



February 27, 2015

Consumer Financial Protection Bureau
Attention: PRA Office
1700 G Street, NW
Washington, DC 20522

Re: CFPB's Consumer Response Intake Form / Docket No. CFPB-2014-0035

To Whom It May Concern,

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on the proposal by the Bureau of Consumer Financial Protection (CFPB or Bureau) to renew approval for its Consumer Response Intake Form (Intake Form). While we believe the Intake Form can be a useful tool for consumers to communicate with the Bureau, we continue to have significant concerns about how the Bureau proposes to use material provided on the form.

Specifically, the Bureau recently proposed to change its policy and display to the public unstructured and unsubstantiated narratives through its Consumer Complaint Database (Complaint Database). It does not plan to review these narratives before posting them beyond ascertaining that the complainant in fact has a relationship with the entity complained about.

While MBA has strongly supported the CFPB's mission to assist consumers in making responsible financial choices, we strongly oppose this change to the Complaint Database. As discussed further, CFPB and industry data both show that a small fraction of consumer complaints warrant any action beyond an explanation. MBA, therefore, believes that if the CFPB posts such narratives it will provide the government's imprimatur to information that has not been fully verified and could be misleading.

Given these concerns, in the attached comment letter dated September 22, 2014, in response to the Bureau's proposal, MBA urged the CFPB to abandon the policy change. In the alternative, if it moves forward, we urged the Bureau to address legal and other concerns to better protect consumers. These recommendations include providing lenders an opportunity to address complaints before they are posted. Moreover, MBA strongly believes any proposal to add consumer narratives to the Complaint Database should proceed only through notice and

¹ The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

comment rulemaking to ensure the fullest public participation and a thorough assessment of its costs and benefits.

I. Concerns with Posting Consumer Complaints

Our comment letter submitted on September 22, 2014 to the Bureau outlined several concerns regarding the CFPB's proposal to add consumer narratives to the Complaint Database including that:

- **Most complaints are invalid or are closed with no response other than an explanation.**

The CFPB noted in conjunction with its most recent report on the Database that a full 80 percent of mortgage complaints it receives from consumers are "closed with an explanation" or "closed without relief or explanation" by the responding entity.² Data from MBA members indicate the numbers of complaints requiring action occur in as few as two percent of the cases. Lenders report that most "complaints" are not in fact "complaints" alleging any wrongdoing. Rather, they are frequently attempts to stop foreclosure for nonpayment. Considering these facts, the posting of a large volume of such narratives will only serve to mislead consumers.

- **The CFPB's posting of these narratives under the imprimatur of the federal government, without regard to their validity, will mislead consumers contrary to the CFPB's mission and will cause severe and reputational and financial harm to lenders.**

Because the government will post these narratives, the narratives can be expected to result in even greater harm. The Bureau's involvement will add credibility and ensure wide dissemination to narratives even though they may be untrue. The customer that reads and believes a compelling but factually false narrative, or is adversely influenced by unsubstantiated narratives posted on a government website, could actually be harmed by the government agency charged with protecting them.

- **Displaying such narratives threatens consumers' privacy - a risk that the Bureau admits it has not resolved.**

The Bureau admitted in its proposal that a principal risk of publishing consumer narratives is the potential harm associated with the possible re-identification of actual consumers within the Complaint Database. The proposal to publish narratives states that "[i]ndividuals with personal knowledge of events described in a narrative may also be able to identify consumers using de-identified narratives." MBA shares the CFPB's concerns and believes there exists a substantial risk of reidentification of consumers by combining Complaint Database data with other publicly available data. These narratives should not be posted to avoid the risks of reidentification and misuse.

- **Providing an opportunity for companies to respond to unsubstantiated narratives is not workable because of reputational and legal concerns including lenders' potential violation of the Gramm-Leach-Bliley Act.**

The Bureau's proposal to allow lenders and servicers to respond to consumers' narratives is not a workable because it places companies in the position of appearing insensitive in

² CFPB, Consumer Response: A Snapshot of Complaints Received (July 2014), p. 29.

responding to what appear to be unfortunate consumers who have financial difficulties. Also, responding to published narratives publicly will strain company resources that could instead be deployed to address the credit needs of aspiring borrowers. Notably, developing public responses will be a particularly great burden for smaller lenders and servicers. Finally, even if a customer's name or account information is not published, the mere publishing of a response by a company could be construed as disseminating non-public personal information about a customer – in violation of the Gramm-Leach-Bliley Act.

