



Consumer Financial
Protection Bureau

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

February 10, 2015

Briefing memorandum for the Director

Meeting on Auto LP Rule

DATE	February 11, 2015	
TIME	10:00 a.m. – 11:00 a.m.	
LOCATION	One Constitution Square, Room 1201	
PARTICIPANTS	Steve Antonakes, [REDACTED] Meredith Fuchs, [REDACTED]	
STAFF CONTACT	Alexandra O'Rourke Karuna Patel	5-7910 5-7587
ASSOCIATE DIRECTOR APPROVAL	Meredith Fuchs	February 6, 2015

The purpose of this meeting is to discuss Legal's recommendation that you approve reopening the comment period for the proposed rule Defining Larger Participants of the Automobile Financial Market for at least 15 days in order to publish and seek comment on the list of entities that the Bureau estimated could qualify for supervision under the proposed rule, along with those entities' market share. The Bureau did not originally release this data because the Bureau understood it to be proprietary under its contract with Experian for acquisition of the data. Experian has since given the Bureau permission to release the data.

Summary

In crafting the proposed rule Defining Larger Participants of the Automobile Financing Market (“Auto LP proposed rule”), the Bureau relied on Experian AutoCount data, among other things, to select the proposed threshold and to conduct other required analyses. At the time the Auto LP proposed rule was published, the Bureau understood that Experian regarded the AutoCount data and information derived from that data, including the names of the entities that the Bureau estimated would be newly subject to supervision under the Auto LP proposed rule, as proprietary and that release of this data for public comment was therefore prohibited under the Bureau’s contract with Experian for acquisition of the data. During the comment period, the Bureau received a request for the names of the entities that the Bureau estimated would qualify for supervision under the Auto LP proposed rule. In response to that request, the Bureau sought permission from Experian to publish the list the Bureau had prepared of potential larger participants under three different possible thresholds and certain associated information. Following the close of the comment period, Experian authorized the Bureau to release the requested names in order of number of originations and each entity’s percent market share (“Experian non-proprietary data”).

In light of this changed circumstance, this memorandum considers whether the Administrative Procedure Act (APA) requires publication of the Experian non-proprietary data and reopening of the comment period for the Auto LP proposed rule to allow for comment on this data. Legal believes that, if the Bureau’s failure to publish the Experian non-proprietary data for public comment were challenged, there is a cognizable risk that a court would find the rule procedurally defective. Accordingly, Legal recommends publication of the Experian non-proprietary data and reopening of the comment period for the Auto LP proposed rule for at least 15 days limited to comment on the released data. Although Legal recognizes that publication of the Experian non-proprietary data raises certain policy concerns that have been voiced by stakeholders, Legal believes that failure to release the data would also give rise to oversight risk given the clear authorization from Experian permitting the data’s release.

I. Background

Experian AutoCount is a vehicle database that collects monthly transaction data from State Departments of Motor Vehicles. In crafting the Auto LP proposed rule, RMR relied on Experian AutoCount data from 2013 to analyze the auto financing market and to determine the appropriate origination threshold to propose for this market. The Bureau believed this to be the best data source for information on the automobile financing market. The Bureau used the data to create a list of nonbank entities in the automobile financing market, with a

count of each of their loans and leases.¹ The Bureau used these counts to calculate the entities' market shares as a percent of the nonbank market. Under the Bureau's contract with Experian for acquisition of the AutoCount data, the Bureau was required to obtain express permission from Experian before releasing any of the data or analysis derived from the data in any public document.

In August 2014, prior to publishing the Auto LP proposed rule, the Bureau contacted Experian to seek permission to identify the AutoCount data as the main data source supporting the Auto LP proposed rule and to publish in the preamble certain information relating to the data, including a description of the data, the methodology used by the Bureau to analyze the AutoCount data for purposes of the proposed rule, the total market of nonbank auto financing companies, and the number of entities and market share covered under three potential thresholds, 5,000, 10,000 and 50,000 originations. The Bureau estimated that it would cover 17, 38, and 55 entities respectively under the thresholds considered.² Experian agreed to the Bureau's request on the condition that it would have the opportunity to approve every statement in the preamble to the Auto LP proposed rule that referenced the data set. Shortly before the release of the Auto LP proposed rule, based on advice from Legal, the Bureau sought permission from Experian to release to the public "the underlying AutoCount data used by the Bureau to make the policy determinations and impact analysis in the proposal."³ Experian denied the Bureau permission to release this underlying data, stating that Experian sells the data as a subscription service and that it would be adversely impacted by the wholesale release of this underlying data.

