<sup>29</sup>

Senator Dodd’s statements—and specifically the use of the words “companies they oversee” and “other regulators”—strongly suggest that Congress intended to limit dissemination of confidential information only to regulatory authorities with jurisdiction. This comports with the text of 12 U.S.C. § 5512(c)(6)(C), which limits the disclosure of CSI to federal or state agencies with jurisdiction; the statute makes no mention of foreign regulators or other quasi-governmental entities and specifically limits disclosure to agencies with jurisdiction. Indeed, prior to this Proposal, the Bureau had interpreted the statute as applying in such a limited manner.<sup>30</sup> The Bureau now, however, asserts that Congress intended the Bureau to be able to share CSI with a broad range of U.S. and foreign government authorities, as well as quasi-governmental entities like state bar associations. Furthermore, the Bureau’s assertion that “effective coordination and communication among

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<sup>26</sup> NPR 58,317.

<sup>27</sup> 156 CONG. REC. S3002-03 (daily ed. Apr. 30, 2010) (statement of Sen. Dodd).

<sup>28</sup> 156 CONG. REC. at S3003.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> See CFPB Bulletin 12-01 (Jan. 4, 2012) and the discussion in part III.A (the Bureau “will not routinely share [CSI] with agencies that are not engaged in supervision” and “[e]xcept where required by law, the Bureau’s policy is to share [CSI] with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations”).

agencies is essential”<sup>31</sup> for the Dodd-Frank Act’s regulatory framework, is contradicted both by Senator Dodd’s statements and the purpose of the Dodd-Frank Act. Senator Dodd’s discussion of inter-agency sharing underscored the importance of continuing the status quo among regulators, which would not support the Bureau’s view that it is now necessary to share CSI with a broader array of entities. Similarly, aside from general statements such as that “multiple agencies have interests and obligations relating to implementation, interpretation and enforcement of the Dodd-Frank Act,”<sup>32</sup> the Bureau has failed to explain how sharing CSI with entities such as foreign governmental authorities and state bar associations is “essential” to the functioning of the framework established by the Dodd-Frank Act, and it is difficult to ascertain how such sharing could be “essential.” This lack of a rationale further undermines the proposal in favor of such sharing.

**C. The Bureau’s Proposal would be inconsistent with the policies of other Agencies that have greater statutory authority to share CSI.**

As further illustration of the unreasonable nature of the Bureau’s proposed expansion of its sharing authority, we note the limited authority that Congress has provided to the Bureau to share CSI when compared with the authority granted to the federal banking regulators. Indeed, Congress has not provided the Bureau with the same authority to disclose supervisory information as it has to the federal prudential supervisors. The FDI Act includes a specific statutory authorization for a federal banking agency (i.e., the Board of Governors of the Federal Reserve System (the “**Board**”), the Office of the Comptroller of the Currency (“**OCC**”) and the Federal Deposit Insurance Corporation (“**FDIC**”) to “furnish any report of examination or other confidential supervisory information concerning any . . . entity examined . . . to . . . any . . . person that the Federal Banking agency determines to be appropriate.”<sup>33</sup> Congress could have extended this discretionary authority to the Bureau, but instead Congress opted to invoke a specific limit on sharing of CSI by the Bureau in the Dodd-Frank Act—a direct contrast from the broad authority granted to the prudential supervisors under the FDI Act.

Although the prudential supervisors have this broad disclosure authority, they have recognized the importance of maintaining the confidentiality of CSI and have promulgated regulations strictly limiting such disclosures. These safeguards provide significant comfort to supervised institutions that, despite the banking regulators’ broad authority, in practice, further distribution of CSI is limited. For example, the regulations established by the Board provide that non-public agency information “is confidential and privileged” and that the Board will not authorize disclosure to persons other than law enforcement agencies and supervisory agencies “unless the person requesting disclosure is able to show a substantial need for such information that outweighs the need to maintain confidentiality.”<sup>34</sup> Similarly,

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<sup>31</sup> NPR 58,317.

<sup>32</sup> *Id.*

<sup>33</sup> 12 U.S.C. § 1817(a)(2)(C)(iii).

<sup>34</sup> 12 C.F.R. § 261.22(a).

the OCC's rules regarding the disclosure of non-public OCC information limit the types of state agencies to which the OCC will disclose this information, providing that where disclosure is not prohibited by law, the OCC may, in its sole discretion, disclose non-public OCC information to "state agencies with authority to investigate violations of criminal law" or "state bank and state savings association regulatory agencies" "when necessary, in the performance of their official duties."<sup>35</sup> Such comparisons are particularly salient because when the Bureau first proposed its regulations surrounding the disclosure of CSI, it noted that "[w]here appropriate, the CFPB based the regulations in this subpart upon regulations of the other federal financial regulatory agencies that provide for the confidentiality and disclosure of certain information generated in the course of supervising, investigating or pursuing enforcement actions against financial institutions."<sup>36</sup>

Thus, the federal banking agencies have broad disclosure authority, but apply it narrowly in practice. In contrast, the Bureau's statutory authority is narrow, but the Bureau is seeking to stretch it beyond its limit. The Dodd-Frank Act authorizes the Bureau to disclose CSI only to certain governmental entities that have direct jurisdiction over a supervised entity, but the Proposal would expand that to include any governmental agency (or entity exercising governmental functions) that may find the supervisory materials useful for some purpose.<sup>37</sup>

Finally, we note that the Bureau's proposed expansion of its sharing authority would overlook the difference in nature between CSI and other types of confidential information. As described in detail below, CSI plays a critical role in the effective supervision of financial institutions, so it is logical that CSI would be subject to heightened disclosure restrictions relative to other types of confidential information, such as confidential investigative information. In fact, that is exactly the standard Congress included in the Dodd-Frank Act, which the Bureau now seeks to undo.