- **Non-government websites already provide nearly unlimited channels for consumers to provide feedback.**

The Internet already gives consumers considerable voice to comment through numerous channels on virtually any company, product and service. Well-known websites such as Google, Yelp, Angie's List, and the Better Business Bureau aggregate and publish consumers' reviews of financial service providers in particular. Considering the reach of these sites, it is unnecessary to also involve the United States government in this work. Notably, available websites feature standards and procedures for removing unfounded reviews and allow consumers to provide negative and positive feedback -- standards which have not been proposed by the Bureau.

- **A change in policy to publicly display narratives through the Complaint Database must proceed only through notice and comment rulemaking to ensure full public participation and a rigorous assessment of its costs, benefits and small business burdens.**

Short of a formal hearing, notice and comment rulemaking is the means used to ensure public involvement and full deliberation prior to agency action. It also affords an opportunity to consider the public benefits and detriments of such action. While the Bureau identified benefits and risks in its proposal to add consumer narratives to the Complaint Database, it did not do so with the rigor of an analysis appropriate to rulemaking.

A more rigorous analysis would quantify the costs and benefits of this important change to consumers and industry alike. Beyond that, it should also consider whether better alternatives are available to address perceived needs. Additionally, before engaging in a rulemaking of this nature, the Bureau is required to convene a panel pursuant to Small Business Regulatory Flexibility Act (SBRFA) to consider the impact of posting consumer narratives on smaller entities.

II. Suggestions for the Intake Form

If the Bureau insists on moving forward with its proposal to publish consumer narratives in its Complaint Database, MBA believes it must address legal and other concerns and modify its proposal to better serve consumers. Given these concerns, we respectfully make the following recommendations for the Intake Form:

- **Avoid publishing complaint narratives collected through the Intake Form that have not been independently verified and validated.**

MBA members report that a large number of the complaints are misdirected. A first step to avoiding mistakes is requiring the CFPB to ensure that complaints collected through the

Intake Form are sent to the right company. The CFPB also should not only definitively confirm the relationship between parties, but it should cull out complaints by competitors, duplicative complaints and products of organized campaign by those hostile to industry. Only complaints that allege an actual harm should be reviewed for posting.

- **Provide adequate notice and time to address complaints collected through the Intake Form before any narrative is posted and only post those where the complaint is valid and unaddressed.**

The purpose of the complaint database is to ensure that valid complaints are addressed by companies, without harm to companies or consumers. If narratives are displayed, invalid complaints should not be allowed to mislead consumers. In order to address both imperatives, if the CFPB moves forward the CFPB should notify a company against which the complaint is filed and provide the company sufficient time to address the complaint before a narrative is posted. If a complaint is misdirected, timely explained or resolved, the narrative should not be posted. In addition, if a consumer provides a rebuttal to a company response, then the lender should be provided sufficient time to respond before the rebuttal is posted. Finally, if a consumer rebuttal is received, companies should be given the opportunity to petition for an extension if additional time is needed to adequately respond.

- **Take down complaint narratives that are published and are subsequently found to be not valid.**

If the CFPB moves forward it should also ensure on an ongoing basis that the information displayed on its website is true and complaints are valid to the greatest extent feasible. A policy such as this should include take down or removal procedures based on reports from companies that complaints are resolved. We urge the CFPB to devote resources to efficiently carrying out this function.

- **Remove aged complaints and compliant narratives from the Complaint Database.**

Complaints and complaint narratives collected through the Intake Form that are older than 24 months should be removed from the Complaint Database. Aged complaints and complaint narratives may not be representative of a lender's current performance.

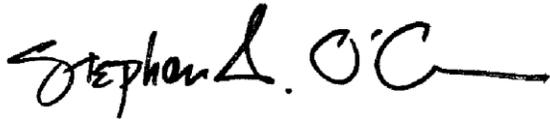
III. Conclusion

MBA appreciates the opportunity to comment on the proposed approval renewal for the Intake Form. MBA believes that before the Intake Form is reapproved the Bureau should be required to address the foregoing concerns with its proposal to add consumer narratives to the Complaint Database. Moreover, any proposal to publicly display consumer narratives should proceed through a public rulemaking process.

