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Response Regarding Bureau Data Collections (Docket No. CFPB-2018-0031)

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Financial Regulation and Consumer Protection Scholars and Former Regulators

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Comment of Legal Scholars and Former Regulators
on Docket No. CFPB-2018-0031

December 21, 2018

Comment Intake
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, D.C.  20552

Dear Sir or Madam:

Please see the submission below in response to the Consumer Financial Protection Bureau’s Request for Information (RFI) Regarding Bureau Data Collections (Docket No. CFPB-2018-0031).  We are legal scholars and former regulators specializing in consumer financial protection.*  Thank you for the opportunity to submit these comments for your consideration.

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Comment of Legal Scholars and Former Regulators on Docket No. CFPB-2018-0031

In this Request for Information (RFI), the Consumer Financial Protection Bureau (CFPB or the Bureau) seeks public comment on “the overall efficiency and effectiveness of the Bureau’s . . . Data Collections in support of the Bureau’s work.” In connection with this RFI, the Bureau states that it “is considering whether any changes to its . . . Data Collections would be appropriate.” The CFPB does not shed light on the changes that it is considering. The RFI’s repeated references to reporting burdens and unsubstantiated privacy concerns send strong signals, however, that the Bureau is contemplating significant cutbacks to data collections and strict limits on data reuse in the name of reducing industry burden.

Major curtailments to the Bureau’s data collections and restrictions on its current reuse would undermine the Bureau’s ability to fulfill its statutory mission to protect consumers. For that reason, we oppose any such cutbacks and restrictions.

I. The CFPB’s Statutory Mission Necessitates the Scope and Robustness of Its Data Collections Activities

The CFPB does not collect data for the sake of collecting data. Rather, it gathers data in order to fulfill its fundamental statutory obligation to protect consumers. Any reevaluation of the CFPB’s data collections activities must therefore ensure that the Bureau continues to gather the full data needed to protect the financial safety of U.S. families.

Consumer financial protection is the overarching statutory mission of the CFPB and therefore the defining purpose of the CFPB’s data collections activities. Specifically, in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Congress defined the CFPB’s purpose as follows:

- One, to “ensur[e] that all consumers have access to markets for consumer financial products and services”; and
- Two, to ensure “that markets for consumer financial products and services are fair, transparent, and competitive.”

The Dodd-Frank Act goes on to charge the CFPB with “implement[ing] and, where applicable, enforc[ing] Federal consumer financial law consistently for the purpose of” of fulfilling those twin statutory goals.

2 Id.
3 In certain cases, the Bureau also collects data pursuant to an independent statutory directive. The most prominent example involves data collection under the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801-2810.
4 Id. § 5511(a).
5 Id.
In furtherance of the CFPB’s statutory mission to ensure consumer financial protection, the Dodd-Frank Act authorizes the Bureau “to exercise its authorities under Federal consumer financial law” to achieve these five statutory objectives:

- **First**, that “consumers are provided with timely and understandable information to make responsible decisions about financial transactions”;
- **Second**, that “consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination”;
- **Third**, that “outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens”;  
- **Fourth**, that “Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition”; and
- **Fifth**, that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”

Any proposal to restrict the Bureau’s data collections and data reuse must therefore be evaluated in light of the CFPB’s statutory purpose and five statutory objectives. When the Bureau’s purpose and statutory objectives are considered together, these are the criteria against which any proposed cutbacks and reuse limitations must be judged:

- Will cuts to data collections or restrictions on data reuse make it harder to ensure that “consumers have access to markets for consumer financial products and services”?
- Without the same robust level of data collections and reuse, will it be harder for the CFPB to ensure that consumer financial markets “are fair, transparent, and competitive”?  
- In a similar vein, will new limits on data gathering and sharing harm the Bureau’s ability to ensure that “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation”?  
- Will it be harder for the Bureau to provide consumers “with timely and understandable information to make responsible decisions about financial transactions” if data are curtailed?  
- Will new data restrictions impede the CFPB’s ability to protect consumers from “unfair, deceptive, or abusive acts and practices and from discrimination”?; and
- Will future strictures on data collections and reuse hamper the CFPB’s ability to consistently enforce Federal consumer financial law “without regard to the status of a person as a depository institution, in order to promote fair competition”?  

Unless the CFPB can answer each of those questions with an unequivocal “no,” it lacks justification to scale back the CFPB’s current vigorous level of data collections and its sensible protocols governing reuse.

