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By electronic delivery to:
www.regulations.gov

The Honorable Richard Cordray
Director
Bureau of Consumer Financial Protection
1275 First Street, N.E.
Washington, D.C. 20002

Re: Notice of proposed policy to disclose consumer complaint narrative data, Docket No. CFPB-2014-0016

Dear Director Cordray:

The American Bankers Association (ABA)[1] respectfully submits its comments on the Bureau of Consumer Financial Protection's (Bureau) proposal to expand the Consumer Complaint Database (Database) to include the public disclosure of consumer complaint narratives.[2]

ABA members welcome consumer feedback on the financial products and services their customers use. Customer satisfaction is a key to franchise value, particularly in the competitive consumer financial services market. For each customer respect for personal circumstances and confidential treatment is paramount, and that includes when they are asserting individual complaints about their private financial affairs.

This has long been recognized as a cornerstone of consumer complaint processing by banks and their supervisory agencies. Prudential regulators have insisted on individual complaint handling by the recipient bank and have monitored individualized responses for alerts to potential compliance risks warranting more systemic attention, when necessary. This process assures both individual responses and appropriate program corrections benefiting the bank's entire customer base, while simultaneously guarding individual privacy. It also assures privileged treatment of supervisory information regarding the bank's operations so that unfounded complaints do not expose the bank to unwarranted reputation risk that can harm the interests of all other customers of the bank as well as shareholders.

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[1] The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend more than $8 trillion in loans. ABA believes that government policies should recognize the industry's diversity. Laws and regulations should be tailored to correspond to a bank's charter, business model, geography and risk profile. This policymaking approach avoids the negative economic consequences of burdensome, unsuitable and inefficient bank regulation. Through a broad array of information, training, staff expertise and resources, ABA supports banks as they perform their critical role as drivers of America's economic growth and job creation.

[2] 79 Fed. Reg. 42765 (July 23, 2014) (Proposed Policy Statement).

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ABA believes that the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) underscores Congress' endorsement of this long-standing process. Rather than authorize unauthenticated publication of individual consumer complaints, Congress directed a strengthening of regulatory processes to ensure customers' concerns were promptly and effectively routed through the right agency to the right company—and responses were confidentially handled and the interests of each customer appropriately and directly addressed, individually and personally with that customer.

The Bureau's proposal for world-wide web *publishing* of select complaints and associated responses erodes customer privacy, impairs the confidential nature of the exchange between customer and banker, compromises the supervisory process, and introduces unreliable and misleading information into the market. Instead of fostering informed and responsible consumer choice, the Bureau becomes a purveyor of at best unsubstantiated, and potentially false, information. On the one hand the Database boldly boasts its pedigree as a site of the United States Government, but gives short shrift to its admission that the information posted on its site is unverified and unreliable.

This mistaken policy is made possible only by the Bureau, however well-intentioned, endeavoring to act without statutory authority and contrary to congressional intent. Rather than continue to pursue an unauthorized path via "policy statement," ABA urges the Bureau to focus on the statutory mandate assigned by Congress – overseeing the individual response to consumer complaints, analyzing complaint data for supervisory oversight purposes, and aggregate reporting to Congress. We look forward to working with the Bureau in support of those goals that benefit consumers and help enhance customer service by the banking industry.

I. Summary of Proposal and Comments

The Proposed Policy Statement would supplement two existing policy statements of the Bureau. The first policy statement, finalized in June 2012, established a public consumer complaint Database, but limited it to the disclosure of specific, discrete data from consumer credit card complaints.[3] A second policy statement, finalized in March 2013, expanded the Database to include consumer complaint data related to other, non-credit card financial products and services.[4] The Bureau now proposes further expansion of the Database to include broad-ranging consumer complaint narratives. According to the Proposed Policy Statement, only those narratives for which consumer consent has been obtained and that have been scrubbed of personal information according to a yet-to-be defined "information scrubbing standard and methodology" will be disclosed on the Database.

The Bureau will not review complaint narratives and acknowledges that "the complaint narratives may contain factually incorrect information" that may misinform consumer

[3] 77 Fed. Reg. 37612 (June 22, 2012) (June 2012 Policy Statement).
[4] 78 Fed. Reg. 21218 (April 10, 2013) (March 2013 Policy Statement).

purchasing decisions and result in lost customer and business opportunities as well as "intangible reputational damage" for impacted financial institutions. The Bureau asserts, however, that these risks will be mitigated by the "marketplace of ideas" and by providing responding financial institutions with the option of providing a narrative response that will be posted with the consumer complaint narrative. [5]

ABA supports the Bureau's execution of its statutory obligation "to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products and services."[6] The industry response to these efforts to date has been robust by the Bureau's own measures. We recognize the importance of Bureau oversight of consumer complaint resolution as well as the role consumer complaint data plays in the fulfillment of the Bureau's supervisory and reporting obligations assigned by the Dodd-Frank Act. We have written six comment letters and have met with Bureau staff on multiple occasions to provide banking industry feedback on the consumer complaint resolution, monitoring, and reporting processes Congress directed the Bureau to establish.[7]

Throughout, we have been cognizant of the challenge of building a complaint resolution process, the Consumer Response Portal (Portal), while standing up a new agency, and we recognize the Bureau's interest in forging new pathways as a 21st century, data-driven agency. We have, however, consistently highlighted objections to Bureau action that exceeds its statutory authority, including where it avoids use of the APA rulemaking process. As inconvenient as these mandates may be, Congress, in extending rule-writing authority, has consistently emphasized long-standing principles of administrative law designed to promote transparency, accountability, and evidence-based decision-making, which principles require strict observance.

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[5] 79 Fed. Reg. *supra at* 42767.

[6] 12 U.S.C. §5493(b)(3)(A).

[7] *See, e.g.,* Joint Comment Letter of ABA, The Clearing House, the Financial Services Roundtable, and the Consumer Bankers Association to the CFPB Implementation Team's Proposal to Establish a Consumer Complaint and Inquiry Database, dated February 8, 2011, *available at* http://www.aba.com/Compliance/Regulatory/Documents/2cd9109b2ca1472f8dd2dc07a15f20c4cl_consumercomplaint2011Feb.pdf;
ABA Comment to Proposed Consumer Response Intake Fields, dated August 1, 2011, available at http://www.aba.com/Compliance/Regulatory/Documents/fd1c842298b843a888d583c1f1d2aed6LtrtoCFPBAug1.pdf;
ABA Comment to the Proposed Policy Statement on Disclosure of Certain Credit Card Data, dated January 30, 2012, *available at* http://www.aba.com/Advocacy/commentletters/Documents/69a1ff377f91425b9f085064d0ad0626cljanuary2012finalrevised.pdf;
ABA Comment to Proposed Policy Statement Regarding Disclosure of Consumer Complaint Data Related to Non-credit Card Financial Products, dated July 19, 2012, *available at* http://www.aba.com/Advocacy/commentletters/Documents/clConsumercomplaintdata2012July.pdf;
ABA Comment to the Bureau's Request for a Generic Clearance for Consumer Complaint and Information Collection System, dated April 23, 2013, *available at* http://www.aba.com/Advocacy/commentletters/Documents/clPRA_ConsumerResponse2013.pdf; and
ABA letter regarding the Company Portal Agreement, dated September 25, 2013, *available at* http://www.aba.com/Compliance/Documents/cl09252013CompanyPortalServicesAgreementFinal.pdf.

II. There Is No Authority for a Public Consumer Complaint Database

As the Bureau is aware, from its initial proposal to establish a public consumer complaint database, ABA has raised objections that this effort exceeds the unambiguous statutory mandate of Congress establishing the Bureau's responsibility for the oversight and reporting of consumer complaints, found in Dodd-Frank Act sections 1013 and 1034.[8] An analysis of the statutory structure and the background of Title X of the Dodd-Frank Act as well as the text of sections 1013 and 1034 unequivocally demonstrate that Congress considered, and clearly defined, the precise role of the Bureau with regard to consumer complaint management and disclosure. The Bureau's regulatory policy choices should be governed by "step-one" of the analysis established by the Supreme Court in *Chevron v. Natural Resources Defense Council,* "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[9]

A. Analysis of the structure of Title X of the Dodd-Frank Act demonstrates that the relevant statutory provisions governing complaint management and disclosure are sections 1013 and 1034, not sections 1021 or 1022.