**D. Other proposed changes would further expand inappropriately the Bureau's authority to share confidential information.**

**1. The proposed disclosure of confidential information in matters "related to" an administrative or court proceeding would be overly broad.**

We have concerns regarding the proposed expansion of the types of proceedings in which the Bureau may make discretionary disclosures of confidential information. The Bureau proposes to expand its authority to disclose confidential information "in an administrative or court proceeding to which the CFPB is a party" to allow the Bureau to disclose confidential information "[i]n or *related to* an administrative or court proceeding to which the Bureau is a

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<sup>35</sup> 12 C.F.R. § 4.37(c).

<sup>36</sup> 76 Fed. Reg. 45,372, 45,374 "Disclosure of Records and Information" (July 28, 2011).

<sup>37</sup> For a complete discussion of this point, see our analysis above under *The Proposal would establish an ambiguous and overly broad definition of "agency."*

party.”<sup>38</sup> The Bureau explains that the proposed revision would clarify “that the Bureau may disclose confidential information not only during an administrative or court proceeding to which the Bureau is a party . . . but also when related to the Bureau’s implementation of ongoing administrative or court orders . . . [which] may be made in furtherance of the Bureau’s reporting requirements and include, for example, updates on required consumer remuneration and the payment of civil money penalties.”<sup>39</sup>

We are concerned that this broadening of authority to disclose confidential information could, as described below, increase litigation and reputational risk for financial institutions, as well as undermine the vitality of the bank examination privilege. Further, the Bureau offers no indication of how broadly the Bureau could construe those circumstances that may be “related to” administrative or court proceedings. Indeed, the Bureau cites the example of meeting its reporting requirements as just one potential scenario in which disclosure would be warranted under this expanded authority. Nor does the Bureau attempt to justify why the disclosure of confidential information is necessary in connection with scenarios “related to” administrative or court proceedings, and even if such a necessity did exist, it is not apparent that it would outweigh the Bureau’s clear need to maintain the confidentiality of such information.

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<sup>38</sup> NPR 58,319 (emphasis added).

<sup>39</sup> *Id.*

**2. The proposed expansion of the disclosure of summary CSI notifications would be overly broad and unnecessary.**

We are also concerned with the proposed changes to Section 1070.45(a)(6), which would expand the Bureau’s authority to make affirmative disclosures of CSI in summary form beyond its current authority to share such information with “law enforcement agencies and other government agencies in summary form to the extent necessary to notify such agencies of potential violations of laws subject to their jurisdiction.” The Proposal would authorize the Bureau to disclose CSI “to Agencies . . . to the extent necessary to confer with such Agencies about matters relevant to the exercise of the Agencies’ statutory or regulatory authority”.<sup>40</sup> As noted above, the term “agency” would be defined to include “a Federal, State, or foreign governmental authority or an entity exercising governmental authority.”<sup>41</sup> Thus, similar to the proposed expansion of disclosure of CSI in response to requests for such information in 1070.43, the proposed changes to this section would allow the Bureau to share CSI in summary form with a broad array of entities on an affirmative, discretionary basis. We have similar concerns with the expansion of this ability to share information as we have articulated above with respect to the proposed amendments to Section 1070.43(b)(1).

Further, this expansion is unnecessary. Congress has provided a specific mandate for the Bureau to transmit evidence to the Attorney General of the United States, if the Bureau has evidence that may constitute a violation of federal criminal law.<sup>42</sup> There is no similar provision for providing information to other state or federal law enforcement agencies that would suggest that CSI could be shared with such agencies.

**E. The Proposal raises significant safety and soundness, litigation, and reputational concerns for banks subject to Bureau supervision.**

**1. The Bureau’s proposed amendments would risk undermining the bank examination privilege and the supervisory process without a corresponding supervisory benefit.**

As described above, several proposed changes to the rule would expand the Bureau’s authority to share confidential information beyond what is permitted under the statute. These proposed changes signal that the Bureau is taking a more expansive view of its authority and its willingness to share confidential and sensitive information with third parties. This signal, alone, would create meaningful and unnecessary disincentives for banks and other parties to openly communicate with the Bureau without providing the Bureau with any material

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<sup>40</sup> The Bureau notes that although it may disclose any category of confidential information under this section, “disclosures made under this section . . . are more likely to involve confidential investigative information, rather than other categories of confidential information, such as [CSI].” NPR 58,319.