To be sure, Congress in the Dodd-Frank Act instructed the Bureau to identify and address “outdated, unnecessary, or unduly burdensome regulations . . . in order to reduce unwarranted regulatory burdens.” That injunction assumes, however, that the Bureau first fulfills its statutory

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6. *Id.* § 5511(b).
obligation to protect the financial safety of consumers. Reducing regulatory burden is not and must not be an objective in and of itself. To the contrary, if new restrictions on data collections and reuse would impede the CFPB’s ability to protect consumers—as we maintain it will, for the reasons we describe below—then the question is settled and the Bureau may not scale back its current commitment to robust data collections and responsible data reuse.

It is equally important that any future consideration of data curtailments be handled with full transparency. In this regard, we are concerned about the lack of process surrounding Bureau’s decision earlier this year to issue an interpretive and procedural rule excusing most mortgage lenders from reporting the discretionary data points added to Home Mortgage Disclosure Act’s data points pursuant to Dodd-Frank in 2015. Despite its obligation to evaluate the potential costs and benefits of that exemption under Section 1022(b)(2)(A) of Dodd-Frank—and despite the extensive cost-benefit analysis to the contrary in the original rule—the Bureau issued this year’s exemption with no quantitative analysis whatsoever of the ensuing costs and benefits. The scant cost-benefit discussion in the preamble to that exemption was mostly conclusory and focused on the benefits to regulated entities (“covered persons”). The only discussion in the preamble of the effect on consumers was a throwaway line saying, “this rulemaking is expected to have negligible impact on consumers, in terms of either costs or benefits.” To compound matters, the Bureau made the exemption immediately effective, with no prior notice or opportunity for public comment.

The handling of this exemption is highly troubling because it reversed a final rule on data collections without evaluating that decision in terms of the purpose or statutory objectives of the CFPB. We have added reservations that the HMDA exemption process violated the impact analysis requirements of Dodd-Frank and the procedural requirements of the Administrative Procedure Act. The experience with the HMDA exemption raises serious concerns that the Bureau will revisit its other data collection activities in an equally casual manner. In view of these concerns, it is imperative that any proposal to further curtail the Bureau’s data collections and data reuse be conducted in a public and fully transparent manner. To do so, any such proposal needs to undergo rigorous empirical analysis of the effect on the Bureau’s core mission and provide the public with a meaningful opportunity for prior comment.

II. Evidence-Based Decision-Making Is a Bedrock Principle of the Bureau

Since it came into existence, the CFPB has refrained from intervening in markets based on doctrine or ideology. Instead, the Bureau has conducted regulation strictly based on rigorous

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9 See id. at 45331.
empirical analysis of the facts. This record is a product of the steadfast commitment the CFPB made from its inception to neutral, evidence-based decision-making.  

In 2010, Congress made the judgment that the crux of CFPB decision-making had to be data. For this reason, Dodd-Frank commands the Bureau to “collect[ ], research[ ], monitor[ ], and publish[ ] information relevant to the functioning of” consumer financial markets “to identify risks to consumers and the proper functioning of such markets . . .” Numerous other provisions in the Dodd-Frank Act authorize the Bureau to collect data in order to discharge its responsibilities to the public. 

This data-driven tradition is the linchpin of the Bureau’s operations and its success in protecting consumers. It ensures that consumer harms will be identified and the extent of those problems gauged. At the same time, it ensures that the Bureau will not intervene unless there is a problem, that the Bureau knows exactly what problem needs to be solved, and that any intervention will be tailored to the issue at hand. None of this is possible without the appropriate data. Data are what enable the Bureau to fulfill its responsibility to protect consumers while avoiding unnecessary regulatory burden and market distortions.

This commitment to empirically-based policymaking is hard-wired into the very structure of the Bureau, pursuant to Dodd-Frank. The Act expressly instructs the Director to establish a research

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11 12 U.S.C. § 5511(c)(3); see also id. § 5512(c) (mandating CFPB monitoring for rulemaking purposes and otherwise).