In *K Mart Corp. v. Cartier,* the Supreme Court recognized that the structure of a statute provides important information about Congressional intent; the Court explained that analysis should look "to the particular statutory language at issue, as well as the language and design of the statute as a whole" in order to ascertain the statute's "plain meaning."[10] We agree that an analysis of the structure of Title X of the Dodd-Frank Act provides compelling evidence of Congress' intent for the Bureau's authorities and obligations with respect to consumer complaints.

In Subtitle A, "Bureau of Consumer Financial Protection," Congress established the new agency and defined its executive and administrative powers. Section 1013 falls within Subtitle A and is titled "Administration." It addresses, unsurprisingly, administrative matters relating to the creation of the new agency, including the employment of personnel, compensation and benefits, the establishment of an agency ombudsman, and the formation of "specific functional units."

Among the units that Congress ordered the Director to set up is a unit dedicated to "Collecting and Tracking Complaints," and in section 1013(b)(3) Congress clearly outlined the responsibilities of that unit: (1) "facilitat[ing] the centralized collection of, monitoring of, and response to consumer complaints;"[11] (2) routing complaints to the Federal Trade Commission

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[8] 12 U.S.C. §5493; 12 U.S.C. §5534.

[9] *Chevron v. Natural Resources Defense Council,* 467 U.S. 837,842 (1984).

[10] *K Mart Corp. v. Cartier,* 486 U.S. 281, 291 (1988). *See also, Robinson v. Shell Oil Co.,* 519 U.S. 337, 341 (1997)("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

[11] 12 U.S.C. §5493(b)(3)(A).

(FTC), and other Federal and State agencies, where appropriate ;[12] (3) reporting to Congress;[13] and (4) data sharing with the FTC, other Federal and State agencies "to facilitate preparation of the reports [to Congress], supervision and enforcement activities, and monitoring of the market for consumer financial products and services."[14] Nothing in the list contemplates the establishment of a public database of consumer complaints and complaint narratives.

Congress revisited the topic of complaint management in Subtitle C, "Specific Bureau Authorities." In section 1034, "Response to Consumer Complaints and Inquiries," Congress further defined one of the responsibilities assigned in section 1013, facilitating and overseeing the individualized response to consumer complaints. Section 1034 clearly states:

> (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 –
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> 1) steps that have been taken 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.
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> (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 –
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> 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.[15]

The assigned responsibilities parallel those adopted by the prudential regulators pursuant to section 18f of the Federal Trade Commission Act. Section 18f authorized the Federal Reserve, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) to establish a "separate division of consumer affairs which shall receive and take appropriate action upon complaints with respect to [unfair and deceptive acts and

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[12] *Id.*

[13] 12 U.S.C. §5493(b)(3)(C).

[14] 12 U.S.C. §5493(b)(3)(D).

[15] 12 U.S.C. §5534.

practices]."[16] Dodd-Frank Act amendments to section 18f, which effectuated the transfer of rule writing authority for UDAP from the Federal Reserve to the Bureau, also necessitated reconstituting the prior statutory direction to prudential regulators to process consumer complaints. Section 1034 provides that reconstituted statutory authority for the Bureau and the prudential regulators.

Although each of the prudential regulators implemented section 18f individually, they all have established programs to collect consumer complaints and route them to the appropriate financial institution for individualized, and confidential, resolution within defined time frames. The prudential regulators exercise oversight of bank responses to ensure that banks adequately address all federal consumer law violations. In addition, as part of the supervisory review process, the prudential regulators monitor each bank's consumer complaint data to identify potential legal and compliance violations that warrant further examination and correction. This process assures both individual responses and appropriate program corrections benefiting the bank's entire customer base, while simultaneously protecting individual privacy. It also assures privileged treatment of supervisory information regarding the bank's operations and that unfounded complaints do not expose the bank to unwarranted reputation risk. Finally, section 18(f) established a Congressional reporting process that was coordinated by the Federal Reserve.

In sections 1013 and 1034, Congress clearly and completely articulated its expectation that the new agency's consumer complaint management, oversight, and reporting process mirror this established format. Furthermore, through the language of 1034(b), Congress firmly placed this authority within the limits of the Bureau's supervisory jurisdiction, thereby underscoring that complaint handling was an inextricable part of the Bureau's *supervisory* oversight, not a part of its market research, regulatory standard setting, or data publication powers.

ABA believes the Bureau's reliance on Dodd-Frank Act sections 1021 and 1022 is misplaced. Sections 1021 and 1022 fall within Subtitle B, "General Powers of the Bureau;" Section 1021 outlines the Bureau's "Purpose, Objectives, and Functions," and section 1022 establishes its rulemaking authority. Neither section expressly grants authority to the Bureau to establish a public Database or to disclose publically consumer complaint narratives.

Instead, section 1021 assigns broad objectives to the Bureau to ensure that "consumers are provided with timely and understandable information to make responsible decisions" and that "markets for consumer financial products and services operate transparently and efficiently."[17] These general objectives, however, cannot be read to expand, modify, or override Congress' specific articulation of its expectations for consumer complaint management and disclosure set forth in sections 1013 and 1034.

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[16] 15 U.S.C. §57a(f).

[17] 12 U.S.C. §5511(b)(1) and 12 U.S.C. §5511(b)(5).

Similarly, provision by Congress – in a statutory section devoted to rulemaking – of authority to "gather and compile information from a variety of sources, including ... consumer complaints,"[18] cannot be construed to imply Congressional authority to effect such a significant and controversial change from existing law and practice regarding consumer complaint management where Congress has already spoken with specificity. Nor does the authorization – also in a statutory section devoted to rulemaking – to "make public ... information obtained by the Bureau under [§1022]...through aggregated reports or other appropriate formats designed to protect confidential information"[19] provide specific direction by Congress to waive its clear instructions for handling consumer complaints. Neither section constitutes sufficient evidence of Congressional intent to authorize the public disclosure of individual complaint data and narratives, a course of action which clearly represents a novel and radical departure from existing and ongoing banking agency practice with regard to consumer complaints.

Courts are unwilling to conclude that Congress has effected a radical change in existing law or regulatory policy unless it does so clearly. Thus, the Supreme Court observed in *Whitman v. American Trucking Association, Inc.*, "Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not ... hide elephants in mouse holes."[20]

As Congress was aware, existing banking agency practice sought to ensure individual response to consumer complaints, analysis of complaint data for supervisory oversight purposes, and aggregate reporting to Congress, all processes kept entirely within supervisory bounds. ABA believes that such a radical change as the *public reporting* of complaint data and narratives would not have been made "in vague terms or ancillary provisions" related to rulemaking or defining the powers of the agency. Rather, Congress would have authorized the change in the Dodd-Frank Act sections specifically devoted to consumer complaints.

B. <u>The statutory text of Dodd-Frank Act sections 1013 and 1034 is clear and unambiguous.</u>

The relevant inquiry must focus on the text of sections 1013 and 1034 to determine whether Congress authorized the public disclosure of consumer complaint data and narratives. As explained above, *Chevron* teaches that the initial question must be whether Congress has "directly spoken to the precise question at issue." Analysis of the text of sections 1013 and 1034 demonstrates that Congress considered and clearly delineated the circumstances and manner by which the Bureau may collect, resolve, and share consumer complaints.

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[18] 12 U.S.C. §5512(c)(4).

[19] 12 U.S.C. §5512 (c)(3)(B).

[20] *Whitman v. American Trucking Association, Inc.*, 531 U. S. 457, 468 (2001). *See also United Savings Association v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988)("Such a major change in the existing rules would likely not have been made without specific provision in the text of the statute, cf. Kelly v. Robinson, 479 U.S. 36, 47 (1986); it is most improbable that it would have been made without even any mention in the legislative history.")

First, Dodd-Frank Act section 1013(b)(3) describes the purpose of the unit assigned to handle consumer complaints:

> (3) COLLECTING AND TRACKING COMPLAINTS
> (A)IN GENERAL.—The Director shall establish a unit whose functions shall include establishing a single, toll-free 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 and services. The Director shall coordinate with the Federal Trade Commission or other Federal agencies to route complaints to such agencies, where appropriate.[21]

The statutory text is clear, the database Congress envisioned the Bureau using was intended "to facilitate the centralized *collection of, monitoring of, and response* to consumer complaints." This charge mirrors the bounds of the then existing, long-standing, and well-known model of individualized handling of consumer complaints established previously by the banking agencies under strict protections for confidentiality. Congress did not authorize the establishment of a database to *publish* consumer complaint information.

