

**American Financial Services Association  
Consumer Mortgage Coalition  
Mortgage Bankers Association**

January 30, 2012

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1500 Pennsylvania Avenue, N.W.  
(Attn.: 1801 L Street, N.W.)  
Washington, D.C. 20220  
[www.regulations.gov](http://www.regulations.gov)

Re: Disclosure of Certain Credit Card Complaint Data  
Docket Number CFPB-2011-0040

Dear Ms. Jackson:

The undersigned trade associations appreciate the opportunity to submit comments to the Consumer Financial Protection Bureau (CFPB) on its proposed policy statement (the Policy Statement or the Proposal) on disclosure of certain credit card complaint data.<sup>1</sup> The Consumer Mortgage Coalition and the Mortgage Bankers Association join this letter because the CFPB has stated that it may adopt a similar consumer complaint policy for other consumer financial products or services. The trade associations note that the CFPB chose to model its mortgage complaint system, activated on December 1, 2011, on its credit card complaint system, activated July 21, 2012.

The CFPB explains that its Proposal is made “in light of [the CFPB’s] statutory purposes of helping to provide consumers with ‘timely and understandable information to make responsible decisions about financial transactions’ and helping the credit card market to ‘operate transparently and efficiently.’”<sup>2</sup> We appreciate the CFPB’s desire to promote a transparent and efficient marketplace. The undersigned strongly support informed consumer choice. We also appreciate the CFPB’s oft-repeated statement that its approach to supervision and regulation is “data-driven.” The undersigned support a centralized complaint system and the appropriate resolution of complaints. We believe the focused and proper use of a centralized consumer complaint database will provide meaningful insight to the CFPB on trends, and will assist the CFPB in providing Congress with the CFPB’s annual consumer complaint consumer report.

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<sup>1</sup> 76 Fed. Reg. 76628 (December 8, 2011).

<sup>2</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011) (citations omitted).

The Policy Statement, however, is not limited to providing information on consumer complaints. It would release raw data on individual complaints to the public. We discuss below why the data would not be helpful, and review some of the legal concerns that would arise. We also discuss how the proposed Policy Statement goes beyond Congressional direction for the CFPB's handling of consumer complaints. Moreover, review that this seems to exceed to the CFPB's authority because it provides public access to complaint data. Finally, we suggest as an alternative approach that will enable the CFPB to fulfill its responsibilities while avoiding these concerns.

## **I. Background**

The CFPB began collecting consumer complaints about credit cards in July 2011. The CFPB has described its procedure as follows:

Once a consumer submits a formal credit card complaint and Consumer Response determines that it is within the Bureau's jurisdiction, the information is sent via a secure web portal to the credit card issuer. The issuer reviews the information, communicates with the consumer as appropriate, and determines what action to take in response. Then the issuer reports to the CFPB how it has responded, and the CFPB invites the consumer to review the issuer's response. Throughout this process, a consumer can log onto the CFPB's secure "consumer portal" or call the toll-free number to receive status updates, provide additional information, and review responses provided to the consumer by the credit card issuer. The CFPB performs additional review and investigation for complaints where the issuer fails to respond or where the response it provides is disputed by the consumer.<sup>3</sup>

The proposed Policy Statement would go beyond accepting and resolving complaints. It concerns the disclosure of complaint data. Under the Policy Statement, the CFPB would collect consumer complaints about credit cards, strip the complaints of personally identifying information (other than zip codes), and post the information online for public use, along with the card issuer's identity, in searchable form.

The Proposal discusses the possibility that the CFPB will also publish the consumer's narrative description of "what happened," the consumer's opinion of what would be a "fair resolution," and the card issuer's narrative response, but that it will not release narrative information immediately. The CFPB acknowledges that disclosing the narratives could compromise consumer's privacy. The proposal suggests providing consumers the ability to opt in or out disclosures of the narratives. It also suggests that the CFPB may publish the narratives after it redacts sensitive information:

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<sup>3</sup> [\*Interim Report on CFPB's Credit Card Complaint Data\*](#), p. 3 (November 30, 2011) (footnote omitted).

[T]he CFPB also will evaluate the CFPB resources that would be required to redact such information so as to eliminate [personally identifying information] and minimize the risk of identification. In the interim, the CFPB will not disclose narratives because of the potentially significant risk to consumers' privacy interests.<sup>4</sup>

As indicated, the proposal states that the CFPB may expand its disclosure of complaints beyond credit cards.

Although the present Policy Statement is limited to credit card complaints, what the CFPB learns about disclosure in this context may serve to inform disclosure of complaint data about other financial products and services.<sup>5</sup>

## **II. The Data the CFPB Proposes to Publish Are Raw, Unvalidated, and Therefore Unreliable**

The Policy Statement would use the existing complaint system to collect information from consumers, much of it subjective, unverified, and irrelevant, and post it in searchable form on the CFPB's website. It would also require card issuers to participate in supplying information about specific, individual consumer complaints for the CFPB to publish.