Should you have questions or wish to discuss any aspect of these comments, please contact Ken Markison, Vice President and Regulatory Counsel, at (202) 557-2930 or at kmarkison@mba.org; or Joe Gormley, Assistant Regulatory Counsel, at (202) 557-2870 or at jgormley@mba.org.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in black ink that reads "Stephen A. O'Connor". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Stephen A. O'Connor
Senior Vice President of Public Policy & Industry Relations
Mortgage Bankers Association



MORTGAGE BANKERS ASSOCIATION

September 22, 2014

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

RE: Docket No. CFPB-2014-0016 - Disclosure of Consumer Complaint Narrative Data

Dear Ms. Jackson,

The Mortgage Bankers Association (MBA)¹ appreciates the opportunity to comment on the proposed policy change (Proposal) by the Bureau of Consumer Financial Protection (CFPB or Bureau) to expand its publicly available Consumer Complaint Database (Database). This expansion would, for the first time, display to the public unstructured and unsubstantiated narratives accompanying consumer complaints in the Database in those instances where a consumer opts in to such disclosure. The proposal also would allow the company that is the subject of the complaint the option of submitting a narrative response that the CFPB would make public.

This is an important issue and we appreciate that the Bureau has extended the time to respond to the Proposal from 30 to 60 days.

MBA has supported the CFPB's efforts to assist consumers in making responsible financial choices and its establishment of a portal or gateway so companies can give prompt attention to complaints from consumers filed with the Bureau. MBA and its members take consumer complaints very seriously. The industry has invested considerable effort and financial resources into receiving, understanding, and responding to customers' feedback. Companies are in constant communication with their customers, through multiple channels, to improve the customer experience. Additionally, they have built reporting, analytics and other platforms that enable them to enhance customer engagement and expeditiously address any complaints.

While we appreciate the Bureau's efforts respecting the Database, for the reasons we explain here, we strongly oppose the Proposal. If the Bureau moves forward, it should address important concerns, change the proposal to protect consumers and proceed only through a public rulemaking process.

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I. Summary of Comment

CFPB and industry data both show that very few consumer complaints warrant any action beyond an explanation. Consequently, MBA believes the CFPB's posting unsubstantiated and frequently emotional narratives with accompanying complaints could mislead consumers and undermine the stated goal of improving consumer decision-making.

In addition, displaying of such narratives threatens consumers' privacy. Such narratives should remain available to the Bureau for supervisory and enforcement purposes, but making them available for public view is unnecessary considering the availability of more balanced non-government avenues to comment. Providing an opportunity for companies to respond to unsubstantiated narratives does not solve these privacy problems and is not workable.

Display of unsubstantiated narratives by financial regulators is unprecedented; other regulators who display complaints have not proceeded as the Bureau would through this Proposal.

Given these concerns, MBA respectfully urges the CFPB to either abandon this Proposal or, if it moves forward, address legal and other concerns and modify the Proposal to better serve consumers. We believe any further action on the Proposal must proceed only through notice and comment rulemaking to ensure full public participation and a more thorough assessment of costs, benefits and small business burdens.

II. Discussion

1. Display of such narratives will result in significant harm without any real benefits.

The Proposal states in examining the benefits of posting narratives that "for some consumers a primary reason for submitting a complaint may be to share their experience with other consumers" and these "needs cannot be served by the Bureau simply by disclosing the non-narrative portions of the complaint. The Proposal also states the Bureau's belief that publication of narratives will lead to an increase in consumer contacts, which will have a positive effect on Bureau operations that "rely, in part on complaint data to perform their respective missions including the Offices of Supervision, Enforcement, and Fair Lending, Consumer Education and Engagement, and Research, Markets, and Rulemaking."

The Proposal addresses two possible risks in conjunction with the proposal including (1) re-identification of individuals who submit narratives and whose identities are intended to be confidential and (2) the fact that narratives may contain factually incorrect information. The Bureau indicates while it is studying the first problem, there remains a real threat that even after extensive data scrubbing re-identification of at least some consumers is likely. As for the second problem, while the Proposal indicates that if information is incorrect "both consumers and the financial institutions that lose business due to misinformation would be disserved," the Proposal countered that "the marketplace of ideas would be able to determine what the data shows." Moreover, the Proposal indicates that the release of the company's response, side-by-side and scrubbed of any personal information would militate against this concern.

MBA respectfully but fervently disagrees with the Bureau's assessment of both the benefits and the risks of its Proposal for the following reasons:

a. Both the CFPB’s and industry data demonstrate that very few consumer complaints in the Complaint Database warrant any action beyond an explanation.