Indeed, other Dodd-Frank Act provisions confirm that Congress was specific when assigning to the Bureau particular responsibilities related to consumer complaints. Section 1021 describes the primary functions of the Bureau, including "collecting, investigating, and responding to consumer complaints."[22] Congress did not authorize the Bureau to *publish* consumer complaint data, a consequential omission that takes on added significance in light of the fact that the next enumerated function assigned to the Bureau (regarding market information) states, "collecting, researching, monitoring, and *publishing* information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets."[23] Congress intentionally made a distinction between these authorities regarding market data and provisions applying to individual consumer complaints. Their juxtaposition underscores the clarity of Congress' intent to exclude *publication* of consumer complaints from Bureau authority.

Moreover, Congress addressed the disclosure of consumer complaint information but expressly chose to limit its disclosure to specific information, provided to specific entities, and only under conditions intended to ensure the privacy of consumers' personally identifiable information. Section 1013(b)(3) states:

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

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[21] 12 U.S.C. §5493(b)(3).
[22] 12 U.S.C. §5511(c)(2).
[23] 12 U.S.C. §5511(c)(3)(emphasis added).

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 or 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 of the prior 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 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 the prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.** The prudential regulators, the Federal Trade Commission, other Federal agencies shall share data relating to consumer complaints regarding consumer financial products and services with the Bureau, subject to the standards applicable to Federal agencies for protection of confidentiality of personally identifiable information and for data security and integrity.[24]

The highlighted statutory text clearly shows significant Congressional care to limit access to and use of consumer complaint information, including a commitment to preserving the privacy of personally identifiable information. First, *reporting* is limited to an annual report to *Congress* on "information and analysis about complaint numbers, complaint types, and where applicable, information about resolution of complaints"—i.e., aggregate data about consumer complaints, not disclosure – even to Congress – of individual complaint information. Second, *data sharing,* which is limited to sharing with Federal and State agencies, is further restricted to specific

[24] 12 U.S.C. §5493(b)(3)(A)-(D)(emphasis added).

purposes, namely "to facilitate preparation of the reports [to Congress], supervision and enforcement activities, and monitoring of the market for consumer financial products and services." Third, *access* to complaint information is restricted to government agencies, provided those agencies will protect personally identifiable information and maintain data security and integrity.

The degree of specificity of the statutory text quoted above unequivocally demonstrates that Congress considered and made explicit policy choices regarding the entities to whom consumer complaint information would be disclosed and the content and circumstances for those disclosures. As noted previously, the disclosure of complaint information is inextricably tied to the Bureau's supervisory function—so much so that the confidential supervisory judgments that accompany complaint analysis (and that evaluate the data in the context of the provider's operations and compliance management) are explicitly precluded from being shared with the complaining consumer by Section 1034(c)(2)(D).

Following *Chevron*, the Bureau must implement Congress' resolution of these matters; it is not free to substitute its judgment or intentions in place of the will of Congress.

A recent case decided by the U.S. District Court for the District of Columbia, *American Petroleum Institute v. SEC,*[25] demonstrates the court's unwillingness to conclude that the plain meaning of one statutory section can be subject to override by another without clear statutory evidence of Congressional intent. In *API v. SEC*, the court reviewed a Dodd-Frank Act rule promulgated by the Securities and Exchange Commission (SEC), which amended section 13(q) of the Securities and Exchange Act to increase the transparency of payments made by U.S. companies to foreign governments for oil, natural gas, or mineral extractions. At issue were two separate subsections of amended 13(q), subsection (2)(A), titled "Disclosure," which requires a company "to include in an annual report of the resource extraction issuer information relating to any payment made... to a foreign government or the [U.S.] Government for the purpose of the commercial development of oil, natural gas or minerals,"[26] and subsection (3)(A), titled "Public Availability of Information," which directs that "to the extent practicable, the Commission shall make available online, to the public, a ***compilation*** of the information required to be submitted under paragraph (2)(A)."[27]

As directed by the Dodd-Frank Act, the SEC promulgated a final rule that defines the information that must be provided in the annual disclosure and that requires the public filing of the individual company information, not a compilation of that information as stakeholders had urged to protect the confidentiality of the information. The district court rejected the SEC's rule, stating:

> Given the annual report provision's silence as to public disclosure – either by referring to it specifically or by using other words that necessarily entail

[25] *American Petroleum Institute v. SEC,* 953 F.Supp.2d 5 (D.D.C. 2013).
[26] 15 U.S.C. §78m (q)(2)(A).
[27] 15 U.S.C. §78m(q)(3)(emphasis added).

> public availability – the Commission's argument that the statute unambiguously requires public filing is a climb up a very steep hill.... Moving to the annual report requirement in the context of section 13(q) things get even worse for the Commission. After establishing the basic disclosure requirement in subsection (2)(A), section 13(q) expressly addresses "[p]ublic availability of information in subsection (3)(A) ... The separate discussion eliminates any inference that Congress relied on (2)(A), the disclosure provision, to establish the information's public availability. Rather, it shows that "[w]here Congress wanted to provide for" public availability, it did so explicitly. [citations omitted.] Viewing section 13(q) as a whole, then, shows that subsection (2)(A), consistent with its title, governs "[i]nformation required" to be "[d]isclosed," while subsection (3)(A) governs that information's "[p]ublic availability."[28]

It is important to note that the Securities and Exchange Act is essentially a *disclosure* statute. Nevertheless, the court refused to ignore the unambiguously expressed intent of Congress and rejected a rule that would have required the public disclosure of the annual report information, a requirement which Congress did not authorize. It is relevant that the SEC did not challenge the court's decision. ABA believes that in light of the unambiguous statutory language of sections 1013 and 1034, in which Congress clearly and completely described the Bureau's responsibilities with regard to consumer complaints, a court would reject the Bureau's reliance on unrelated statutory provisions to authorize the publication of consumer complaint data or unstructured narratives.

C. The legislative history and context confirm the plain language of the statute.

As discussed above, the plain language of the statute could be the analytical "starting and stopping point." Nevertheless, judicial reference to legislative history and historical context for background is commonplace. The Supreme Court often observes that a "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and the general objectives Congress sought to achieve."[29] ABA believes that review of the Dodd-Frank Act's legislative history and context provides further support for the conclusion that Congress never contemplated the establishment of a public consumer complaint Database.

From the initial bill that was introduced in the House of Representatives in December 2009 to the legislation that was ultimately enacted into law on July 21, 2010, the statutory provisions that address consumer complaints were repeated almost *verbatim*, and they address only the collection, tracking, and resolution of consumer complaints and the sharing of complaint data

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[28] *API v. SEC, supra at 20.*

[29] *Wirtz v. Bottle Blowers Association*, 389 U.S. 463, 468 (1968); *Shell Oil Co. v Iowa Department of Revenue*, 488 U.S. 19, 26 (1988)(purposes of the Outer Continental Shelf Lands Act, as evidenced in legislative history, confirm a textual reading of the statute and refute the oil company's reading).

with the Federal banking agencies, other Federal agencies, State regulators, and Congress.[30] There is nothing in the text of the bills considered by Congress to suggest that Congress ever intended the establishment of a public database of consumer complaint data.

In addition, neither the 2008 law review article which is credited with introducing the concept of a consumer financial protection regulator nor the Obama Administration's Whitepaper on Financial Services Industry Restructuring mention the establishment of a consumer complaint database.[31] In fact, the Administration Whitepaper includes complaints within the "wide variety of tools" the proposed consumer regulator (the Consumer Financial Protection Agency or CFPA) should have at its disposal. It describes a role for complaint management, oversight, and disclosure comparable to that ultimately enacted by the Dodd-Frank Act. The Whitepaper states:

> Complaint data are an important barometer of consumer protection concerns and must be continuously communicated to the persons responsible for consumer regulation, enforcement, and supervision. Currently, however, many consumers do not know where to file a complaint about financial services because of the balkanized regulatory structure. The CFPA should have responsibility for **collecting and tracking complaints** about consumer financial services **and facilitating complaint resolution** with respect to federally supervised institutions. Other federal supervisory agencies should refer any complaints they receive on consumer issues to the CFPA; **complaint data should be shared across agencies.** The states should retain primary responsibility for tracking and facilitating resolution of complaints against other institutions, and the CFPA should seek to coordinate exchanges of complaint data with state regulators.[32]

The focus of this strategy found in the architecture of what became the Bureau was not to oust the existing agency complaint resolution process, but instead to make sure that the appropriate agency oversees the resolution of each consumer complaint, the agency that also has supervisory and enforcement jurisdiction over the institution that is the subject of the complaint. In other words, it endorses the existing complaint resolution and supervisory

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[30] HR 4173, The Wall Street Reform and Consumer Protection Act of 2009 (as introduced in House) contained the following language that was repeated with only minor, immaterial changes through each iteration of the bill considered by Congress. The relevant language includes the following: "(1) the Director shall establish a unit whose functions shall include establishing a central database, or utilizing an existing database, for **collecting and tracking** information on consumer complaints about consumer financial products or services and resolution of complaints;" (2) to the extent permitted by law and the regulations prescribed by the Director regarding the confidential treatment of information, the Director **shall share data relating to consumer complaints with Federal banking agencies, other Federal agencies, and State regulators;**" and (3) "the Consumer Financial Protection Agency shall establish a single, toll-free telephone number for consumer complaints and inquiries concerning institutions regulated by such agencies and a system **for collecting and monitoring complaints** and, as soon as practicable **a system for routing** such calls to the Federal financial regulatory agency that primarily supervises the financial institution." *See* https://beta.congress.gov/bill/111th-congress/house-bill/4173/all-actions.

