American Bankers Association
Building Success. Together.

CBA CONSUMER BANKERS ASSOCIATION

July 13, 2016

By electronic delivery to:
www.regulations.gov

The Honorable Howard Shelanski
Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Mr. Dominic Mancini
Deputy Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Re: Generic Information Collection Plan for "Qualitative Consumer Education and Engagement Information Collections"; Docket No. CFPB-2016-0027-0001, OMB Control No. 3170-0036.

Dear Administrator Shelanski and Deputy Administrator Mancini:

The American Bankers Association[1] and the Consumer Bankers Association[2] (the Associations) submit this comment in response to the Bureau of Consumer Financial Protection's (Bureau) request for re-approval, under the Paperwork Reduction Act of 1995 (PRA),[3] of a revised generic clearance "to collect qualitative data on effective strategies and consumer experiences" to improve consumer financial decisions (Qualitative Consumer Education Generic Clearance).[4] In addition to commenting on this request, we take this opportunity to express broader concerns with the Bureau's use of the generic clearance process and to urge the Office of Information and Regulatory Affairs (OIRA) to implement specific reforms to the generic clearance process to maximize the utility of the surveys and other information collections conducted under this process, in keeping with the purposes and provisions of the PRA.

The Associations did not raise concerns when the Bureau first sought approval of the existing Qualitative Consumer Education Generic Clearance in 2013 because the stated purpose of the clearance—"to develop a deeper understanding of effective financial education and

---

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.
[2] Founded in 1919, the Consumer Bankers Association (CBA) is the trade association for today's leaders in retail banking - banking services geared toward consumers and small businesses. The nation's largest financial institutions, as well as many regional banks, are CBA corporate members, collectively holding well over half of the industry's total assets. CBA's mission is to preserve and promote the retail banking industry as it strives to fulfill the financial needs of the American consumer and small business.
[3] Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501 et seq.).
[4] Notice and Request for Comment, Agency Information Collection Activities: Submission for OMB Review, "Generic Information Collection Plan for Qualitative Consumer Education and Engagement Information Collections," 81 Fed. Reg. 38144, 38145 (June 13, 2016). The letter that the American Bankers Association submitted to the Bureau during the initial, 60-day comment period on the Bureau's request for re-approval of the Qualitative Consumer Education Generic Clearance is attached.

empowerment strategies"[5]—is a subject that potentially might meet the purposes of a generic clearance. However, the Bureau has used this clearance to conduct information collections on substantive and policy-related issues—namely, overdraft services—which is prohibited by guidance interpreting the PRA that was published by OIRA. OIRA's guidance requires that such collections be subject to the standard PRA clearance process, which obligates notice to the public and an opportunity for comment. These requirements are integral components of the statute, as they help to maximize the collection's utility and benefit to the public. As we have commented on multiple occasions, we oppose the use of the generic clearance process to undermine the structure and purposes of the PRA.[6]

The Bureau's use of the Qualitative Consumer Education Generic Clearance for research on overdraft is illustrative of a broader trend by the Bureau to use generic clearances to conduct substantive or policy-related information collections in contravention of OIRA's guidance. To ensure that the Bureau (and other agencies) do not use the generic clearance process improperly, we urge OIRA to issue updated guidance that includes two revisions to this process:

- First, we urge OIRA to impose an explicit term of clearance on every generic clearance, including the Qualitative Consumer Education Generic Clearance (if OIRA decides to re-approve it), that prohibits the requesting agency from using the clearance to conduct substantive or policy-related collections.

- Second, we urge OIRA to require an agency to provide notice to the public whenever it requests approval, under a generic clearance, of an individual information collection on a topic that is or may be the subject of rulemaking. This step would afford the public with an opportunity to comment when an agency seeks to conduct a collection that could impact a rulemaking or other policy activity of the agency.

These two steps would help constrain agencies from improperly using the generic clearance process and promote the utility of the collections performed.

I. OIRA Should Ensure that the Bureau and Other Agencies Follow OIRA Guidance that Prohibits Use of the Generic Clearance Process to Collect Information on Substantive or Policy Issues

OIRA's guidance implementing the Paperwork Reduction Act states that a generic clearance may be used only to conduct collections that "do not raise substantive or policy issues."[7] This

---

[5] Supporting Statement A, Information Collection Request, Generic Clearance for Qualitative Consumer Education, Engagement, and Experience Information Collections 2 (OMB Control No.: 3170-0036), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=46648301 (hereinafter, "Qualitative Consumer Education Generic Clearance Request Supporting Statement A").