The Auto LP proposed rule was published online on September 18, 2014 and published in the Federal Register on October 8, 2014. On September 30, [REDACTED] sent an inquiry to the Bureau's Regulations inquiry mailbox. The inquiry quoted the preamble to the Auto LP proposed rule, which stated that the Bureau estimated that the proposed threshold of 10,000 would cover 38 entities. [REDACTED] stated "I have the Experian Report outlining the top 20; however, I do not have the information regarding the top 38. If you could forward me that information, I would appreciate it." The Bureau has not responded to

¹ As noted in the preamble to the Auto LP proposed rule, the Bureau made several adjustments to the data to reflect the Bureau's definitions of the market and of "originations." 79 FR 60762, 60769 & n. 60-62 (Oct. 8, 2014). Still, the list of entities prepared by the Bureau is under- and over-inclusive, as described in the preamble to the Auto LP proposed rule. *Id.* at 60772 & n. 79. One limitation, for example, is that the list does not account for much of the affiliate aggregation that would be done under the proposed rule pursuant to a requirement under the Dodd-Frank Act. 12 U.S.C § 5514(a)(3)(B). As a result, the list may omit entities that do not have sufficient originations to meet the thresholds under consideration but that could be larger participants when their activity is aggregated with that of their affiliates. Another limitation is that the Experian AutoCount data do not include data related to refinancings or motorcycle financing.

² 79 FR at 60772-73.

³ Email from Maureen [REDACTED], Office of Research, Markets, and Regulations to Melinda [REDACTED], Experian (September 8, 2014).

that request. In early to mid-November, the Bureau received another less targeted inquiry from [REDACTED]. Initially, a [REDACTED] representative requested discussion on a range of possible issues, including whether the Bureau had assembled data that it made public about the identity of the large players that would be subject to supervision under the Auto LP proposed rule, but a subsequent email from [REDACTED] provided the list of 9 topics that [REDACTED] wanted to discuss and did not include this subject. The Bureau is not currently planning to meet with [REDACTED].

As a result of these inquiries, the Bureau sent a follow-up inquiry to Experian to confirm that Experian regarded as proprietary the names and/or origination amounts of the 55 entities that would be covered under the lowest threshold considered in the Auto LP proposed rule, which is a more limited subset of the data the Bureau had previously sought permission to release. The Bureau noted in the inquiry that permission from Experian to publish such information could range from releasing the list of names only in alphabetical order, so as not to disclose the relative size or order of the entities on the list, to releasing a list of the number of originations for each individual entity. See Tab 1 (lists proposed to Experian for release). The Bureau did not receive a response from Experian until after the comment period closed.

During the comment period, the Bureau received a number of comments pertaining directly or indirectly to the Experian list.⁴ For example, the law firm Buckley Sandler, representing several entities defined as small businesses by the Small Business Administration (SBA), submitted a comment stating, in part, that one of those clients would fall under the proposed 10,000 originations threshold, but was not one of the 38 entities the Bureau anticipated covering.⁵ It pointed to this fact as evidence that the Auto LP proposed rule underestimated

⁴ Other than the comments discussed, the American Financial Services Association (AFSA), commented that the threshold would cover small businesses under the SBA definition for the industry and also asked a number of detailed questions about the data, noting that “it is unclear as to whether the data gathered from Experian’s AutoCount database by the CFPB to identify larger participants will mis-identify ‘larger participants’ by inaccurately including those lenders that make direct loans (for purposes other than purchases or refinances of purchases) and note their lien on automobile titles that are recorded with state Departments of Motor Vehicles.” AFSA Comment at 7, 9. At least two consumer advocates commented that “while the 10,000 appears to include large finance companies that focus on a particular region, and finance companies related to larger Buy Here Pay Here dealers, little data from auto finance is publicly available. **The Bureau should use all data it has access to ensure [sic] the threshold does capture the larger participants in each of these categories.**” Shawna Cheney, Staff attorney for legal services provider in Virginia, Comment at 2; John Cole Gayle, Jr. Esq., The Consumer Law Group, P.C., Comment at 2 (emphasis in original). Another attorney, known among consumer advocates as an expert in auto financing, commented “Although I support the CFPBs [sic] proposed threshold . . . , the CFPB should continue to monitor the market and ensure that this measure captures the larger participants within niche markets, like subprime, Buy-Here-Pay-Here, service members as consumers, minority populations, etc. Even those financial institution [sic] with a small market share could be very influential within their niche within the auto finance market.” Tom Domonoske Comment at 2.

⁵ The comment stated:

the number of entities covered by the proposed threshold. The Bureau also received a joint comment letter from several advocacy organizations including the Center for Responsible Lending, the National Consumer Law Center, National Council of La Raza, NAACP and U.S. PIRG, stating that the proposed threshold seemed to cover the types of entities that formed the “important segments” of the market, but that they could not be certain of that fact because the data regarding the entities that would be covered was not public.⁶ No commenter specifically requested that the Bureau publish Experian non-proprietary data or argued that publication was required under the APA. The comment period closed on December 8, 2014.

On January 15, 2015, Experian responded to the Bureau’s inquiry by telephone conference, stating that it had no objection to releasing the list of entity names that the Bureau estimated would be covered under the Bureau’s proposed threshold as well as the relative market share for each listed entity. Experian did, however, object to releasing the actual number of originations per entity. [REDACTED]

II. Legal Analysis

A. Legal Standard

The Administrative Procedure Act (APA) requires agencies to publish “notice” of “either the terms or substance of the proposed rule or a description of the subjects and issues involved” to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments.” 5 U.S.C. §§ 553(b), (c). Courts have held that to satisfy the requirements of § 553 agencies must provide an opportunity for the public

Certain of the Clients . . . qualify as a “small business” under the SBA’s definition, one of whom, by way of example . . . will also be deemed a “larger participant” under the Proposed Rule because it exceeds the aggregate annual originations threshold for [2014] . . . Interestingly, that entity is not one of the largest 38 entities the Bureau anticipated would be subject to its supervisory authority as a result of the 10,000 aggregate origination threshold. In light of this fact, it reasonably appears that the data relied upon in reaching the proposed threshold may in fact result in a meaningfully larger group of entities being subject to supervision, including a perhaps unanticipated number of institutions defined as small business by the SBA.

