



September 22, 2014

Consumer Financial Protection Bureau
Attention: Monica Jackson
Office of the Executive Secretary
1700 G Street NW
Washington, DC 20552

RE: Docket No. CFPB-2014-0016; Notice of Proposed Policy Statement with Request for Public Comment.

Dear Ms. Jackson:

The Financial Services Roundtable (“FSR”)¹ and the Housing Policy Council (“HPC” and collectively, the “Associations”) appreciate the opportunity to comment on the Consumer Financial Protection Bureau’s (the “Bureau”) proposed policy statement on disclosure of consumer complaint narrative data (the “Proposal”).²

The Associations and our members strongly support the Bureau’s mission to equip consumers with the knowledge and skills to produce better financial outcomes and believe that when consumers share reliable information with others, it can be very helpful in making “markets for consumer financial products and services work for Americans.”³ Indeed, since the Bureau was established, we have worked with the Bureau to advance its educational mission and we recognize and applaud the Bureau and its staff for their fine

¹ Financial Services Roundtable represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America’s economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

The Housing Policy Council of the Financial Services Roundtable is a trade association that represents 30 of the leading national mortgage finance companies. HPC members originate, service, and insure mortgages. We estimate that HPC member companies originate approximately 75% of mortgages and service two-thirds of mortgages serviced in the U.S.

² Disclosure of Consumer Complaint Narrative Data, 79 Fed. Reg. 42765 (July 23, 2014).

³ CFPB, About the CFPB, available at <http://www.consumerfinance.gov/the-bureau/>.

work.⁴ Nevertheless, we must take issue with two key premises underlying the Bureau's Proposal, namely, that consumers lack opportunities to tell their stories and that publishing an individual's account of her experience with a financial services provider will help her or others make better financial choices.

Our members are committed to the financial success of our customers and all consumers. We respect and support their right to voice opinions and share their concerns with us, with others, and with the Bureau. However, we do not believe that this Proposal will help consumers make better or more informed financial choices.

We also believe that posting unverified and possibly inaccurate accounts on the CFPB's website will expose providers of consumer financial services to reputational and financial risk for which there is no effective method of mitigation. Moreover, for a provider of consumer financial services—especially a depository institution—damage to reputation can have regulatory consequences.

Further, we are concerned about the Bureau's ability to secure its systems and the sensitive personal information contained therein, and believe that the Proposal would create additional risks to consumer privacy.

Finally, in our view, the Proposal is not authorized by the Dodd-Frank Act, and the use of guidance instead of a rulemaking violates the Administrative Procedure Act. A comparison between the Bureau's proposed action and the Consumer Product Safety Commission's creation of www.SaferProducts.gov highlights the transparency and due process features, including a disclaimer of accuracy and completeness, missing from the Bureau's Proposal.

For these reasons, the Associations urge the Bureau to reconsider its Proposal. We look forward to working with the Bureau in support of our shared commitment to helping consumers make sound financial choices.

The Bureau's Proposal Will Confuse Consumers

The Associations understand and respect the Bureau's interest in giving consumers an opportunity to be heard because our members are deeply invested in listening to customers, understanding what's on their minds, and responding to them. Our members are in constant communication with customers through multiple channels and provide many ways for customers to express themselves directly to the company. Members also solicit feedback on customer experience in other forums including social media. In addition to analyzing input on their own channels, members follow social media to fine-tune their understanding of customer wants and needs. Based on this knowledge, we seriously question the Bureau's premise that consumers lack opportunities to be heard. A

⁴ See e.g., CFPB, Financial Literacy Annual Report (2013), *available at* http://files.consumerfinance.gov/f/201307_cfpb_report_financial-literacy-annual.pdf; CFPB, Paying for College, *available at* <http://www.consumerfinance.gov/paying-for-college/>.

quick online search shows myriad sites where consumers voice their complaints about hotels, restaurants, other businesses and government agencies. In short, the unmet need that the Bureau cites simply is not apparent.