[6] *See, e.g.,* Letter from Virginia O'Neill, Am. Bankers Ass'n, and Dong Hong, Consumer Bankers Ass'n, to PRA Officer, Bureau of Consumer Fin. Prot. (June 12, 2014), *available at* http://www.aba.com/Advocacy/commentletters/Documents/clCFPB-PRA-consumer2014June.pdf (opposing request for generic clearance to conduct information collections on topics that have significant substantive and policy implications for future consumer protection regulation).

[7] CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INFORMATION COLLECTION UNDER THE PAPERWORK REDUCTION ACT 5 (Apr. 7, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf (hereinafter, "SUNSTEIN APRIL 2010 MEMO"); *see also* JOHN D. GRAHAM, ADMIN., OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON AGENCY SURVEY AND STATISTICAL INFORMATION COLLECTIONS 6 (Jan. 20, 2006), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf

prohibition is intended to maximize the utility of the information collected—a central purpose of the PRA—by requiring that an information collection relating to a substantive or policy issue be conducted through the standard clearance process, which provides the public with an opportunity to comment on, and thus strengthen, the collection.[8] By contrast, an information collection conducted under a generic clearance is not subject to public notice and comment.[9] Importantly, OIRA's guidance provides no exception to the prohibition on using a generic clearance to conduct a substantive or policy-related collection.

We are concerned that OIRA's process for reviewing generic clearance requests, including those submitted by the Bureau, has not been applied consistently with the approach mandated by the PRA and OIRA guidance. Based on a meeting we attended with OIRA staff on April 13, 2016, we understand that OIRA distinguishes between two categories of generic clearances: "standard" and "fast-track" generic requests. According to staff's explanation, a "standard" generic clearance can be used to pretest survey questions or methodologies that will inform a subsequent survey. By contrast, "fast-track" generic clearances are reserved for customer feedback surveys and similar, non-substantive, non-policy-related topics.

We have reviewed OIRA's guidance memoranda on generic clearance requests, issued on January 20, 2006;[10] April 7, 2010;[11] and May 28, 2010;[12] and we do not find reference to a distinction between "standard" and "fast-track" generic requests. Instead, the guidance clearly states that the generic clearance process is available only to conduct collections that do "not raise substantive or policy issues."[13] No exception is discussed. Thus, we believe that the law does not allow a generic clearance to be used for collections that pretest survey questions or methodologies if that clearance (or the collections conducted pursuant thereto) could produce data or information on a substantive or policy-related issue.

There are strong policy reasons why a generic clearance is an inappropriate mechanism for collecting information on a substantive or policy issue, including surveys developed for the purpose of informing a rulemaking. The prohibition ensures that the public can provide feedback on any collection that may be relied upon for rulemaking or other policymaking, thereby maximizing the utility of information collected and promoting "accountability[] and openness in Government and society."[14] Once OIRA approves a generic clearance request, "individual collections that fall within the generic clearance are reviewed on an expedited basis and are not generally required to undergo further public comment."[15] Therefore, it is critical that use of the generic clearance process be limited to the types of collections identified in OMB's guidance, namely "voluntary, low-burden . . . and uncontroversial collections," including "methodological

---

("Individual collections [under a generic clearance] should not raise any substantive or policy issues . . . .") (hereinafter, "GRAHAM MEMO").

[8] *See* 44 U.S.C. § 3501 (stating that the PRA was enacted to "ensure the greatest possible public benefit from and maximize the utility of information" collected by the Federal government and to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society").

[9] *See* SUNSTEIN APRIL 2010 MEMO, *supra* note 7, at 5.

[10] GRAHAM MEMO, *supra* note 7, at 6.

[11] SUNSTEIN APRIL 2010 MEMO, *supra* note 7, at 5.

[12] CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REGULATORY AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PAPERWORK REDUCTION ACT – GENERIC CLEARANCES 2 (May 28, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf (hereinafter, "SUNSTEIN MAY 2010 MEMO").

[13] SUNSTEIN APRIL 2010 MEMO, *supra* note 7, at 5; *see also* GRAHAM MEMO, *supra* note 7, at 6.

[14] *See* 44 U.S.C. § 3501(4).