<sup>41</sup> Proposed 12 C.F.R. § 1070.2(a).

<sup>42</sup> 12 U.S.C. § 5566.

supervisory benefit. Open communication between banks and their regulators is one of the fundamental pillars of effective bank supervision. As the Bureau has acknowledged, “the [bank] supervisory process is based on the supervisor’s full and unfettered access to information, and the supervisor is entitled—indeed, duty bound—to ensure that it thoroughly understands the institution in question and has access to all information that . . . may bear on its supervisory responsibilities.”<sup>43</sup> The protection of a bank’s confidential information is, of course, critical to maintaining a relationship of trust between a regulated institution and its supervisors, enabling them to work collaboratively towards the common goal of preserving the institution’s safety and soundness by, among other things, resolving problems without inciting panic or increasing litigation or reputational risk of the relevant institution.

The banking agencies have long asserted the bank examination privilege to protect CSI from disclosure in litigation, and this privilege has been upheld by courts. For example, the D.C. Circuit has found that:

[b]ecause bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged.<sup>44</sup>

In general, courts have recognized that the qualified bank examination privilege “arises out of the practical need for openness and honesty between bank examiners and the banks they regulate,”<sup>45</sup> and that the regulation of financial institutions necessitates open and honest communication between the regulator and the institutions it regulates.<sup>46</sup>

By expanding the disclosure of CSI to more agencies and other entities, and making the transfer of that information to outside parties occur more routinely than it has historically, the Proposal would increase the risk that courts will no longer be willing to protect supervisory

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<sup>43</sup> CFPB Bulletin 12-01 at 2 (Jan. 4, 2012).

<sup>44</sup> *In re Subpoena Served Upon Comptroller of Currency (In re Subpoena)*, 967 F.2d 630, 634, citing *Franklin Nat’l Bank*, 478 F. Supp. 577, 586; see also *United States v. Provident Nat’l Bank*, 41 F.R.D. 209, 210 (E.D. Pa. 1966); see also *Wolfe v. Dep’t of Health and Human Servs.*, 839 F.2d 768, 773 (D.C. Cir. 1988) (“[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”).

<sup>45</sup> See, e.g., *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797 (RWS), 2004 WL 2624673, at \*4 (S.D.N.Y. Nov. 18, 2004), quoting *Merchants Bank v. Vescio*, 205 B.R. 37, 42 (D. Vt. 1997)).

<sup>46</sup> See, e.g., *In re Subpoena Served Upon Comptroller of Currency (In re Subpoena)*, at 633-34 (D.C. Cir. 1992) (“bank examination reports and related communications” privileged; collecting cases evincing long history of privilege and explaining “practical necessity” of open, frank, iterative dialogue between banks and regulators).

information from disclosure in private litigation, thereby severely undermining the supervisory process. The bank examination privilege is a qualified privilege, and some courts have been reluctant to uphold it in recent years.<sup>47</sup> Accordingly, to protect the integrity of the bank examination privilege, the Bureau (like other agencies) should disclose CSI only in rare cases when the particular disclosure serves a strong governmental interest—not just a theoretical advancement of the Bureau’s mission.

We are concerned that the above-referenced proposed amendments: (i) would undermine the relationship of trust between banks and the Bureau in a manner that could be detrimental to the banks’ safety and soundness and (ii) would not provide the Bureau with a corresponding supervisory benefit.

Finally, in the preamble to the Proposal, the Bureau notes that “[i]n developing this proposed rule, the Bureau has considered the potential benefits, costs, and impacts required by section 1022(b)(2)(A) of the Dodd-Frank Act. The Bureau has consulted, *or offered to consult with*, the prudential regulators and the Federal Trade Commission including consultation regarding consistency with any prudential, market, or systemic objectives administered by such agencies.”<sup>48</sup> In light of the potential harm to the supervisory process and the negative impact on the viability of the bank examination privilege that could result from the proposed expansion of the sharing of CSI, we believe that meaningful consultation by the Bureau with the prudential regulators, in particular, is critically important in connection with any proposal related to the disclosure of CSI.

## **2. The Bureau should determine that it may not transfer privileged material submitted pursuant to 12 U.S.C. § 1828(x).**

In addition to the above concerns, we are troubled by the Bureau’s assertion that it has the authority to transfer privileged information submitted under Section 1828(x) of the FDI Act to other agencies (including law enforcement agencies) without “destroying” or “breaching” the submitter’s privilege. Section 1828(x) provides that the disclosure of privileged materials, such as those subject to the attorney-client privilege, to certain regulators does not constitute a waiver of such privilege vis-à-vis third parties. If the Bureau shared such information with another “agency” outside the scope of the statute, it may undermine or endanger the submitting institution’s privilege, thereby potentially exposing the institution to increased safety and soundness, litigation, and reputational risks. This could set a dangerous precedent for the preservation of the attorney-client privilege and other privileges not only for financial institutions, but more broadly.