12 See, e.g., Bureau of Consumer Financial Protection, Sources and Uses of Data at the Bureau of Consumer Financial Protection 26-27 (Sept. 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/bcfp_sources-uses-of-data.pdf [hereinafter Data Report]; Dodd-Frank Act § 1447 (default and foreclosure database); 12 U.S.C. §§ 2801-2810 (Home Mortgage Disclosure Act data collection), 5107-5108 (backup authority to establish loan originator licensing system and nationwide mortgage licensing and registry system), 5493(b)(3)(A) (mandate to establish a consumer complaint database), 5511(c)(2) (collecting consumer complaints), 5512(c)(4) (“the Bureau shall have the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers”), 5512(c)(5) (the CFPB may gather information to determine whether a nonbank provider is a covered person), 5512(c)(6)(B) (access by the Bureau to reports of other regulators), 5512(c)(7)(B) (public disclosure of nonbanks’ registration information), 5514(b)(1) (supervisory collection of information through reports and examinations of non-depository providers), 5514(b)(4) (CFPB use of information on nonbank providers from public sources and reports by other regulators), 5515(b)(1) (supervisory collection of information through reports and examinations of very large depository institutions and credit unions), 5515(b)(3) (CFPB use of information on very large depository institutions and credit unions from public sources and reports by other regulators), 5516(b) (access to reports on smaller depository institutions and credit unions), 5514-5516 (authorizing the Bureau to require financial institutions to provide data in response to supervisory requests), 5517(n)(2) (permissible CFPB information requests of certain service providers), 5534 (authorizing the Bureau to require financial institutions to provide data in response to consumer complaints), 5536(a)(2) (making it illegal for covered persons and service providers to fail or refuse to make reports or provide information to the Bureau), 5562-5563 (subpoena, civil investigative demand, and other information gathering powers for purposes of CFPB investigations and enforcement); 15 U.S.C. §§ 1632(d)(2) (authorizing the Bureau to require financial institutions to provide data on consumer credit card agreements), 1637(r)(2) (authorizing the Bureau to require financial institutions to provide data on college credit card marketing agreements), 1646(b) (authorizing the Bureau to require financial institutions to provide data on the terms of credit card plans), 1691c-2(f) (small business loan data collection), 1701-1720 (authorizing the Bureau to require financial institutions to provide data on land sales agreements).
function and makes that operation responsible for “researching, analyzing, and reporting” on consumer financial markets, market developments and their effects, and consumer behavior when using financial products.\textsuperscript{13} The Bureau houses its research operations in two types of teams within its Regulations, Markets, and Research Division (RMR). The research team, which is staffed with respected Ph.D. economists, behavioral scientists, and data analysts, conducts neutral quantitative and qualitative research on topics in consumer finance, including firm behavior, household decision-making, and welfare-enhancing regulation.\textsuperscript{14} Meanwhile, the markets teams in RMR monitor consumer financial markets and conduct evidence-based policy analysis on markets including mortgages, credit cards, small dollar lending, student loans, deposits, debt collection, and credit reporting.\textsuperscript{15} These teams work closely together and with other CFPB regulators in rulemaking, consumer education, supervision and enforcement.

By necessity, data are the lifeblood of the Bureau’s markets analytics, research, consumer education, supervision, and enforcement activities. The Bureau draws on a broad range of quantitative and qualitative data to tackle analytical questions. The research economists and markets experts in RMR analyze large data sets, some assembled by the federal government and others purchased from private vendors.\textsuperscript{16} Their work is supplemented with qualitative analysis and field insights from CFPB examinations, consumer complaints, public comments, and other sources,\textsuperscript{17} which are used, among other things, to spot emerging issues for further research.

In some cases, the Bureau collects new data and creates new datasets in order to monitor markets, understand consumer decisions, or evaluate anecdotal reports of consumer harm.\textsuperscript{18} Before the creation of the Bureau, the available data to analyze many consumer financial issues were woefully inadequate. Without improved data, the Bureau would face a Hobson’s choice of regulating based on uncertainty or doing nothing when confronted with serious consumer

\textsuperscript{13} 12 U.S.C. § 5493(b)(1).
\textsuperscript{14} See Kennedy et al., supra note 10, at 1155.
\textsuperscript{17} See Data Report, supra note 12, at 24-26. The Bureau also draws on public data and data collected from financial institutions and consumers. Id. at 21-22, 26-28. See id. at 21-28 for a comprehensive description of the data sources used by the Bureau.
\textsuperscript{18} See, e.g., Consumer Financial Protection Bureau, How We Use Complaint Data, https://www.consumerfinance.gov/complaint/data-use/ (viewed Apr. 30, 2018); March 2017 Semi-annual Report, supra note 15, at 64.
\textsuperscript{19} See, e.g., Data Report, supra note 12, at 26-28.
injuries. Collecting new data to shed light on these areas of uncertainty enables the Bureau to avoid this type of a no-win choice.