[15] SUNSTEIN MAY 2010 MEMO, *supra* note 12, at 5.

testing, customer satisfaction surveys, focus groups, contests, and website satisfaction surveys."[16]

During our meeting with OIRA staff, the staff stated the "standard" generic clearance process is premised on the expectation of subsequent agency submission of a survey instrument—which would be used for rulemaking or other policymaking *and* would be subject to the notice and comment requirements of the PRA. However, there is no mechanism to ensure that an agency will perform this second collection.[17] Moreover, even if an agency performs a second collection under an approved, standard clearance, there is no way to ensure that the agency will not use the information it obtained through the generic clearance process in its subsequent policymaking, because there is no neat division between pretesting and substantive research. Research is an iterative and cumulative process. The information learned and data generated by initial studies inform and influence subsequent hypotheses investigated and, ultimately, the substantive policy choices made. Indeed, to suggest that the considerable amounts of time and resources expended in pretests would *not* yield information and data that contribute to regulatory decisions would be an irresponsible expenditure of agency resources.

All of the foregoing supports the clear division drawn by OIRA's guidance between collection requests that concern substantive or policy issues, which must be submitted through the standard clearance process requiring notice to the public and an opportunity for comment, and collection requests that do not concern substantive or policy issues and are therefore appropriate for submission through the generic clearance process without any requirement for notice or opportunity for public comment.

II. The Bureau Has Improperly Used the Qualitative Consumer Education Generic Clearance to Conduct a Substantive and Policy-Related Information Collection

We believe the Bureau has improperly used the generic clearance process by applying for the Qualitative Consumer Education Generic Clearance and other generic clearances that appear, on their face, to be appropriate—e.g., to gather information to improve "consumer education"—and then using the approved clearances to conduct collections on matters that clearly will influence the Bureau's policy work—such as overdraft—never providing notice to, or receiving comment from, the public. In addition, the Bureau has not followed these generic clearances with a standard clearance to collect information, after notice and public comment, for the Bureau's policymaking. Thus, OIRA's expectation that the Bureau would use a generic clearance merely to pretest methodology that would be used by the Bureau in a subsequent collection conducted under a standard clearance appears to be misplaced.

The existing Qualitative Consumer Education Generic Clearance is an example of a generic clearance that the Bureau has misused to conduct a substantive or policy-related collection. That clearance listed seven "[t]ypes of the information" that could be collected (quote):

- Examples of promising practices and approaches in financial education and empowerment;

[16] SUNSTEIN MAY 2010 MEMO, *supra* note 12, at 2 & 1.

[17] OIRA staff suggested that, if an agency failed to perform a second collection (through the standard process) prior to the issuance of a proposed rule, a member of the public could raise that failure in its comment letter to the proposed rule. That suggestion, however, does not offer meaningful relief. When an agency issues a proposed rule, it has completed the research supporting the policy choices reflected in the proposed rule. Needless to say, a comment submitted at this stage comes too late to redress such procedural shortcomings.

- Examples of promising practices and approaches in delivering financial capability programming, particularly for special populations of consumers, such as low-income consumers;
- Examples of promising practices and approaches in delivering targeted and/or innovative financial products and services to consumers, particularly for special populations of consumers, such as low-income consumers;
- Examples of challenges that financial education practitioners face in helping consumers[;]
- Respondents' assessments of the usability and effectiveness of financial education and empowerment tools and strategies;
- Consumer stories about financial challenges they face, how they make financial decisions, and how they navigate the financial services marketplace; and
- Respondents' assessments of the type of knowledge, behavior, and other factors and experiences that affect consumer financial capability and well-being.[18]

All of the categories quoted above concern how the Bureau might improve consumers' financial education and understanding. No category could have alerted the public that the clearance might be used to conduct research on a substantive or policy issue such as overdraft. When, in February 2014, the Bureau did just that—used the generic clearance to seek approval for a survey on "Consumer Understanding and Decision-making Related to Overdrafts" (Overdraft Decision-making Survey)[19]—the Bureau did not notify the public of the survey request or provide a period of time for the public to comment. Instead, the survey was requested under an existing generic clearance, rather than under a standard clearance.