It is also unclear why the Bureau believes that publication of a consumer's narrative will help the individual who submitted a complaint achieve a better outcome when her financial institution is already committed to responding through its own dispute resolution processes and through the CFPB's Response Portal. And, as discussed below, publishing consumer narratives is unlikely to help other consumers make better or more informed financial choices.

Several considerations lead us to believe that the publishing of consumer narratives will not serve consumers well. By definition, a consumer narrative is one-sided, reflecting that individual's recollection of events and may omit crucial information and contain inaccuracies. When a consumer submits a complaint involving debt collection to the Bureau, he can only describe his experience and may not recall and include all the facts. However, in order to put a complaint about debt collection in context, a reader would need to know—among other facts—whether and when the individual filing the complaint had contacted the company to discuss his inability to repay in accordance with the advice provided on the CFPB's website.⁵ Without this vital information, the consumer's complaint does not enable others to make more informed financial choices.⁶

In addition, since the Bureau's website invites visitors to "submit a complaint" and does not solicit positive experiences, consumers are more likely to describe only perceived negative experiences with consumer financial products or services. However, positive accounts are equally helpful to consumers in making informed financial choices. Experience during the housing crisis shows that consumers who sought homeownership counseling and talked to their lender about their financial difficulties were often able to work out a repayment plan and save their homes. Stories like that and others that reveal positive outcomes resulting from awareness and problem-solving skills help other consumers who might not be aware of the value of reaching out the lender or who are reluctant to contact their lender.

Narratives also are prone to inaccuracies and the Bureau's statement that it "do[es] not] verify all the facts alleged" in the complaints⁷ is troublesome because the Bureau's own experience with the Response Portal indicates that a significant number of the "complaints" are baseless. Nevertheless, the Bureau did not indicate that it intends to

⁵ See e.g., Consent Order, *In re Ace Cash Express*, 2014-CFPB-0008 (July 1, 2014), available at http://files.consumerfinance.gov/f/201407_cfpb_consent-order_ace-cash-express.pdf (alleging that ACE Cash Express took unreasonable advantage of the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service).

⁶ See section V below for discussion of company responses.

⁷ CFPB, Consumer Complaint Database, available at <http://www.consumerfinance.gov/complaintdatabase/>.

mitigate the risk of consumer confusion by warning visitors to its website that information in the consumer narratives is not verified and may contain errors. We also note that the Proposal does not address whether or how the Bureau will filter out spurious complaints filed by competitors or individuals with a personal animus against a particular company.

The potential for consumer confusion is compounded by the fact that the information will appear on the website of a government agency. By its nature, a government website is more likely to be trusted than a commercial site and the Bureau has worked diligently to create trusted consumer-centric content and drive consumer traffic to www.consumerfinance.gov. Placing its imprimatur on unverified and possibly inaccurate statements will impede consumers from making informed choices and undermine the Bureau's credibility.⁸

Moreover, unverified and potentially inaccurate information may improperly affect market incentives and reduce transparency. Thus, the result of the Proposal could well be the exact opposite of what the Dodd Frank Act and the Bureau intended.⁹

Another consideration is that a significant majority of "complaints" to the Bureau are fundamentally either questions or misunderstandings between the consumer and the company. The Bureau's June 2014 report, *Consumer Response: A Snapshot of Complaints Received*, indicates that 68 percent of complaints received by the Bureau between July 21, 2011 and June 30, 2014 were resolved as "closed with explanation."¹⁰ According to the Bureau, a submission is properly categorized as "closed with explanation" when no monetary or non-monetary relief is necessary or appropriate because the company finds "that the complaint does not merit substantive relief, and instead provides a full explanation to the consumer."¹¹

An example of the many questions and misunderstandings that come through CFPB's Response Portal is the "complaint" a member received from a borrower who believed that, upon filing bankruptcy, he was entitled to a refund of all payments he had made within 60 days of filing bankruptcy and wanted the institution to refund those payments. The institution knew that under bankruptcy law, the *bankruptcy trustee* may challenge a preferential payment on behalf of the *bankruptcy estate*, but that right does

⁸ See *Doe v. Tenenbaum*, 900 F. Supp. 2d 572, 597 (D.D.C. 1992) (finding public report's misleading information substantial and important as to affect a reasonable consumer's decision making about the product).