### *A. Uninvestigated Consumer Complaints Can Be Expected to Include a Very Significant Proportion That Are Not Valid*

By their nature, consumer complaints that have not been investigated and validated are not necessarily reliable or accurate.

The CFPB's credit card complaint intake contains an affirmation that "The information given is true to the best of my knowledge and belief. I understand that the CFPB cannot act as my lawyer, a court of law, or a financial advisor." This, however, is insufficient to prevent inaccurate, or even intentionally inaccurate, complaint information. Even an alert to consumers of the possibility of criminal liability, while helpful, would not wring out all misinformation.

The Proposal states, "The issuer of the applicable credit card can be reliably identified from the submitted credit card number."<sup>6</sup> This presupposes that the consumer reports the card number, and reports it accurately, which will not always be the case. It further presupposes that the consumer had a card number. If the complaint concerns a declined credit application, there will be no card number. Publishing unreliable complaint information that may misidentify the card issuer will result in inappropriate reputation risk to card issuers. This is not a data-driven approach to consumer complaints.

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<sup>4</sup> 76 Fed. Reg. 76628, 76632 (December 8, 2011).

<sup>5</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011).

<sup>6</sup> 76 Fed. Reg. 76628, 76631 (December 8, 2011).

### *B. Card Issuers Should Not be Identified*

We strongly believe that the name of the card issuer should not be disclosed in the credit card complaint database or in the CFPB's public reports. There is no public policy purpose served by the release of data by issuer. Disclosing the names of individual card issuers serves only as fodder for plaintiff attorneys.

Moreover, disclosing the name of individual card issuers may unfairly harm those issuers for several reasons. For example, the narrow definition of "Relief," could result in complaints that have actually been resolved satisfactorily being filed as "Closed Without Relief," as we discuss below. Also, the complaint categories are problematic, also as we discuss below. Data disclosed about an individual card issuer may be misleading because consumers often incorrectly choose the complaint category. The discrimination box may lead to a number of "false positives." Duplicate complaints may inflate the statistics. Consumers file complaints about card issuers that are really merchant disputes, not issuer complaints.

In the event that the CFPB concludes that identifying the card issuer in the complaint database is appropriate, the CFPB should at a minimum ensure that the issuer is accurately identified. For example, many card issuers offer private label credit cards or co-branded credit cards to customers of retailers. These cards are generally branded with the retailer's name. In the "Bank Name" field of the CFPB's complaint submission form, a cardholder could erroneously provide the retailer's name instead of the bank's name. If, as a result, the CFPB publishes the retailer's name in the complaint database, it could result in harm to such retailer's reputation. Therefore, we request that the CFPB aggregate all complaints filed in private label or co-branded programs at the bank level.

### *C. Complaint Categories are Applied Unreliably and are Unclear*

The complaint intake relies on individual consumers to categorize their complaints. This means the categorizations are inconsistent. For example, our members have noted that many consumers put complaints about closure requests, disputed chargeback resolution, do-not-solicit requests, minimum payments, and others under the "advertising and marketing" category rather than "closing / cancelling account," "transaction issue," "privacy," "credit card payment / debt protection" where they would seem more apt. Under the "APR or interest rate" category, our members have seen debt validation requests and financial hardship issues, which should be under the "collection practices" category. Consumers are also using the "APR or interest rate" category for balance transfer and cash advance issues, even though there are separate categories for each of those issues. In addition, consumers are sometimes choosing the "credit card payment / debt protection" category for a miscoded payment issue.

Another example of the problem with relying on the general public to identify relevant research data is an attorney who filed multiple complaints on behalf of his clients under the "identity theft" category, although the complaints actually relate to disputes against

merchants that claim they have buyers for the consumer's time shares. These complaints should actually be categorized elsewhere, although where is unclear. Since there are a large volume of complaints from this single attorney, it makes it seem as though the issuer has a large number of identity theft complaints when that it not the case. This is an example of how the CFPB's proposal to identify the card issuer would present inaccurate, yet damaging, reputation risk.

Moreover, some consumers have an incentive to slant what they report to make a resolution in their favor more likely. Self-reported information that is not independently verified and that has not been determined to state even a *prima facie* violation allows anecdotes, misstatements of fact, or disputes based on a misunderstanding of applicable law, to be comingled with, or substituted for, facts.