Clearly, the Overdraft Decision-making Survey will inform the Bureau's rulemaking on overdraft services. In its request for approval of this survey, the Bureau explained that it sought to conduct qualitative research "to better understand the quantitative information that has been generated to-date" through its "inquiry into overdraft programs."[20] The Bureau stated further that the Overdraft Decision-making Survey is "part of an overall effort . . . to under[stand] the different *policies* and behaviors that drive differences in consumer experiences."[21] Thus, the Bureau acknowledged that it is seeking to understand how different regulatory approaches, such as increased disclosures and limitations on usage, would impact policy considerations related to consumers' usage of overdraft. This is precisely the type of collection that should have been submitted through the standard clearance process, where the public would have been given an opportunity to provide comment to improve the survey's utility.

Notably, the Bureau's acknowledgement that it would use the survey results to inform its policymaking is inconsistent with its boilerplate assertion in its request that the "[i]nformation gathered [in the Overdraft Decision-making Survey] will not be used for the purpose of

---

[18] Qualitative Consumer Education Generic Clearance Request Supporting Statement A, *supra* note 5, at 2-3.

[19] Qualitative Research of Consumer Understanding and Decision-making Related to Overdrafts, Request for Approval under the "Generic Clearance for Qualitative Consumer Education, Engagement, and Experience Information Collections" (OMB Control No.: 3170-0036), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=46649801 (hereinafter, "Overdraft ICR").

[20] *Id.* at 1.

[21] Supporting Statement Part A, Information Collection Request, Generic Information Collection Plan for for Qualitative Consumer Education, Engagement, and Experience Information Collections 7-8 (OMB Control No.: 3170-0036) (30-day Fed. Reg. and OMB Review), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=64936900 (emphasis added and internal quotation marks omitted).

substantially informing *influential* policy decisions."[22] Put simply, the Bureau did not adhere to its assertion in conducting the Overdraft Decision-making Survey.

The Bureau's use of the Qualitative Consumer Education Generic Clearance also demonstrates the flaw in the OIRA staff's view that a substantive or policy-related collection is permissible under a generic clearance as a means to pretest a survey instrument that would subsequently be submitted under the standard clearance process. There has been no subsequent survey. Since the Bureau conducted the Overdraft Decision-making Survey, it has not engaged in overdraft-related surveys under a standard clearance. Although the Bureau initiated a PRA review of a survey of 8,000 consumers on its "comprehension and decision-making in response to revised overdraft disclosure forms" using the standard process,[23] the Bureau's latest Regulatory Agenda indicates that it will move forward with its rulemaking on overdraft services prior to, or without, completing the process to obtain OIRA's approval to conduct this survey.[24] If the Bureau moves forward with its overdraft rulemaking without completing a survey under the standard clearance process, it is clear that the Bureau will use the data obtained through the Overdraft Decision-making Survey for its overdraft rulemaking, and the public will have little recourse to hold the Bureau accountable for its improper use of the generic clearance process.[25]

III. If OIRA Re-Approves the Qualitative Consumer Education Generic Clearance, OIRA Should Impose an Explicit Term of Clearance and Other Safeguards to Prohibit the Bureau from Using the Clearance to Conduct Substantive or Policy-Related Information Collections

If OIRA decides to re-approve the Qualitative Consumer Education Generic Clearance, it should take two steps to constrain the Bureau from improperly using the clearance to conduct substantive or policy-related information collections.

First, OIRA should impose an explicit term on the clearance that prohibits the Bureau from using the clearance to conduct a substantive or policy-related collection. As discussed above, OIRA's guidance is clear that a generic clearance may not be used to pursue a substantive or policy-related collection. However, in light of the Bureau's past, improper use of the Qualitative Consumer Education Generic Clearance to conduct the Overdraft Decision-making Survey, we believe the imposition of an explicit term of clearance is necessary, should OIRA decide to re-

[22] Overdraft ICR, *supra* note 19, at 6 (emphasis added).

[23] Comment Request, Web-Based Quantitative Testing of Point of Sale/ATM (POS/ATM) Overdraft Disclosure Forms, 80 Fed. Reg. 53503, 53505 (Sept. 4, 2015).

[24] *See* Bureau of Consumer Fin. Prot., Spring 2016 Rulemaking Agenda, May 18, 2016, http://www.consumerfinance.gov/about-us/blog/spring-2016-rulemaking-agenda/.

