The George Washington University Regulatory Studies Center

Public Interest Comment\(^1\) on
The Consumer Financial Protection Bureau’s Proposed Rule:
Home Mortgage Disclosure (Regulation C)
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The George Washington University Regulatory Studies Center
Retrospective Review Comment Project

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Consumer Financial Protection Bureau’s proposed rule implementing the Dodd-Frank Act’s amendments to the Home Mortgage Disclosure Act (HMDA) and making other revisions to Regulation C does not represent the views of any particular affected party or special interest, but is designed to evaluate whether the Bureau’s proposal incorporates plans for retrospective review, pursuant to President Obama’s Executive Orders 13563 and 13579.

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Introduction

Pursuant to the statutory requirements in Section 1094 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), the Consumer Financial Protection Bureau (CFPB or the Bureau) is proposing to amend Regulation C, which implements the Home Mortgage Disclosure Act (HMDA), to incorporate the specific changes prescribed by Congress, streamline HMDA compliance for covered institutions, and adopt other measures to improve the general utility of HMDA data. According to the rule’s preamble, “the Bureau views implementation of the Dodd-Frank Act changes to HMDA as an opportunity to assess other ways to improve upon the data collected, reduce unnecessary burden on financial institutions, and streamline and modernize the manner in which financial institutions collect and report HMDA data.”

Consistent with the above stated goals, the Bureau is proposing to:

1. Revise the institutional coverage tests for determining which financial institutions and housing-related credit transactions are covered under HMDA. Specifically, “depository and non-depository institutions that meet all other criteria for a financial institution under Regulation C would be required to report HMDA data if they originated 25 covered loans, excluding open-end lines of credit, in the previous calendar year.”

2. Require financial institutions to report several new (or modified) data points, some of which are specifically identified in the Dodd-Frank Act and others of which are being added at the Bureau’s discretion. These data points fall into four categories: (1) applicant, borrower, and underwriting information; (2) property information; (3) loan feature information; and (4) unique identifiers.

3. Better align the requirements of Regulation C with existing industry standards for collecting and transmitting mortgage loan and application data (i.e., those established by the Mortgage Industry Standards Maintenance Organization (MISMO)).

4. Require financial institutions with a high transaction volume to submit their HMDA data to the Bureau or appropriate agency on a quarterly, rather than an annual, basis.

5. Allow reporting institutions to direct members of the public that request a disclosure statement to a publicly available website to obtain the data.

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3 79 FR 51732.
4 79 FR 51732.
5 79 FR 51733.
6 79 FR 51810.
7 79 FR 51733.
6. Make several changes to clarify and provide additional guidance on existing requirements of Regulation C that financial institutions and other stakeholders have identified as confusing or unclear.8

Evaluating whether the proposal’s intended outcomes are met ex post can be challenging, so multiple government guidelines instruct agencies to incorporate retrospective review plans into their proposals during the rulemaking process.9 To support this effort, the GW Regulatory Studies Center examines significant proposed regulations to assess whether they include plans for retrospective review, and submits comments on the public record with suggestions on how best to do so. This comment on the Consumer Financial Protection Bureau’s proposed rule is part of that effort.

**Incorporating Retrospective Review into NPRMs**

Through a series of Executive Orders, President Obama has encouraged federal regulatory agencies to review existing regulations that may be “outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.”10 On July 11, 2011, President Obama signed Executive Order 13579, “Regulation and Independent Agencies,” which reaffirmed the importance of retrospective review by encouraging independent regulatory agencies to comply with the principles established in Executive Order 13563 and to “facilitate the periodic review of existing significant regulations [by considering] how best to promote retrospective analysis of rules.”11

In his memo implementing President Obama’s executive order on retrospective review, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, stated that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’”12 This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.”13

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8 79 FR 51732.
In its 2013 *Report to Congress on the Benefits and Costs of Federal Regulations*, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to the flaws of ex ante analyses. According to that report, the result of systematic retrospective review of regulations:

should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and importantly, *rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.*¹⁴

Further reinforcing the Obama Administration’s consistent emphasis on retrospective review, Congress has also taken steps to encourage government agencies in general, and the Bureau in particular, to retrospectively analyze the impact of their significant rules. Specifically, under section 1022 of the Dodd-Frank Act, which defines the Bureau’s rulemaking authority, the Bureau is required to:

conduct an assessment of each significant rule or order adopted by the Bureau under Federal consumer financial law. The assessment shall address, among other relevant factors, the effectiveness of the rule or order in meeting the purposes and objectives of this title and the specific goals stated by the Bureau. The assessment shall reflect available evidence and any data that the Bureau reasonably may collect….The Bureau shall publish a report of its assessment under this subsection not later than 5 years after the effective date of the subject rule or order.¹⁵