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<sup>47</sup> See, e.g., *Wultz v. Bank of China Ltd.*, 61 F. Supp. 3d 272, 290 (S.D.N.Y. 2013) (“While the public interest in candor [between banking regulators and banks] is a serious concern, it is present in every case involving the bank examination privilege—and yet the privilege remains qualified, not absolute.”); *United States ex rel. Fisher v. Ocwen Loan Servicing, LLC*, 2015 WL 3942900, at \*5 (E.D. Tex. June 26, 2015) (“[T]he privilege should not apply to highly relevant documents in a FCA case. . .”).

<sup>48</sup> NPR 58,321 (emphasis added).



The Bureau should confirm that it will not transfer privileged materials that have been submitted to the Bureau in reliance on the non-waiver provisions of Section 1828(x) to other agencies or parties. We respectfully submit that the Bureau lacks the legal authority to do so, and, if it were to transfer privileged material to another agency or person, it may potentially breach the submitter's privilege. Section 1828(x) was intended to alleviate supervised institutions' concerns that the submission of confidential materials to regulators would enable others (including private litigants and law enforcement) to claim that a privilege had been waived, destroyed, or otherwise affected, with potentially far-reaching consequences unrelated to the needs of proper supervision.

Although the Bureau and the banking agencies have taken a position that examination authority is sufficiently broad to compel an institution to provide privileged materials, that view has not been tested in the courts.<sup>49</sup> Instead, the supervisory agencies (now including the Bureau) understand that seeking access to privileged materials raises serious policy issues by, among other things, potentially inhibiting firms from seeking legal advice or otherwise interfering with the attorney-client relationship.<sup>50</sup> The Bureau's own policy "is to request privileged information only when the Bureau determines that such information is material to the supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources."<sup>51</sup>

Section 1828(x) serves to enable institutions to comply with supervisory requests for privileged material with greater confidence because the statutory non-waiver provision provides comfort that privileged information submitted "in the course of any supervisory or regulatory process of [the] Bureau" will not then be passed on to other parties who do not themselves have even a colorable claim to privileged material. There is no indication in

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<sup>49</sup> See, e.g., Federal Reserve Board Supervisory Letter SR 97-17, Access to Books and Records of Financial Institutions During Examinations and Inspections, *available at* <https://www.federalreserve.gov/BoardDocs/SRLetters/1997/SR9717.HTM>.

<sup>50</sup> For example, the OCC consistently took the position that privileged information submitted to examiners is not voluntary and does not result in the waiver of the applicable privilege with respect to third parties. However, the OCC still supported the enactment of 12 U.S.C. 1828(x) to provide greater assurance to its supervised entities that their submission would not waive any applicable privilege with respect to third parties. 77 Fed. Reg. 15,286, 15,287 "Confidential Treatment of Privileged Information" (March 15, 2012), *citing* OCC Interpretive Letter, 1991 WL 338409 (Dec. 3, 1991); Statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, before the U.S. House Subcommittees on General Oversight and Investigations and on Financial Institutions and Consumer Credit, Committee on Financial Services, on Coordination and Information Sharing among Financial Institution Regulators, 20 No. 2 OCC Q.J. 45, 2001 WL 1002162 (Mar. 6, 2001); Statement of Julie L. Williams, First Senior Deputy Comptroller and Chief Counsel, Office of the Comptroller of the Currency, before the Senate Committee on Banking, Housing and Urban Affairs, Hearing: Consideration of Regulatory Relief Proposals, 2006 WLNR 3558037 (Mar. 1, 2006).

<sup>51</sup> CFPB Bulletin 12-01 at 3 (Jan. 4, 2012).

Section 1828(x) that Congress intended this provision *to enable* a banking agency or the Bureau to circumvent the inability of other agencies to obtain privileged materials. Indeed, the statute describes the protection of privileged material in the strongest terms, stating that the submission “shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim...” If an agency receives information pursuant to Section 1828(x), then passes that information on to others, it may potentially put the privilege at risk of being “destroyed,” even if there has been no formal “waiver.”<sup>52</sup>

A clarification that the Bureau will not further disclose privileged material that it receives from supervised entities and others pursuant to Section 1828(x) is comparable to the control that the Bureau and other agencies maintain over their own CSI that has been provided to supervised institutions and others. Namely, the privileges belong to the submitter, and the receiving agency’s receipt of the information is for its own use and does not authorize further transfers to any other party.

**F. The Bureau should not expand its current approach to sharing CSI.**

The Bureau has not conducted a thorough analysis of the risks associated with expanded disclosure of CSI, which include supervisory, litigation, and reputational risks. As we believe that such risks far surpass any perceived benefits of the Proposal, we respectfully request that the Bureau retain the current approach to sharing CSI.