To summarize, the breadth and depth of the data the CFPB collects are essential to making sure that CFPB policymaking is evidence-based and not ideologically driven. Without that data, the Bureau could not protect consumers.

III. Any Material Reduction in the Current Level of Data Collections and Data Reuse at the Bureau Will Hamstring the Agency’s Ability to Protect Consumers

Each of the CFPB’s core functions—monitoring, rulemaking, supervision, enforcement, consumer education, and consumer complaints—critically depends on data collections to do its job. Moreover, each of these functions depends on data shared by other CFPB offices and other state and federal regulators to carry out its mission. Any unnecessary constraints on data flows into and within the Bureau would jeopardize the CFPB’s ultimate responsibility to safeguard the welfare of consumers.

a. Curtailing Data Collections Would Undermine the Bureau’s Ability to Safeguard Consumers

In the Dodd-Frank Act, Congress directed the CFPB to carry out six core functions in order to protect consumers. Rulemaking, supervision, enforcement, financial education, and collecting and responding to consumer complaints make up the first five. The sixth, as previously noted, consists of “collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets.” This data collection function is essential both for monitoring and for the successful execution of the first five functions.

Without the requisite data, CFPB monitoring, rulemaking, supervision, enforcement, financial education, and consumer complaints would be immobilized. In December 2017, we got a glimpse of the paralysis that a data crackdown would induce when the then-Acting Director Mick Mulvaney imposed a temporary freeze on data collection within the Bureau. While the data freeze was in effect, it was impossible for at least three of the CFPB’s three empirically oriented groups to carry out their responsibilities. The data freeze shuttered the Extranet, which CFPB examiners depended on to upload company data in advance of examinations. This crippled supervision’s ability to conduct examinations and analyze trends. Meanwhile, the Bureau’s enforcement attorneys were barred from reviewing electronic evidence produced in discovery, which hampered enforcement. The action also stopped the research team from the

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21 Id. § 5511(c)(3).
22 For further discussion of the temporary freeze, see page 14 infra.
long-planned onboarding of data that were necessary to carry out the five-year lookback reviews of certain rulemakings mandated by Congress in the Dodd-Frank Act. The data freeze was just a preview of what would happen if data flows were halted permanently.

Monitoring is an obvious area where data flows are crucial. In Dodd-Frank, Congress directed the CFPB to track consumer finance markets and identify risks to consumers. Needless to say, monitoring without data would amount to no real monitoring at all. In turn, ineffective monitoring would have serious negative repercussions for rulemaking, consumer education, supervision, and enforcement, because those functions would break down without the insights that continuous monitoring provides.

Data analysis similarly forms the bedrock of CFPB rulemaking. In advance of virtually all of its major proposed rulemakings, the Bureau traditionally has conducted in-depth empirical analyses of consumer financial markets and the ensuing benefits and any harms to consumers. Importantly, where the Bureau’s rulemaking authority is discretionary, the agency has not prejudged the need for a rule. Instead, RMR has conducted economic studies of the market in question, following consultation with industry, academia, think tanks, consumer groups and others, to evaluate whether a rule should even be considered in light of the competing benefits and costs. If a discretionary rulemaking moves forward, the Bureau typically has run additional empirical analyses to pinpoint how the market failed and to evaluate competing approaches for how to fix it. None of these evaluations would have been possible without the necessary data.

Likewise, data are the *sine qua non* of the impact analyses that the Dodd-Frank Act requires for CFPB rulemakings. Section 1022(b)(2) of Dodd-Frank mandates the principal impact analysis, known as the “Section 1022(b)(2) Analysis,” and describes the cost-benefit analysis that the Bureau must conduct:

In prescribing a rule under the Federal consumer financial laws—

(A) the Bureau shall consider—

(i) the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule; and

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25 *See generally* Comment of Financial Regulation and Consumer Protection Scholars And Former Regulators on Docket No. CFPB-2018-0009, at 11-13 (June 7, 2018), https://lawdigitalcommons.bc.edu/cfpb-comments/6/ [hereinafter June 7 Comment]. The ability-to-repay rule was a special case. Because the Bureau inherited that rulemaking from the Board of Governors of the Federal Reserve System, which had issued the proposed rule, this initial research occurred both at the Bureau and at the Federal Reserve.
26 These analyses build on an existing foundation of the ongoing monitoring of consumer financial markets for developments and any risks to consumers required by 12 U.S.C. § 5512(c).
27 *Id.* § 5512(b)(2). That provision requires the Bureau to “consider” potential benefits and costs, but does not require the Bureau to calculate net benefit. *See id.*

In addition, the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, requires the CFPB to consider whether its proposed and final rules would have a significant economic impact on a substantial number of small entities.
(ii) the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas . . .

These impact analyses require intensive data analysis of the respective costs and benefits of prospective rules.

Nor does rulemaking stop with the issuance and implementation of a final rule. Under Dodd-Frank, the CFPB has a statutory obligation to carry out five-year lookback reviews of every significant rule that it issues. At least two of those assessments are ongoing right now, one of the ability to repay/qualified mortgage rule and the other of the mortgage servicing rule. These assessments would be impossible without the onboarding and analysis of major datasets.

The Bureau does not limit empirical analysis to its rulemaking and monitoring activities. Supervision uploads data from covered persons and service providers via the Extranet in advance of examinations and conducts voluminous empirical analysis of that and other data to detect and understand trends in the field. Enforcement collects and analyzes data in the course of investigations and discovery to evaluate whether action should be taken and, if so, what type. Financial education collects and analyzes information for understanding of consumer decisions and for dissemination to consumers. And consumer response requires the collection of voluminous data in the form of consumer complaints.

Here, it is also important to stress that the Bureau needs the continued ability to collect new data whenever necessary to analyze new questions and evaluate future risks. Financial services markets are constantly evolving and the CFPB needs the flexibility to gather new data points from industry participants and consumers whenever needed to understand new developments. In particular, fintech is an area where the potential risks are not well understood while the field generally flies under regulators’ radar screen. It will be essential for the Bureau to be able to collect new types of data to stay abreast of fintech and other financial innovations as they emerge.

Bottom line, the Bureau’s evidence-based approach and its ability to protect consumers depend on robust data collections. Impeding the CFPB’s access to data would impair the Bureau’s capability to detect emerging harms, to build an evidentiary foundation for needed action, to provide meaningful redress, and ultimately to discharge its statutory obligation to protect consumers. Under these circumstances, any attempt to curtail data collections must be seen for what it is: as deregulation for its own sake, in disregard for the safety of consumers.

b. Restricting Data Sharing and Reuse Would Harm Consumer Protection

It is common for offices within agencies to share data that are gathered initially by another office in order to do their job. It is similarly common for agencies, including the CFPB, to share data with other federal agencies and the states. To be sure, this sharing raises legitimate data security and privacy considerations. For this reason, the CFPB has put strong cybersecurity and private

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28 This refers to depository institutions and credit unions with $10 billion or less in total assets. 12 U.S.C. § 5516.
29 Id. § 5512(d).
safeguards in place to make sure that data are shared strictly for legitimate purposes and when needed to protect consumers, as we discuss in the last section of this comment.

This carefully managed data sharing is important because it maximizes the ability of sister offices and agencies to operate effectively, for the reasons we describe. Additionally, data sharing avoids needless expenditures for duplicate purchases of data while reducing regulatory burden by shielding regulated entities and consumers from repetitive data requests.

i. Data Sharing Is Essential to the Effective Operation of the CFPB And Contemplated by the Dodd-Frank Act

When Congress made the decision to confer monitoring, rulemaking, supervision, enforcement, consumer education, and consumer complaint powers on the CFPB, it made a conscious design choice meant to strengthen the capabilities of the Bureau to protect consumers. Data sharing is key to realizing the potential of that design choice. The CFPB’s own Data Report, which accompanies this RFI, recognized this benefit when it aptly stated: “The analysis or insights derived from the data one Bureau office collects can be useful to inform the work of other office in the Bureau.”

Part of the reason for combining so many functions under the CFPB’s roof was to take advantage of the crucial symbiosis among those functions. We can see this, for example, in Dodd-Frank’s directive to the CFPB to share HMDA data with other specified federal regulators to “facilitate research, examinations, and enforcement.”