In December 2013, the Government Accountability Office published a report assessing the extent to which financial regulators had retrospectively analyzed the impact of their Dodd-Frank rules, and whether they had developed and implemented plans for ongoing retrospective review. Finding that several regulators, including the Bureau, had not yet implemented a retrospective review plan, the GAO cautioned that “if agencies fail to plan for how they will measure the performance of their rules and how they will obtain the data they need to do so, they may be


limited in their ability to accurately measure the progress or true effect of the regulations.”16 To that effect, the GAO encouraged agencies to prepare for retrospective review by “identify[ing] the needed data before beginning a review and, even better, before promulgating the rule.”17

Retrospective Review Requirements

To evaluate whether the Bureau’s proposal was “designed and written in ways that facilitate evaluation of [its] consequences,” we measure it against five criteria:

- Did the Bureau clearly identify the problem that its proposed rule is intended to address, and the outcomes it is expected to achieve?
- Did the Bureau explain how the standards that the Bureau proposes will directly or indirectly trigger the desired outcomes?
- Did the Bureau provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did the Bureau commit to collecting information to assess whether its measurable metrics are being reached?
- Did the Bureau provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?

1. Identifying the Problem and Intended Outcomes

The first of the “Principles of Regulation” outlined by President Clinton in Executive Order 12866 directs agencies, as a first step, to identify the problem that justifies government action through regulation:

Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.18

While we recognize that, as an independent agency, the Bureau is not legally required to comply with EO 12866, problem identification is nonetheless crucial to the effective formulation of any policy. Without knowledge of the problem that the agency is trying to address, the public cannot

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assess whether the policy or regulation at hand has had the intended effect, which is key in retrospectively evaluating the regulation.

a. Home Mortgage Disclosure Act: Background and Purpose

In 1975, Congress passed the Home Mortgage Disclosure Act in response to congressional findings that certain financial institutions had “sometimes contributed to the decline of certain geographic areas by their failure pursuant to their chartering responsibilities to provide adequate home financing to qualified applicants on reasonable terms and conditions.”

Seeking to address this failure through the implementation of a mandatory disclosure framework, Congress designed HMDA to fulfill two primary purposes:

1. Provide citizens, public officials and community groups with sufficient information to “determine whether depository institutions are fulfilling their obligations to serve the housing needs of the communities and neighborhoods in which they are located,” and
2. Assist public officials in determining how best to distribute public sector investments “in a manner designed to improve the private investment environment.”

In 1989, Congress expanded HMDA to incorporate applicant and borrower race, gender, and income data points into the reporting requirements, leading the Federal Reserve Board of Governors to identify in its implementing regulation a third purpose for HMDA data: to identify possible discriminatory lending patterns and enforce antidiscrimination statutes.

b. Statutory and Discretionary Authority

The current proposed rule stems from both statutory requirements outlined in the 2010 Dodd-Frank Act and the Bureau’s discretionary authority to effectuate the purposes of HMDA. Passed in response to the 2008 financial crisis and subsequent recession, section 1094 of the Dodd-Frank Act amended the HMDA by (1) transferring HMDA rulemaking and enforcement authority from the Federal Reserve Board of Governors to the Bureau, and (2) adding several new data points on which covered institutions are required to report. Congress also provided

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19 Home Mortgage Disclosure Act, 12 U.S. Code Ch. 29 (1975), § 2801.
20 Home Mortgage Disclosure Act, 12 U.S. Code Ch. 29 (1975), § 2801.
21 Home Mortgage Disclosure Act, 12 U.S. Code Ch. 29 (1975), § 2801.
22 79 FR 51820.
the Bureau with discretionary rulemaking authority to “carry out the purposes of HMDA by addressing data gaps.”24

c. Need for the Rule

Broadly speaking, the Bureau believes the current proposed rule is necessary to correct “current deficiencies” in Regulation C, “address market failures,” and “meet the compelling public need for improved efficiency in government operations.”25 Specifically, the Bureau argues:

To ensure that HMDA continues to empower communities by providing transparency into mortgage lending practices,…HMDA data must be updated to address the informational shortcomings exposed by the financial crisis, to meet the needs of homeowners, potential homeowners, and neighborhoods throughout the nation, and to reflect changes in business practices and the technological evolution of the mortgage market.”26

