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Regulatory: The Consumer Financial Protection Bureau's Data Sharing Policy

Banks believe that wide dissemination of confidential supervisory information could ultimately hurt consumers.

October 5, 2011
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This column is part of a series of articles on the new Consumer Financial Protection Bureau and the upcoming wave of regulations affecting the consumer financial industry.

Major bank and financial services trade associations are trying to push back against the Consumer Financial Protection Bureau's plans to share with states the data it collects from financial institutions during the supervision process. While the Bureau insists that information sharing serves the public interest, banks are legitimately concerned that the distribution of data—particularly confidential data—will upset the delicate supervisory process and ultimately limit the capability of banks to serve their customers.

If the Bureau gives the attorneys general of the various states information about bank conduct, the concern is that private lawsuits will ultimately follow. The Dodd-Frank Act grants the Bureau significant enforcement and supervisory powers. The plaintiffs' bar, however, is empowered to seek civil remedies for individuals under the numerous state and federal consumer financial protection laws. The result is potentially a double or even triple "whammy": federal regulators, state attorneys general and plaintiffs all seeking to pounce on a bank over what might have been previously and acceptably remedied in the relative quiet of the supervisory process.

How did this evolve?

Back on Jan. 4, 2011, the Bureau entered into a memorandum of understanding (Memorandum) with the Conference of State Bank Supervisors (CSBS) entitled "On the Sharing of Information for Consumer Protection Purposes." The Memorandum's stated purpose is:

[T]o establish the framework for the parties, consistent with law, to establish and enhance the cooperative relationship between the [Bureau] and State Regulators contemplated by [Article X of the Dodd-Frank Act] and to preserve the confidential nature of the information the parties share by and among themselves.

According to the Department of the Treasury, the Bureau and the CSBS "will endeavor to promote consistent examination procedures and effective enforcement of state and federal consumer laws and to minimize regulatory burden and efficiently deploy supervisory resources." Elizabeth Warren, then the special advisor to Treasury Secretary Tim Geithner regarding the Bureau, had this to say about the Memorandum:

The new consumer financial agency and the state banking regulators are forging an alliance to protect American families. ... This agreement allows us to bring thousands of financial service providers out of the shadows and to begin the process of ensuring that all lenders comply with the same basic rules.

In April, the Bureau entered into a Joint Statement of Principles (Joint Statement) with the Presidential Initiative Working Group of the National Association of Attorneys General (NAAG) that included a promise to "[s]hare information, data, and analysis about conduct and practices in the markets for consumer financial products or services to inform enforcement policies and priorities." According to the Bureau, the Joint Statement was "the first step in forging a new partnership between federal and state officials to protect consumers of financial products and services."

In July, the Bureau issued its "Interim Final Rule on Disclosure of Records and Information" (the Disclosure Rule) which, among other things, provides for the confidential treatment of information the Bureau receives in during the exercise of its various duties under the federal consumer financial protection laws, and provides procedures for the public to obtain information from the Bureau under the Freedom of Information Act and other methods. The Dodd-Frank Act allows, but does not require, the Bureau to share with the states information it gathers from its consumer complaint system. In August, the Bureau began sharing that information with some state attorneys general.

On September 26, four prominent trade associations—the American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable and the Mortgage Bankers Association—collectively commented on the Disclosure Rule, expressing grave concerns that the rule "could lead to frequent and routine disclosure of confidential information to third parties and that such disclosure would do little, if anything, to advance the mission of the [Bureau], while causing considerable harm to financial institutions, their customers and the economy as a whole."

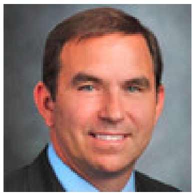
As a remedy, the associations proposed four reasoned amendments to the Disclosure Rule:

1. First, the associations asked that, except in very limited circumstances, supervisory information remain confidential. This would facilitate continued open communication and transparency between the Bureau and its supervised institutions.
2. Next, the associations suggested an amendment that would limit disclosures of confidential supervisory information to only those state officials which have authority to enforce the law at issue.
3. Third, to the extent confidential information is regularly shared, the associations requested that the Bureau limit the sharing to only the other state and federal agencies that have supervisory authority.
4. Finally, the associations asked that the Bureau affirmatively state that it will "normally share confidential information with third parties, apart from other relevant financial supervisory authorities."

The Bureau has not yet commented on how it will incorporate, if at all, the associations' suggested amendments to the Disclosure Rule. The risk of over-disclosing confidential supervisory information and failing to adopt these amendments is potentially significant, while the upside of leaving the Disclosure Rule "as is" remains elusive. After all, if an alleged consumer ill is rectified in the supervisory process, how are the interests of consumers as a whole advanced by allowing other regulators, state enforcement agencies and the plaintiffs' bar to pile on?

One can certainly see the potential for a regulatory and litigation waterfall that does nothing to remedy the larger wrong already corrected but nonetheless increases the costs to consumers generally.

About the Author



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