**III. THE BUREAU SHOULD, AT A MINIMUM, INCORPORATE SOUND DISCLOSURE PRACTICES INTO THE REGULATION.**

**A. The Bureau should articulate a standard that it will apply in considering whether to disclose confidential information.**

In seeking to expand the universe of entities with which the Bureau may share CSI, the Bureau has not articulated a standard against which disclosure requests would be evaluated. This stands in stark contrast to the policies of the federal banking regulators, which have adopted regulations and policies permitting such disclosure only in very limited circumstances, notwithstanding their plenary authority to disclose CSI to “any person.”<sup>53</sup> For example, and as described previously, with respect to disclosure to entities, other than federal

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<sup>52</sup> Nor does Section 1821(t) of the FDI Act provide a legal basis for the Bureau to share a submitter’s privilege with another agency. To do so would breach or “destroy” the submitter’s privilege, something that Section 1828(x) does not permit. Section 1821(t) deals with an entirely different issue. It ensures that the “agency” “shall not be deemed to have waived any [applicable] privilege” by transferring privileged material to any other federal agency listed in that statute. There is no indication that Section 1821(t) was designed to apply to any privileges other than the transferring agency’s own privileges. The Bureau cannot waive the privilege of a submitter in any event, so this statutory provision cannot be read as license for a banking agency to end-run restrictions on other federal agencies’ ability to obtain privileged materials without raising waiver issues.

or state financial supervisory agencies or law enforcement agencies and other nonfinancial institution supervisory agencies “for use where necessary in the performance of official duties,”<sup>54</sup> the Board’s rules provide that the Board “will not authorize disclosure [of CSI] unless the person requesting disclosure is able to show a substantial need for such information that outweighs the need to maintain confidentiality.”<sup>55</sup> Similarly, the OCC’s rules regarding the disclosure of non-public OCC information limits the types of state agencies to which the OCC will disclose this information, providing that where disclosure is not prohibited by law, the OCC may, in its sole discretion, disclose non-public OCC information to “state agencies with authority to investigate violations of criminal law” or “state bank and state savings association regulatory agencies” “when necessary, in the performance of their official duties.”<sup>56</sup>

These policies for limiting disclosure reflect the recognition that, in order to encourage the free exchange of information between institutions and their regulators, and to protect the viability of the bank examination privilege, the possibility of disclosure must be remote. Further, as a matter of practice, there is a limited universe of other governmental entities with which the federal banking agencies are willing to share confidential information generally. Sharing information with other agencies having either law enforcement or regulatory authority over the institution presents less risk of further disclosure, as such entities themselves recognize the critical importance of maintaining the confidentiality of such information in a manner that other entities, such as, for example, a state bar association, may not. In addition, such agencies are more likely to have the advanced cybersecurity and information technology systems crucial to protect sensitive information, including NPPI.

Consistent with the policies of the banking agencies described above, the Bureau previously announced, in CFPB Bulletin 12-01 (Jan. 4, 2012) (the “**Bulletin**”), that it “will not routinely share [CSI] with agencies that are not engaged in supervision” and that “[e]xcept where required by law, the Bureau’s policy is to share [CSI] with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all the relevant facts and considerations.”<sup>57</sup> In fact, the Proposal confirms that this policy articulated in the Bulletin “remains in place” and that the “Bureau’s revised interpretation of 12 U.S.C. 5512(c)(6) and its proposed revision to § 1070.43(b)(1) do not

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<sup>53</sup> 12 U.S.C. § 1817(a)(2)(C)(iii).

<sup>54</sup> 12 C.F.R. § 261.21(a).

<sup>55</sup> 12 C.F.R. § 261.22(a).

<sup>56</sup> 12 C.F.R. § 4.37(c).

<sup>57</sup> CFPB Bulletin 12-01 at 5 (Jan. 4, 2012). The Bulletin explains that “[t]his review will include, among other things, the information requesting agencies are required to provide pursuant to 12 C.F.R. § 1070.43(b)(2), including the purpose for which the information is sought, the legal authority of the requesting agency, and the requesting agency’s commitment to maintain the confidentiality of the information in accordance with the Bureau’s regulations and any other conditions the Bureau may impose.”

alter” the Bulletin.<sup>58</sup> However, it is unclear whether the Bureau intends to extend this policy to the discretionary sharing of such sensitive information more broadly.<sup>59</sup> In light of the expanded scope of information-sharing put forward by the Proposal, we believe it is critical that the Bureau do so.

Therefore, we respectfully request that the Bureau identify and codify in its revised regulation a formal policy and practice parallel to the one set forth in the previously published Bulletin. Pursuant to such a policy, unless required by law, the Bureau will share CSI with entities (other than federal or state financial supervisory agencies with jurisdiction over the supervised entity or, if the Bureau has evidence that may constitute a violation of federal criminal law, the Attorney General of the United States) only in very limited circumstances and where the person requesting disclosure successfully demonstrates to the Bureau’s satisfaction the various factors listed in the Bulletin, including a substantial need for the requested information that outweighs the Bureau’s need to maintain its confidentiality.