[25] In a second example of the Bureau's improper use of the generic clearance process, the Bureau requested approval, under a generic clearance for an individual collection that the Bureau stated was to be used for *rulemaking*—the primary policymaking activity of an agency. Specifically, the Bureau used a generic clearance designed to test "model forms, disclosures, tools, and similar related materials" to perform an information collection titled "Consumer Focus Groups Relating to Prepaid Products Rulemaking and Model Form Development." When the Bureau issued its proposed rule on prepaid products, it readily acknowledged the role that this collection played in the proposed rule, devoting 10 paragraphs, under a separate subsection, to the results of this collection. *See* Proposed Rule and Request for Public Comment, Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg. 77102, 77121-23 (Dec. 23, 2014); Consumer Focus Groups Relating to Prepaid Products Rulemaking and Model Form Development, Request for Approval under the "Generic Clearance for Development and or Testing of Model Forms, Disclosures, Tools, and Other Similar Related Materials" (OMB Control No.: 3170-0022), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=42705001.

approve the clearance. More broadly, OIRA should place an explicit term of clearance on each generic clearance it approves to ensure that agencies understand that a generic clearance cannot be used for a substantive or policy-related collection.

Second, OIRA should revise its guidance to require an agency to provide notice to the public whenever it requests approval, under a generic clearance, of an individual information collection on a topic that is or may be the subject of rulemaking. It is plausible that an agency may believe that a requested collection concerns an issue that is non-substantive and not related to policy, even though the subject of the request is listed on the agency's rulemaking agenda. In cases such as these, public notice of the request would provide members of the public who disagree with the agency's assessment of policy relevance with an opportunity to comment on the proposed collection.

Conclusion

We appreciate the opportunity to provide comment on the Bureau's request for re-approval of the Qualitative Consumer Education Generic Clearance, and to provide specific suggestions to improve OIRA's process for reviewing agencies' requests to collect information under the PRA. We support the purposes of the PRA to promote accountability, transparency, and the utility of the information that agencies, including the Bureau, collect, particularly information that informs an agency's rulemaking. We urge OIRA to adhere to its published guidance that prohibits a generic clearance from being used for a substantive or policy-related collection. To promote compliance with that guidance, we urge OIRA to impose an explicit term on generic clearances consistent with this prohibition, and to require notice to the public whenever an agency seeks approval, under a generic clearance, of an information collection on a topic that is the subject of rulemaking.

The purposes of the PRA can be preserved only if OIRA adheres to its published guidance that states that a generic clearance cannot be used for a substantive or policy-related collection.

Thank you for your attention to these important issues. We look forward to your response.

Sincerely,

Jonathan Thessin

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance
American Bankers Association

Steven Zeisel

Steven I. Zeisel
General Counsel, Executive Vice President
Consumer Bankers Association

Cc: Ms. Jasmeet Seehra
The Office of Information and Regulatory Affairs

Ms. Shagufta Ahmed
The Office of Information and Regulatory Affairs

Ms. Katie Johnson
The Office of Information and Regulatory Affairs

Mr. Max West
The Office of Information and Regulatory Affairs

Mr. Tyler Curtis
The Office of Management and Budget

Mr. Dan Smith
Assistant Director, Office of Financial Institutions and Business Liaison
Bureau of Consumer Financial Protection

Mr. Gary Stein
Deposits Markets Program Manager
Bureau of Consumer Financial Protection

ATTACHMENT

American Bankers Association
Building Success. Together.

Jonathan Thessin
Senior Counsel
Center for Regulatory Compliance
Phone: 202-663-5016
E-mail: Jthessin@aba.com

May 9, 2016

By electronic delivery to:
www.regulations.gov

Bureau of Consumer Financial Protection
Attention: PRA Office
1700 G Street, N.W.
Washington, D. C. 20552

Re: Generic Information Collection Plan for "Qualitative Consumer Education and Engagement Information Collections"; Docket No. CFPB-2016-0009, OMB Control No. 3170-0036.

PRA Officer:

The American Bankers Association[1] submits this comment in response to the Bureau of Consumer Financial Protection's (Bureau) request for approval, under the Paperwork Reduction Act of 1995 (PRA),[2] of an existing generic clearance "to collect qualitative data on effective strategies and consumer experiences . . . ." (Qualitative Consumer Education Generic Clearance).[3]

ABA did not raise concerns when the Bureau first sought approval of this generic clearance in 2013 because the stated purpose of the clearance—"to develop a deeper understanding of effective financial education and empowerment strategies"[4]—is a subject that arguably may meet the purposes of a generic clearance. However, the Bureau has used this clearance to conduct information collections on substantive and policy-related issues—namely, overdraft services—which is prohibited by guidance interpreting the PRA that was published by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget. OIRA's guidance requires that these collections be subject to the standard PRA clearance process, which obligates notice to the public and an opportunity for comment. As we have commented on multiple occasions, ABA opposes the use of the generic clearance process to undermine the accountability structure and purposes of the PRA.[5]