Whether or not some consumers want narrative data on their complaints disclosed, the fact remains that most complaints do not warrant action. The CFPB noted in conjunction with its most recent report on the Database that a full 80 percent of mortgage complaints it receives from consumers are “closed with an explanation” or “closed without relief or explanation” by the responding entity.² The reason is that any alleged problems were easily explicable and did not warrant action, i.e., the borrower didn’t understand the lending process, didn’t qualify for transaction, or the complaint itself was misdirected to the firm.

Data from MBA members is consistent with the CFPB’s and indicates the numbers of complaints requiring action range from as little as 2-19 percent of the cases. Lenders report that most “complaints” are not in fact “complaints” in the sense that the consumer is not alleging any wrongdoing. Rather, they are attempts to stop foreclosure or expressing unhappiness that a loan modification was denied. Also, many complainants file the same complaint multiple times.

Based on lenders’ experiences, some narratives contain purely false information. In some business areas, members report that the level of inaccurate or false information is quite high. Salient facts and legal issues are often distorted through the lens of an angry or emotional account that may also omit a consumer’s contributing factors.

Three representative lenders provided the following statistics on their complaints from the CFPB Complaint Database:

	Misdirected or Invalid Complaints	Valid Complaints
Midsized Lender 1	90 percent	10 percent
Midsized Lender 2	92 percent	8 percent
Large Lender	81 percent	19 percent

b. Display of most narratives will mislead consumers and cause significant reputational harm to companies large and small.

If narratives are displayed, large lenders can be expected to have a greater number of complaints as a function of their business volume. Some smaller lenders also may have a greater number of narratives for a variety of reasons, including chance.

Publishing narratives also can be expected to result in the wide dissemination of untrue and possibly libelous statements against both financial institutions and their employee in a database that because of its government sponsorship appears credible. Notwithstanding, these narratives will be published under the imprimatur of the federal government giving them great credibility.

² CFPB, Consumer Response: A Snapshot of Complaints Received (July 2014), p. 29.

The customer that reads and believes a compelling but factually false narrative, or is influenced by the number of unsubstantiated narratives and then chooses a less advantageous product from another provider will be harmed by the database. Misinformation via unverified narratives will not improve consumer decision-making.

Those companies that are disadvantaged by invalid or untrue complaints may not only face an undue reduction in business but in some cases may scale back their mortgage activity, lessening competition and consumer service while increasing costs and consumer harm.

MBA does not share the view in the Proposal that better services will prevail in the “marketplace of ideas,” a view that seems to be based on the assertion that lenders will have a chance to respond. However, lender responses often may be limited or restricted (as noted below in section 5), and in any case, they are not a substitute for verified information that consumers could rely on.

MBA believes publishing unsubstantiated complaints is, inconsistent with the CFPB's objective of making sure consumers have access to “understandable information to make responsible decisions about financial transactions.”

c. Display of unsubstantiated narratives will not serve any supervisory or enforcement purpose and indeed no other agency regulating financial services providers displays such narratives.

The Proposal states that posting unverified narratives will assist enforcement, supervision and other regulatory purposes. In essence, it indicates that the addition of narratives will increase the volume of complaints from those who choose to write public narratives and have them displayed. There is, however, no basis cited or evidence offered to conclude that a greater number of complaints will result in a greater number of valid complaints.

In fact—assuming that 80 percent of mortgage complaints do not require action—a greater number of complaints can only be expected to lead to even greater misinformation—particularly if the CFPB does not give lenders time to review and respond to complaints before narratives are posted.

A policy of posting unsubstantiated narratives also can be expected to invite persons with interests adverse to a particular institution to commandeer the Database as a device to disseminate information for their own purposes.

Currently, the CFPB is already receiving narratives and is free to use them for enforcement or supervisory actions without making them public. Notably, no other financial services regulator, federal or state, publishes consumers' complaints in the way the Bureau proposes to, to foster enforcement, regulation or any other purpose.

In sum, there is no basis to conclude that here is any value in the display of narratives for enforcement and regulatory purposes. Even if there were, we believe in a full cost benefit analysis any such value would be far outweighed by the harm that display of these narratives will cause.

2. Display of unsubstantiated narratives risks harm to consumers' privacy interests.

In its Database, CFPB publishes the consumer's zip code, the date and category of the complaint, the identity of the financial services provider, and the outcome of complaints. CFPB encourages its download with no restrictions.