More generally, data sharing is key to the rich set of other interactions among monitoring, rulemaking and supervision. Monitoring by RMR (as well as by consumer complaints) flags issues and trends that supervision may want to scrutinize through off-site data collection and on-site examinations. RMR’s rulemaking activities generate rules that form a key basis for supervision’s compliance examinations (with the other basis being observation for any unfair, deceptive or abusive acts or practices). Supervision may also consult with markets in RMR to “help inform [s]upervision’s risk-based prioritization and to define the scope of contemplated examinations.” In some cases, RMR and supervision work together on a discrete project and jointly share data for that purpose.

This interaction between RMR and supervision is a two-way street. Supervision is in a unique position to detect new consumer risks and trends through offsite supervision and periodic

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30 The CFPB uses the term “data reuse” relatively narrowly. There are many types of data sharing within the Bureau that the agency does not define as data reuse. See generally Data Report, supra note 12, at 40-52. Accordingly, we will use the term “data sharing” to refer to all joint use of data across one or more divisions at the Bureau and with other government entities, whether that sharing constitutes data reuse.
31 Id. at 40.
33 See Data Report, supra note 12, at 41. RMR almost never shares raw data with supervision or enforcement. It does share insights and analyses of data, however, with both offices. See id. at 50.
34 Id. at 41.
35 See id. For instance, research “regularly supports [s]upervision with respect to fair lending examinations requiring complex econometric analyses of supervisory data.” Id.
examinations. Supervision has also used its authority to collect data, such as de-identified account-level data on credit card practices, payday loans, and overdraft usage.36 These supervisory data, when shared with RMR subject to access restrictions and approval requirements to protect the information’s confidentiality,37 can then tee up questions for future RMR monitoring and empirical research studies. Supervisory data also enable the Bureau to update its rules to prevent any new abuses from occurring and to conduct lookback assessments of significant rules.38

In these ways, data sharing enables each function—monitoring, rulemaking, and supervision—to operate more effectively. In order for this symbiosis to work, however, RMR and supervision must be able to freely share the data they gather and develop, subject to proper data security and data privacy safeguards.

Similarly, RMR data flows enable CFPB enforcement to do a better job of protecting consumers.39 Research “supports [e]nforcement from time to time on request to provide analyses of complex data assets obtained in the course of an investigation.”40 Monitoring by RMR and consumer complaints and research and markets analysis provide an important avenue for detecting potential enforcement problems and sizing their importance.

Supervision and enforcement enjoy a similarly beneficial interaction. The CFPB’s supervision office has one of the smallest examination forces of any federal agency.41 Nevertheless, the on-site examinations and off-site monitoring conducted by CFPB supervision are invaluable in detecting violations that may require investigation and, ultimately, enforcement action. Congress’ decision to endow the CFPB with supervision as well as enforcement powers puts the Bureau in a strong position to actively root out problems needing enforcement because it has the independent authority to go into companies and examine their practices directly. Congress housed supervision and enforcement side-by-side within the CFPB to facilitate this symbiosis.

Consistent with the traditional practice of all federal banking regulators, CFPB enforcement accesses confidential supervisory information to evaluate whether to take action.42 These data need to flow freely from supervision to enforcement in order for enforcement to properly do its job.

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36 See id. at 44-46.
37 See id. at 46.
38 See id. at 41, 46-49.
39 Enforcement almost never shares its data with other offices. Id. at 49, 51. The few times it did so were subject to formal agreements governing the sharing of specific data assets. Id. at 42, 49-50.
40 Id. at 41.
42 See Data Report, supra note 12, at 43-44. Only enforcement employees who need the information for specific job-related tasks have access to that information. See id. at 44.
We can see similar data sharing between consumer education and research. Like other offices within the Bureau, these two units have shared data while working together on joint studies. An example of that data sharing and collaboration is the *Financial Well-Being Survey in America.*

In sum, Congress’ decision to endow the CFPB with all six functions of monitoring, rulemaking, supervision, consumer education, consumer complaints, and enforcement vastly enriched its ability to define violations, to detect violations when they occur, and to initiate enforcement when consumers have suffered harm. This design substantially strengthened the Bureau’s ability to safeguard consumers. The intent behind that design would be undermined, however, if CFPB offices such as supervision and enforcement could not share data.