⁹ *Id.* (stating that because the public report had the government's stamp of approval through its publication on an official website it could improperly affect consumer decision-making in contravention with the Consumer Product Safety Commission's own regulations).

¹⁰ See, *Consumer Response: A Snapshot of Complaints Received Through June 30, 2014*, at 29, available at http://files.consumerfinance.gov/f/201407_cfpb_report_consumer-complaint-snapshot.pdf. An additional 2% were "closed" which means that the complaint was closed without monetary or non-monetary relief and without explanation. *Id.*

¹¹ 77 Fed. Reg. at 37565.

not authorize an individual who declares bankruptcy to recoup payments he made before filing for bankruptcy. The institution noted “we of course understand that not all consumers are necessarily experts in bankruptcy law, and, as part of our response, referred the borrower to the borrower’s own attorney.”

Another example of a “complaint” sent through the Complaint Portal was a question about voluntarily surrendering a vehicle. Members also report that a substantial number of submissions are duplicates or are received in error and must be redirected to another company.

The Bureau’s statement that it is prepared to “allow the marketplace of ideas to determine what the data will show”¹² appears to disregard the risks to consumers and providers of consumer financial services. With respect to consumers, it is unrealistic and unfair to expect consumers, most of whom lack the training and experience of professional market researchers, to judge the relative merits of unverified complaints. In fact, instead of helping consumers, the Proposal is likely to confuse them by providing misleading and incomplete information. Such an approach flies in the face of the Dodd Frank Act’s mandate to develop initiatives to educate and empower consumers to make better informed financial decisions.¹³ Consumers can and should make educated decisions based on market information; they cannot do so based on one-sided, unverified information.

Harm to Covered Persons

The Bureau mentions that “there is a risk that financial institutions could incur intangible reputational damage as a result of the dissemination of complaint narratives” but asserts that this risk is mitigated by allowing financial institutions to respond and publish their statement next to the consumer’s complaint. In our view, the Proposal fails to take into account the serious financial and reputational damage that the publication of unverified and potentially inaccurate information is likely to cause.

The fact is that in today’s digital world, consumers trust online reviews and negative reviews have been shown to have a significant impact on a company’s revenue and profitability. Nielsen’s 2013 *Trust in Advertising* report indicates that consumer reviews posted online are the third most trusted form of “advertising.” Sixty-eight percent of survey respondents said they trust online consumer reviews, behind only word-of-mouth recommendations from friends and family and advertising on branded websites.¹⁴ A 2011 Harvard Business School study speaks to the financial impact of online reviews. *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud* found that a one

¹² *Id.* at 37561.

¹³ Dodd-Frank § 1013(d)(1).

¹⁴ See, 2013 *Trust in Advertising* at <http://www.nielsen.com/us/en/insights/news/2013/under-the-influence-consumer-trust-in-advertising.html>.

star difference on Yelp – the popular neighborhood review site – can account for a 5-9% difference in sales.¹⁵

A key premise behind the Proposal is that consumers will check the CFPB’s website when they are considering doing business with a specific financial institution. If that premise is correct, then it’s fair to assume that consumers will see and factor into their financial decision-making both the number of complaints lodged against a particular institution and any narratives that involve that institution. Although the narratives present only the consumer’s side of the story and could contain inaccurate and misleading information, the narratives are likely to affect consumers’ shopping decisions.

Thus, the number of complaints the Bureau receives and will continue to receive will inappropriately and unnecessarily taint the opinions of consumers who read misleading personal stories about an institution’s products and services. The Bureau itself admitted that that “[c]onsumers would be better informed if the public database included complaint data from issuers’ internal processes or even surveys of complainants and non-complainants.”¹⁶ Ironically, the publication of misleading information may well have the perverse effect of driving consumers away from sound and valuable financial products and services.