**B. The Bureau should provide notice and an opportunity to object to the relevant entity prior to disclosing its CSI.**

Further, because of the importance of maintaining the confidentiality of CSI, if the Bureau proceeds with the proposed expansion of agencies who can receive CSI, we respectfully request that the Bureau amend the Proposal to provide that, absent circumstances that compel otherwise, the Bureau will provide prior notice to a supervised entity when the Bureau proposes to disclose CSI relating to the institution to any entity (other than federal or state financial supervisory agencies with jurisdiction over the supervised entity or, if the Bureau has evidence that may constitute a violation of federal criminal law, the Attorney General of the United States), and provide the institution with a reasonable opportunity to object. Such notice would be consistent with the approach adopted by the OCC, which has a policy of “[f]ollowing receipt of a request for non-public OCC information” of “generally notif[y]ing the national bank or Federal savings association that is the subject of the requested information, unless the OCC, in its discretion, determines that to do so would advantage or prejudice any of the parties in the matter at issue.”<sup>60</sup>

For the same reasons, we object to the Bureau’s proposal to amend its rules to remove the mandatory notice requirement to an institution when CSI is sought by either House of Congress, or by an appropriate committee or subcommittee thereof. The Bureau proposes to amend this provision to provide the Bureau with discretion to notify an institution of such request, which would achieve “greater flexibility” for the Bureau.<sup>61</sup> Without any explanation of the reasons for the Bureau not providing institutions notice, we believe that this unexplained “flexibility” is outweighed by the importance of preserving the confidentiality of

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<sup>58</sup> NPR 58,318.

<sup>59</sup> NPR 58,317.

<sup>60</sup> Consideration of Requests, 12 C.F.R. § 4.35(a)(5).

<sup>61</sup> NPR 58,319.

CSI, which is critical to ensuring that information is not misused, misunderstood, or inaccurately reported by allowing institutions to be prepared to respond to questions and potentially avoid panic or inappropriate or harmful reactions. These important interests justify providing the institution with notice and an opportunity to object to such disclosure, or, at a minimum, an opportunity to ensure that safeguards are in place for Congress to hold the information confidential. Indeed, the Bureau currently provides notice to institutions when CSI is sought by Congress, and, through this notice process, institutions have been able to redact highly sensitive information, including NPPI, not responsive to the request, and thereby avoid inadvertent disclosure of information that should not have been disclosed. The Bureau's current procedures regarding such notice are therefore critical to institutions' efforts to prevent inadvertent disclosure of highly sensitive information.

#### **IV. THE PROPOSAL IS INCONSISTENT WITH THE GRAMM-LEACH-BLILEY ACT'S CONSUMER PRIVACY PROTECTIONS.**

We also are concerned that the Proposal would allow for disclosure of confidential information inconsistent with the privacy provisions applicable to financial institutions under Subtitle A of Title V of the GLBA and its implementing regulations. The Proposal's expansion of those entities with which the Bureau may share confidential information, including entities such as state bar associations and other entities "exercising government authority," would put financial institutions in the position of effectively sharing information in a manner that is inconsistent with Regulation P, which implements Subtitle A of Title V of the GLBA. That section of the GLBA limits the instances in which a financial institution may disclose NPPI about a consumer to nonaffiliated third parties and requires financial institutions to provide certain privacy notices to their consumers and customers.<sup>62</sup> Currently, financial institutions routinely inquire into the statutory or regulatory authority of agency requests for NPPI,<sup>63</sup> and if such authority is lacking, financial institutions decline the requests, consistent with Regulation P.<sup>64</sup> However, under the Proposal, "agencies" outside the scope of those contemplated under Regulation P could simply obtain from the Bureau data they could not otherwise legally obtain from financial institutions. Thus, we respectfully request that the Bureau amend the Proposal so as to not evade Regulation P

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<sup>62</sup> 15 U.S.C. § 6802–6803(a).

<sup>63</sup> Under Regulation P, financial institutions are not required to comply with the notice and opt-out provisions "[t]o the extent specifically permitted or required under other provisions of law and in accordance with the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401 *et seq.*) to law enforcement agencies (including the Bureau, a Federal functional regulator, the Secretary of the Treasury, with respect to 31 U.S.C. Chapter 53, Subchapter II (Records and Reports on Monetary Instruments and Transactions) and 12 U.S.C. Chapter 21 (Financial Recordkeeping), a state insurance authority, with respect to any person domiciled in that insurance authority's state that is engaged in providing insurance, and the Federal Trade Commission), self-regulatory organizations, or for an investigation on a matter related to public safety." 12 C.F.R. § 1016.15(a)(4).

<sup>64</sup> 12 C.F.R. § 1016.15(a)(4).

requirements, which implements Congress's considered view of the appropriate protections that should be afforded to consumers.

Further, if the proposed expansion of the Bureau's ability to share confidential information, including personal information about non-U.S. individuals (such as, for example, non-U.S. holders of U.S. consumer accounts) were finalized, we believe that such sharing would be inconsistent with non-U.S. privacy rules and be likely to draw serious objections from the EU and other foreign jurisdictions. Indeed, perceived overreaching of access to personal information by the U.S. government has been a driving force behind recent EU legal activity, such as the decision in the *Schrems* case,<sup>65</sup> which invalidated the well-established EU-U.S. Safe Harbor agreement, and regulatory developments, such as the adoption of the General Data Protection Regulation, which protects the privacy of individuals within the EU even when their data is processed outside the EU and is expected to take effect in 2018.<sup>66</sup> If corporate client information would be disclosed by the Bureau, contractual confidentiality obligations may be compromised, in addition to other client relationship issues. Moreover, for non-U.S. clients, potential issues would arise under blocking statutes and bank secrecy laws.