With available technology, data in the database can be easily filtered and sorted in a wide variety of ways including geographically. Users can then combine Database information with other publicly available data sets such as public land records, real estate foreclosure information, judicial records such as bankruptcy, divorce, child support, and probate records.

In its Proposal, CFPB admits a principal risk of publishing narratives is the potential harm associated with the possible re-identification of actual consumers within the Consumer Complaint Database." The Proposal also acknowledges that "[i]ndividuals with personal knowledge of events described in a narrative may also be able to identify consumers using de-identified narratives."

MBA shares the CFPB's concern and believes there exists a substantial risk of re-identification of consumers by combining complaint database data with other publicly available data. Adding narratives to this data will only increase the information available to those who might misuse it.

Narrative facts may allow those familiar with a particular consumer's situation to identify the consumer through a narrative. The addition of a response from a lender or other entity that suggests that the problem is a failure to meet financial obligations will worsen the effects of any privacy breach. The Proposal indicates the Bureau is still studying problem of possible re-identification. MBA urges that the Bureau not move forward until it can satisfy the public that the risk of re-identification and privacy breach is eliminated. Otherwise, the Bureau must, in our view, provide a warning to consumers in the complaint process that allowing their narrative to be placed into the public database could expose them to the risk that private or confidential information could be re-identified.

Notably, the Bureau has released this Proposal to collect and release additional data at the same time it is proposing to collect and release additional data under the Home Mortgage Disclosure Act (HMDA) and the Federal Housing Finance Agency is collecting new data for the National Mortgage Database. The agglomeration of all this new data in the government raises additional privacy and data security concerns. MBA urges that the CFPB work closely with other agencies to make certain that the government's collection of data generally and the CFPB's data in particular does not present undue risks.

3. Other agency databases do not provide precedent for this effort.

The Bureau cites release of narrative information by other government agencies such as the Consumer Product Safety Commission (CPSC) and the Federal Trade Commission (FTC) in support of its Proposal. Upon close review, however, those agencies' actions not only do not support the Proposal but they underscore the need for legal authority for the Bureau to move forward and use of a rulemaking process if it does so.

a. The complaint database established by the CPSC is not comparable to what the Bureau has proposed.

The CPSC was specifically directed by the Consumer Product Safety Improvement Act to develop a publicly available and searchable Internet database to hold consumer product safety information and allow consumers to report product safety issues. That law required CPSC to submit an implementation plan to Congress. CPSC then undertook a lengthy, thoughtful and transparent process—which included public hearings—in which CPSC worked with interested stakeholders, including consumer groups and industry, to understand the issues implicated by the CPSC database and develop such a plan. Incorporating what it learned, CPSC debated, voted on and then issued a Notice of Proposed Rulemaking. After it carefully considered comments, it issued a final rule in December 2010. From beginning to end, the CPSC’s implementation process took over two and a half years.

Unlike the Consumer Product Safety Improvement Act, Dodd-Frank does not specifically direct CFPB to set up a public database to hold consumer complaints. Nor has CFPB chosen to pursue a rulemaking process.

Notably, the CPSC also established a “take down” process for retracting complaints which it determines are factually inaccurate.³ CFPB does not and has not proposed to implement any such process. Should it proceed with this Proposal, such takedown procedures should be established.

Beyond that, CPSC is required by law to “provide clear and conspicuous notice to users of the database that the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database.”⁴ CFPB makes no similar representation. In fact, it does just the opposite, it implies the current database is reliable stating “The information shared by consumers and companies throughout the complaint process informs the Bureau about business practices that may pose risks to consumers and helps the Bureau in its work to supervise companies, enforce Federal consumer financial laws, and write better rules and regulations.”⁵ If unsubstantiated narratives are included in the Database, the Bureau should warn consumers that the complaints and narratives are unsubstantiated and the vast majority do not warrant any action.

Finally, under the CPSC’s rule, complaints in its database must posit that the product in question caused actual harm. Reports that do not state an actual harm are excluded from the database with the rule stating “[i]ncident reports that relate solely to the cost or quality of a consumer product... do not constitute ‘harm...’”⁶ CFPB has proposed no such requirement and should establish one.

b. Government agencies releasing information through FOIA requests is not similar to posting narratives on a public website.

The Bureau also analogizes the public posting of its narratives to the response by the Federal Trade Commission (FTC) to Freedom of Information Act (FOIA) requests for

³ 16 C.F.R. § 1102.10(f)(7).