The Associations are also concerned about the Proposal’s potential for harm to the reputation of consumer financial services providers. The Bureau’s embrace of digital experience fails to take account of the regulatory implications of reputation risk inasmuch as Federal and state prudential regulators require financial services providers—and especially depository institutions—to take steps to safeguard their reputation as protection for their customers and the financial services system.

Indeed, the guidance, “Social Media: Consumer Compliance Risk Management Guidance” adopted by the Bureau and other members of the FFIEC in December 2013 specifically discusses the reputational risk posed by critical or inaccurate statements on social media that could discourage an institution from responding. The guidance states that an institution “is expected to take into account the results of its own risk assessments in determining the appropriate approach to take regarding monitoring of, and response to [internet] communications.”¹⁷ The Associations note that when deciding whether and how to respond to a narrative on the Bureau’s response portal, financial institutions would be required to balance the expectations of the FFIEC guidance against the legal and reputational concerns discussed above.

¹⁵ *Fake It Till You Make It: Reputation, Competition, and Yelp Review Fraud* at <http://www.hbs.edu/faculty/Pages/item.aspx?num=45151>.

¹⁶ 77 Fed. Reg. at 37562.

¹⁷ See, <http://www.ffiec.gov/press/pr012213.htm>.

The Bureau's proposed solution to the publication of inaccurate or baseless complaints—that the financial services company post a response—is not feasible. Assuming the privacy concerns could be addressed by the consumer opting in to share her narrative online, financial services providers simply do not disclose information about their customers' financial affairs as a matter of policy and contract.

Take, for example, a case where a consumer complains that her credit card issuer imposed multiple late fees. Consider how embarrassing and damaging it would be for that individual if the credit card issuer indicated in its response that she was charged late fees because she repeatedly failed to make timely payments. Moreover, the card issuer would likely be publicly criticized for revealing information that embarrasses the company's customer. Thus, we believe that the potential reputational risk associated with posting a specific response to individual complaints will keep companies from submitting more than an anodyne response. In fact, a review of the business responses posted on www.saferproducts.gov shows that, other than responses that reference a product recall, in almost all cases, businesses provide stock responses that recite their commitment to safety and encourage consumers to contact the business for assistance or more information.¹⁸

If a company were able to respond publicly and decided to do so, the process would involve significant new costs. Currently, financial institutions work directly with the consumer and the Bureau to resolve issues raised in complaints by reviewing consumer files or accounts and then writing to or speaking with the consumer. Those written responses are private but if the financial institution were to respond publicly, it would have to create a second version of its response, scrubbed to eliminate personally identifiable information. The creation and internal business and legal review of a scrubbed second version would involve significant cost.

Finally, if a company were inclined to respond, it could be forced into a Hobson's choice of publishing information that would otherwise be protected under Exemption 4 of the Freedom of Information Act and the Bureau's rules against disclosure of confidential complaint information.¹⁹ Confidential consumer complaint information is defined to include responses to consumer complaints, to the extent that such information is exempt from disclosure under 5 U.S.C. § 552(b).²⁰ Although the Bureau has rejected the argument that disclosure of an issuer name runs afoul of FOIA, it has not considered the issue financial institutions will now face: responding to a narrative will require the disclosure of

¹⁸ For example, a recent business comment to a complaint involving a space heater reads as follows: "Comment from Sunbeam Products, Inc. d/b/a Jarden Consumer Solutions (8/29/2014) Jarden Consumer Solutions encourages consumers with any concerns about our products to contact us directly (if they have not already done so) at [jardencs.com](http://www.jardencs.com) (<http://www.jardencs.com/ContactUs.aspx>) where consumers will find brand specific contact information, including toll-free phone numbers. We appreciate receiving information from consumers and try to achieve consumer satisfaction."

¹⁹ 12 C.F.R. 1070.41.

²⁰ 12 C.F.R. 1070.2(g).

competitive commercial information relating to how an institution handles complaints. This type of sensitive commercial information is protected under FOIA Exemption 4 and the Bureau's own rules.