Adding to the unreliability of the complaints is that the complaint categories are poorly defined and imprecise. For example, are "advertising and marketing complaints" limited to those about misleading or deceptive claims (a legitimate basis for CFPB action) or does this field include complaints that are outside the regulatory ambit (e.g., complaints about receiving "too many solicitations" or complaints about the tone, theme, or the actors appearing in, television ads for credit cards)? What is included in the category of complaints about "APR or interest rate"? Does it include general expressions of dissatisfaction ("their interest rates are too high"), or is it limited to allegations about violations of specific obligations regarding interest rates, such as disclosure requirements and restrictions on changing interest rates?

Indeed, the content of the complaint field listed in the Interim Report as generating the largest number of complaints ("billing disputes" - 13.4% of the total) is unclear. Is this field limited to allegations concerning a card issuer's alleged failure to comply with its obligations under the Fair Credit Billing Act to assist consumers in resolving complaints about transactions on their account? Or does it include general complaints about products or services purchased with a credit card ("the toaster doesn't work"), complaints that are really about the providers of goods and services purchased with a card, not about the credit card issuer? Does the "billing disputes" field include complaints about the inability to recognize transactions on a periodic statement that may not have previously been disputed with the card issuer?

Notwithstanding, the Policy Statement would make public an unreliable database. The fact that the database would be a CFPB creation would make the validity of the data appear to have the backing of the federal government, which would be misleading.

For these reasons, we urge the CFPB to limit its consumer complaint procedure to the collection and resolution of individual complaints, with the CFPB releasing only aggregate data. Under this approach, the CFPB should either (1) assign the complaint category itself after reviewing the complaint to ensure consistency among issues; or (2) use a decision channel that would ask the consumer questions, and the answers would produce the complaint type that is transmitted to the issuer. In any case, better complaint titles and definitions for each would improve the accuracy of complaint type choices.

The CFPB should also clarify the meaning of the categories it uses. The CFPB's November 30, 2011 "Interim Report" on the credit card database lists 32 data fields, but their meaning is not always evident. We also respectfully request that the CFPB provide card issuers with a report with the aggregated data every month or quarter.

If the CFPB does decide to go forward with a public database based on self-reported consumer information that is non-random, unfiltered, and unverified, the CFPB should be very explicit on every publicly available page about all the limitations of its data. The CFPB should be clear that neither the agency nor the Federal government stands behind the data in any way.

*D. Unsubstantiated Discrimination Allegations Should Not Be Made Public Under Any Circumstances*

One of the questions the CFPB's complaint intake asks consumers is, "Do you believe the issue involves discrimination?" Member companies have seen complaints that answer this in the affirmative, when the basis of the complaint is that the consumer did not receive goods or services from a merchant.

Allegations of impermissible discrimination are serious, and can have immediate negative consequences, including reputation risk, litigation risk, and safety and soundness risks. In recognition of industry concerns regarding including this question in the complaint intake, the CFPB adjusted the consumer complaint form to include a drop down menu to enable consumers to select the basis for discrimination, such as age, marital status, and other prohibited bases. However, a complainant may still raise discrimination issues that do not involve illegal discrimination at all.

For these reasons, the CFPB should not disclose discrimination allegations without a confirmed factual basis. We recommend that, at a minimum, the CFPB verify there is a factual basis for any discrimination allegation before making any information about that complaint public.

*E. Duplicate Complaints Should Be Removed*

We believe that the CFPB defines duplicate complaints as complaints that are duplicated *verbatim*. However, card issuers have consumers who re-file substantially the same complaint repeatedly, but this does not seem to be considered a duplicate. We ask that the CFPB review and verify that complaints are not virtual duplicates before sending them to the issuer for review, and exclude them from the complaint database.

*F. Resolution Status Categories Can Be Misleading*

The consumer complaint system categorizes complaints by resolution status. The status categories are sometimes misleading. A complaint categorized as "Closed Without Relief" carries negative implications, but is applied even when the consumer obtains all requested relief because there is no remuneration.

For example, complaints may seek any of the following: add a consumer to the Do-Not-Call list, remove an authorized buyer, determine that payments were applied correctly, or alert the card issuer that the consumer is collecting Social Security income so that the card issuer will use the debt collection restrictions that apply to that income, or reduce call frequency. In these cases, if the issuer does exactly what the consumer requests, the complaint is categorized as Closed Without Relief because there is no cash payment, which categorization is inaccurate. This unfairly taints the card issuer's reputation, notwithstanding that the complaints were actually resolved just as the consumer requested.

We request that "Closed With Relief" have sub-categories for monetary and non-monetary relief so that these types of resolutions can be categorized accurately.

*G. Zip Code Data Should Not Be Released*

We ask that the CFPB not disclose complaint data by the complainants' zip code. People tend to conclude that discriminatory practices are related to zip codes because zip codes often correspond with high concentrations of people in protected classes. In fact, high concentrations of complaints from a particular zip code often do not correspond to discrimination on a prohibited basis, but to differences in income and credit.