[31] *See* Oren Bar-Gill & Elizabeth Warren, "Making Credit Safer," University of Pennsylvania Law Review, Vol. 157, No.1 (Nov. 2008); Obama Administration Financial Services Industry Restructuring Proposal (June 2009)(Whitepaper); Elizabeth Warren, "Unsafe at Any Rate," Democracy (Summer 2007) *available at* http://www.democracyjournal.org/5/6528.php?page=1.

[32] Whitepaper, *supra at* 59-60 (emphasis added).

processes and seeks to make them more efficient—not to make them into megaphones for publicly broadcasting individual financial complaints without regard for their accuracy, for their potential for misleading consumers, or for their potential for misrepresenting an institution's responsiveness to individual consumers or the strength of its compliance program.

Moreover, at the time that the Administration and Congress were considering the appropriate responsibilities and authorities for the new consumer regulator, both were well-aware of Congress' explicit decision the year earlier to direct the Consumer Product Safety Commission (CPSC) "to establish and maintain a database on the safety of consumer products that is – (A) publically available; (B) searchable; (C) accessible through the internet website of the Commission." [33] In fact, throughout 2009 and 2010, the CPSC was engaged in implementing that directive, a process that required the CPSC to report periodically to Congress on its progress.[34]

The amendment of the Consumer Product Safety Act (CFPA) underscores another important point—the issues presented by the proposal to publish consumer complaint data and narratives are precisely the kind of judgments that should be, and increasingly are, resolved by an elected Congress, not agency fiat. As Administrative Law Professor Richard J. Pierce explains, "The traditional institutional rivalry between two politically accountable branches gives Congress a powerful incentive to resolve as many policy disputes as it can once it knows that the Executive will have the power to resolve those disputes Congress delegates but does not resolve by statute." [35] Accordingly, when Congress directed the CPSC to establish a public product safety database, it debated and resolved the many challenging policy issues presented. For example, the Consumer Product Safety Improvement Act (CPSIA) defined what should constitute a "report of harm," who can file a report, how confidential information should be treated, and how manufacturers can challenge the accuracy of a report on the database.[36]

It is fair to assume that neither Congress nor the Administration intended at the time the Dodd-Frank Act was being debated and voted upon that a comparable public database of consumer complaint data be authorized. Had Congress intended to authorize the Bureau to establish a public database, it would have delegated that authority expressly as it did when it enacted the CPSIA and directed the CPSC to establish a public product safety database.[37]

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[33] 15 U.S.C. §2055a. (On August 14, 2008, Congress enacted the Consumer Product Safety Improvement Act (CPSIA) which amended the CPSA and added a new section 6A, "Publically Available Consumer Product Safety Information Database").

[34] As required by statute, the CPSC conducted extensive pre-implementation outreach and reported to Congress on that outreach throughout 2009. The CPSC issued a notice of proposed rulemaking on May 24, 2010, and a final rule on December 9, 2010. *See* 75 Fed. Reg. 29156 (May 24, 2010) and 75 Fed. Reg. 76832 (December 9, 2010).

[35] *See* Richard J. Pierce, Jr. *Administrative Law Treatise*, Fifth Edition (2010) Vol. I, p. 164.

[36] *See* 15 U.S.C. §2055a.

[37] *See FCC v. NextWave Personal Communications Inc.,* 537 U.S. 293, 302 (2003)(Recognizing that when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly."); *Meghrig v. KFC Western, Inc.,* 516 U.S. 479, 485 ("Congress... demonstrated in [the Comprehensive Environmental Response, compensation and Liability Act] that it knew how to provide for recovery of cleanup costs, and ... the language used to define the remedies under [the Resource conservation and Recovery Act] does not provide that remedy.")

D. Related legislative history confirms Congress' commitment to preserving the privacy of consumer financial information.

In addition, there is evidence of Senate debate and legislative action during the final days before passage of the Dodd-Frank Act that further demonstrates Congress' commitment to preserving the privacy of consumer financial information and, in that regard, Congress' intention that the Bureau's data disclosure authorities would be "nothing new."

The debate concerned a provision in the bill being considered by the Senate, section 1071, which was intended "to identify business and community development needs" by requiring depository institutions to record the following information for deposits: the account number, the dollar amount, and the customer's geocoded address. Section 1071 also would have required the Bureau to disclose that information publicly after removing any personally identifiable data elements and replacing the geocoded addresses with census tract information.

Senator Shelby strongly objected to section 1071, and Senator Snowe submitted an amendment to strike the provision. That amendment was adopted by a voice vote.[38] During the course of this action, Senator Dodd reassured his colleagues as follows:

> I wish to address the claim that [ ] the bill gives the consumer financial protection agency the authority to request and hold reports from any covered entity – including reports from banks about their types of accounts and the balances in each account. In fact, just as regulators today collect and share information about the companies they oversee, the Consumer Financial Protection Bureau will be able to collect information and share it with other regulators. **There is nothing new about that at all. But unlike some of the claims that have been made that this information will be made public, that is not true either. That is false. Strong privacy protections are included in our bill to make sure that proprietary, personal, or confidential consumer information is kept just that – private.**[39]

Thus, Congress struck a provision that would have authorized the Bureau to collect personal financial information, strip it of personal identifiers, and publish it. ABA believes that this is additional, strong evidence that Congress did not intend to enact an analogous "new" public data disclosure authority.

In summary, the clearly expressed intent of Congress – as confirmed by the legislative history and historical context – shows that Congress directed the Bureau to establish a unit *to collect, monitor and respond to* consumer complaints and prescribed to whom and how consumer complaint data will be disclosed to ensure the preservation of the supervisory nature of consumer complaint data and the maximum protection of consumer privacy. Nothing in the

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[38] 156 Cong. Rec. S3071 (daily ed. May 4, 2010).

[39] 156 Cong. Rec. S3003 (daily ed. April 30, 2010)(statement of Sen.. Dodd)(emphasis added).

Dodd-Frank Act authorizes, or even contemplates, the public disclosure of consumer complaint data or narratives. Therefore, the establishment and operation of the Consumer Complaint Database is outside of the law, and the Bureau's proposal to add consumer complaint narratives to the Database should be withdrawn.

III. The Decision to Establish the Database and the Proposal to Publish Consumer Complaint Narratives Cannot Skip Implementation By APA Rulemaking.

Beginning with the Bureau's initial proposal to establish the Database, the Bureau has asserted that it is acting pursuant to a "policy statement," which is, therefore, exempt from the notice and comment rulemaking procedures of APA §553(b). Notwithstanding this characterization, the Bureau has expressed its commitment to "transparency and robust engagement with the public," reporting in both the June 2012 and March 2013 Policy Statements that it received and considered "substantial" public feedback.[40] The Bureau's outreach, however, is not a substitute for APA rulemaking. The Bureau's attempt to forego APA rulemaking is either an admission that the Bureau lacks legal authority to proceed or a further disregard of the application of legal strictures to its activities. As such, the Bureau would be denying both the lack of legal foundation for its action and the statutory obligations for public rulemaking, if it had a legal basis for those actions.