The Proposal Raises Serious Data Security and Privacy Concerns

The Associations are troubled by risks to the security of sensitive information collected by the Bureau from consumers and financial services providers via the Response Portal. In a 2012 report, the Bureau's Office of the Inspector General ("OIG") found that the Bureau's information security program did not meet the standards of the Federal Information Security Management Act of 2002 ("FISMA").²¹ A year later, the OIG found improvement, but nonetheless noted that there were areas in which the Bureau should make changes, such as improving training programs for those with significant security responsibilities and strengthening its continuous monitoring program.²² In July 2014, the OIG's Security Control Review of the CFPB's Cloud Computing recommended that the Bureau "strengthen security controls for the GSS in four information security areas: system and information integrity, configuration management, contingency planning, and incident response."²³ We urge the Bureau to close the gaps identified by the OIG before considering any expansion of its information collection activities.

With respect to protecting the privacy of individuals who submit complaints, the Associations note that information currently publicly available on the Bureau's website can be combined with other information readily available online to identify the individual who filed the complaint. However, the Complaint Portal currently does not contain a clearly worded and prominent warning to consumers about risks to their privacy and the Proposal does not indicate that the Bureau is considering providing such a disclosure.

As a sister trade association has noted, a combination of zip code, nature of the complaint and category of the complaint (in this case, a complaint involving settlement costs on an FHA loan) allowed a non-professional searcher to find the name and address of the complainant.²⁴ To reduce the risk of re-identification, the Bureau should remove fields or redact information that may contribute to re-identification, such as zip codes or types of loans.

²¹ Office of Inspector General, 2012 Audit of the Consumer Financial Protection Bureau's Information Security Program, *available at* http://oig.federalreserve.gov/reports/Audit_CFPB_FISMA_November2012.pdf.

²² Office of Inspector General, 2013 Audit of the CFPB's Information Security Program, *available at* http://oig.federalreserve.gov/reports/CFPB_Audit_Information_Security_FISMA_Dec2013.pdf.

²³ CFPB Report: 2014-IT-C-010 (July 17, 2014).

²⁴ See Letter dated August 26, 2014 to the Consumer Financial Protection Bureau from Consumer Mortgage Coalition, at 7-11.

We also note that the analytical tools available on the Bureau's website encourage and facilitate analysis and integration with other data sources thereby increasing the likelihood that the consumer's identity can be discovered.²⁵

We are concerned that the Proposal will increase the risk that the identity and personal information of those who submit complaints will become known to anyone with access to the Internet and average search skills.²⁶ Even if the Bureau scrubs the narratives of personal identifiers, the narratives are likely to reference life events including marriage, divorce, and the birth of a child or the death of a spouse. Anyone with passing familiarity with the Internet can likely find birth, death, marriage and divorce records on governmental sites and additional information on social networking sites that will allow identification of the consumer. Similarly, mention of a natural disaster or other news event in a narrative can help a searcher identify the individual who submitted the complaint. These examples reveal the limitations of scrubbing standards and methodologies, which the Bureau acknowledges it has not fully tested yet.

The Bureau Lacks Statutory Authority to Publish Consumer Complaint Narratives

We respectfully encourage the Bureau to consider carefully the legal foundation for the Proposal. Three sections in the Dodd-Frank Act address the Bureau's authority with respect to consumer complaints. However, none of the three address or authorize the Bureau to publish consumer complaint narratives. Nor are complaint narratives necessary to accomplish the CFPB's functions.

Section 1013(b)(3) requires the Bureau to establish an office 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 or services."²⁷ Nothing in this section supports the public disclosure of information received through the Bureau's database.

Section 1034(a) directs the Bureau to work with other Federal regulators to establish reasonable procedures "[t]o provide a timely response to consumers."²⁸ Here, too, the plain language of the statute does not authorize the Bureau to publicly disclose consumer complaint data.

²⁵ *Id.* at 10.

²⁶ The Associations are also concerned about the privacy of their employees. Consumer complaints may include the names of employees or information about them that would allow them to be identified. In addition to redacting an employee's name, any scrubbing process must effectively remove the employee's job title and location.

²⁷ 12 U.S.C. § 5493(b)(3).

²⁸ 12 U.S.C. § 5534(a).