Discrimination allegations cause extremely dangerous business risks and alarming headlines, and disclosing zip code data would invite unsupported allegations that have exceptionally negative impacts on a card issuer's reputation even if the claims are untrue. Companies that engage in debt negotiation or credit counseling could even influence the data by encouraging people in a certain zip code to file form unsubstantiated complaint letters that would then lead the database to show that creditor had high complaints in certain zip codes. Such unreliable data do not improve market transparency or efficiency, and are not a data-driven approach to consumer complaint resolutions.

We recommend that the CFPB not release complaint data in a granular form at all. If it does, it should not release data by issuer name. If it does release granular data, it should at least eliminate the zip code from the non-narrative fields it releases. The CFPB itself will still be able to research credit practices by all relevant data. Withholding the zip code data would prevent the data from being used irresponsibly to hurt the reputation of card issuers even in the absence of any improper discrimination.

*H. Difficulties in Normalizing Data Weigh Against Releasing Data By Issuer*

The CFPB discusses that the data need to be normalized to account for differences in card issuer's lending volume and product mix. That is, larger issuers will have more complaints in absolute number than smaller lenders even if the rate of complaints is the same. Different loan products also have different complaint rates, and the data need to be normalized to account for that fact. We agree with the CFPB that some trend and pattern data may need context to make the data informative to consumers.

We understand the difficulty of normalizing data. Finding a general data point for products or denominator of normalization, such as the average complaint rate for a particular product, is not easy. For example, the CFPB might say that card issuer ABC has 1000 credit card complaints per million accounts and the average credit card complaint volume for issuers was 750 per million for credit card complaints. However, the problem with using complaints per million accounts and the average credit card complaint volume is that there can be complaints about non-accounts, such as complaints from consumers who were turned down for accounts. The difficulty in finding a denominator further demonstrates why normalization may be too difficult and the issuer name should not be released (thereby making normalization less of an issue.)

We believe the CFPB should categorize complaints by type of card – private label and general purpose. Mortgage complaints are broken into six different types of mortgages, but credit cards are not. Private label credit cards may garner more complaints than other general purpose cards because many complaints are about the merchant rather than the issuer. In the general purpose context, people are less likely to relate the merchant to the issuer, and so we see fewer complaints about merchants. In any event, if the complaint volumes for these two types of credit cards differ substantially industry-wide, it would make sense to distinguish them when normalizing the data because different issuers have different portfolios. One issuer may have a majority of private label cards, while another may have almost none.

The CFPB could consider asking consumers to identify the type of card they have when making the complaint. However, consumers may not know, and may find the request too burdensome or time-consuming. Alternatively, the CFPB could consider whether challenges such as this make it too potentially prejudicial and unhelpful to release data by issuer in the first place.

### **III. Congress Required a Specific Approach to Consumer Complaints**

The Dodd-Frank Act requires the CFPB to facilitate the collection of consumer complaints and responses to them, and to submit to Congress an analysis of complaints:

(A) IN GENERAL.—The Director shall establish a unit whose functions shall include establishing a single, tollfree telephone number, a website, and a database or utilizing an existing database to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services. The Director shall coordinate with the Federal Trade Commission or other Federal agencies to route complaints to such agencies, where appropriate.

(B) ROUTING CALLS TO STATES.—To the extent practicable, State agencies may receive appropriate complaints from the systems established under subparagraph (A), if—

(i) the State agency system has the functional capacity to receive calls or electronic reports routed by the Bureau systems;



(ii) the State agency has satisfied any conditions of participation in the system that the Bureau may establish, including treatment of personally identifiable information and sharing of information on complaint resolution or related compliance procedures and resources; and

(iii) participation by the State agency includes measures necessary to provide for protection of personally identifiable information that conform to the standards for protection of the confidentiality of personally identifiable information and for data integrity and security that apply to the Federal agencies described in subparagraph (D).

(C) REPORTS TO THE CONGRESS.—The Director shall present an annual report to Congress not later than March 31 of each year on the complaints received by the Bureau in the prior year regarding consumer financial products and services. Such report shall include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints.

(D) DATA SHARING REQUIRED.—To facilitate preparation of the reports required under subparagraph (C), supervision and enforcement activities, and monitoring of the market for consumer financial products and services, the Bureau shall share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information and for data security and integrity.<sup>7</sup>

Congress was specific that the CFPB’s role relating to consumer complaints is restricted to facilitating the “collection of, monitoring of, and response to” the complaints.

Significantly, Congress directed the CFPB to either establish a new database or use an existing database in paragraph (A) above. The fact that no database of the type the CFPB now proposes existed when Congress enacted Dodd-Frank indicates that Congress never envisioned such open access to granular consumer data.