Buckley Sandler LLC Comment at 2.

⁶ The comment stated:

The threshold seems to capture the larger financial institutions in the important segments of the market, such as Buy-Here/Pay-Here affiliated finance companies, large regional finance companies, and finance companies targeting sub-prime borrowers. However, because the data is not public we cannot be certain that is the case. We recommend that the Bureau review the data available to it to ensure that it does capture the larger participants in all segments.

Joint Comment of Advocacy Organizations at 5.

to comment on data and technical studies used to support a rule. *See Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982) (finding that integral to the notice requirement is the agency's duty "to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. . . . An agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary."); *see also Am. Radio Relay League v. FCC*, 524 F.3d 227, 236, 237 (D.C. Cir. 2008), quoting *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("[It is not consonant with the purpose of rulemaking to promulgate rules on the basis of . . . data that, [to a] critical degree, is known only to the agency."). This principle extends to situations in which the primary use of the data or technical studies is to fulfill a statutory obligation to consider the economic consequences, *i.e.*, the costs and benefits, of a proposed regulation. *See, e.g., Chamber of Commerce v. SEC (Chamber II)*, 443 F.3d 890, 901 (D.C. Cir. 2006) (vacating provisions of a rule where the SEC relied on extra-record materials critical to its cost estimates to the prejudice of the defendant). When an agency wishes to rely on data to support a final rule and did not previously seek comment on that data, the agency must generally reopen the comment period to explain the data and seek comment. *See, e.g., id.* at 909.

There are three potential circumstances in which an agency may meet its obligations under § 553 without full publication for public comment of data or technical studies supporting a rule, at least in the absence of any indication that the agency withheld the information in bad faith.⁷ First, an agency may not need to seek comment when the data are publicly available and agency reliance on the data was obvious to potential commenters. *See Chamber II*, 443 F.3d at 906. Second, in the case of confidential data, an agency may meet its obligations under § 553 by soliciting comment on data described in an aggregate or other non-identifiable form, provided at least that the agency discloses the source of the data and the methodology by which the data were generated. *See NRDC v. Thomas*, 805 F.2d 410, 418 n.13 (D.C. Cir. 1986) (upholding reliance on confidential data, despite misgivings, where agency compiled composite graph of the data and explained its significance); *see also Riverkeeper Inc. v. EPA*, 475 F.3d 83, 112 (2d Cir. 2007) (Sotomayor, J.) ("We accept the EPA's argument that masking the facility names [as confidential business information] did not prevent interested parties from commenting on the methodology and general cost data underlying the EPA's approach because the [Notice of Data Availability] explained the costing methodology and because the general cost data, while not identified by the Agency as relating to actual, specific facilities, was made available to interested parties."), *rev'd on other grounds*, 556 U.S. 208 (2009). Redactions, however, must be strictly limited to confidential, personally identifying, or irrelevant supplementary information; an agency may not withhold from the record negative data or data that might weigh against the agency's

⁷ *See, e.g., Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1991) ("Nor does the record suggest that EPA hid or disguised the information it used, or otherwise conducted the rulemaking in bad faith.").

conclusions. See *Am. Radio Relay League, Inc.*, 524 F.3d at 239 (FCC violated APA by citing studies in which it had redacted certain staff opinions; “the Commission can point to no authority allowing it to rely on the studies in a rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed”). Third, in the absence of a showing of prejudice by the plaintiff, an agency may not need to reopen the comment period for data that is “supplementary” to data or studies for which the agency already sought comment, *Chamber II*, 443 F.3d at 906, or for data that the agency gathered in response to public comments, see, e.g., *Rybachek v. EPA*, 904 F.2d 1276, 1286 (9th Cir. 1990). To demonstrate prejudice from an agency’s failure to seek comment in such circumstances, a petitioner need only establish that “it had something useful to say about th[e] critical data.” *Chamber II*, 443 F.3d at 905. A party may, for example, show prejudice by “point[ing] to inaccuracies in the [supplemental] data,” or by “indicat[ing] with ‘reasonable specificity’ what portions of the [data] it objects to and how it might have responded if given the opportunity.” *Id.* at 904 (quoting *Solite Corp.*, 952 F.2d at 484).⁸

Applying these standards, Legal believes that there is a cognizable risk that a court would conclude that the APA requires issuance of a supplementary notice of proposed rulemaking to allow for comment on the Experian non-proprietary data.