## **V. OTHER MODIFICATIONS SHOULD BE MADE TO THE PROPOSAL.**

### **A. The proposed shifting of disclosure authority from the General Counsel to the Associate Director would be inappropriate.**

The proposal to shift the authority under Sections 1070.43(b)(2) and 1070.47(a) to release confidential information pursuant to access requests and to authorize further sharing of confidential information, respectively, from the General Counsel to the Associate Director would be inappropriate. It presents a potential conflict of interest and would provide the Associate Director with legal authority that should rightfully reside with the General Counsel, the Bureau's most senior attorney, who is in a better position to weigh the impact of disclosure practices on the vitality of the bank examination privilege and other legal obligations. The Bureau states that these changes in procedure each "would lead to increased efficiency because the vast majority of access requests submitted to the Bureau pertain to work conducted by its Division of Supervision, Enforcement, and Fair Lending."<sup>67</sup> The fact that most requests pertain to work conducted by the Division of Supervision, Enforcement, and Fair Lending provides a strong reason why the Associate Director should *not* have the sole authority to act on such requests, as he or she may have an interest in sharing or further releasing the information for reasons related to the work conducted by his or her division. Furthermore, the determination as to whether information should be released presents questions about the agency's legal authority, which are most appropriately addressed by the General Counsel. For example, in connection with a proposed clarifying amendment to Section 1070.43(b)(2)(iii), an access request must contain, among other things, "a statement

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<sup>65</sup> Case C-362/14, *Schrems v. Data Protection Comm'r*, 2015 E.C.L.I. 627.

<sup>66</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council (Apr. 27, 2016).

certifying and identifying the agency’s ‘statutory or regulatory authority that is relevant to the requested information . . . .’<sup>68</sup> Determining whether a requestor has the appropriate authority to make such request is a task that should reside with the General Counsel and the legal staff who are charged with executing and enforcing the legal authority of the Bureau.

The Proposal would also represent a departure from the Board’s regulation, which vests authority to review access to information in its legal division.<sup>69</sup> For example, as discussed in part II.E.2, supervised financial institutions may submit privileged information to the Bureau, the handling of and disclosure of which is particularly sensitive. Furthermore, as previously noted, the bank examination privilege is a qualified one that requires legal training and experience in the area to properly understand.

We are sympathetic to the Bureau’s desire to make the access request approval process more efficient by giving the lead to the staff potentially closest to the information being requested. For the reasons described above, however, we believe it is critical to ensure that the expertise and objectivity of the General Counsel is brought to bear whenever a request for access is approved. Accordingly, we respectfully request that the Bureau refrain from shifting the above-referenced disclosure authority set forth in Sections 1070.43(b)(2) and 1070.47(a) from the General Counsel to the Associate Director and retain the current framework. At a minimum, if the Bureau proceeds in transferring the authority to the Associate Director, we respectfully request that the approval of the General Counsel also be required to make disclosure determinations under these sections.

**B. The “immediate notification requirement” improperly shifts the burden to individual persons and should be eliminated from the Final Rule.**

We are also troubled by the proposed provision that would make it an independent violation for “any person” in possession of confidential information (not only CSI) to fail to notify the Bureau “immediately” upon discovery of an improper disclosure.<sup>70</sup> Supervised institutions are legally required to maintain the confidentiality of such information and are subject to potential penalties in the event they fail to uphold this requirement. Banks have developed policies and procedures to monitor distribution of confidential information and have the obligation to train their employees on the definition of confidential information. By contrast, a potential recipient of the information, particularly an individual or non-regulated third party, would not have the same supervisory relationship that would make such a notification obligation appropriate. By making it an independent violation for “any person” not to make an immediate notification to the Bureau of an improper disclosure, the Bureau would heighten uncertainty and legal risk for individuals as well as institutions. This is

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<sup>67</sup> NPR 58,318.

<sup>68</sup> NPR 58,318.

<sup>69</sup> 12 C.F.R. § 261.22.

<sup>70</sup> Proposed 12 C.F.R. § 1070.47(g).

particularly so in the case of CSI, because whether a particular document or piece of information is, in fact, CSI, is often difficult to determine, even for a supervised entity.

These concerns are compounded by the Bureau's proposed language, requiring "[a]ny person in possession of confidential information" to notify the Bureau "upon discovery of any disclosures made in violation" of the relevant rule. Such language seems to impute an awareness of what constitutes confidential information, including CSI, and of what sharing of confidential information is permitted, on individuals for whom such awareness may be unreasonable. In light of the foregoing—especially the weighty legal obligations of supervised institutions to keep information confidential—the imposition of additional liability on recipients of improper disclosure would improperly shift the burden to those who are, in essence, innocent bystanders in a violation. Accordingly, we respectfully request that the Bureau remove the notification requirement discussed in this paragraph from the Proposal.