Also significant is that Congress, when directing the CFPB to facilitate responses to complaints, directed the CFPB to share complaint information only in a specific manner – only with certain agencies. This narrow audience for the complaint data means the CFPB does not have authority to publish the data on a public website.

Additionally, Congress permits the CFPB to share complaint data with other agencies only subject to confidentiality standards for protecting personally identifiable information and for data security and integrity. ***Making narratives public is impermissible under this standard*** because they contain personally identifiable information. Maintaining a public database of unvalidated, unreliable, subjective, information reported by those with an interest in a particular resolution of a complaint is inconsistent with data integrity. ***A public database of the type the CFPB proposes cannot meet the data integrity standard Congress explicitly required.***

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<sup>7</sup> Dodd-Frank Act § 1013(b)(3), 12 U.S.C. § 5493(b)(3) (emphasis added).

Congress was also specific about what it requires the CFPB and covered persons to do regarding consumer complaints in another provision:

Sec. 1034. RESPONSE TO CONSUMER COMPLAINTS AND INQUIRIES.

(a) TIMELY REGULATOR RESPONSE TO CONSUMERS.—The Bureau shall establish, in consultation with the appropriate Federal regulatory agencies, reasonable procedures to provide a timely response to consumers, in writing where appropriate, to complaints against, or inquiries concerning, a covered person, including—

- (1) steps that have been taken by the regulator in response to the complaint or inquiry of the consumer;
- (2) any responses received by the regulator from the covered person; and
- (3) any follow-up actions or planned follow-up actions by the regulator in response to the complaint or inquiry of the consumer.

(b) TIMELY RESPONSE TO REGULATOR BY COVERED PERSON.—A covered person subject to supervision and primary enforcement by the Bureau pursuant to section 1025 shall provide a timely response, in writing where appropriate, to the Bureau, the prudential regulators, and any other agency having jurisdiction over such covered person concerning a consumer complaint or inquiry, including—

- (1) steps that have been taken by the covered person to respond to the complaint or inquiry of the consumer;
- (2) responses received by the covered person from the consumer; and
- (3) follow-up actions or planned follow-up actions by the covered person to respond to the complaint or inquiry of the consumer.

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(d) AGREEMENTS WITH OTHER AGENCIES.—The Bureau shall enter into a memorandum of understanding with any affected Federal regulatory agency regarding procedures by which any covered person, and the prudential regulators, and any other agency having jurisdiction over a covered person, including the Secretary of the Department of Housing and Urban Development and the Secretary of Education, shall comply with this section.<sup>8</sup>

Congress was specific that, regarding consumer complaints, the CFPB is required to establish reasonable response procedures for *individual* complaints. Congress used the phrase “a timely response” in the singular in subsection 1034(a), and the singular “the complaint” in (a)(1) and (a)(3), as well as in (b)(1) and (b)(3). Making granular data from complaints and their responses widely available for mining purposes is designed to promote market research. This far exceeds a reasonable response procedure because it does not *respond* to the individual consumer complaint.

The fact that Congress requires the CFPB to enter into memoranda of understanding with other agencies that have been handling consumer complaints for many years further supports the reasoning that Congress intended the CFPB to handle consumer complaints much as other agencies have for years. Other agencies, such as the FTC as described

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<sup>8</sup> Dodd-Frank Act § 1034, 12 U.S.C. § 5534 (emphasis added).

below, maintain the confidentiality of the complaints they handle and publish instead reasonably supported conclusions drawn from the data.

#### **IV. Card Issuer Narratives Should Not Be Disclosed**

The Supplementary Information in the Proposal states that the CFPB is considering permitting consumers or financial service providers to opt in or out of disclosures of the narrative fields, and is considering whether the CFPB will disclose the narrative fields after redacting information from them. Any information in a financial services provider's narrative field is confidential.

Financial services providers are not permitted to divulge such information without informed consumer consent. The Gramm-Leach-Bliley consumer financial protection restrictions protect against disclosure more than just the consumer's name, address, zip code, and credit card number. For example, if a consumer uses a credit card to purchase a pair of shoes, that consumer's shoe purchase, dollar amount paid, purchase date, shoe merchant, and even the consumer's shoe size and color if the issuer somehow were to learn them, all become protected nonpublic personal information.<sup>9</sup> Absent informed consumer consent, the card issuer cannot make public *anything* about the purchase of shoes. The issuer cannot even make public the fact that the consumer has a credit card from the issuer.

Any publication of narrative statements from complaint responses would counter the Congressionally mandated protections that financial institutions are required to provide to consumers. Were the CFPB to begin disclosing those narratives, financial services providers would be very reluctant to provide meaningful responses to consumers. Even the possibility that the CFPB may release information about the narratives at some future time will have the same effect. This approach undermines the entire Congressional purpose behind the consumer complaint process, which is to resolve legitimate complaints.