B. Whether the Bureau “employed” or “used” the Experian non-proprietary data in the Auto LP rulemaking

Given the Bureau’s understanding that the Experian AutoCount data and other derivative information were proprietary, the Bureau met its obligations under the APA by disclosing in the preamble to the Auto LP proposed rule, in place of the full dataset and other derivative information, the source of the data relied upon (*i.e.*, Experian AutoCount), the methodology by which the data were generated, including certain limitations of that methodology, and an aggregate description of the contents of the dataset. Arguably, the most important factors in selecting the proposed threshold at or above which market participants would be considered larger participants of the auto market were the market share, number of originations, number of entities, and percent of the market in terms of number of entities that would fall at or above the proposed threshold as calculated by the Bureau. The Bureau disclosed these data points for the threshold it ultimately proposed as well as for other thresholds it

⁸ By contrast, where an agency dodges APA notice and comment procedures outright, courts have permitted an even more “limited showing of prejudice.” *Chambers II*, 443 F.3d at 902. Specifically, courts have held that “an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.” *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) (explaining the standard of *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir.1988)).

considered in formulating the proposal, *i.e.*, 5,000 and 50,000 originations.⁹ Thus, the Bureau might argue that the identities of entities that would fall under each proposed threshold was not central to the rulemaking and could emphasize that the Experian non-proprietary data is not a list of the entities that the Bureau will actually supervise because, among other things, it represents only an estimate, the rule may not be finalized as proposed, the market will likely change over time, and the Bureau will determine supervisory priorities under its risk-based program.

On the other hand, it would be difficult to persuade a court that the identities of the entities contained in the Experian non-proprietary data were irrelevant to the Bureau's analysis in formulating the Auto LP proposed rule. Based on internal analysis related to the Auto LP proposed rule and statements in the preamble to the proposed rule explaining the Bureau's reasoning and methodology, one could persuasively argue that the identities of the entities that the Bureau estimated would fall under the three proposed thresholds and their individual market shares were utilized or employed by the Bureau in crafting the Auto LP proposed rule. As to the entities' identities, in setting the threshold for the Auto LP proposed rule, RMR could be described as having relied on the specific identities of the entities that it estimated would be covered under that threshold for at least two purposes: (1) to ascertain whether the proposed threshold would capture an adequate mix of types of entities; and (2) to determine how many of the captured entities would qualify as SBA small businesses for purposes of the Regulatory Flexibility Act (RFA) analysis. Both purposes are captured in statements made in the preamble to the Auto LP proposed rule.¹⁰ A commenter could argue that release of the identities would allow more complete comment on these issues that were highlighted by the Bureau as pertinent to its analysis. Moreover, as noted above, certain commenters suggested that these issues were relevant to their evaluation of the rule and that the lack of data hindered their ability to comment more fully on the issues. For example, consumer advocates noted that they could not be certain of the adequacy of the mix of entities that would be covered because they did not have the necessary information. And, a group of small finance companies as defined by the SBA argued that one of its

⁹ The preamble to the LP Auto proposed rule offered that under a threshold of 10,000 originations, under the 2013 AutoCount data the Bureau analyzed, 91 percent of the activity in the nonbank market, 7 percent of all nonbank covered persons, 38 entities and 6.8 million transactions would be covered by the rule. 79 FR at 60772.

¹⁰ The preamble to the LP Auto proposed rule states that, at the lower 5,000 threshold, the additional entities "are only a fraction of the size of the smallest entities that meet the threshold and are mostly regional finance companies." 79 FR at 60772. It also states that at the higher 50,000 threshold, "the Bureau would not be able to supervise as varied a mix of nonbank larger participants that have a substantial impact on the full spectrum of consumers in the market." *Id.* at 60773. The preamble also mentions that "fewer than 40 entities comprise over 90 percent of the auto loan and lease transactions in the nonbank market . . . The top tier of this market is dominated by large captives. The other large companies . . . are either specialty finance companies or BHPH finance companies." *Id.* at 60769. The preamble's RFA analysis states, in part "The Bureau used AutoCount data for 2013 combined with public financial statements, securitization filings, and additional market research to estimate annual receipts for each of the potential larger participants." *Id.* at 60781.

members, a small business, would qualify for supervision under the proposed threshold, notwithstanding the Bureau's statement that "few, if any" small businesses were on its list of the 38 entities that would be subject to supervision under that threshold.¹¹ As to the entities' respective market shares, one could reasonably argue that RMR used the market shares to analyze and confirm that the entities it believed would fall under the proposed threshold would in fact qualify as larger participants of the auto market.

C. Whether the Experian Non-Proprietary Data Qualifies For Potential Exception to Release under Section 553

The potential exceptions for publishing data and technical studies for public comment do not clearly apply here. First, the Experian non-proprietary data is not publicly available since it is not regularly published for public use, but rather would require purchase of the Experian AutoCount data set at a significant cost as well as application of the Bureau's methodology to that dataset.