⁴ 15 U.S.C. § 2055a(b)(5).

⁵ CFPB, Consumer Response: A Snapshot of Complaints Received, p. 35 (July 2014).

⁶ 16 C.F.R. § 1102.10(d)(3).

consumer complaint information. But the Federal Trade Commission, like other regulators, does not maintain a publicly available database of complaint narratives. Releasing consumer complaint information pursuant to individual FOIA requests is not the same as routinely making available on a public government website information that, as discussed elsewhere in this comment, can be misleading, harmful but nonetheless downloaded and manipulated.

4. Making a change of this nature through a policy change and not rulemaking is not authorized by statute or rule.

As indicated, the CFPB recognizes the risk of re-identification and release of privacy data if narratives and responses are released. Accordingly, the CFPB's attempt to authorize the disclosure of narrative data through a policy statement is improper because the Dodd-Frank Act and the Privacy Act of 1974 require the proposed disclosure of personal information to be addressed through rulemaking and notice to the public.⁷ The Dodd-Frank Act requires the CFPB to "promulgate regulations providing for the confidentiality of certain types of information and protecting such information from public disclosure."⁸ CFPB's confidentiality rule⁹ does not authorize the dissemination of consumer complaint narratives, and, in fact, contemplates that such information will not be publicly disclosed.¹⁰ If it wants to pursue the Proposal, MBA believes CFPB must amend its confidentiality rule.

Although the CFPB has previously taken the position that its policies governing the disclosure of confidential information are an "agency rule of organization, procedure, or practice that is exempt from notice and public comment pursuant to [the APA],"¹¹ MBA believes this is incorrect. The APA only exempts "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" from formal notice and comment rulemaking requirements where "notice or hearing" is not required by statute.¹² This does not apply here because the Dodd-Frank Act specifically requires "rules" regarding confidential treatment of consumer information (§ 1022(c)(6)(A)), and the Privacy Act contemplates providing "notice" to the public of rules regarding the disclosure of personal information (5 U.S.C. § 553(b)-(d)). It would be improper for the CFPB to attempt to use a policy statement to circumvent notice and comment rulemaking.

The narrative data the CFPB intends to publish will necessarily include nonpublic personal information that qualifies as "confidential information," as defined by the CFPB.¹³ The Bureau's confidentiality rule is clear that, except as otherwise required by law or provided in the Rule, the CFPB will not "disclose such confidential information by any means...or in any format..."¹⁴ Nowhere in the confidentiality rule, or any other law or regulation, is there any

⁷ See the Administrative Procedures Act, 5 U.S.C. § 553, Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, and the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*

⁸ 78 Fed. Reg. 11484 (February 15, 2013). See *e.g.* Dodd-Frank Act § 1022(c)(6)(A) ("The Bureau shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.").

⁹ 12 C.F.R. § 1070 *et seq.*

¹⁰ See 12 C.F.R. § 1070.2 ("Confidential Information means confidential consumer complaint information..."); 12 C.F.R. § 1070.41(a) (detailing general rule of non-disclosure of confidential information).

¹¹ 76 Fed. Reg. 45372, 45376 (July 28, 2011).

¹² 5 U.S.C. § 553(b).

¹³ *Id.*

¹⁴ 12 C.F.R. § 1070.41(a).

authority for the CFPB to publicly disseminate narrative consumer complaints.¹⁵ It is beyond the authority of the CFPB, or any federal agency, to amend a final rule adopted through notice and comment rule making through the issuance of a mere policy statement.¹⁶

Beyond the impropriety of moving forward with a policy statement, we believe only through a more deliberative process as discussed below, can significant concerns such as the impacts of this change on small businesses and its costs and benefits be fully addressed.

5. The proposed opportunity for companies to respond to unsubstantiated narratives in the Complaint Database is not viable for several reasons.

MBA believes that consumers are best served and can make well-informed choices when presented with balanced and factual information. We commend the spirit in which the CFPB proposes to give financial firms the right to respond to any customer narratives. Nevertheless, for several reasons, this is not a viable option.

Frank responses to consumers' narratives by lenders and servicers are likely to be more harmful to these entities than the consumers who wrote them. For example, a large number of complaints are filed by borrowers who have had persistent financial difficulties and do not receive a loan modification.