It is well established that a statement of policy that has a "binding effect" is a legislative rule subject to notice and comment procedures of APA §553. In *Pacific Gas & Electric Co. v. FPC*, the D.C. Circuit applied the binding effect test and in doing so described the difference between a legislative rule and a policy statement. The court wrote:

> A properly adopted substantive rule establishes a standard of conduct which has the force of law.... A general statement of policy, on the other hand, does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.[41]

While the two previous Policy Statements did announce the Bureau's intention to establish and then expand the Database, they could only have been considered "tentative" and non-binding *if* the Bureau did not require entities subject to its supervisory jurisdiction to receive consumer complaints through the Consumer Response Portal and *if* data from all such complaints were not reported automatically on the Database—neither of which is true.

A recent case considered by the D.C. Circuit illustrates that the focus is on whether the policy "purports to bind" so that "affected private parties are reasonably led to believe that failure to

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[40] 77 Fed. Reg. *supra at* 37560;.78 Fed. Reg. *supra at* 21220.

[41] *Pacific Gas & Electric Co. v. FPC*, 506 F.2d. 33, 38 (D.C. Cir. 1974).

conform will bring adverse consequences." In *Electronic Privacy Information Center v. Department of Homeland Security*, the court concluded that a Transportation Security Agency (TSA) policy that required airline passengers to go through a full-body scanner or to opt for a pat-down is a legislative rule, not an exempt policy statement, because compliance was mandatory at airport checkpoints that are equipped with scanners.[42] We believe that the mandatory nature of the Bureau's Consumer Complaint Portal and Database would also be found to constitute a binding rule that could not have been appropriately exempted from APA rulemaking.

The fact that a consumer has the choice to opt in to the publication of a complaint narrative and that a bank is free to choose whether to publish its response would not result in a different conclusion with regard to the Proposed Policy Statement. In *Electronic Privacy Information Center, t*he TSA made a similar argument, which the court dismissed summarily:

> To be sure, [the passenger] can opt for a patdown but, as the TSA conceded at oral argument, the agency has not argued that option makes its screening procedures nonbinding and we therefore do not consider the possibility. We are left, then, with the argument that a passenger is not bound to comply with the set of choices presented by the TSA when he arrives at the security checkpoint, which is absurd.[43]

It is clear in the Proposal that the publication of the complaint narrative would bind the financial institution to the procedure outlined in the Proposal. The financial institution could opt not to provide a response, but it cannot opt not to be the subject of the Bureau's publication of the complaint data and its effects, including the effects of government publication of false or misleading information.

Courts also hold that policy statements that "bind" the agency are legislative rules that must be adopted by notice and comment rulemaking. In *Community Nutrition Institute v. Young,* the D.C. Circuit concluded that a policy statement that "purports to bind" an agency's staff by reducing staff discretion to prosecute cases is a legislative rule. As the court explained, "If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is--a binding rule of substantive law."[44] Similarly, in *Cohen v. United States*, the D.C. Circuit concluded that an IRS notice in which it announced a method of processing certain requests for refunds was a legislative rule, not a policy statement, because it "bound the Service, tax collectors and taxpayers."[45]

To endeavor to protect personal financial information from disclosure, the Bureau must subject itself to binding rules for scrubbing personal identifiable information from narratives and

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[42] *Electronic Privacy Information Center v. Department of Homeland Security*, 653 F.3d 1, 16 (D.C. Cir. 2011)(citing *General Electric Company v. EPA*, 290 F.3rd 377, 383 (D.C. Cir. 2002)).
[43] *Id.*
[44] *Community Nutrition Institute v. Young,* 818 F.2d 943 (D.C. Cir. 1987).
[45] *Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009).

company responses. In addition, whatever standards the Bureau might apply to assure that the complaint data is accurate, complete, and unbiased will only be reliable to the extent the Bureau binds itself to such standards.[46]Applying *Community Nutrition,* a court would likely conclude that the Proposed Policy Statement is "a binding rule of substantive law," or a legislative rule, that cannot be exempted from APA notice and comment rulemaking.

A. The APA and the Dodd-Frank Act impose important procedural and substantive standards.

Neither the Bureau's assurance of its commitment to "transparency and robust engagement with the public regarding its actions" nor its invitation to the public to provide comment on the Proposed Policy Statement can substitute for APA rulemaking. Both the APA and the Dodd-Frank Act impose important procedural and substantive standards essential to promote transparency, fact-based decision-making, and accountability.

APA §553(c), as interpreted by the courts reviewing agency rules under an "arbitrary and capricious standard," requires an agency:

> [T]o set forth the basis and purpose of the rule in a detailed statement ... in which the agency refers to the evidentiary basis for all factual predicates, explains its methods of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates to and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted.[47]

Section 1022(b) of the Dodd-Frank Act imposes additional standards for rulemaking:

> In prescribing a rule under the Federal consumer financial laws[48]—
>
> (A) The Bureau shall consider—
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> i. the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products and services resulting from such rule; and
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> ii. the impact of proposed rules on covered persons, as described in section 1026, and the impact on consumers in rural areas.

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[46] As noted at pp. 23-25, *infra,* the Proposal is deficient in assuring the objectivity of complaint data, but should the Bureau address that deficiency, it must do so through APA rulemaking.

[47] *Administrative Law Treatise, supra at* 593.

[48] In as much as the Bureau invokes section 1022 as the authority for its Proposal, it should at least comply with the requirements of that section.

(B) The Bureau shall consult with the appropriate prudential regulators or other federal agencies prior to proposing a rule and during the comment process regarding consistency with prudential, market, or systemic objectives administered by such agencies.[49]

Finally, Dodd-Frank Act section 1022(d) requires an assessment of significant rules and publication of a report on that assessment (to be issued after the agency has provided the opportunity for public comment). Assessments must occur within five years of the effective date of a rule.[50]

These statutory requirements impose important procedural and substantive standards essential to promote public engagement, evidence-based decision making, and accountability. Review of the June 2012 and March 2013 Final Policy Statements, however, demonstrates that despite the Bureau's professed commitment to "robust" public engagement and its assertion that it considered "substantial" public feedback, the Final Policy Statements do not reflect the rigorous, fact-based decision making that would have occurred had the Bureau engaged in rulemaking under the APA and the Dodd-Frank Act.

Instead, the Final Policy Statements are basically summaries of stakeholder comments culminating in subjective policy decisions by the Bureau that consumers will benefit from publication of unverified complaint data and that the "marketplace of ideas" will correct data inaccuracies and other limitations of the data. Rather than empirical analysis of costs and benefits, there are promises of future plans to study key issues—promises that have yet to be realized.

For example, responding to the banking industry's challenge to the Bureau's assertion of a "link between the availability of complaint information and informed consumer decision making," the Bureau simply asserts that it has "plans to study the effectiveness of its policy on an ongoing basis."[51] Similarly, the Bureau dismissed concerns raised about the possibility of consumers being misled by unverified, random data, stating that it is open to "further suggestions ... on how best to provide additional context for the public database."[52] Finally, responding to concerns that consumers may be misled by complaint data that have not been normalized, the Bureau announced its intention "to work further with commenters on specific normalization proposals."[53] To our knowledge, the Bureau has yet to initiate these studies or public outreach.

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[49] 12 U.S.C. §5512(b).

[50] 12 U.S.C. §5512(d).

[51] 77 Fed. Reg. *supra at* 37560; *see also* 78 Fed.Reg. *supra at* 21220.

[52] 77 Fed. Reg. *supra at* 37562.

[53] 77 Fed. Reg. *supra at* 37564; *see also* 78 Fed.Reg. *supra at* 21222. In addition, in the March 2013 Policy Statement, the Bureau promised that stakeholder concerns regarding privacy issues related to the Fair Debt Collection Practices Act would be considered and addressed before the Bureau began accepting debt collection complaints and disclosing those data. However, the Bureau began posting complaints regarding debt collection in November 2013, apparently without resolving this issue. *See* 78 Fed.Reg. *supra at* 21223.

The decision about whether to publish consumer complaint narratives should not be reached by similarly subjective and inadequate policy analysis. The magnitude of the issues presented demands fulsome analysis of the privacy risks presented and how to manage those risks; empirical evaluation of the potential benefits and costs to consumers and industry; and consideration of alternative means to inform consumer decision making about financial products and services.

B. There is no way forward without a statutory mandate.

ABA urges the Bureau to withdraw the proposal to publish complaint narratives. The Bureau has no statutory authority to proceed, and doing so would contravene congressional intent. Our Constitutional system of checks and balances requires an elected Congress to decide which duties, obligations, and authorities to extend to regulatory agencies in order to strike the balance between significant competing interests, such as those presented in this Proposal: consumer privacy, the utility and accuracy of the information to consumers (including the risks of misleading information), and the reputational and other costs to industry. In addition, as demonstrated by the establishment of the CPSC database, had Congress intended the Bureau to have this authority, Congress would have articulated standards to be implemented via rulemaking to preserve the balance Congress struck.