Second, Legal believes that the Experian non-proprietary data would likely be subject to disclosure under the Freedom of Information Act (FOIA), making it difficult to reasonably argue that the confidentiality exception to full disclosure for public comment, as generally required under the APA, applies. FOIA Exemption 4, which exempts confidential commercial information from FOIA's disclosure requirements, does not apply to the data at issue because Experian has indicated the information is non-proprietary.¹² 5 U.S.C. § 552(b)(4). Exemption 8, which generally exempts supervisory information from FOIA's disclosure requirements, likely also does not apply because the Bureau does not yet have supervisory authority over the entities on the list.¹³ 5 U.S.C. § 552(b)(8). Moreover, Exemption 8 has traditionally applied only to depository institutions and credit unions subject to supervision by federal regulators. The application of Exemption 8 to automobile finance companies implicates an open legal question about the application of Exemption 8 to non-depository institutions. *See Public Investors Arbitration Bar Ass'n v. SEC*, 771 F.3d 1, 7 (D.C. Cir. 2014) (stating its "broad reading of Exemption 8 extends no further than the walls of the Securities and Exchange Commission" and that its "opinion has nothing to say about the ability of other financial agencies—say, the Consumer Financial Protection

¹¹ 79 FR at 60781.

¹² FOIA Exemption 4 applies to trade secrets and commercial or financial information that is privileged or confidential. Experian has indicated it does not consider the list of entities to be a trade secret or confidential.

¹³ FOIA Exemption 8 applies to information "contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). In this context, the scope of FOIA Exemption 8 may differ from the scope of "confidential supervisory information," as defined in the Bureau's confidentiality regulations at 12 C.F.R. § 1070.2(i). To the extent these standards differ, the scope of the FOIA is the relevant standard for assessing legal risk.

Bureau—to withhold specific records”). A court’s unfavorable determination on the applicability of Exemption 8 in this context could negatively impact the Bureau’s supervision of non-depository institutions. The unlikelihood that the Bureau could shield the Experian non-proprietary data from disclosure under FOIA also raises the possibility of future FOIA litigation over the Experian non-proprietary data if it is not disclosed as part of the rulemaking.

Third, it is not entirely clear that the exception for supplementary data would apply on these facts, where the Bureau had the data in its possession prior to release of the Auto LP proposed rule, but did not question whether this particular subset of the data, *i.e.*, the names of the 55 entities that would fall under the lowest threshold according to the Bureau’s estimates with the entities’ market shares, was proprietary since Experian had made clear that the Bureau was not permitted to release the entire data set. But assuming the exception would apply since the Bureau properly disclosed the data source and believed in good faith that the Experian non-proprietary data was confidential, the Bureau might have a colorable argument that the data is “supplementary” on the theory that it “check[s] or confirm[s] prior assessments without changing methodology [and] confirm[s] or corroborat[es] data in the rulemaking record.” *Chamber II*, 443 F.3d at 900. On the other hand, a court could reasonably conclude that the data is “primary” rather than supplementary since it is arguably the “only source of information” on a number of important issues, including the accuracy of the Bureau’s statements that few, if any, small businesses would be subject to supervision under the proposed threshold and that the threshold would subject an adequate mix of types of entities to supervision. *Id.* at 902.¹⁴

D. Whether Commenters Can Demonstrate Prejudice

Even if the Bureau could prevail on the argument that the Experian non-proprietary data is “supplementary” rather than “primary,” it is difficult to say with any certainty in the absence of actual public comment that commenters would not be able to demonstrate “prejudice” from the Bureau’s failure to disclose the data for public comment, *i.e.*, that commenters would not have had something useful to say about the data. *See Solite Corp.*, 952 F.2d at 484 (“[C]onsistent with the APA, an agency may use ‘supplementary’ data, unavailable during the notice and comment period . . . so long as no prejudice is shown.”); *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (same). To be sure, no commenter specifically requested that the Bureau publish the Experian non-proprietary data or argued that publication was required under the APA.¹⁵ However, as discussed above,

¹⁴ Nor is there any argument that the Bureau gathered the Experian non-proprietary data in response to public comments.

¹⁵ Courts have sometimes applied the doctrine of issue waiver in notice and comment rulemaking, requiring parties challenging a rule to have raised the issue in the rulemaking process to preserve the issue for judicial review. *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*,

certain comments could be interpreted to illustrate that the absence of publicly available data hindered the public's ability to comment on the diversity of the types of entities that would qualify for supervision under the proposed threshold and on whether the proposed threshold would subject any small businesses to supervision. Moreover, publication of the Experian non-proprietary data for public comment would arguably enable more meaningful comment on the accuracy of the Bureau's data, market conclusions, and regulatory analyses. For example, release of the names of the entities that potentially would be covered under the proposed thresholds and their associated market share would allow listed and non-listed entities, especially those close to the proposed threshold, to verify whether their actual originations matched those generated under the Experian AutoCount data and the Bureau's methodology. One could argue that large discrepancies between the results generated by the Bureau and those generated by entities based on their actual originations would speak to the accuracy of both the Experian AutoCount data and the Bureau's methodology and could thus be useful to finalizing the Auto LP proposed rule. Indeed, a commenter representing a group of small finance companies expressly questioned the accuracy of the Bureau's data by seeking to contrast the 38 entities it believed to be on the Bureau's internal list to those of the other entities it believed would be covered under the proposed threshold. Given the commenter's suggestion that its calculations did not match those of the Bureau, it would be difficult to say that this commenter would have nothing "useful" to say about the Experian non-proprietary data.