A frank response by a company that a consumer had a bad record of payment may be perceived as bullying by the public and even a basis for suit no matter how baseless the complaint. Responding to published narratives also will strain company resources de-prioritizing work to satisfy the credit needs of the vast majority of customers. This will be a particular challenge to smaller lenders and servicers.

Finally, as discussed further below, even if a customer's name or account information is not published, the mere publishing of a response by a company could be construed as disseminating non-public personal information about a customer— in violation of the Gramm-Leach-Bliley Act. This exposes a financial institution to possible regulatory and legal scrutiny and the CFPB to criticism for establishing requirements breaching privacy.

¹⁵ *Id.* Although the confidentiality rule allows the CFPB to “disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains” (1070.41(c)), this exception does not apply to the contemplated database because, as detailed in this comment, consumers *can* be identified through the proposed database and then matched with the additional personal information in the narrative complaints.

¹⁶ See *Mendoza v. Perez*, 754 F.3d 1002, 1023-25 (D.C. Cir. 2014) (legislative rule that agency claimed to be “interpretative” invalidated because of lack of notice and comment, rejecting argument by Department of Labor that it was merely a “rule[] of agency organization, procedure, or practice”). Indeed, the CFPB’s proposed policy statement directly meets the test for categorizing legislative rules on multiple grounds, including because it effectively amends a prior legislative rule, *i.e.* the Confidentiality Rule. *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (an agency’s proposal is a legislative rule where it “effectively amends a prior legislative rule”).

- 6. Display of unsubstantiated narratives is unnecessary. Non-Government websites, and social media, already provide a forum for narrative complaints about all manner of service providers—and unlike the Bureau’s website provide an opportunity for positive reviews—although allowing positive feedback on the Database would not resolve concerns.**

The Internet already gives consumers considerable voice to comment through numerous avenues on a wide range of companies, products and services. Well known websites such as Google, Yelp, Angie’s List, and the Better Business Bureau aggregate and publish consumers’ reviews of financial service providers specifically. Notably, these websites feature standards and procedures for removing unfounded reviews and allow consumers to provide negative and positive feedback.

Considering the abundance of comment information currently available from non-government sources, lenders are now able to track complaints and gain feedback. Also, considering this abundance, MBA urges that this policy change with all of its attendant problems is unnecessary.

- 7. Given the concerns in this comment, MBA respectfully urges that the CFPB either abandon this approach or address several concerns before moving forward through rulemaking.**
- a. Resolve concerns that the Proposal exceeds the Bureau’s authority under Dodd-Frank and violates the Gramm-Leach-Bliley Act.**

Dodd-Frank explicitly requires the CFPB to: monitor consumer complaints and use a complaint database;¹⁷ permits the CFPB to share complaint monitoring information with limited parties for limited purposes;¹⁸ and makes monitoring information public as long as the CFPB protects confidential information. As indicated, Congress separately required the CFPB to establish procedures for responding to consumer complaints and information requests.¹⁹ Nowhere in the statute does it provide specific authority for the CFPB to display complaint narratives for public use.

The privacy provisions of the Gramm-Leach-Bliley Act (GLB)²⁰ prohibit a financial institution from disclosing nonpublic personal information to a nonaffiliated third party except in specific circumstances set forth in the statute.²¹ Even if a customer’s name or account information is not published, the mere publishing of a response from a customer’s lender could be construed as disseminating non-public personal information about a customer – in violation of Gramm Leach Bliley. Under GLB, lenders will be unable to respond to many consumer complaints through the CFPB website because there is a real risk that doing so will enable public access to at least some protected information.

MBA urges the CFPB to carefully consider, before it moves forward, the Bureau’s legal authority for this proposal including whether a lender could legally respond to a complaint.

¹⁷ Dodd-Frank Act § 1013(b)(3)(A), 12 U.S.C. § 5493(b)(3)(A).

¹⁸ Dodd-Frank Act § 1013(b)(3)(D), 12 U.S.C. § 5493(b)(3)(D).

¹⁹ Dodd-Frank Act §§ 1033 and 1034, 12 U.S.C. §§ 5533 and 5534.

²⁰ Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 501 – 509, 113 Stat. 1338, 1436-45 (1999), codified at 15 U.S.C. § 6801 – 6809.

²¹ *Id.* 6802 (b)(1)

b. Ensure all necessary protections against re-identification are in place before proceeding.