Finally, section 1034(b) is directed to consumer financial services providers that are subject to supervision and primary enforcement by the Bureau and outlines the how and when they must respond to consumer complaints referred by the Bureau.²⁹ However, nothing in this section authorizes or requires the Bureau to publicly disclose consumer narrative and non-narrative information.

In previous policy statements relating to the Complaint Portal, the Bureau cited three additional provisions in the Act as support for public disclosure. However, none of these additional provisions authorize the Bureau to publish consumer complaint narratives.

First, the Bureau cited Section 1013(b)(3)(C) as permitting public disclosure. This section requires the Bureau to submit an annual report to Congress on consumer complaint information, such as complaint numbers, types and resolution.³⁰ Clearly, this provision does not authorize the Bureau to disclose narrative and non-narrative individual consumer complaint data to the general public.

The Bureau also has asserted that its ability to ensure that “consumers are provided with timely and understandable information to make responsible decisions” and to provide that “markets for consumer financial products operate transparently and efficiently” permits publication of consumer complaint information.³¹

Finally, the Bureau references its “broad authority” to make public information that is not required to be given confidential treatment.³² However, the provisions the Bureau cites are limited in scope. Section 1012 does not contain any reference to public disclosure of consumer complaints, or public disclosure generally. In addition, Section 1022(c)(3)(B) only permits publication of confidential information “through aggregated reports or other appropriate formats designed to protect confidential information.”³³ Even if the Bureau were able to protect a consumer’s confidential information when publishing a complaint, the words “other appropriate formats” must be read in conjunction with “aggregated reports.” Thus, the only permissible method of publication would be in an aggregated format.

Thus, a careful reading of the statute shows that Congress contemplated disclosure of consumer complaint information only in specific circumstances involving specific disclosures to state and federal agencies, and in an aggregated format for purposes of an

²⁹ 12 U.S.C. § 5534(b).

³⁰ 12 U.S.C. § 5493(b)(3)(C).

³¹ 12 U.S.C. § 5511(b)(1), (5).

³² 12 U.S.C. §§ 5512(c)(3)(B) (Bureau’s ability to disclose information in the public interest, through aggregated reports or other appropriate formats designed to protect confidential information under “monitoring” authority); 5942(a) (Bureau powers).

³³ 12 U.S.C. §§ 5512(c)(3)(B).

annual Congressional report.³⁴ Nothing in the Act indicates that Congress intended the Bureau to publish consumer complaint narratives, nor is the publication of consumer complaints necessary for the functions with which the Bureau is in fact charged.

In support of the Proposal, the Bureau cites the Consumer Product Safety Commission's ("CPSC") database, which publishes narrative consumer reports of harm on www.saferproducts.gov. However, it is worth noting that the CPSC has been challenged regarding its decision to publish factually inaccurate information. Although Congress enacted the Consumer Product Safety Commission Improvement Act to give the CPSC explicit statutory authority to publish reports of harm, the publication of a factually inaccurate report was held to be arbitrary and capricious.³⁵ In fact, the court stated that publication of factually incorrect information, of which the CPSC was aware, would run contrary to the CPSC's own regulations and would defeat the purpose of providing consumers with accurate information about the product.³⁶

In this case, publication of materially or factually inaccurate consumer complaint information, which the Bureau has acknowledged will occur, conflicts with the Dodd Frank Act's mandate to ensure "consumers are provided with timely and understandable information to make responsible decisions." Further, the Bureau's charge to ensure that "markets for consumer financial products operate transparently and efficiently," also would be undermined if such materially and factually inaccurate statements were published.

We also note that courts have struck down an agency's publication of individualized information in cases where the Dodd-Frank Act did not unambiguously require such disclosure. For example, the D.C. Circuit determined, that despite the Dodd-Frank Act's provision requiring the Securities & Exchange Commission ("SEC") to issue final rules on the inclusion of foreign government extraction payments in an annual report, publication of the report was only limited to a compilation of information, rather than a public filing as the SEC contended.³⁷ As noted previously, the Dodd-Frank Act only authorizes the Bureau "disclose public information through aggregated reports or other appropriate formats designed to protect confidential information."³⁸

³⁴ 12 U.S.C. § 5493(b)(3)(A)-(D). *See also* Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 80 (2002) ("[E]xpressing one item of an associated group or series excludes another left unmentioned.") (citations and alterations omitted).