III. Policy Implications

Legal recognizes that release of the Experian non-proprietary data may have collateral consequences that impact the Auto LP proposed rule and the Bureau's work more generally. First, Legal shares the concerns of stakeholders that releasing for public comment the specific names of entities that the Experian AutoCount data and Bureau methodology

429 F.3d 1136, 1148-50 (D.C. Cir. 2005). However, where the agency does not provide adequate notice of the challenged issue at the time of the proposed rulemaking, courts have declined to apply the doctrine. See *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009) (explaining that the issue waiver doctrine "permits courts to decline to hear arguments not raised before the agency where the party had notice of the issue," but does not apply where the party lacked such notice); see also *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 682 (D.C. Cir. 1983) (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 283-84 (D.C. Cir. 1971)) (holding that "where issues by their nature could not have been raised before the agency (e.g., a material change in circumstances or a serious impropriety in the administrative process)," a court may remand to the agency for reconsideration). Here, we would have some discomfort with arguing, and it might be difficult to persuade a court, that commenters waived their right to contest the Bureau's failure to release the Experian non-proprietary data for public comment. Commenters could make a persuasive case that they assumed based on the Bureau's reference to the Experian AutoCount database, which is available only at a substantial charge, that the data were proprietary, and had no way of knowing that Experian had granted the Bureau permission to release the data. And without access to the data, commenters could not waive any specific arguments they might have regarding the reliability or content of the data, though commenters did address these issues based on the more limited data made available by the Bureau.

suggest would qualify for supervision under the proposed threshold might attract undue attention and be misunderstood as a list of entities that the Bureau in fact intends to supervise. Legal believes, however, that these risks can be minimized by a clear description in the notice of reopening of the content and significance of the published data. Specifically, the Bureau can clarify that this data does not represent a determination by the Bureau that the listed entities in fact would fall under the proposed threshold since the originations estimates are under- and over-inclusive as described in the preamble, the rule may not ultimately be finalized exactly as proposed and in implementing the final rule, the Bureau will rely on the best and most current data available at that time and entities will have an opportunity under 12 C.F.R. 1090.103 to contest the accuracy of the Bureau's decision to assert supervisory authority. The Bureau can also again explain that under its risk-based supervision program, it does not expect to supervise all entities that it believes would be subject to supervision under the final rule.

In addition, release of the Experian non-proprietary data may lead to requests for additional lists of entities that would be subject to supervision under the Bureau's other Larger Participant rules—information that the Bureau has not previously made public. For the four larger participant rules that have already been finalized, the Bureau has a reasonable argument that the information qualifies as confidential supervisory information since it has been prepared for purposes of deciding whether to conduct an actual exam and represents the results of the Bureau's risk-based analysis on its supervisory priorities.

More problematically, it is possible that releasing the Experian non-proprietary data for public comment will raise questions about whether the four prior Larger Participant rules were procedurally defective since the Bureau did not solicit public comment on the identities of the entities that would qualify for supervision under the thresholds proposed and ultimately selected for those rules. However, for the most part, the litigation risk for the prior larger participant rules would not be as substantial. For credit reporting¹⁶ and debt collection, the Bureau relied on Census data on the industries, which did not include identifying information. For international money transfers, the Bureau relied substantially on confidential supervisory information from states and data from the National Mortgage Licensing & Registry system (NMLS) that were provided pursuant to Memoranda of Understanding. For student loan servicing, there is some litigation risk under the APA because the Bureau used data that the Bureau never confirmed to be proprietary, although the data may in fact be proprietary. The Bureau did, however, lay out the sources, methodology and potential shortcomings of its analysis in that rule. Relatedly, publication of the Experian non-proprietary data may create the public expectation that the Bureau will

¹⁶ For credit reporting, there may have been market research that included figuring out names of entities other than the big three credit reporting agencies that would potentially be covered as well as coverage of analyzers of data, like FICO.

identify the names of potential larger participants with respect to future larger-participant proposals, even where the data utilized by the Bureau would not necessitate this disclosure. The Bureau might feel the need to manage this expectation by providing a detailed explanation in future rulemakings of exactly why the identities of potential larger participants are not being released, which might draw attention to potential limitations of the dataset utilized to support the rule.

Other policy implications may include increased lobbying by listed entities and related Congressional scrutiny, negative public statements or publicity from the listed entities, and pressure and scrutiny from consumer advocates related to the mix of entities covered. Additionally, entities that appear on the list released by the Bureau may also put pressure on the Bureau to provide advance determinations regarding whether they, in fact, meet the larger participant test. In establishing the initial larger participant rule, the Bureau expressly declined to provide for such advance determinations, noting how burdensome it would be for the Bureau to respond to such requests; instead, the Bureau created the existing mechanism in 12 CFR 1090.103 that allows entities to dispute their status after the Bureau indicates an intent to supervise them.¹⁷

Although it would be difficult to avoid these collateral consequences entirely, they, of course, do not provide a defense against § 553's notice and comment requirements. Moreover, it bears note that failure to release the Experian non-proprietary data would create oversight risk in light of Experian's express permission to the Bureau to release the requested information. Moreover, as addressed above, if the Bureau were to receive a FOIA request for the Experian non-proprietary data, the Bureau would likely have to release this data in response to the request. Release of the data at a later stage of the rulemaking process would make it difficult for the Bureau to respond to any comments raised about the data, and would invite scrutiny regarding the Bureau's failure to release the information for public comment earlier in the rulemaking process.

