

Incorporating Safeguards For CFPB Info Request Targets

By **John Coleman** (November 5, 2021)

The U.S. Consumer Financial Protection Bureau announced[1] recently that it ordered several large technology companies to submit detailed information concerning their payment products, including how they collect, use and share data about consumers who use their products.

The information demand is substantial, with 55 separate specifications, many of which contain multiple subparts. Aside from signaling the CFPB's policy direction under its new director, the announcement suggests that the CFPB may exercise its market monitoring authority more frequently during the next several years.



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The announcement and the prospect of more to come highlight long-standing concerns regarding the procedural and other safeguards available to recipients of these orders. The CFPB could address these concerns — and ensure a more constructive process for its collection of information in support its market monitoring — by offering safeguards that mirror those available to recipients of similar demands issued by the Federal Trade Commission.

The CFPB's Market Monitoring Authority

The Consumer Financial Protection Act requires the CFPB to "monitor for risks to consumers in the offering or provision of consumer financial products or services, including developments in markets for such products or services." [2]

To help it carry out this function, Section 1022(c)(4) of the CFPA gives the CFPB authority to issue orders requiring participants in the "consumer financial services markets to file with the Bureau, under oath or otherwise, in such form and within such reasonable period of time as the Bureau may prescribe by rule or order, annual or special reports, or answers to specific questions" about their conduct. [3]

The CFPA does not provide a specific mechanism for the enforcement of these orders. Rather, it generally makes it unlawful to fail or refuse to comply with lawfully issued orders requiring that market participants make reports or provide information to the bureau, [4] and authorizes the CFPB to seek injunctive relief and civil money penalties for violations of this provision. [5]

The CFPB is authorized to make information public that it obtained through its market monitoring authority, but this authority is subject to important limitations. [6] For example, any publication must protect the confidentiality of proprietary or personal information submitted by market participants to the same extent that such information would be protected if requested under the Freedom of Information Act. [7]

Open Questions Regarding the Procedural Rights of Recipients of Market Monitoring Orders

The CFPB's announcement leaves open important questions regarding how recipients of these orders can resolve good faith disagreements about their obligations to comply with the orders or protect their legitimate interests in the confidentiality of the requested

information.

For example, the CFPB's market monitoring authority is subject to well-established limitations, including that orders issued under this authority cannot be too indefinite, issued for an illegitimate purpose or unduly burdensome.[8]

These limitations also apply to the bureau's authority to issue a civil investigative demand, or CID, as part of its investigation of possible violations of law.[9] Recipients of CIDs have multiple opportunities to resolve disagreements regarding the scope and validity of a CID without fear of incurring any penalty.

CID recipients can first seek to resolve any concerns with bureau staff, who are explicitly empowered to modify the terms of compliance.[10] If disagreements cannot be resolved at the staff level, the recipient of a CID is entitled to formally petition the director to modify or set aside the demand, and the recipient's obligation to respond is stayed until the director publicly resolves the petition.[11]

Even if the director denies the petition, the CID is not self-enforcing, and noncompliance triggers no fine or penalty.[12] Rather, the bureau must ask a federal district court to enforce the order, giving recipients another opportunity to raise any grounds for modifying or setting aside the demand — this time before an independent member of the judiciary.[13]

Only if the district court issues an order enforcing the CID could the recipient be sanctioned for continued noncompliance.

This process is modeled on those of other agencies and designed to ensure the fair and efficient resolution of disputes regarding the bureau's authority to obtain information.[14]

But the CFPB's rules governing CIDs do not, by their terms, apply to orders issued under the CFPB's market monitoring authority[15] and the generic order accompanying the CFPB's announcement did not suggest any intention to adopt them.[16] Recipients may instead schedule a meeting with bureau staff to discuss the order, as well as their plans for compliance and any proposed changes that might reduce recipients' cost or burden while still giving the bureau the information it needs.

Recipients unable to successfully negotiate scope or burden issues with bureau staff appear to have limited options. They may choose to simply comply with the order, even if they believe it to be unduly burdensome or otherwise unenforceable. Or they can ask the courts to resolve disagreements about the lawfulness of an order, either as part of a declaratory judgment action that they bring affirmatively or in an enforcement action brought by the CFPB to enforce the orders.[17]

Neither option is likely to be regarded as palatable.

The latter in particular leaves open the possibility that the CFPB could seek civil money penalties for recipients' alleged noncompliance, even during the period prior to a court's resolution of any good faith dispute over the enforceability of the order. The ambiguity over recipients' ability to seek judicial review of a Section 1022(c)(4) order without incurring a penalty raises significant concerns as to how recipients will protect their rights to due process and procedural fairness.[18]

The generic order[19] published as part of the CFPB's announcement provided similarly

limited guidance regarding recipients' rights to protect privileged or confidential information.

For example, the order does not expressly acknowledge recipients' right to withhold privileged or other protected information.[20] Further, although the CFPB referenced its authority to publish its findings, it did not mention the specific limitations on this authority.[21]

The CFPB's regulations on FOIA requests let respondents review planned disclosure of any material they had deemed confidential so that they can ask a court to preserve confidentiality[22] — the sample order did not provide the same opportunity.

Because the orders do not expressly acknowledge recipients' rights regarding their privileged or proprietary information, or establish reasonable mechanisms for recipients to protect these rights, they risk giving rise to legitimate concerns regarding the agency's treatment of the sensitive information it has requested.