Having a clear and well-defined statutory mandate to provide structure for notice and comment rulemaking is critical for transparent and fact-based analysis of all of the issues presented. Its absence is a foundational flaw of the Proposed Policy Statement.

IV. The Banking Industry's comments on the Proposed Policy Statement

ABA members have identified a number of gaps between the Bureau's proposal and the fundamental requirements that Congress has expected of similar complaint publication systems. In the absence of a congressionally mandated structure, the Bureau's establishment of the complaint database and its proposal to publish complaint narratives and responses falls far short of the fundamental protections for consumer privacy, accurate market information, and supervisory integrity that provide the cornerstone for sound financial services regulation. Our remaining comments address these shortcomings.

A. The publication of the Proposed Policy Statement was premature.

As discussed above, by proceeding via "policy statement" the proposal lacks the structure and analytical rigor that should apply to a matter of this consequence for consumers and industry. The fact that the proposal mentions two on-going research projects – a test of the "scrubbing standard and methodology" to remove personal information from complaint narratives [54] and a

[54] 79 Fed. Reg. *supra at* 42767.

test of the consumer opt-in process[55]-- begs the question, why the proposal was published before these studies were completed. The premature release of the proposal suggests a commitment to a predetermined plan that has characterized the rollout of the Portal and Database. In addition, the Bureau has long promised to update complaint categories chosen by consumers so that they more accurately identify the topic of the complaint. In meetings with the Bureau and prior comment letters, ABA has supported such an update and has expressed the banking industry's interest in providing feedback on the new categories. We believe this work would need to be completed before the Bureau proceeds with this initiative, because it would impact the utility of the information to consumers.

ABA believes strongly that the public must be given an opportunity to review and comment on this work before the Bureau proceeds any further. We note the deliberation that marked the CPSC's implementation of the product safety database. The CPSC conducted research and solicited public feedback before it published a notice of proposed rulemaking. Moreover, recognizing the importance of "getting it right," the CPSC also conducted pilot tests with consumer reports of harm to ensure that the database worked as planned. We believe that the issues presented by the complaint narrative proposal call for similar deliberation and public engagement.

ABA also questions how the Bureau was able to avoid filing for a Paperwork Reduction Act (PRA) clearance to conduct this testing. As we have noted on numerous occasions, the PRA was enacted "to improve the quality and use of federal information to strengthen decision making, accountability, and openness in Government and society;"[56] we strongly discourage efforts to circumvent its review process.

B. <u>The Proposed Policy Statement ignores the substantial costs the Bureau will incur.</u>

By proceeding via policy statement, the Bureau also fails to report on the significant costs the agency has incurred to establish and maintain the Database as well as the costs it will incur from its proposed expansion. We believe that these costs must be calculated and reported publically, before the Bureau were to proceed.

We understand that the Bureau has engaged a consultant to design and test the proposed scrubbing standard and methodology to be used to de-identify complaint narratives and company responses. The cost of this study and the anticipated ongoing cost of scrubbing all narratives and responses should be reported publically prior to proceeding with such a proposal. Similarly, costs incurred (and to be incurred) to design and test a consumer opt-in disclosure should be factored in.

Assuming for the purpose of argument that the Bureau is granted statutory authority to publish complaint narratives, we anticipate that Congress will impose standards to promote the utility

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[55] *Id. at* 42769.
[56] 44 U.S.C. §3501.

of the data similar to those Congress assigned to the CPSC to ensure the accuracy of the product safety database. Accordingly, we assume the Bureau will have to expand consumer response staff in order to have the capacity to assume greater responsibility for the accuracy of consumer narratives published on the Database. At a minimum, these safeguards would include reviewing and responding to narratives alleged to include "materially inaccurate information," to have been submitted in bad faith, or to be in violation of the narrative content guidelines.[57]

C. The Proposed Policy Statement asserts unfounded benefits and ignores costs and adverse effects.

The Proposed Policy Statement recites the policy considerations it believes support the publication of consumer narratives and the risks presented, but there has been no effort to quantify or compare the benefits and costs. On closer examination, many of the asserted benefits are speculative and subjective, lacking in a supporting base of impartial data. For example, the Bureau identifies the fact that consumers will have an opportunity to "share their story" with others as a direct benefit. However, there is no shortage of social media sites for consumers to share their story.[58] Moreover, a government operated site suggests a federal imprimatur to the complaints being published by the agency that styles itself as the champion for all consumers and that carries the words at the top of its website, "An official website of the United States Government."

The Bureau's Database of complaint narratives, as proposed, will allow self-selecting consumers to share only their negative, unverified complaints. The Bureau has not proposed any measures to promote the objectivity, reliability, or utility of the narratives it will publish. Nor has it suggested content guidelines to discourage inappropriate narratives or emotional rants. Despite the Bureau's acknowledgement of the "risk that market participants will draw erroneous conclusions from available data" the Bureau proposes to rely on the "marketplace of ideas" to mitigate this risk. The Bureau places its faith in journalists, consumer advocates, and researchers to supply the necessary context and to normalize the data so that it has utility and relevance for consumers. It does so without acknowledging the demonstrated ability of parties to use the Internet through various campaigns to sway opinion by manipulating open-source comment platforms. In reality, however, journalists, researchers, and consumer advocates will interpret the collective experience of consumers to advance their own agenda, citing "facts" from individual narratives instead of providing a balanced and fully informed evaluation that can only come from knowing the particular details of each complainant's claim.

The Bureau also describes the "indirect benefits" it believes will flow to consumers and the marketplace, including "the effect narratives can have on consumer purchasing decisions." The Proposed Policy Statement relies upon unidentified "research" that shows that "consumer

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[57] *See* the discussion on page 28, *infra.*

[58] *See, e.g.,* Better Business Bureau, Yelp, Google Places, Yahoo Local, Angie's List, and Judy's Book. Perhaps the most famous of these cites is Yelp.com. Since its inception in 2004, consumer use of Yelp has grown dramatically; as of the second quarter of 2014, Yelp reports receiving approximately 138 million unique visitors per month, and it includes 61 million reviews in its collection, including reviews of financial service providers. *See* "About Yelp," *available at* http://www.yelp.com/about.

word of mouth (which includes consumer reviews and complaints) is a reliable signal of product quality that consumers consult and act upon when making purchasing decisions."[59] While we agree that there is a growing body of academic research studying the relationship between online consumer reviews and demand, the vast majority of this research examines reviews for relatively simple and routine purchasing decisions such as where to eat, what to read, or what movie to watch. We are not aware of research demonstrating that consumers rely on social media reviews of complex products or services such as financial products or services. In fact, the opposite premise – namely, that the complexity, diversity, and changeability of consumer financial products makes information acquisition challenging for consumers – led Senator Warren to call for the creation of a consumer financial protector regulator.[60]

Our members report that the accuracy of consumer narratives is dependent on the perception and memory of the consumer and that salient facts and issues may be distorted by consumer understanding and emotion. All too frequently, our members report, they must have several exchanges with a consumer to understand fully the "facts" of the complaint. In addition, complaint narratives often reference account statements or other personal financial records or correspondence that will not be published with the narrative to protect the privacy of the consumer. Obviously, decoupling the narrative from these attachments will negatively impact the ability of the narrative to impart usable information to other consumers. In addition, when narratives have been stripped of confidential information, their ability to inform consumer decision making will be further degraded.

Unlike the extensive record developed by the CPSC and without consideration of the differences between regulated industries and those that are closely and confidentially supervised like financial services, the Bureau's assertions of consumer benefit have neither an adequate legislative nor administrative record. There is no evidence that the Bureau has convened focus groups to review a random sample of de-identified complaint narratives (that present a regulatory, contractual, or policy violation) to investigate whether study participants are willing to read the narrative *and* whether they can glean salient information from the narratives that they would rely on to inform their personal financial decisions. We believe that this is critical, baseline information that must be considered by Congress and the Bureau.