IV. Timing for Reopening

The APA does not require a specific number of days for a comment period. Instead, courts measure the adequacy of comment periods by whether interested parties have a "meaningful opportunity" to comment. *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 559 (10th Cir. 1986) (holding EPA's refusal to extend 45-day comment period was not arbitrary or capricious and noting that APA does not specify a certain number of days as long as EPA gave interested parties "an opportunity to participate in the rulemaking" (quoting 5 U.S.C. 553(c))). Generally, the baseline comment period for notice and comment rulemaking is 60

¹⁷ 77 FR 42882-83 (July 20, 2012).

days.¹⁸ However, courts have upheld shorter periods in certain circumstances, such as when the public is aware of the action in advance of the comment period, and when the agency receives a high number of substantive comments during the shorter period. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 989-90 (D.C. Cir. 1976) (upholding 10 day period based, in part, on interested parties' knowledge of the proposed action before the comment period began as a result of agency's public statements); *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 767, 772 (D.C. Cir. 1988) (holding that there was a "meaningful opportunity to comment" even in 15 days, based, in part, on the fact that the agency received 61 comments, some lengthy, and none of the substantive challenges raised in litigation differed from the issues raised in the comments). Given the limited scope of the Experian non-proprietary data against the background of the information already released for public comment, Legal believes that a comment period as short as 15 days, limited to the published data, would be legally defensible in this circumstance, though the Bureau would want to consider lengthening the comment period if specifically requested to do so by interested parties.¹⁹

Attachment(s)

Tab 1: Lists Proposed to Experian for Release

¹⁸ Executive Order 12,866 § 6(a) provides that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." (<http://www.archives.gov/federal-register/executive-orders/pdf/12866.pdf>).

¹⁹ For example, in a similar context, the Bureau reopened the comment period from June 5, 2012 to July 9, 2012 to allow public comment specifically on newly received mortgage loan data from FHFA before finalizing Ability to Repay and Qualified Mortgage Rule. 77 FR 33120 (June 5, 2012).

Sample of Category 1 Information - Ranked by # of Total Origin

Rank	Lender
1	TOYOTA FINANCIAL SERVICES
2	AMERICAN HONDA FINANCE
3	FORD MOTOR CREDIT
4	NISSAN INFINITI FINANCIAL SERVICES
5	HYUNDAI CAPITAL AMERICA
6	VW CREDIT INC
7	GM FINANCIAL AMERICREDIT
8	MERCEDES BENZ FINANCIAL
9	CARMAX AUTO FINANCE
10	WORLD OMNI FINANCIAL
11	CREDIT ACCEPTANCE CORP
12	WESTLAKE FINANCIAL SERVICES
13	KIA MOTOR FINANCE CO
14	EXETER FINANCE CORP
15	DRIVETIME FINANCE CORP
16	CNAC
17	LEXUS FINANCIAL SERVICES
18	CPS CONSUMER PORTFOLIO SERV. INC
19	AMERICAN CREDIT ACCEPTANCE
20	VOLVO CAR FINANCIAL SERVICES
21	LOBEL FINANCIAL
22	UNITED AUTO CREDIT
23	CAR MART / AMERICAS CAR MART
24	PRESTIGE FINANCIAL SERVICES
25	RELIABLE CREDIT ASSOCIATION INC
26	FLAGSHIP CREDIT ACCEPTANCE
27	LINCOLN AUTOMOTIVE FINANCIAL SERVICES
28	PORSCHE CREDIT CORP
29	MITSUBISHI MOTOR CREDIT
30	CONDOR CAPITAL CORP
31	NICHOLAS FINANCIAL INC
32	UNIVERSAL ACCEPTANCE CORP
33	FIRST INVESTORS FINANCIAL SERVICES GROUP
34	GFC LENDING LLC
35	SNAAC
36	CAR FINANCE CAPITAL
37	VEROS CREDIT LLC
38	PROFESSIONAL FINANCIAL SERVICES
39	FINANCIAL INSTITUTION LENDING OPTION LLC
40	GATEWAY FINANCIAL SERVICES
41	GE CAPITAL
42	AL FINANCIAL CORP
43	HONOR FINANCE
44	CIG FINANCIAL
45	NEW CITY FUNDING CORP
46	TOTAL FINANCE
47	TIDEWATER MOTOR CREDIT
48	COASTAL CREDIT LLC
49	TURNER ACCEPTANCE CORP
50	AUTO LOAN
51	UNITED FINANCE CO
52	SAC FINANCE
53	LOAN MAX
54	LENDMARK FINANCIAL SERVICES
55	AUTO FINANCE