Consistent with the regulatory principles outlined in Executive Order 12866, the Bureau identifies two market failures which it believes can be addressed through its proposed improvements to HMDA: “(1) the under-production of public mortgage data by the private sector, and (2) the information asymmetries present in credit markets.”27 In light of the recent subprime mortgage crisis, we agree with the Bureau’s assessment that informational failures in the mortgage market can, and did, contribute to problematic lending behaviors that disadvantage consumers and increase systemic risk. However, we urge the Bureau to carefully consider the extent to which the additional information it is proposing to collect will solve the problems it has identified.

d. Intended Outcomes

Recognizing the challenges associated with quantifying the value of increased information and transparency, the Bureau identifies several qualitative outcomes that it believes the proposed rule can help facilitate. In general, these outcomes fall into three categories: benefits to consumers, benefits to covered entities, and general societal benefits. According to the Bureau, the primary benefits to consumers include: (1) more effective detection and remediation of discriminatory lending practices; (2) the promotion of public and private investment in under-served markets by making it easier to determine whether financial institutions are serving the housing needs of their communities (which, the Bureau argues, could result in a possible increase in access to mortgage

24 79 FR 51733.
25 79 FR 51820-51821.
26 79 FR 51739.
27 79 FR 51821.
credit); and (3) the promotion of more stable and competitive markets. On the other hand, the Bureau argues that covered entities will benefit from: (1) the prevention of major disruptions to the financial system; (2) a reduction in the false positive rate associated with fair lending exams, complaints, and lawsuits; and (3) a reduction in the burden associated with some aspects of HMDA compliance. General societal benefits, while not specifically characterized as such, include: (1) a reduction in systemic risk; (2) improved efficiency in government operations; and (3) more effective policy-making.

2. Causal Logic

While the nature of the proposed rule makes it difficult to differentiate between its causal mechanisms, direct benefits, and indirect benefits, the Bureau generally suggests that its proposal will accomplish the benefits described above by addressing “serious inadequacies...in the information currently collected” and enhancing HMDA data to provide a more complete picture of the mortgage lending market. More specifically, by expanding the scope of institutions and transactions covered under HMDA and requiring covered institutions to report more comprehensive information (in some cases, on a more frequent basis), the Bureau argues that the utility of HMDA data will improve dramatically. While higher quality, more readily available data is beneficial on its own terms, the Bureau believes better data will facilitate the outcomes described above by enabling public officials, community groups, and members of the public to more effectively analyze and monitor the mortgage market. The causal assumptions underlying each benefit category are discussed in greater detail below.

Turning first to consumers, the Bureau argues that having more complete data on a broader scope of institutions and transactions will serve anti-discriminatory purposes, help determine whether financial institutions are serving the housing needs of their communities, promote more effective public investment, and contribute to a more stable and competitive market. With regards to the first goal, the Bureau believes that requiring additional data, such as information on underwriting and pricing decisions, will aid in the detection of discriminatory lending patterns and the enforcement of antidiscrimination statutes by (1) providing a better understanding of “disparities in underwriting and pricing outcomes,” (2) making fair lending analyses and examinations more accurate and comprehensive, and (3) helping regulators prioritize redlining reviews. Second, the Bureau suggests that more useful and comprehensive data will help determine whether financial institutions are serving the housing needs of their communities, as well as promote public and private investment in underserved communities, by making it easier to assess the

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28 79 FR 51822.
29 79 FR 51823.
30 79 FR 51821-51824.
31 79 FR 51820.
32 79 FR 51823.
supply and demand of mortgage credit and financial institutions’ treatment of applicants in these communities. Finally, the Bureau implies that better, more readily available data will promote market stability and competition by addressing some of the informational asymmetries present in the mortgage lending market, enabling more effective market monitoring, and increasing overall market transparency.

The Bureau’s anticipated benefits for covered entities include the prevention of major disruptions to the financial system, a reduction in the false positive rate associated with fair lending exams, complaints, and lawsuits, and a reduction in the burden associated with some aspects of HMDA compliance. The first benefit—the prevention of major disruptions to the financial system—which is arguably also a societal benefit, relies on the assumption that “enhanced HMDA data will facilitate improved monitoring of the mortgage market,” thereby making it easier to identify and address problematic market trends and new risk factors through early intervention. With regards to the anticipated reduction in false positives, the Bureau argues that requiring more complete data, particularly relating to reasons for denial and other underwriting factors, will help regulators “better understand underwriting decisions and focus fair lending reviews.” Finally, although the compliance burden will increase for many institutions, the Bureau believes that aligning some Regulation C data collection and transmission requirements with existing industry standards will help alleviate some of the cost and time burden associated with HMDA compliance. According to the Bureau, the presumed reduction in false positives will also contribute to a decrease in compliance costs for some covered institutions subject to fair lending exams. The Bureau is also proposing to simplify the institutional coverage test, allow for HMDA data disclosure via a publicly accessible website, and clarify several confusing aspects of the current Regulation C, all of which could reduce the compliance burden as compared to the current baseline scenario.