The CFPB indicates that it “is currently conducting a study to further verify that [its] proposed scrubbing standard and methodology will sufficiently address concerns related to the FOIA, the Privacy Act, the Dodd-Frank Act, and the Bureau’s confidentiality regulations.” Protection of consumer privacy is a paramount concern. Accordingly, MBA respectfully urges the CFPB to await completion of these studies and address any privacy concerns. Only if privacy concerns have been fully addressed and explained to the public, should the CFPB engage in rulemaking on this subject. If it is determined that it would be impossible or too costly to implement necessary privacy safeguards, then the Proposal should be abandoned.

Whether or not the CFPB moves forward with this change, MBA also recommends that CFPB review and as necessary remove items such as zip code and product type from the current complaint database to prevent re-identification.

c. Sufficiently address the costs and benefits of the display of unsubstantiated narratives.

While the Bureau identified benefits and risks in its proposal, it did not do so with the rigor of a true cost benefit analysis accompanying a rulemaking. A more rigorous analysis would quantify the costs and benefits of this important change to consumers and industry. Beyond that, It should also address whether better alternatives are available that could address consumers’ needs.

d. Adequately consider the effects of any such change on small businesses.

As indicated, small businesses may be adversely affected by this policy because of the borrowers they serve or for other reasons. The Small Business Regulatory Flexibility Act (SBRFA) requires an assessment of the impact of regulations on these entities. Before engaging in rulemaking, the Bureau should convene a panel pursuant to SBRFA to consider the impact of posting consumer narratives on smaller entities. Any proposed rule by the Bureau should consider the input of the SBRFA panel.

8. Possible approaches to a proposed rule – If the CFPB moves forward with a proposed rule it should reformulate it to protect consumers from misinformation.

If the CFPB is able to resolve the foregoing concerns, there are several points that it should include in a proposed rule:

a. Charge CFPB staff with properly reviewing and directing complaints.

MBA members report that a large number of the complaints are still misdirected. A first step to avoiding mistakes is requiring that the CFPB shall carefully review complaints to ensure they are sent to the right company. The CFPB should not only definitively confirm the relationship between parties, but it should also screen to cull out complaints by competitors, duplicative complaints and products of campaigns.

b. Provide adequate notice and time to address complaints before any narrative is posted and only post those where the complaint is valid and unaddressed.

The purpose of the complaint database is to ensure that valid complaints are addressed by companies, not to harm them. At the same time, if narratives are displayed, invalid complaints should not be allowed to mislead consumers.

In order to address both imperatives, a revised proposal should provide that the CFPB will notify a company against which the complaint is filed before a narrative is posted and provide the company sufficient time to address the complaint. If a complaint is misdirected, timely explained or resolved, the narrative should not be posted.

c. Take down complaint narratives that are not valid.

If the CFPB proposes to publish narratives, it should ensure on an ongoing basis that the information displayed on its website is true and complaints are valid to the greatest extent feasible. Also, most Internet review sites and the CSPC have processes to takedown complaints that are not true. Any proposal should establish such procedures and the CFPB should devote resources to carry out this function. Also, complaint narratives that simply express dissatisfaction should not be posted. Only complaints that allege an actual harm should be reviewed for posting.

d. The CFPB should explain the data it shares publicly.

A key issue in avoiding misleading consumers is providing clear direction on the uses and limitations of the data. In this regard, at minimum a new proposal should require that the CFPB include a bold disclaimer on its website that information in the database may contain errors. It should also normalize the data by identifying for the consumer the complaint experience for providers of various sizes.

III. Conclusion

MBA appreciates the opportunity to comment on this Proposal and the Bureau's work to provide relevant information to American consumers. However, given the significant concerns outlined in this comment, MBA respectfully urges that the CFPB either abandon this Proposal or, if it moves forward, address several concerns and adjust its proposal to avoid undue harm to consumers. MBA believes that as it is, this Proposal will not achieve its stated goal of informing consumers, in fact, it will harm them. If the Bureau proceeds and the proposal is revised, it should do so through a public rulemaking process.

Should you have questions or wish to discuss any aspect of these comments, please contact Ken Markison, Vice President and Regulatory Counsel, at (202) 557-2930 or at kmarkison@mba.org; or Joe Gormley, Assistant Regulatory Counsel, at (202) 557-2870 or at jgormley@mba.org.

Thank you for your consideration of these views.

Sincerely,

A handwritten signature in black ink, appearing to read "Pete Mills". The signature is written in a cursive style with a large, looping initial "P".

Pete Mills
Senior Vice President
Residential Policy and Member Services