Sample of Category 1 Information - Ranked In Alphabetical Order

Rank	Lender
1	AL FINANCIAL CORP
2	AMERICAN CREDIT ACCEPTANCE
3	AMERICAN HONDA FINANCE
4	AUTO FINANCE
5	AUTO LOAN
6	CAR FINANCE CAPITAL
7	CAR MART / AMERICAS CAR MART
8	CARMAX AUTO FINANCE
9	CIG FINANCIAL
10	CNAC
11	COASTAL CREDIT LLC
12	CONDOR CAPITAL CORP
13	CPS CONSUMER PORTFOLIO SERV. INC
14	CREDIT ACCEPTANCE CORP
15	DRIVETIME FINANCE CORP
16	EXETER FINANCE CORP
17	FINANCIAL INSTITUTION LENDING OPTION LLC
18	FIRST INVESTORS FINANCIAL SERVICES GROUP
19	FLAGSHIP CREDIT ACCEPTANCE
20	FORD MOTOR CREDIT
21	GATEWAY FINANCIAL SERVICES
22	GE CAPITAL
23	GFC LENDING LLC
24	GM FINANCIAL AMERICREDIT
25	HONOR FINANCE
26	HYUNDAI CAPITAL AMERICA
27	KIA MOTOR FINANCE CO
28	LENDMARK FINANCIAL SERVICES
29	LEXUS FINANCIAL SERVICES
30	LINCOLN AUTOMOTIVE FINANCIAL SERVICES
31	LOAN MAX
32	LOBEL FINANCIAL
33	MERCEDES BENZ FINANCIAL
34	MITSUBISHI MOTOR CREDIT
35	NEW CITY FUNDING CORP
36	NICHOLAS FINANCIAL INC
37	NISSAN INFINITI FINANCIAL SERVICES
38	PORSCHE CREDIT CORP
39	PRESTIGE FINANCIAL SERVICES
40	PROFESSIONAL FINANCIAL SERVICES
41	RELIABLE CREDIT ASSOCIATION INC
42	SAC FINANCE
43	SNAAC
44	TIDEWATER MOTOR CREDIT
45	TOTAL FINANCE
46	TOYOTA FINANCIAL SERVICES
47	TURNER ACCEPTANCE CORP
48	UNITED AUTO CREDIT
49	UNITED FINANCE CO
50	UNIVERSAL ACCEPTANCE CORP
51	VEROS CREDIT LLC
52	VOLVO CAR FINANCIAL SERVICES
53	VW CREDIT INC
54	WESTLAKE FINANCIAL SERVICES
55	WORLD OMNI FINANCIAL

Sample of Category 2 Information

2013 Total Originations

Rank	Lender
1	TOYOTA FINANCIAL SERVICES
2	AMERICAN HONDA FINANCE
3	FORD MOTOR CREDIT
4	NISSAN INFINITI FINANCIAL SERVICES
5	HYUNDAI CAPITAL AMERICA
6	VW CREDIT INC
7	GM FINANCIAL AMERICREDIT
8	MERCEDES BENZ FINANCIAL
9	CARMAX AUTO FINANCE
10	WORLD OMNI FINANCIAL
11	CREDIT ACCEPTANCE CORP
12	WESTLAKE FINANCIAL SERVICES
13	KIA MOTOR FINANCE CO
14	EXETER FINANCE CORP
15	DRIVETIME FINANCE CORP
16	CNAC
17	LEXUS FINANCIAL SERVICES
18	CPS CONSUMER PORTFOLIO SERV. INC
19	AMERICAN CREDIT ACCEPTANCE
20	VOLVO CAR FINANCIAL SERVICES
21	LOBEL FINANCIAL
22	UNITED AUTO CREDIT
23	CAR MART / AMERICAS CAR MART
24	PRESTIGE FINANCIAL SERVICES
25	RELIABLE CREDIT ASSOCIATION INC
26	FLAGSHIP CREDIT ACCEPTANCE
27	LINCOLN AUTOMOTIVE FINANCIAL SERVICES
28	PORSCHE CREDIT CORP
29	MITSUBISHI MOTOR CREDIT
30	CONDOR CAPITAL CORP
31	NICHOLAS FINANCIAL INC
32	UNIVERSAL ACCEPTANCE CORP
33	FIRST INVESTORS FINANCIAL SERVICES GROUP
34	GFC LENDING LLC
35	SNAAC
36	CAR FINANCE CAPITAL
37	VEROS CREDIT LLC
38	PROFESSIONAL FINANCIAL SERVICES
39	FINANCIAL INSTITUTION LENDING OPTION LLC
40	GATEWAY FINANCIAL SERVICES
41	GE CAPITAL
42	AL FINANCIAL CORP
43	HONOR FINANCE
44	CIG FINANCIAL
45	NEW CITY FUNDING CORP
46	TOTAL FINANCE
47	TIDEWATER MOTOR CREDIT
48	COASTAL CREDIT LLC
49	TURNER ACCEPTANCE CORP
50	AUTO LOAN
51	UNITED FINANCE CO
52	SAC FINANCE
53	LOAN MAX
54	LENDMARK FINANCIAL SERVICES
55	AUTO FINANCE