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<sup>9</sup> See 12 C.F.R. § 1016.3(q), which defines personally identifiable financial information to include, in part, the following:

- (q)(1) *Personally identifiable financial information* means any information:
  - (i) A consumer provides to you to obtain a financial product or service from you;
  - (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or
  - (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.
- (2) *Examples.* (i) *Information included.* Personally identifiable financial information includes:
  - (A) Information a consumer provides to you on an application to obtain a loan, a credit card, a credit union membership, or other financial product or service;
  - (B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;
  - (C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;
  - (D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;
  - (E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on, or servicing, a loan or a credit account[.]

## V. The CFPB's Authority to Divulge Consumer Data in Raw Form to the Public Is Not Evident

The proposal states that the CFPB's interim final regulation on disclosure of records and information (the Disclosure Rule)<sup>10</sup> "generally prohibits the disclosure of confidential consumer complaint information, except in certain limited circumstances."<sup>11</sup> However, the Disclosure Rule permits the CFPB to make any disclosure not otherwise prohibited by law:

To the extent permitted by law and as authorized by the Director in writing, the CFPB may disclose confidential information other than as set forth in this subpart.<sup>12</sup>

Further, the Proposal's Rationale for Disclosing Certain Credit Card Complaint Data states that the Proposal is not "intended to limit the CFPB's discretion to share complaint data as otherwise permitted by law."<sup>13</sup> Given the CFPB's position that it can make any disclosure unless prohibited, and given that the Proposal states that it is not intended to limit the CFPB from making disclosures, it is not at all clear that Proposal will effectively maintain the confidentiality of sensitive information. Disclosure of consumer complaint data, under the Disclosure Rule or otherwise, is impermissible.

It is true that the CFPB has authority to monitor consumer financial markets, and the CFPB relies, for this Proposal, on its monitoring authority under Dodd-Frank § 1022(c)(3)(B). Indeed, the CFPB explains in the Proposal that disclosing data as proposed will let outside parties identify trends and patterns that they believe may help inform consumer decisions about credit cards.<sup>14</sup> This authority on which the CFPB relies for the Proposal provides:

The Bureau may make public such information obtained by the Bureau under this section as is in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information in accordance with paragraphs (4), (6), (8), and (9).

This cited authority permits the CFPB to release aggregated reports, not granular, mineable data. Any other "appropriate formats" are permitted only on two conditions. First, they must protect confidential information. Release of narratives, or of issuer complaints by zip code, would not protect confidential information, it would release it. Second, appropriate formats must protect confidential information in accordance with the four cited paragraphs. We discuss these paragraphs *seriatim*.

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<sup>10</sup> 12 C.F.R. §§ 1070.1 – 1070.63, published at 76 Fed. Reg. 45372 (July 28, 2011).

<sup>11</sup> 76 Fed. Reg. 76628, 76629 (December 8, 2011).

<sup>12</sup> 12 C.F.R. § 1070.46(a).

<sup>13</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011).

<sup>14</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011).

Paragraph (4) provides:

The Bureau may not use its authorities under this paragraph to obtain records from covered persons and service providers participating in consumer financial services markets for purposes of gathering or analyzing the personally identifiable financial information of consumers.<sup>15</sup>

The CFPB lacks authority in its monitoring activities to gather personally identifiable information, such as zip codes and identity of the consumer's credit card issuer. This means that the CFPB does not have authority to disclose that information for any purpose. The CFPB also does not have authority to analyze the information, so it certainly does not have authority to release it so that the general public may analyze it.

Paragraph (6) provides interagency access to examination reports in limited circumstances. It also permits the CFPB to provide other confidential supervisory information to other regulators as follows:

[T]he Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.

Congress was clear that the CFPB may release confidential supervisory information only to regulators with jurisdiction over the financial institution in question. The Proposal would release confidential supervisory information to the general public. It certainly exceeds the CFPB's authority.

Paragraph (8) provides that the CFPB may release proprietary, personal, or confidential information only when that information is not protected from disclosure by *any* law. In other words, § 1022, on which the CFPB relies for its Proposal, does not provide independent authority to release information if any law requires it to remain confidential. Congress was explicit:

(8) PRIVACY CONSIDERATIONS.—In collecting information from any person, publicly releasing information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under section 552(b) [FOIA exemptions] or 552a [Privacy Act of 1974] of title 5, United States Code, or any other provision of law, is not made public under this title.

Release by Federal employees of trade secrets, such as credit card issuers' narratives, or their complaint rates by zip code, could be a criminal offense under the Trade Secrets Act.<sup>16</sup> The language quoted above prohibits the CFPB's disclosure of all trade secrets.