Another indirect benefit cited by the Bureau is its belief that the "utility of the overall Consumer Complaint Database would greatly increase with the inclusion of narratives." This, in turn, "could lead to increased use by advocates, academics, the press, and entrepreneurs" and increased consumer contacts with the Bureau.[61] Presumably, the Bureau equates "consumer contacts" with consumer complaints, for it goes on to point to another benefit that could result, achieving a "critical mass of complaint data" which it believes will increase the

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[59] 79 Fed. Reg. *supra at* 42766.

[60] *See* "Making Credit Safer," *supra at* 11-17 (discussing the "limits of learning" and why even publications like *Consumer Reports* have limited effectiveness informing consumers about consumer financial products and services and correcting perceived market imperfections).

[61] 79 Fed. Reg. *supra at* 42766.

"representativeness of Bureau complaint data."[62] Implicit here are two admissions that speak for themselves: the Database has not received the level of attention and use necessary to justify its cost, and the complaint data is unrepresentative.

C. The proposed publication does not comply with OMB standards for ensuring and maximizing the "utility, objectivity, and integrity" of information disseminated by the government.

A benefit that the Bureau claims as support for the publication of complaint narratives is its assertion that, "The Bureau would benefit by establishing itself as a leader in the realm of open government and open data."[63] In support of this assertion, the Bureau cites an Office of Management and Budget (OMB) Open Government Directive urging agencies to expand access to information and data by making them available online. While acknowledging that publication is only warranted "to the extent permitted by law and subject to valid privacy, confidentiality, security, or other restrictions," the Bureau specifically notes the Directive's suggestion that agencies should "proactively use modern technology to disseminate useful information rather than waiting for specific requests under FOIA."[64]

As ABA wrote in our comment to the initial proposal to establish the Database, we agree with the analysis and conclusion of a January 12, 1991 Interpretive Letter by the Comptroller of the Currency which held that the disclosure of the name of a national bank contained in a consumer complaint is not required under FOIA. As explained in our earlier letter, we believe that information identifying the bank included in a complaint narrative would be exempt from disclosure under FOIA pursuant to exemptions 4 and 8; therefore, we do not agree that the Bureau, by publishing this information, would be preempting a FOIA request.[65]

In addition, although the OMB Directive encourages agencies to make information publically available, it also directs agencies to "make certain that the information conforms to OMB guidance on information quality."[66] Pursuant to that guidance, the Bureau has adopted its own Draft Information Quality Guidelines that promises, "The Bureau strives to ensure and maximize the quality, objectivity, utility, and integrity of the information that it disseminates to the public." To do so the Bureau states that it focuses on maximizing the three following requirements:

- **Utility:** In assessing the usefulness of information disseminated to the public, **the Bureau will consider how the public will use the information.** When

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[62] *Id.*

[63] *Id. at* 42766.

[64] Office of Management and Budget "Open Government Directive," December 8, 2009, *available at* http://www.whitehouse.gov/open/documents/open-government-directive.

[65] *See* ABA Comment Letter to the Proposed Policy Statement on Disclosure of Certain Credit Card Data, dated January 30, 2012,p. 13 & attached OCC Interpretive Letter, *available at* http://www.aba.com/Advocacy/commentletters/Documents/69a1ff377f91425b9f085064d0ad0626cljanuary2012finalrevised.pdf.

[66] *See* OMB Open Government Directive, *supra at* paragraph 2 "Improve the Quality of Government Information."

transparency of information is relevant to an assessment of the public's perception of its usefulness, the Bureau will address transparency – the clear, obvious, and precise nature of the data or analysis – when developing and reviewing information.

- **Objectivity:** The Bureau will consider whether disseminated information is **accurate, clear, complete, and unbiased both in presentation and substance. Information will be presented within its proper context.** Where appropriate, data will be accompanied by full, accurate, and transparent documentation, and will disclose error sources affecting its quality. Analytic results will be generated using sound statistical and research methods.

- **Integrity:** The Bureau will protect information from unauthorized access or revision, to prevent corruption or falsification of information. The Bureau will comply with government-wide security requirements when disseminating information.[67]

It is clear that publishing unverified, non-random, and de-identified complaint narratives would not conform to the Bureau's own information quality guidelines for utility or objectivity. As noted above, the Bureau has not adequately studied whether the narratives will inform consumer choices, and it eschews responsibility for ensuring that published narratives are "accurate, complete and unbiased" or "presented within its proper context." Indeed, the Bureau concedes that neither the complaints nor the responses will be published with "full, accurate and transparent documentation," since they will be stripped of telltale attachments.

In addition, the OMB Open Government Directive states that agencies should not disclose information if doing so would damage compelling interests, such as privacy or confidentiality. Such compelling interests necessarily encompass those enumerated in 1034 (c) (2) such as "confidential supervisory information." While the Bureau plans to take steps to protect the privacy of individuals who submit complaints, we believe that the consumer interests harmed by government publication of misleading information as well as the business interests of responding banks that may be harmed by unverified complaints are also compelling.

Therefore, the OMB Open Government Directive would bar, not support, the proposed publication of consumer complaint narratives. Certainly any empowering statutory authority would expect a system of similar requirements that are lacking in this proposal.

D. <u>The Proposal makes the Bureau a broadcaster of false and misleading information</u>.

Characterizing consumer complaints as "data" in the way data is referred to in the OMB Open Government Directive is to accord it a standard of acceptability and accountability that is not

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[67] CFPB Draft Information Quality Guidelines, *available at* http://www.consumerfinance.gov/informationquality/ (emphasis added).

merited. The Proposal directly contravenes the agency's mission of policing the integrity of marketplace information by transforming the Bureau itself into a platform for unsubstantiated rants or inaccurate representations of operative facts—especially when the Bureau knows such statements to be false or misleading.

The Proposed Policy Statement acknowledges the risk of consumer misinformation and reputational risk to the banking industry but dismisses it, stating, "while there is always a risk that market participants will draw erroneous conclusions from available data, the Bureau [is] persuaded that the marketplace of ideas will be able to determine what the data shows."[68] How many data entries has the Bureau research found will be necessary to give the typical consumer an adequate benefit from this postulated "marketplace of ideas" and how many data entries does Bureau research show that the typical consumer will read? We have been unable to discover the answers to these basic and essential questions about the verifying and cleansing power of the Bureau's assumed marketplace of ideas. Nowhere in the proposal has the Bureau detailed what record evidence "persuades" it of the verity of this pivotal assertion. The Bureau has conducted no analysis or issued any report on whether the consumer complaints it has received since July 2011 would have been useful to consumers (with or without intermediaries) for making choices in the marketplace.

The reality is that Bureau investigators or agency field examiners examine the spectrum of consumer complaints and company responses.[69] Bureau staff evaluates complaints regularly to test the substantive validity and make conclusions about whether a law or regulation has been violated or a bank practice needs to be addressed. In addition, they consider whether individual complaints are representative of broader issues and distinguish among those that indicate provider violations and those complaints that are unfounded. Arriving at such judgments is precisely the purpose for the supervisory oversight Congress *did* authorize. Nevertheless, despite these supervisory conclusions that vindicate the targeted provider, the Bureau posts all complaint "data" and now proposes to publish unverified, anonymous, and even demonstrably erroneous and misinformed allegations in the apparently blind confidence that the "marketplace of ideas" can somehow ferret out truth from falsehood for the readers of its official website.

E. <u>The Proposed Policy Statement fails to quantify potential costs and burdens to industry.</u>

Although the Proposed Policy Statement mentions the risk of reputational harm resulting from the publication of complaint narratives, it dismisses the threat by suggesting that respondents will have the opportunity to post a response. According to the Bureau, "this process will assure

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[68] *Id. at* 42767.

[69] See, CFPB Supervision and Examination Manual Version 2, Part II A, Compliance Management Review, pp. CMR 10 – 11: "Examiners should review records, interview management, and contact consumers if needed to evaluate this consumer response component of the compliance management system. Examiners should: 1. Obtain and review records of recent consumer complaints and inquiries received by CFPB about the entity and its service providers...."

that, to the extent there are factual disputes, both sides of the dispute can be made public."[70] This statement misunderstands the constraints faced by a bank regarding public responses to its customers and underestimates the potential risks and costs.

The potential for reputational harm is of paramount concern to the banking industry and has been from its beginning. It is inherent in the business model of an institution given responsibility to protect and process customers' money.

Notwithstanding the Database disclosure that complaint data is not verified, the publication of a complaint narrative on a government-sponsored database will imply that it is valid, reliable information. Moreover, as will be discussed subsequently, financial institutions will face substantial obstacles to providing an informative and responsive reply. As a result, the publication of complaint narratives may result in lost business opportunities and may cause significant, and immediate, reputational harm to individual banks and to the banking industry as a whole. Ultimately, this may erode consumer confidence in the banking system and lead consumers to withdraw – in whole or in part – from the banking industry, with negative consequences to customers and the overall economy.