Consistent with the causal mechanisms described in the preceding paragraphs, the general societal benefits of reduced systemic risk, improved efficiency in government operations, and more effective policy-making all stem from the assumption that higher quality, more comprehensive mortgage data will enable more vigilant market monitoring and provide more information on which to base policy decisions. In addition, the Bureau argues that the additional data points and covered transactions will facilitate research that may help “identify new risk factors that might increase systemic risk to the overall economy. Better understanding

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33 79 FR 51823.
34 79 FR 51838
35 79 FR 51839.
36 79 FR 51838.
37 79 FR 51821-51824.
of these risk factors could provide early warning signals to the government of worrisome market trends.”

Given the difficulty in assessing whether any of the desired outcomes can in fact be attributed to the “improved” HMDA data proposed in this regulation, when analyzing the rule’s impact retrospectively, the Bureau should carefully examine alternative causal mechanisms before concluding that any changes are indeed the result of this regulation. Measuring the baseline or status quo for each targeted outcome of this rule before it goes into effect would greatly assist in the Bureau’s future evaluation. In addition, before finalizing this rule, the Bureau should thoroughly consider the range of possible unintended consequences that may result. While the Bureau is clearly aware of potential consumer privacy risks and the possibility that small entities may attempt to pass on the full cost of HMDA compliance to consumers, we encourage the Bureau to continue analyzing the effects of these potential unintended outcomes. Finally, while we are confident that the Bureau will remain mindful of the standards and sentiment set forth in its ability-to-repay rules, we nonetheless urge the Bureau to resist any assumptions that an expansion of credit, even in targeted communities, is an unequivocally positive outcome.

3. Measurement Criteria

In order to measure the success of this rule following implementation, it is necessary for the Bureau to define what constitutes a “success.” Any stated metrics of success should be linked to the problems identified, and demonstrate that the new requirements the Bureau is proposing actually accomplish its stated goals.

Based on our analysis, the Bureau does not appear to have identified any clear metrics for evaluating the success of this proposed rule, nor has it indicated any plans for conducting a retrospective review in the future. We recognize the inherent difficulty in measuring the incremental value of additional information disclosure requirements, especially given that the information is a public good that serves myriad purposes. We also recognize the challenges in determining the extent to which any outcomes can be attributed to a specific policy change. However, given the important problems being addressed by this rule, and the additional compliance burden associated with the proposed changes, we strongly urge the Bureau to identify reliable methods for measuring success.

To assist with this process, we propose several metrics that may enable the Bureau to retrospectively evaluate both the rule’s success and the accuracy of its ex ante analysis. To measure the extent to which the proposed data, coverage, and reporting requirements facilitate HMDA’s stated purposes as well as the other goals discussed in this proposed rule, we encourage the Bureau to consider measuring the following:

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38 79 FR 51824.
• whether the utility of HMDA data improves
• whether enforcement of antidiscrimination statutes increases
• how many fair lending cases rely on newly required data points or involve newly covered institutions or transactions
• whether there is a reduction in redlining activity
• whether there is a reduction in the false positive rate associated with fair lending examinations, complaints, and lawsuits
• whether credit access in underserved communities expands or contracts
• whether public and private investment in underserved communities increases
• whether costs to consumers increase (especially those associated with mortgages obtained through small lenders)
• whether (and the extent to which) the time and cost burden associated with various industry compliance tasks changes

4. Information Collection

In describing its methodology for generating cost estimates, the Bureau states that it classified compliance tasks in a highly detailed manner in order to “facilitate estimation of baseline costs and to enable rigorous analysis of the impact of the proposals across a wide range of financial institutions.”39 Despite the Bureau’s commendable efforts to collect data to assess current and predicted industry compliance costs, however, the Bureau’s ex ante data collection efforts do not appear to be as thorough for areas beyond cost research. Moreover, the Bureau does not commit to collecting information ex post to evaluate the success of this rule. Given the importance of having pre-policy baseline data against which to compare post-policy data when retrospectively measuring a rule’s impact, we recommend the Bureau consider collecting additional information for these purposes before the rule goes into effect and once again after it has been in effect for a meaningful period of time (e.g., three to five years).