---

[1] The American Bankers Association is the voice of the nation's $16 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $12 trillion in deposits and extend more than $8 trillion in loans.
[2] Paperwork Reduction Act of 1995, Pub. L. No. 104-13 (codified at 44 U.S.C. § 3501 et seq.).
[3] Notice and Request for Comment, Generic Information Collection Plan for "Qualitative Consumer Education and Engagement Information Collections," 81 Fed. Reg. 12479, 12480 (Mar. 9, 2016).
[4] Supporting Statement A, Information Collection Request, Generic Clearance for Qualitative Consumer Education, Engagement, and Experience Information Collections 2 (OMB Control No.: 3170-0036), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=46648301 (hereinafter, "Qualitative Consumer Education Generic Clearance Request Supporting Statement A").
[5] *See, e.g.,* Letter from Virginia O'Neill, Am. Bankers Ass'n, and Dong Hong, Consumer Bankers Ass'n, to PRA Officer, Bureau of Consumer Fin. Prot. (June 12, 2014), *available at* http://www.aba.com/Advocacy/commentletters/Documents/clCFPB-PRA-consumer2014June.pdf

I. Paperwork Reduction Act and OIRA Guidance

OIRA's guidance implementing the Paperwork Reduction Act states that a generic clearance may be used only to conduct collections that "do not raise substantive or policy issues."[6] This prohibition is intended to maximize the utility of the information collected—a central purpose of the PRA—by requiring that an information collection relating to a substantive or policy issue be conducted through the standard clearance process, which provides the public with an opportunity to comment on, and thus strengthen, the collection.[7] By contrast, an information collection conducted under a generic clearance is not subject to public notice and comment.[8] Importantly, OIRA's guidance provides no exception to the prohibition on using a generic clearance to conduct a substantive or policy-related collection.

II. The Bureau's Improper Use of the Qualitative Consumer Education Generic Clearance

Nothing in the Bureau's Qualitative Consumer Education Generic Clearance request suggested that the Bureau would use the clearance to conduct a substantive or policy-related collection. Indeed, the supporting statement indicated that the purpose of its data collection was to collect the following types of information:

- "Examples of promising practices and approaches in financial education and empowerment;
- "Examples of promising practices and approaches in delivering financial capability programming, particularly for special populations of consumers, such as low-income consumers;
- "Examples of promising practices and approaches in delivering targeted and/or innovative financial products and services to consumers, particularly for special populations of consumers, such as low-income consumers;

(opposing request for generic clearance to conduct information collections on topics that have significant substantive and policy implications for future consumer protection regulation).

[6] CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, INFORMATION COLLECTION UNDER THE PAPERWORK REDUCTION ACT 5 (Apr. 7, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRAPrimer_04072010.pdf (hereinafter, "SUNSTEIN APRIL 2010 MEMO"); *see also* JOHN D. GRAHAM, ADMIN., OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, GUIDANCE ON AGENCY SURVEY AND STATISTICAL INFORMATION COLLECTIONS 6 (Jan. 20, 2006), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/pmc_survey_guidance_2006.pdf ("Individual collections [under a generic clearance] should not raise any substantive or policy issues . . . .").

[7] *See* 44 U.S.C. § 3501 (stating that the PRA was enacted to "ensure the greatest possible public benefit from and maximize the utility of information" collected by the Federal government and to "improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society").

[8] *See* SUNSTEIN APRIL 2010 MEMO, *supra* note 6, at 5 (stating that, once OIRA grants its approval to a generic collection request, "individual collections that fall within the generic clearance are reviewed on an expedited basis and are not generally required to undergo further public comment").