In addition, the proposal will significantly increase the costs of responding to consumer complaints. As the Bureau is aware, banks currently devote considerable resources to responding to individual consumer complaints, and the industry's record of resolving complaints in a timely fashion and to the satisfaction of the consumer is strong. According to the Bureau's June 30, 2014, report on the consumer response program, companies have responded to 96% of the complaints sent to them and have closed 92% of them. Of the closed complaints, only 20% of consumers have disputed the response provided. Finally, 97% of the complaints have been responded to according to the time parameters established by the Bureau.[71]

To achieve this level of consumer satisfaction, banks expend considerable resources communicating with the consumer to understand fully the nature of the consumer's complaint, researching what transpired, and drafting a response that fully explains what occurred and that documents the bank's resolution. Our members report that to explain fully to the consumer the bank's resolution of an issue, written responses generally must reference (and attach) contracts, account statements, transaction histories, and previous communications between the consumer and the bank.

The Bureau proposes to permit a bank to publish a response that will be posted with each consumer narrative on the Database. However, to protect the privacy of consumers and bank employees and to preserve confidential business information, our members anticipate that they will have to draft a distinct public response that does not expose personal confidential information, does not discuss specific details about an individual's interaction with the bank,

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[70] 79 Fed. Reg. *supra at* 42767.

[71] *See* Consumer Response: A Snapshot of Complaints Received, July 2014, *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf.

and does not reference any bank documents. As a result, this second, public facing response is unlikely to inform consumers and may appear less than adequately responsive to the complaint narrative.

In addition, drafting two responses will require additional time, diverting resources from the important work of resolving individual complaints and responding to consumer inquiries. In fact, the proposal may result in slower responses to all consumers, undermining Congress' goal of ensuring that consumers receive a timely response to their complaint.[72] As the Privacy Rights Clearinghouse wrote to the Bureau in 2012, "[W]e often find that individuals are hesitant to give out information when they are not sure how it will be used or disclosed."[73] If this is the case, complaint narratives of consumers who opt-in to publication will provide less factual information about their complaint, requiring the bank to contact the consumer for additional information. Thus, responding banks may be forced to request additional time to respond to complaints more often than occurs today.

Moreover, our members have to consider that the publication of a public response, without the benefit and clarification provided by reference to underlying details and documents, would present the opportunity for complaint narratives and responses to become search engines for civil actions, including class actions. The Bureau is willfully blind to this likely dynamic and disregards its implications for the quality or utility of the published information. Proceeding as proposed without explicitly studying this phenomenon illustrates another deficiency in having the Bureau act without statutory authority or administrative process safeguards.

V. Deficiencies of the Current Database

In addition to our criticism of the proposal to publish consumer narratives, the banking industry has identified deficiencies in the current iteration of the Database that make it a flawed foundation for further expansion.

First, the Database fails to employ adequate regulatory safeguards similar to those adopted by the CPSC to promote the accuracy and integrity of the product safety information reported on its public database. For example, the final rule adopted by the CPSC defines a process by which a manufacturer or consumer can assert that a consumer report of harm or a manufacturer response includes "materially inaccurate information" which is defined as "information that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision-making about the product."[74] Upon receipt of a submission of the required documentation and information in support of that assertion, the Commission makes a

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[72] ABA members feel strongly that a narrative should not be posted until the bank has had an opportunity to respond, even if the bank has to request additional time to close the case.

[73] Letter of the Privacy Right Clearinghouse to the Bureau's Proposed Policy Statement on the Disclosure of Certain Credit Card Complaint Data, dated January 30, 2012.

[74] 16 C.F.R. Part 1102.26.

determination and may remove the information determined to be materially inaccurate, correct the information, or add information to the report to correct it.[75]

We understand that the current version of the Bureau's Company Portal Manual permits Portal users to request that "qualifying complaints" be withheld from publication if they are found to contain "materially inaccurate information."[76] There are, however, no guidelines in the Manual for how to request that a complaint be withheld or standards for review of such requests, omissions we believe have discouraged use of the designation. The Bureau has failed to establish a process for identifying a complaint as materially inaccurate, standards by which those determinations will be made, and timeframes that will apply. In addition, the Bureau has failed to promote the accuracy of information reported on the Database by such a simple and fundamental step as informing the industry that it encourages responding companies to identify materially inaccurate complaints.

To reduce the likelihood that the Database becomes a platform for abuse or manipulation by individuals or advocacy groups, the Bureau could employ a process by which banks could notify the Bureau when a complaint has not been submitted in good faith. In addition, the Bureau should have guidelines for the tone and content of consumer complaints. Such guidelines would define appropriate and inappropriate language, establish content standards, and discourage rants about a company's employment practices, facilities or any other matter that does not address the core of the consumer experience at issue with that financial service provider.

Third, as an additional assurance against consumer misinformation, the Bureau would need to adopt a stronger and more conspicuous disclaimer. Currently, the disclaimer states merely, "We don't verify all the facts alleged in these complaints but we take steps to confirm a commercial relationship between the consumer and company," and it is located only on the landing page for the Database, not on the complaint Database itself. The Bureau fails to follow the example of the CPSC, which would call for posting the disclaimer conspicuously on the Database landing page, the Database itself, and on any documents that are printed, downloaded, or otherwise transferred from the Database. A more appropriate disclaimer would state: "The Bureau does not routinely verify the facts alleged in consumer complaints; therefore, complaint data and associated narratives may be inaccurate or incomplete. The Bureau does not endorse the opinions contained in any complaint and does not contend that any complaint is suitable as a basis for consumer reliance."

Fourth, the Database lacks a needed process for a financial institution to identify and block the publication of consumer complaints about matters for which the institution had no responsibility. The publication of these complaints cannot inform consumer decisions about financial service providers or improve the efficiency of the marketplace. For example, our members report that many consumers incorrectly identify a merchant dispute as complaint

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[75] *Id.*

[76] Company Portal Manual, Version 2.10, Revised July 10, 2013.

against the credit card issuing bank. Similarly, consumers often identify the creditor bank and the third-party debt collector or debt buyer in a complaint about the *third-party's* collection practices. We understand that the Bureau has made a "policy decision" to permit the complaint to identify both entities, despite the fact that this improperly inflates the number of debt collection complaints posted on the Database and improperly impugns the reputation of the underlying creditor. This current practice is misleading and misinforms consumers consulting the Database.

Fifth, the Bureau fails to employ an adequately robust and prominent privacy disclosure. Currently, under the heading, "How will you use my information" the Bureau states, "We forward the information you provide so the company can identify you and address your issue. We also share complaint data with state and federal agencies who oversee financial products and services, and we publish a database of non-personal complaint information so the public knows what kinds of complaints we receive and how companies respond." A consumer must search the page to find a link to the Bureau's complete Privacy Act Statement, which is located at the bottom of the page among a list of other links to legal notices.

We believe that consumers should be fully informed before they file a complaint that once data is posted on the Database it is not protected from further disclosure in the press and on social media sites. They should be informed that third parties regularly publish data from the Database on Twitter. Consumers should also be informed that the Bureau encourages third parties to download the data in a variety of formats which enables it to be integrated with other private and government data sets that may result in privacy breaches.

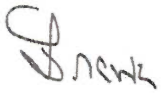
Finally, the Bureau needs to work with industry to normalize and provide context for the data, as has been repeatedly promised.

VI. Conclusion

ABA opposes the Database and the proposed expansion to include published consumer complaint narratives because it will not enable better, more accurately informed consumers. We believe strongly that the Bureau should reconsider its assertion of statutory authority and the process by which it has chosen to act. Neither reflect respect for the principles of accountability, transparency, and data-driven decision making which the Bureau professes guide its work. Rather than continue to pursue an unauthorized path via "policy statement," we urge the Bureau to focus on the statutory mandate assigned by Congress –overseeing the individual response to consumer complaints, analyzing complaint data for supervisory oversight purposes, and aggregate reporting to Congress. ABA looks forward to working with the Bureau in support of those goals that benefit consumers and help enhance customer service by the banking industry.

If your staff has questions about ABA's comments or would like to discuss anything further, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Sincerely,



Frank Keating

Cc. Ms. Monica Jackson, Office of the Executive Secretary