Recognizing the challenges associated with quantitatively measuring a rule’s effect on issues such as data utility, discrimination, and systemic risk, we recommend the Bureau consider information collection as a possible method for measuring outcomes. For example, to determine whether HMDA data utility improves as a result of the rule, the Bureau could attempt to measure the value of the data before and after the rule goes into effect by using tools such as contingent valuation surveys or a Request for Information. The Bureau could take a similar approach to

39 79 FR 51826.
determine the degree to which the industry’s compliance burden changes and whether the Bureau’s efforts to “streamline” compliance were in fact helpful.

OMB’s Paperwork Reduction Act regulations require agencies to “ensure that each collection of information … informs and provides reasonable notice to the potential persons to whom the collection of information is addressed of … an estimate, to the extent practicable, of the average burden of the collection (together with a request that the public direct to the agency any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden).”\textsuperscript{40} Consistent with these requirements, the Bureau should commit to collecting the information needed to measure the rule’s success. At a minimum, OMB PRA approval will provide an opportunity to collect information from the industry regarding the change in compliance burden that resulted from this rule. This information could then be evaluated against the baseline data included in the proposed rule to measure the accuracy of the Bureau’s ex ante estimates and the ex post effect of the rule on the mortgage industry. As suggested above, to fully assess the rule’s many outcomes, which will not be limited to its effects on industry, we encourage the Bureau to take advantage of this opportunity to collect useful information from a range of stakeholders who rely on HMDA data for a variety of purposes.

5. Timeframe

The text of the proposed rule does not include a timeframe for retrospective evaluation of whether the rule achieves its intended goals. In the final rule, the Bureau should identify a timeframe for review, indicating how soon after implementation it will begin to measure the progress of its metrics. Since the Bureau will need to seek OMB approval three years after the rule takes effect in order to continue collecting information under the Paperwork Reduction Act, I recommend the Bureau plan on collecting any information necessary to measure the effects of the rule at that point in time.

Recommendations

The subprime mortgage crisis, broader financial crisis, and subsequent recession have served as an important reminder of the disastrous effects that can result from problematic mortgage lending behaviors. The Bureau’s proposed rule amending Regulation C seeks to modernize the Home Mortgage Disclosure Act to address many of the deficiencies that were brought to our collective attention in the aftermath of the crisis. By expanding the scope of covered institutions and transactions, adding new data points to fill in key information gaps, and requiring high volume institutions to report on a more frequent basis, the Bureau argues that information asymmetries in the credit market can be reduced, thereby facilitating greater transparency and improved monitoring. Through these mechanisms, the Bureau believes public officials,

\textsuperscript{40} 5 CFR Part 1320.8(b)(3)(iii).
community groups, and members of the public will be better equipped to identify troublesome trends and risk factors, such as those that contributed to the financial and housing crises. Moreover, the Bureau suggests that the proposed changes will help HMDA better accomplish its original purposes of helping public officials determine whether financial institutions are serving the lending needs of the communities in which they are located, promoting public investment in underserved communities in a way that encourages private investment, and identifying discriminatory lending patterns and enforcing antidiscrimination statutes.

Given the importance of each of these desired outcomes and the magnitude of the burden on regulated entities, it is crucial that the Bureau be able to determine whether the regulation is actually accomplishing its goals and, if so, to what extent. While we are sympathetic to the challenges associated with measuring the marginal effect of additional information on largely qualitative benefits, we urge the Bureau to think creatively about possible measurement approaches. We also believe that by planning for retrospective review when the rule is still in its preliminary stage, the Bureau can start gathering the necessary data that will enable a meaningful assessment of the rule after it is in effect. In particular, we recommend that the Bureau devise a method for measuring whether the utility of HMDA data increases for the various stakeholders who rely on it (e.g., public officials, community groups, researchers, industry analysts, and members of the public).

Though we recognize that it is difficult to fully attribute any outcomes to the changes in HMDA data and coverage requirements, we encourage the Bureau to measure—to the greatest extent possible—whether there are meaningful changes in the metrics we identified for evaluating discrimination, investment in underserved communities, and the extension of fair credit. Finally, to assess whether the Bureau’s time and cost burden estimates are accurate and to evaluate whether its efforts to streamline compliance alleviates some of the burden, we recommend that the Bureau utilize the extensive cost data that were collected for this proposed rule and compare them against data collected after the rule has been in effect for three or more years.