The FTC Framework

The CFPB could address these concerns by adopting the same procedural safeguards provided by the FTC when it exercises nearly identical authority under Section 6(b) of the Federal Trade Commission Act.[23] Recipients of Section 6(b) orders — like recipients of FTC CIDs — may petition the commission to review any objection to them, and their obligation to comply with the order is stayed until the commission rules on the petition and establishes a new return date.[24]

Even if the recipient fails to respond by that date, penalties do not begin to accrue until 30 days after the FTC's general counsel issues a notice of default, providing recipients with an opportunity to obtain judicial review.[25] Even if the recipient still does not comply, the applicable penalties are a fraction of those available to the bureau: \$576 per day.[26]

The FTC also provides greater clarity regarding its treatment of confidential information obtained pursuant to Section 6(b). Recipients of FTC orders are entitled to assert claims of privilege or other bases for withholding information,[27] and orders issued by the FTC contain explicit assurances regarding recipients' right to notice prior to the FTC's publication of any information they have marked as confidential.[28]

The CFPB can easily provide equivalent protections to the recipients of its Section 1022(c)(4) orders. It can amend its regulations governing investigations to extend to recipients of these orders the same rights that CID recipients have to withhold privileged or otherwise protected information and to petition the director for review.[29]

And it can make clear, either through a rulemaking or through the adoption of an enforcement policy, that it will not seek civil money penalties for noncompliance with a 1022(c)(4) order until the recipient has had a reasonable opportunity to seek judicial resolution of any disagreement over its enforceability.

Finally, it can acknowledge the specific limitations on its authority to publish information it obtains and agree to provide recipients notice prior to the publication of any information recipients mark as confidential, just as it does in the context of the FOIA and when it resolves petitions to modify or set aside CIDs.[30]

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[1] CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans | Consumer Financial Protection Bureau, available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

[2] 12 U.S.C. §5512(c)(1).

[3] 12 U.S.C. §5512(c)(4)(B)(ii).

[4] 12 U.S.C. §5536(a)(2)(C).

[5] 12 U.S.C. §5565.

[6] 12 U.S.C. §5512(c)(3).

[7] 12 U.S.C. §5512(c)(3)(B), (8).

[8] *McLane Co. v. E.E.O.C.* , 137 S. Ct. 1159, 1165 (2017); see also *United States v. Morton Salt Co.* , 338 U.S. 632, 652–653 (1950) ("The gist of the protection is in the requirement ... that the disclosure sought shall not be unreasonable") (cleaned up).

[9] See *CFPB v. Accrediting Council for Indep. Colleges & Sch.* , 854 F.3d 683, 688 (D.C. Cir. 2017).

[10] See 12 C.F.R. §1080.6(c), (d).

[11] See 12 C.F.R. §1080.6(e), (f).

[12] *John Doe Co. v. Consumer Fin. Prot. Bureau* , 849 F.3d 1129, 1131 (D.C. Cir. 2017).

[13] 12 U.S.C. §5562(e)(1).

[14] See, e.g., *McLane*, 137 S.Ct. at 1164-65 (discussing similar process for resolving disagreements over EEOC subpoena); *F.T.C. v. Ken Roberts Co.* , 276 F.3d 583, 583–84 (D.C. Cir. 2001) (discussing similar process for resolving disagreements over FTC CIDs).

[15] See 12 C.F.R. §1080.1.

[16] https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf.

[17] See, e.g., *A. O. Smith Corp. v. F.T.C.* , 530 F.2d 515, 518 (3d Cir. 1976) (affirming the appropriateness of a declaratory judgment action in analogous circumstances).

[18] In *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1961), the Supreme Court considered whether the imposition of penalties based on a company's failure to comply with a similar order "during a time the [recipient] was without remedy to test [its] validity" amounted to a denial of due process. *Id.* at 213. The court rejected the due process challenge on the ground that the company had failed to seek emergency relief from the courts, notwithstanding a reasonable opportunity to do so. *Id.* at 226-27. This holding may well be distinguishable under many factual scenarios, but even assuming similar logic would apply to orders issued under Section 1022(c)(4) of the CFPA, it makes little sense to adopt a process that encourages the resolution of legitimate disagreements through emergency litigation.

[19] https://files.consumerfinance.gov/f/documents/cfpb_section-1022_generic-order_2021-10.pdf.

[20] Cf 12 C.F.R. §1080.8 (providing the recipients of CIDs with the right to withhold privileged or otherwise protected information).

[21] 12 U.S.C. § 5512(c)(3)(B), (c)(8). The order states that the information will be treated in accordance with the CFPB's confidentiality regulations, but those regulations likewise do not specifically acknowledge the statutory provisions that govern the CFPB's publication of information obtained through its market monitoring authority. 12 C.F.R. § 1070.40 et seq.

[22] See 12 C.F.R. §1070.20.

[23] See 15 U.S.C. § 46(b).

[24] 16 C.F.R. §§2.7, 2.10.

[25] 15 U.S.C. §50; 16 C.F.R. §2.13(b)(2).

[26] See generally *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority* | Federal Trade Commission, available at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (citing 16 C.F.R. §1.98(f)).

[27] 16 C.F.R. § 2.11.

[28] https://www.ftc.gov/system/files/attachments/press-releases/ftc-seeks-examine-privacy-practices-broadband-providers/isp_privacy_model_order.pdf.

[29] 12 C.F.R. §§1080.8,1080.6(e), (f).

[30] See, e.g., 12 C.F.R. §§ 1070.20 (submitter notice in FOIA);1080.6(g) (instructing petitioners to demonstrate good cause for not making public information contained in a petition to modify or set aside a CID); https://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf, at 11 (providing petitioner 10 days to consider its response to the bureau's denial of a request for confidentiality).