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<sup>15</sup> Dodd-Frank Act § 1022(c)(4)(C), 12 U.S.C. § 5512(c)(4)(c).

<sup>16</sup> 18 U.S.C. § 1905.

Moreover, the CFPB should not in the ordinary course of business disclose information in consumer complaints because that information may be protected from disclosure under the Freedom of Information Act (FOIA). The FOIA exempts from disclosure information that is:

- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; [and] . . .
- (8) 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;

The identity of the card issuer is exempt from FOIA disclosures under exemption (4) because its disclosure would impair the government's ability to obtain necessary future information, and because its release would cause substantial competitive harm.<sup>17</sup>

Additionally, the proposed searchable database contains operating or condition report information prepared by the CFPB, which is responsible for regulating and supervising financial institutions. Information of that nature is exempt from FOIA disclosure under exemption (8). As the District Court for the District of Columbia recently explained, in discussing another case:

The court found that because the Fed's bank supervisory process was one of 'continual interaction and information-sharing by regulated entities with their bank supervisors,' the defendant did not need to identify the specific report to which each piece of redacted information related. The court found that in light of Exemption 8's 'breadth,' affidavits that established the information was obtained through an ongoing supervisory process were sufficient to make the withheld information 'related to the 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.'<sup>18</sup>

For all these reasons, the CFPB lacks authority to release consumer complaint data as proposed, and the proposed Policy Statement should be withdrawn.

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<sup>17</sup> [\*Gold Anti-Trust Action Committee v. Federal Reserve\*](#), (D.D.C. Feb. 3, 2011) (citations omitted). See also OCC Interpretive Letter, Jan. 14, 1991, 1991 WL 338374 (O.C.C.) (finding identity of bank named in a complaint is exempt from FOIA disclosure under exemption (4). "The OCC relies upon the unimpeded flow of information from the banks that it regulates in order to carry out its supervisory functions. The data gathered from banks as part of the complaint monitoring system plays an integral part in the bank examination process. If the OCC were to permit public disclosure of the information that banks supply as part of the consumer complaint monitoring process, banks would be less willing to volunteer information which is particularly helpful and the regulatory efficiency of the OCC would be impaired.")

<sup>18</sup> [\*Judicial Watch v. Treasury\*](#), (D.D.C. July 11, 2011) (citations omitted).

## **VI. A Rationale for the Proposed Broad Disclosures is Absent**

The CFPB explains that its Proposal is designed to help provide consumers with timely and understandable information to make responsible decisions about financial transactions and to help the credit card market to operate transparently and efficiently.<sup>19</sup> The Proposal does not identify how publishing inherently unreliable information could make the market more transparent. Rather, it would be misleading and confusing. Nor does the Proposal identify how unreliable data would make the market more efficient.

On the contrary, the proposal acknowledges that it may not assist consumers:

There is considerable controversy over the extent to which credit card consumer complaint data can provide consumers with useful or reliable information for making decisions about credit card use.<sup>20</sup>

Other agencies take and respond to consumer complaints. The proposal discusses three. One relates to complaints about airplane flights, such as flight delays, lost baggage, and oversales. Another relates to automobile safety, and a third relates to Consumer Product Safety Commission reports that began less than a year ago.

Information about airplane flights is not at all relevant to consumer complaints about financial products and services because flight information is far simpler. Either a flight was timely or it was late. Either baggage was lost or it was not. Either a passenger boarded a plane or did not. Nor is automobile safety information relevant. Like airline data, automobile data are objective. Either a car works correctly or it does not. There is little room for opinion about whether a car's brakes slow the car sufficiently.

Financial product and services, in contrast, have numerous characteristics not readily captured by binary disclosures. Much of a consumer's experience with a financial product or service is a matter of subjectivity and opinion. For example, the consumer's description of what the consumer believes would be a "fair resolution" explicitly solicits the consumer's opinion rather than factual information.

Another difference is that consumers elect many of the characteristics of their financial products, while no one elects to have a flight arrive late and no one elects a car with faulty brakes. With credit cards, some consumers prefer credit limits that are lower than what a lender offers to extend, while other consumers elect the maximum credit limit they can get. Some consumers prefer to pay their credit card balance in full each month, while others prefer to maintain a balance. What is a basis for complaint by one consumer is a preference for another.

The proposal did not mention the Federal Trade Commission's (FTC) consumer complaint process relating to the Fair Debt Collection Practices Act (FDCPA). This is far more relevant to credit cards and other financial products and services than airline or

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<sup>19</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011) (citations omitted).