**ii. Congress Expressly Authorized and Sometimes Mandated Data Sharing Among Agencies in the Dodd-Frank Act**

In a similar vein, Congress contemplated data sharing between the CFPB and other state and federal agencies and officials. In some cases, it *mandated* data sharing among agencies. For example, Congress required the CFPB and other supervisors to share examination reports with each other and further authorized the sharing of other confidential supervisory information. Congress also required the CFPB to use reports provided to state or federal agencies and publicly available information when conducting supervisory activities. Elsewhere in the Dodd-Frank Act, Congress authorized the CFPB and the federal prudential banking regulators, the Federal Trade Commission, other federal agencies, and state agencies to share consumer complaints with one another, with the proper safeguards. In this additional way, the Dodd-Frank Act expressly contemplates broad data sharing to effectuate the mission of the Bureau.

**iii. Sensible Data Sharing Avoids Wasteful Costs While Reducing Regulatory Burden**

Besides the CFPB’s effectiveness and that of fellow regulators, there are other important reasons why data should be and must be shared within the Bureau across division lines. Data sharing eliminates the wasteful expense that would be incurred if multiple offices within the Bureau each had to acquire identical data sets. It would be unconscionable, for example, to require different offices of the Bureau to acquire the same proprietary data set, when the CFPB could (and currently does) acquire a single license for multiple uses across divisions. Similarly, data sharing eliminates multiple, burdensome calls on regulated persons and other members of the public for the same data. It is precisely for that reason, in fact, that Dodd-Frank directs the Bureau to use other supervisors’ examination reports in conducting its own supervision.

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43 *Id.* at 41.
44 *Id.*
46 *Id.* §§ 5514(b)(4), 5515(b)(3).
47 *Id.* § 5493(b)(3)(B), (D).
48 See Data Report, *supra* note 12, at 43.
To appreciate the pivotal role that data sharing plays in the CFPB’s overall effectiveness, it is worth considering a few counterfactuals. What point is supervision if it cannot refer violations that it discovers in the course of examinations to enforcement for investigation? What is the point of research if it cannot pinpoint trends for supervision to track? What will happen to the quality of CFPB cost-benefit analysis (which is now housed in the Office of the Director) if it cannot use the data collected by RMR?

The short answer to all of these questions is that the effectiveness of these activities will suffer and so will the financial welfare of the American consumer. There is no legitimate reason to block the current level of data sharing among the Bureau’s offices and with fellow state and federal regulators. Any effort to do so would be for the purpose of hamstringing the protection of consumers.

IV. Data Security and Data Privacy Are No Justification for Scaling Back Data Collections or Sharing at the Bureau

We place extremely high importance on the security and privacy of confidential information collected by and maintained by the Bureau. Data security and privacy are crucial for the safety and autonomy of the consumers and regulated entities whose data are collected.

The CFPB has treated these concerns with the utmost seriousness by carefully spelling out policies and data governance structures on the intake, storage, and sharing of data. The Bureau instituted a Policy on Information Governance and a formal data governance structure to ensure the security and privacy of the nonpublic data that the Bureau collects and stores. The Bureau has also adopted a Privacy Policy which addresses, among other things, safeguards for the data it acquires and protocols to minimize the collection of personally identifiable information (PII). Together, the Privacy Policy and the Policy on Information Governance restrict access to sensitive information to CFPB staff on a need-to-know basis. Meanwhile, confidential information that is provided to the CFPB by other agencies is treated according to the CFPB’s and the other agency’s “applicable regulations regarding the treatment of confidential information.” Normally, access to and sharing of those data “are restricted in accordance” with a Memorandum of Understanding (MOU) between the two agencies.

The CFPB’s Office of Cybersecurity “continuously monitors systems for indications of a potential system compromise, and routinely identifies and blocks a number of potential attempts.” As of September 2018 (the latest date for which we have information), the Bureau knew of no “attacks from outsiders that resulted in third parties gaining access to non-public data

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49 See id. at 6.
50 See id. at 7-11.
51 See id. at 11-12.
52 See id. at 12, 15.
53 Id. at 12, 15.
54 Id.
55 Id. at 15.
without appropriate authorization.” 56 Similarly, the Bureau had “not experienced a ‘major incident’ as that term is defined by OMB and FISMA” as of that date. 57

The Bureau did experience 371 breaches in which Bureau personnel who were not authorized users accessed or potentially accessed PII through June 2018. 58 In general, these breaches occurred when staff in consumer response did not follow internal procedures when corresponding with complainants or when staff in other offices sent individual emails including PII to the wrong person. 59

