



Consumer Financial  
Protection Bureau

1700 G Street, N.W., Washington, DC 20552

August 26, 2014

The Honorable Mary Jo White  
Chair  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Dear Chair White:

I am writing regarding the Securities and Exchange Commission's ("Commission") proposed regulations requiring issuers of asset-backed securities ("issuers") to disclose to investors asset-level information regarding underlying pool assets.<sup>1</sup> We understand that some stakeholders have expressed concerns about the implications of the Fair Credit Reporting Act ("FCRA") for the proposed regulations. As you know, the Consumer Financial Protection Bureau ("Bureau") is the federal agency with general rulemaking authority and the authority to issue guidance with respect to the FCRA.<sup>2</sup> This letter provides the Commission with our views about FCRA implications of the Commission's proposed regulations.

The Commission's proposals would require issuers of asset-backed securities to disclose certain asset-level data, including data that the Commission finds "are necessary for investors to independently perform due diligence," pursuant to section 942(b) of the Dodd-Frank Act.<sup>3</sup> The asset-level data would include detailed, standardized data points about each asset in a pool such as the obligor's credit score, employment status, and income, but would not include information that directly identifies an individual borrower, such as name, address, or Social Security numbers.<sup>4</sup> Under the Commission's proposals, issuers would file the data with the Commission, and the Commission would disseminate some or all of the data filed with it through its EDGAR system.

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<sup>1</sup> 75 FR 23328 (May 3, 2010); 76 FR 47948 (Aug. 5, 2011); 79 FR 11361 (Feb. 28, 2014).

<sup>2</sup> 15 U.S.C. § 1681s(e)(1); 12 U.S.C. § 5512(b)(1). Other agencies, including the Federal Trade Commission, the Securities and Exchange Commission, and the federal banking regulators, have the authority to issue rules under some specific provisions of the FCRA, such as § 615(e). 15 U.S.C. §1681m(e) (authorizing various agencies to prescribe regulations regarding the prevention of identity theft).

<sup>3</sup> Section 942(b) added Section 7(c) to the Securities Act, which directs the Commission to adopt regulations requiring issuers to disclose asset-level information if such information is "necessary for investors to independently perform due diligence." In doing so, it directs the Commission to set standards for the format of the data to facilitate comparison of such data across securities in similar types of asset classes. 15 U.S.C. § 77g(c).

<sup>4</sup> 75 FR 23328, 23357 (May 3, 2010). We understand that some stakeholders have raised general privacy concerns about the Commission's proposals. This letter discusses only the FCRA and does not address broader privacy concerns. As noted above, the Bureau understands that the asset-level data would not include direct identifiers (*e.g.*, name, address, Social Security number, etc.). We further understand that the Commission may develop and consider measures to help prevent re-identification of data when it is disseminated.

The issuers would also directly disclose the data to investors. The Commission's proposals present certain issues under the FCRA: first, whether the Commission and the issuers are "consumer reporting agencies" under the FCRA; and second, whether issuers may provide and the Commission may obtain or disseminate the asset-level information, including borrowers' credit scores,<sup>5</sup> without a "permissible purpose" as required by the FCRA for obtaining or using a "consumer report."

The FCRA defines a "consumer reporting agency" as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."<sup>6</sup> We believe that if the Commission determines that disclosure of the asset-level information at issue which, among other things, excludes direct identifiers is "necessary for investors to independently perform due diligence," and determines that such information should be filed with the Commission and disclosed via EDGAR to best fulfill a congressional mandate, such as DFA Section 942(b), the Commission would not become a consumer reporting agency by requiring, obtaining and disseminating such information.<sup>7</sup> Similarly, an issuer does not become a consumer reporting agency by disclosing to investors certain asset-level information that excludes direct identifiers and filing it with the Commission pursuant to a regulatory requirement, if the Commission determines the information is "necessary for investors to independently perform due diligence" and that requiring its disclosure to investors and filing with the Commission will best fulfill a congressional mandate.

We have considered whether the Commission needs a "permissible purpose" under section 604 of the FCRA to obtain or disseminate the asset-level information excluding direct identifiers that is required to be disclosed under the proposals, which may include credit scores,<sup>8</sup> and whether an issuer needs a "permissible purpose" to disclose such information to investors or file it with the Commission. Under the FCRA, "A person shall not obtain or use a consumer report for any purpose unless (1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section; and (2) the purpose is certified in accordance with section 607 by a prospective user of the report through a general or specific certification."<sup>9</sup> To the extent that the Commission obtains or disseminates the information

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<sup>5</sup> 75 FR 23328, 23357 (May 3, 2010).

<sup>6</sup> 15 U.S.C. § 1681a(f).

<sup>7</sup> Cf. *Ollestad v. Kelley*, 573 F.2d 1109, 1111 (9<sup>th</sup> Cir. 1978) (holding that the FBI is not a "consumer reporting agency" and noting that "the tenor of remarks of members of Congress indicates that the statute is concerned with regulating practices in the credit reporting industry rather than with regulating the record-keeping functions of federal agencies"); Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act*, p. 31 (2011), available at <http://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/11072ofcrareport.pdf> (explaining that "A state agency that provides information such as criminal records checks to further state law enforcement or other state functions mandated by the state legislature is not a CRA").

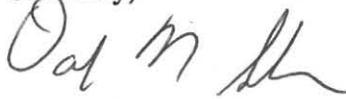
<sup>8</sup> 75 FR 23328, 23357 (May 3, 2010).

<sup>9</sup> 15 U.S.C. § 1681b(f).

described above, we do not believe that such actions would violate section 604(f) of the FCRA here if the Commission were to determine that disclosure of the information is “necessary for investors to independently perform due diligence” under DFA § 942(b) and that the information should be filed with the Commission and disclosed via EDGAR to best fulfill the congressional mandate in DFA § 942(b). Similarly, we do not believe that an issuer would violate section 604(f) of the FCRA by disclosing any information that is a consumer report to investors or filing it with the Commission in order to comply with a regulatory requirement, if the Commission makes the determination that the information is “necessary for investors to perform due diligence” and that requiring its disclosure to investors and filing with the Commission will best fulfill a congressional mandate.<sup>10</sup>

I hope the foregoing analysis addresses the FCRA issues raised in response to the Commission’s proposals. Please feel free to contact me if you have any questions or would like to further discuss any of these issues.

Sincerely,



David M. Silberman  
Associate Director  
Office of Research, Markets & Regulations

cc: The Honorable Luis A. Aguilar, Commissioner  
The Honorable Daniel M. Gallagher, Commissioner  
The Honorable Kara M. Stein, Commissioner  
The Honorable Michael S. Piwowar, Commissioner

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<sup>10</sup> The Bureau emphasizes that the conclusions expressed in this letter are limited to the instant circumstances where a federal statute directs an agency to issue implementing regulations requiring particular conduct if it determines that specific conditions are met and where certain information is at issue that, among other things, excludes direct identifiers. The Bureau expresses no view as to the implications of the FCRA under any other circumstances, such as where another federal statute simply gives an agency discretionary rulemaking authority to issue implementing regulations requiring particular conduct.