#### **VI. IMPORTANT CLARIFICATIONS ARE NEEDED ON MULTIPLE ISSUES RAISED BY THE PROPOSAL AND THE BUREAU'S RULES REGARDING CONFIDENTIAL INFORMATION MORE GENERALLY.**

The Associations are increasingly concerned about the compliance risks institutions need to manage with respect to their internal handling of supervisory information and about assisting in maintaining the viability of the bank examination privilege. In addition, the restrictions on disclosure of supervisory information can, in certain circumstances, inhibit normal business processes. Accordingly, we respectfully request that the Bureau clarify the following points in this rulemaking proceeding:

- ***The Proposal should provide further guidance regarding the type of information that will be considered to be "derived" from CSI and included in the definition of CSI.<sup>71</sup>***
  - For example, institutions may undertake projects in response to Bureau concerns. The work plan for such projects could potentially be considered CSI, but it could also be considered simply "business information." This is particularly important in light of the Bureau's proposed deletion of 12 C.F.R. § 1070.2(i)(2), which currently states that CSI does not include documents prepared by a supervised financial institution for its own business purposes. In light of the significant ambiguities in this area, we urge the Bureau to provide additional guidance regarding the standards it uses to determine whether or not information related to CSI is itself CSI. This guidance would assist institutions in their compliance efforts, and therefore confer benefits on institutions and on the Bureau.
- ***With respect to confidential investigative information that the Proposal permits a covered person to share with its own counsel, the rules should be clarified to***

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<sup>71</sup> NPR 58,312.



***explicitly permit persons who are the subject of investigations to consult with other persons who may have relevant information.***

- For example, an institution may need to interview former employees about their conduct to respond to a Bureau inquiry. Similarly, a former employee who receives a civil investigative demand may need to review documents and materials that the institution possesses in order to prepare for testimony. If such clarification is not provided, institutions must obtain the Bureau's approval to disclose this information, which could require disclosure to the Bureau of attorney work-product and would inhibit institutions from reliably assessing potential enforcement actions. The clarification would be a corollary to the Bureau's reservation of the right to use confidential information in its own investigative and litigation activities.
- ***The regulation should contain an acknowledgment that disclosure by entities pursuant to their securities law disclosure obligations will not be deemed a violation of the confidentiality rules.***
  - Historically, the federal banking agencies have taken the informal position that certain securities law disclosures made on the advice of counsel do not violate the confidentiality rules. The Bureau should consider explicitly taking this position.
- ***The regulation should be reciprocal regarding the exchange of CSI and investigative information between institutions and their service providers, thereby enabling service providers (such as debt collectors who are examined) to provide confidential information to the institutions to which they are providing services.***
  - Currently, Section 1070.42(b)(2)(i) permits a supervised financial institution to provide CSI to its service providers, but does not authorize the service provider to furnish its CSI to the financial institution to whom it provides services.
  - The prudential regulators and the Bureau have imposed on banks the responsibility to monitor a broad range of third-party relationships. This responsibility is made more difficult if the service provider (or other third party) is able routinely to withhold negative supervisory evaluations or investigative information from its bank.
- ***The rule should explicitly require the Bureau to provide notification in connection with administrative or court proceedings.***
  - The rule provides that a submitter of information may seek a protective or similar order for its confidential information in connection with the Bureau's use of such information in administrative or court proceedings.<sup>72</sup> However, as currently drafted, it is ambiguous as to whether the Bureau is required to notify the submitter if it intends to use such information in such proceedings. While this notification requirement is implied, it should be an explicit requirement.

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12 C.F.R. § 1070.45(a)(4).

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We appreciate your consideration of our comments and welcome the opportunity to provide you with any assistance or input that you might find helpful. Should you have any questions or need further information about any of the matters discussed in this letter, please do not hesitate to contact any of the undersigned.

Respectfully submitted,



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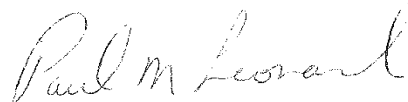
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American Bankers Association



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ANNEX 1  
The Associations



The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.



The American Bankers Association is the voice of the nation's \$16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people. Safeguard \$12 trillion in deposits and extend more than \$8 trillion in loans.



Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.



As *advocates for a strong financial future*<sup>™</sup>, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for \$98.4 trillion in managed assets, \$1.1 trillion in revenue, and 2.4 million jobs.



### **Background**

The HPC was established in April 2003 by FSR's Board. HPC's mission is to promote the mortgage and housing marketplace interests of our members in legislative, regulatory, and judicial forums as well as to communicate the benefits of a fully competitive and integrated housing market to the American public. HPC advocates on behalf of its members on mortgage finance and housing issues to Congress, the Administration, regulators and the public. HPC companies originate, service, and insure mortgages.



The U.S. Chamber of Commerce (the "Chamber") is the world's largest federation of businesses and associations, representing the interests of more than three million U.S. businesses and professional organizations of every size and in every economic sector. These members are both users and preparers of financial information. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. To achieve these goals, the CCMC has supported the development of robust financial reporting systems and encouraged efforts to improve standards and reduce complexity.