³⁵ Doe, 900 F. Supp. 2d at 595 (finding that publication of a report bore no rational relationship to agency's public safety purposes and agency's conduct was arbitrary and capricious).

³⁶ *Id.* at 597.

³⁷ American Petroleum Institute v. SEC, 953 F. Supp. 2d 5, 14 (D.D.C. 2013) (finding DFA provision requiring SEC to issue final rules on inclusion of payments in an annual report did not mandate public disclosure of the report, but limited public availability to "a compilation of information").

³⁸ 12 U.S.C. §§ 5512(c)(3)(B).

The Bureau's Process Violates the Administrative Procedure Act and Other Laws

The process that the Bureau is using, namely, claiming exemption from the requirements of the rulemaking provisions of the Administrative Procedure Act (“APA”),³⁹ as well as related provisions of the Regulatory Flexibility Act (“RFA”),⁴⁰ violates the APA and the RFA and is improper. As Justice Blackmun wrote for a unanimous Court forty years ago, “[t]he Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished and ad hoc determinations.”⁴¹ When the Bureau “make[s] rules that affect substantial individual rights and obligations,” the APA requires specified procedures “[n]o matter how rational or consistent with congressional intent a particular decision might be.”⁴²

The Bureau asserted in its Notice that its Proposal is “an agency statement of general policy” and thus exempt from rulemaking pursuant to 5 U.S.C. § 553(b),⁴³ but that exception applies only in circumstances in which a policy statement has no “present binding effect.”⁴⁴ The “present binding effect” standard is met when the agency’s statements “‘purport to bind’ those subject to it, that is, to be cast in ‘mandatory language’ so ‘the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences.’”⁴⁵

Here, there is no doubt that the Associations’ members would be “reasonably led to believe that failure to conform” to the Proposal “will bring adverse consequences,” because the publication of unverified and possibly inaccurate statements poses risk to reputation while privacy and contractual constraints would limit the ability of financial services companies to respond. Thus, the Proposal is not only a rule, it is inherently “arbitrary and capricious.” The Bureau appears to be making the same argument made by the Department of Homeland Security several years ago, namely, that a company accused of misconduct has a “set of choices” including the right not to respond at all, and therefore is “not bound to comply” with the Proposal’s limitations on published replies. The Court of Appeals for the District of Columbia Circuit rejected this argument, calling it “absurd.”⁴⁶

³⁹ 5 U.S.C. §§ 551, 553.

⁴⁰ *Id.* §§ 601 *et seq.*

⁴¹ *Mortan v. Ruiz*, 415 U.S. 199, 231 (1974).

⁴² *Id.*

⁴³ See 79 Fed. Reg. at 42769.

⁴⁴ *Electronic Privacy Information Center v. Dep’t of Homeland Security*, 653 F.3d 1, 7 (D.C. Cir. 2011) (quoting *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988)).

⁴⁵ *Id.* (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)).

⁴⁶ *Id.*

While the Bureau undertook to consider comments and extended the comment period for an additional 30 days, these actions do not correct the failure to conduct an APA rulemaking procedure. In situations where rulemaking is required, the Bureau is obligated to respond to material comments that, if true, would require a change in the proposed rule, raise significant problems, can be thought to challenge a fundamental premise, or are otherwise relevant or significant.⁴⁷

Moreover, when an agency undertakes an APA rulemaking, if it appropriately considers comments and otherwise complies with applicable law, the agency's decisions are subjected to *Chevron* deference. This is not the case when an agency proceeds by way of a policy statement that is outside the APA rulemaking framework.⁴⁸ Action by "policy statement," while not automatically qualifying for a denial or reduction of deference, can generate significant uncertainty in whether the agency action will be sustained. In that respect, the Bureau's failure to act through APA rulemaking undermines its own stated purposes in announcing a new program.