<sup>20</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011).

car safety complaints because the FDCPA covers subjective issues, such as whether a practice constituted harassment or whether a debt collector used abusive language. The subjective nature of the FDCPA complaints make them far more relevant to the CFPB's complaint policies. We believe the FTC's 2011 FDCPA [report](#), based on years of experience, is insightful:

The FTC uses complaints generally to monitor the industry, select targets, and conduct preliminary analysis that, with further factual development, might reveal or help prove a law violation.

Based on the FTC's experience, many consumers never file complaints with anyone other than the debt collector itself. Others complain only to the underlying creditor or to enforcement agencies other than the FTC. Some consumers may not be aware that the conduct they have experienced violates the FDCPA or that the FTC enforces the FDCPA. For these reasons, the total number of consumer complaints the FTC receives may understate the extent to which the practices of debt collectors violate the law.

On the other hand, the FTC acknowledges that not all of the debt collection practices about which consumers complain are necessarily law violations. Many consumers complain of conduct that, if accurately described, would indeed violate the FDCPA, or Section 5 of the FTC Act, 15 U.S.C. § 45. The FTC, however, does not verify whether the information consumers provide is accurate unless the agency undertakes such an inquiry in connection with its law enforcement activities.

Moreover, even if accurately described, some conduct about which consumers complain does not violate the FDCPA. For example, a consumer may complain that a debt collector will not accept partial payments on the same installment terms that the original lender permitted when the account was current. Although a collector's demand for accelerated payment or larger installments may be frustrating to the consumer, such a demand generally does not violate the FDCPA. To the extent that consumers complain about conduct that may not or does not violate the FDCPA, the FTC's complaint data may overstate the extent of law violations.

Finally, consumers may complain of conduct about which more information is needed to determine whether it would violate the law. If a consumer complains that a debt collector has threatened to file a civil lawsuit to collect a debt, for example, the FTC cannot determine whether such conduct violates the FDCPA without investigating whether the debt collector had the requisite intention to do so.<sup>21</sup>

The FTC does not provide public access to complaint data to our knowledge. Nevertheless, the FTC has annually produced reports that are extremely helpful in

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<sup>21</sup> FTC Report pages 1-2 (footnote omitted).



describing industry trends and issues. *See*, for example, the FTC’s April 2010 annual report, available [here](#), pages 25 – 61.

The FTC’s approach is sound. The FTC used information it collected to detail for the public what the information supports, without reporting unfounded conclusions. It also explained the limitations of its information. This is a data-driven approach.

## **VII. Congress Enables Research About Complaints Consistent With its Goal that Complaints Remain Confidential**

The CFPB envisions that the public will mine its proposed database for research purposes.<sup>22</sup> We certainly support research as part of the CFPB’s data-driven approach.

Consistent with its restrictions on publication of consumer complaint data, Congress provided for that very research. It created within the CFPB a Research Unit with an open-ended research mandate relating to consumer financial services and products, markets, risks, access to credit, consumer awareness, consumer behavior, and other areas.<sup>23</sup> The CFPB has been clear that it will conduct extensive research. For example, last May, the CFPB [announced](#):

The CFPB is building an Office of Research to support its commitment to evidence-based policymaking. The research office will produce new findings that deepen our understanding of the problems that consumers, firms, and markets encounter. It will also help the CFPB conduct rigorous policy evaluations, which in turn will help maximize our effectiveness in addressing these problems and minimize unintended consequences.

The CFPB can align its Policy Statement to be consistent with what Congress intended, eliminate inappropriate privacy risks, and eliminate inappropriate and unsupported reputation risks, without sacrificing research that would support the CFPB’s function. The CFPB has both the capacity and the budget to conduct all appropriate research and to provide reports to the Congress and public as appropriate without creating issues that arise by publishing raw, confidential, and unreliable data.

## **VIII. Conclusion**

We appreciate your consideration of our comments relating to the disclosure of consumer complaints. We recommend that the CFPB withdraw the proposed Policy Statement and not make consumer complaint data public except in aggregate form. This would prevent public reliance on raw data that are not validated and that are unreliable. It would also be consistent with the handling of consumer complaints as Congress required, and would be consistent with the CFPB’s authority. At the same time, it would permit all appropriate market research.

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<sup>22</sup> 76 Fed. Reg. 76628, 76630 (December 8, 2011).

<sup>23</sup> *See* Dodd-Frank Act § 1013(b), 12 U.S.C. § 5493(b).

If the CFPB does release granular complaint data, we recommend that it exclude individual issuer information, and that the CFPB be clear and explicit about all the limitations on the validity, accuracy, and reliability of the data, as described in this letter.

We appreciate your consideration of our comments and would welcome an opportunity to meet with you to discuss our concerns.

Sincerely,

American Financial Services Association  
Consumer Mortgage Coalition  
Mortgage Bankers Association