

October 24, 2016

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

RE: Docket No. CFPB-2016-0039

Dear Ms. Jackson:

On behalf of the National Council of Higher Education Resources (NCHER), thank you for the opportunity to respond to the above referenced Notice of Proposed Rulemaking (“Notice”) published August 24, 2016 in which the Consumer Financial Protection Bureau (“Bureau”) is seeking comments from the public on a proposed rule relating to the disclosure of records and information (the “Proposed Rule”).

NCHER is a national, nonprofit trade association that represents higher education service agencies that administer education programs that make grant and loan assistance available to students and parents to pay for the costs of postsecondary education. Our members include lenders, servicers, and collectors of loans made under the Federal Family Education Loan Program (FFELP) and state and private student and parent education loans. A number of our members also currently have contracts with the U.S. Department of Education to service and collect loans made under the William D. Ford Federal Direct Loan Program. Many of our members, including state agencies and state-designated authorities, also provide higher education access, outreach and financial literacy programs, counseling, and delinquency and default aversion services.

NCHER disagrees with that part of the Proposed Rule that amends the standard that governs to whom the Bureau may disclose confidential supervisory information collected by the Bureau. The Dodd-Frank Wall Street Reform and Consumer Protection Act and the Bureau’s implementing regulations currently authorize the Bureau to disclose confidential supervisory information to agencies “having jurisdiction over [the] supervised financial institution.” Under the Proposed Rule, such information would be disclosed to any agency if such disclosure is “relevant to the exercise of the agencies’ statutory or regulatory authority.” We believe that, despite the Bureau’s assertion that it seeks to provide the maximum protection for confidential information, the revised standard set forth in the Proposed Rule is inconsistent with the Bureau’s enabling legislation contained in the Dodd-Frank Act and opens the possibility of unnecessary public disclosure of confidential information.

The Dodd-Frank Act 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 confidential supervisory information concerning such person examined by the Bureau...”¹ The current

¹ 12 U.S.C. 5512(c)(6)(C)(ii).

regulation mirrors this language.² The Notice states that the Bureau has interpreted the Dodd-Frank Act to limit the Bureau's discretion to disclose confidential supervisory information.³ We believe this is the correct interpretation of the Dodd-Frank Act. Nonetheless, the Notice says that, while the Bureau's previous interpretation was reasonable, the expanded interpretation now proposed is "more reasonable," going on to say that the "proposed change will assist the Bureau in implementing and administering federal consumer financial law in a more consistent and effective fashion, and enable the Bureau to work together with other agencies having responsibilities related to consumer financial matters." This rationale is without foundation. The expanded authority will not in fact help the Bureau's ability to administer consumer financial laws, as the current regulation does not restrain the Bureau's supervisory or enforcement authorities. Instead, the Proposed Rule expands the Bureau's authority to disclose confidential information in its possession to agencies that do not have jurisdiction over a regulated financial institution.

Further, the Proposed Rule is not needed for the Bureau to provide a prudential regulator, a state regulator, or any other federal agency having jurisdiction over a covered person or service provider with confidential supervisory information. The current regulation makes it clear that these agencies shall have access to any report of examination made by the Bureau. What the proposed rule does is expand the universe of agencies to whom the Bureau may disclose confidential information beyond agencies that have jurisdiction over a covered financial institution or service provider. Significantly, no examples are cited as to when this expanded authority might come into play. The Notice mentions that the current regulation creates an unnecessary impediment to information-sharing which impedes supervisory and enforcement coordination.⁴ However, this explanation does not seem to comport with the expanded authority, since any agency that has supervisory and enforcement authority over a covered financial institution can receive the information under the existing rule.

Also, from a privacy standpoint, the relaxed limits in the Proposed Rule are troubling. We see the heightened standard for disclosing confidential supervisory information as not only a correct reading of the Dodd-Frank Act, but also as the appropriate standard given the nature of the information involved. Confidential supervisory information includes nonpublic business and personal information developed during the Bureau's supervisory and enforcement activities, including information and documents compelled pursuant to civil investigative demands. The Proposed Rule is inconsistent with the statement in the Notice that "the Bureau has sought to provide the maximum protection for confidential information."⁵ Given that hackers seem to have almost unlimited access to confidential information, every disclosure of confidential supervisory information to additional recipients increases the possibility of unauthorized disclosures of potentially damaging information.

We also question the appropriateness of substituting the Bureau's head of Supervision, Enforcement, and Fair Lending for the Bureau's General Counsel as the person who decides whether to disclose confidential supervisory information under the amended regulation. Given the traditional role that General Counsels provide within the federal government, and the personal and business privacy interests at stake, we see the General Counsel as being better suited to make these important decisions.

For all of these reasons, NCHER believes the existing provisions in Subpart D of 12 U.S.C. Part 1070 should stand.

² 12 C.F.R. 1070.43(b)(1).

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

⁴ 81 Fed. Reg. 58317 (August 24, 2016).

⁵ 81 Fed. Reg. 58310 (August 24, 2016).

Thank you for the opportunity to provide these comments on this important matter. If you have any questions about these comments or need additional information, please contact me at jbergeron@ncher.us or at (202) 822-2106.

Sincerely,

A handwritten signature in black ink, appearing to read "J P Bergeron". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James P. Bergeron
President