These data breaches may have been part of the reason why the previous Acting Director, Mick Mulvaney, placed a freeze on CFPB data as one of his first actions after his appointment. Specifically, on December 4, 2017, Mr. Mulvaney announced that he was freezing all collection by the Bureau of personal information, including loan level data, citing privacy and information security. 60 In imposing the freeze, Mr. Mulvaney reportedly halted the collection of data that could trace back to either consumers or businesses. 61 Approximately six months later, Mr. Mulvaney reversed course and announced that he intended to resume the collection of consumers’ personally identifiable information because an outside consultant had determined that the agency’s information security systems “appeared to be well-secured.” 62

Based on the outcome of that investigation, it appears that the problem with the data breaches has now been resolved. Meanwhile, the Bureau’s data governance, privacy programs, and information security have recently undergone outside audits and other third-party evaluations. None of those audits or evaluations recommended any curtailment of or halt to CFPB data collections.

For instance, the U.S. Government Accountability Office (GAO) issued an audit report on September 22, 2014, on the Bureau’s information and data practices. GAO concluded in that report that the “CFPB [had] taken steps to protect the privacy of consumers and comply with requirements, restrictions, and recommended practices in the Dodd-Frank Act, Paperwork Reduction Act, Privacy Act, E-Government Act, and NIST Guidelines.” 63 In its report, GAO issued a number of recommendations for improvement, but never advised halting the collection of data. 64 Subsequently, the CFPB resolved each of those items to GAO’s satisfaction and GAO “closed” each recommendation. 65

56 Id.
57 Id.
58 See id.
59 See id.
60 See generally June 7 Comment, supra note 25, at 19-20.
64 Id. at 65-66.
65 See Data Report, supra note 12, at 17-18.
Similarly, the CFPB’s Inspector General (IG) has examined the Bureau’s data security annually and has never recommended any curtailment in data collections. Most recently, starting in May 2017, the IG issued several reports on data security at the Bureau. In one of these reports, the IG found that the Bureau’s information security program was operating at a level-3 maturity (consistently implemented), on a scale of 1 to 5, and that several of the program’s activities were operating at a higher level-4 maturity. Despite room to improve, the CFPB’s cybersecurity readiness exceeded that of the Federal Reserve Board, the Federal Deposit Insurance Corporation, the Securities & Exchange Commission, and the Department of the Treasury, which never stopped data collection. While the IG proposed improvements, it never recommended a halt to the Bureau’s data collection, whether for purposes of gathering PII or otherwise. Subsequently, the IG concluded as of February 2018 that “the CFPB [had] substantially developed, documented, and implemented a privacy program that addresses applicable federal privacy requirements and security risks related to collecting, processing, handling, storing, and disseminating sensitive privacy data.”

Finally, the CFPB underwent a Risk and Vulnerability Assessment in spring 2018 pursuant to an agreement with the Department of the Defense to identify potential gaps in cybersecurity controls. The assessors found that the “Bureau’s security posture [was] well-organized and maintained” and issued no “Critical” findings and three technical recommendations. Subsequently, the CFPB finished the remediation of all three recommendations. Based on these repeated findings and the successful conclusion of Acting Director’s data freeze investigation, we see no justification to cut back on CFPB data collections or the sharing of CFPB data based on privacy or data security concerns. This is consistent with cybersecurity norms. No other federal financial regulator had halted data onboarding in response to a data breach, and particularly not where its systems “appeared to be well-secured,” as is the case with the Bureau.

In short, there is no evidence of outstanding privacy or data security concerns that would justify scaling back the collection or sharing of data at the CFPB. Given this lack of evidence, we have serious concerns that any effort to roll back CFPB data collections or sharing in the name of privacy or cybersecurity would be a smokescreen for paralyzing the core functions of the Bureau. Given its documented level of preparedness, the CFPB should adhere to established cybersecurity norms and maintain the free flow of information into and within the Bureau.

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66 See June 7 Comment, supra note 25, at 20 n.90.
67 Warren Letter, supra note 23, at 4-5.
68 See Data Report, supra note 12, at 18-20.
70 See Data Report, supra note 12, at 20.
71 See Evan Weinberger, CFPB to Resume Data Collection After Data Security Review, BLOOMBERG LAW BANKING DAILY, May 31, 2018. Instead, if a data breach occurs, federal agencies typically plug the leak as quickly as possible while resuming data collection. Kate Berry, Mulvaney response to CFPB data security gaps baffles cyber experts, AM. BANKER, Apr. 23, 2018; Warren Letter, supra note 23, at 2-4.