- "Examples of challenges that financial education practitioners face in helping consumers[;]
- "Respondents' assessments of the usability and effectiveness of financial education and empowerment tools and strategies;
- "Consumer stories about financial challenges they face, how they make financial decisions, and how they navigate the financial services marketplace; and
- "Respondents' assessments of the type of knowledge, behavior, and other factors and experiences that affect consumer financial capability and well-being."[9]

If the Bureau conducted information collections on these topics, it would advance its goal to develop a deeper understanding of effective financial education and empowerment strategies—topics that do not directly relate to policymaking. We in fact share the Bureau's goal of educating and empowering consumers to make informed and responsible financial decisions. However, after obtaining approval for the Qualitative Consumer Education Generic Clearance in 2013, the Bureau improperly used it to seek approval—without notice to the public—for overdraft research. In February 2014, the Bureau submitted to OIRA a request to conduct an information collection on "Qualitative Research of Consumer Understanding and Decision-making Related to Overdrafts."[10] The stated purpose of this collection was "to better understand how consumers understand the [overdraft] product and how consumers make decisions about using different financial products."[11] It is clear that this collection will inform the Bureau's rulemaking on overdraft services and, consequently, should have been pursued through a standard clearance.[12] The Bureau's Fall 2015 Regulatory Agenda unequivocally states that the agency will engage in rulemaking concerning overdraft programs on checking accounts.[13]

Despite being characterized as "qualitative research," the Bureau acknowledged its interest in engaging in "qualitative information-gathering *to better understand the quantitative information that has been generated to-date*."[14] The collection request itself underscores the Bureau's intent to conduct substantive research on overdraft. The questions asked of respondents include the number of times the consumer accessed overdraft during the past 12 months and the total

---

[9] Qualitative Consumer Education Generic Clearance Request Supporting Statement A, supra note 4, at 2-3.

[10] Qualitative Research of Consumer Understanding and Decision-making Related to Overdrafts, Request for Approval under the "Generic Clearance for Qualitative Consumer Education, Engagement, and Experience Information Collections" (OMB Control No.: 3170-0036), *available at* http://www.reginfo.gov/public/do/DownloadDocument?objectID=46649801 (hereinafter, "Overdraft ICR"). The Bureau did not mention the subject of overdraft in its request for the generic clearance.

[11] *Id.* at 1.

[12] Despite the fact that the information collection on overdraft research will influence the Bureau's overdraft rulemaking, the Bureau appeared to recognize, in its collection request, that a generic clearance may not be used for a substantive or policy-related collection. In that request, the Bureau *certified* "[i]nformation gathered will not be used for the purpose of substantially informing influential policy decisions." *Id.* at 6.

[13] Bureau of Consumer Fin. Prot., Fall 2015 Rulemaking Agenda, http://www.consumerfinance.gov/about-us/blog/fall-2015-rulemaking-agenda/ ("The Bureau is preparing for a rulemaking concerning overdraft programs on checking accounts.").

[14] Overdraft ICR, *supra* note 10, at 1 (emphasis added).

amount of overdraft fees paid during that time.[15] These topics bear directly on policy questions the Bureau is almost certainly considering as part of its rulemaking on overdraft, including the need for increased disclosures and limitations on usage.

Moreover, the information collection request cannot reasonably be characterized as "methodological testing" that may in certain circumstances be appropriate for a generic clearance.[16] The supporting statement the Bureau submitted to OMB included an eight-page screener survey (with 19 questions), and a 12-page script of 43 questions for "in-depth telephone interviews" that will be conducted of 100 users of overdraft programs.[17] Instead, it was a well-defined information collection that should have been subject to a more structured and comprehensive review process that would have enabled public review and comment.

III. Conclusion

ABA urges the Bureau to refrain from improperly using a generic clearance to conduct an individual collection on a substantive or policy issue, such as overdraft. If the Bureau desires to collect information on a substantive or policy issue, it should seek approval for a standard clearance, which would provide the public with an opportunity to comment on the collection request, including providing suggestions to improve the methodology of the proposed collection.

If you have questions about ABA's comments or would like to discuss them, please contact the undersigned at jthessin@aba.com or 202-663-5016.

Sincerely,

Jonathan Thessin

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance

---

[15] *Id.* at 9-10.
[16] *See* CASS R. SUNSTEIN, ADMIN., OFFICE OF INFO. & REG. AFFAIRS, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PAPERWORK REDUCTION ACT – GENERIC CLEARANCES 1 (May 28, 2010), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/PRA_Gen_ICRs_5-28-2010.pdf ("Clearances of generic ICRs provide a significantly streamlined process by which agencies may obtain OMB's approval for particular information collections—usually voluntary, low-burden, and uncontroversial collections . . . including methodological testing, customer satisfaction surveys, focus groups, contests, and website satisfaction surveys.").
[17] Overdraft ICR, *supra* note 10, at 3 & 7-27.