The Bureau's attempt to act by means of a policy statement is also improper because the Dodd Frank Act and the Privacy Act of 1974 require the proposed disclosure of personal information to be addressed through "rules" and "notice" to the public, subject to all of the APA rulemaking requirements, the RFA, and the Paperwork Reduction Act.⁴⁹ The Dodd Frank Act requires the Bureau to "promulgate regulations providing for the confidentiality of certain types of information and protecting such information from public disclosure."⁵⁰ The final rule that the Bureau previously issued "pertain[ing] to the protection and disclosure of confidential information" (12 C.F.R. § 1070 *et seq*, the "Confidentiality Rule") does not authorize the dissemination of consumer complaint narratives and, in fact, contemplates that such information will not be publicly disclosed.⁵¹ The CFPB cannot substantively amend the Confidentiality Rule short of notice and comment rulemaking.

⁴⁷ See generally *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 435 U.S. 519 (1978); *Federal Land Bank Ass'n, FLCA v. Farm Credit Admin*, 336 F.3d 1075 (D.C. Cir. 2003); *City of Waukesha v. E.P.A.*, 320 F.3d 228 (D.C. Cir. 2003); *Action on Smoking and Health v. C.A.B.*, 699 F.2d 1209 (D.C. Cir. 1983); *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9 (D.C. Cir. 1977).

⁴⁸ See *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001).

⁴⁹ 44 U.S.C. § 3501 *et seq*.

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

⁵¹ See 12 C.F.R. § 1070.2 ("Confidential Information means confidential consumer complaint information..."); 12 C.F.R § 1070.41(a) (detailing general rule of non-disclosure of confidential information).

As discussed above, the consumer narratives may well contain nonpublic personal information that qualifies as “confidential information,” under the Bureau’s rule even if the Bureau’s scrubbing process is successful.⁵² The Confidentiality Rule is clear that, except as otherwise required by law or provided in the Rule, the Bureau will not “disclose such confidential information by any means...or in any format...”⁵³ Neither the Confidentiality Rule or other law or regulation authorizes the Bureau to publicly disseminate consumer complaint narratives⁵⁴ and no federal agency including the Bureau can amend a final rule adopted through notice and comment rule making through the issuance of a policy statement.⁵⁵

Although the Bureau has previously taken the position that its policies governing the disclosure of confidential information are an “agency rule of organization, procedure, or practice that is exempt from notice and public comment pursuant to [the APA],”⁵⁶ this assertion is incorrect. The APA only exempts “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice” from formal notice and comment rulemaking requirements where “notice or hearing” is not required by statute.⁵⁷ The exemption does not apply here because the Dodd Frank Act specifically requires “rules” regarding confidential treatment of consumer information (§ 1022(c)(6)(A)), and the Privacy Act contemplates providing “notice” to the public of rules regarding the disclosure of personal information (5 U.S.C. § 553(b)-(d)). It would be improper for the Bureau to attempt to use a policy statement to circumvent federal statutes requiring notice and comment rulemaking.

⁵² *Id.*

⁵³ 12 C.F.R. § 1070.41(a).

⁵⁴ *Id.* Although the Confidentiality Rule allows the CFPB to “disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains” (1070.41(c)), this exception does not apply to the contemplated database because consumers *can* be identified through the proposed database and then matched with the additional personal information in the narrative complaints.

⁵⁵ See *Mendoza v. Perez*, 754 F.3d 1002, 1023-25 (D.C. Cir. 2014) (legislative rule that agency claimed to be “interpretative” invalidated because of lack of notice and comment, rejecting argument by Department of Labor that it was merely a “rule[] of agency organization, procedure, or practice”). Indeed, the CFPB’s proposed policy statement directly meets the test for categorizing legislative rules on multiple grounds, including because it effectively amends a prior legislative rule, *i.e.* the Confidentiality Rule. *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (an agency’s proposal is a legislative rule where it “effectively amends a prior legislative rule”).

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

⁵⁷ 5 U.S.C. § 553(b).

The CPSC's Complaint Database

The Bureau cites the CPSC's complaint database as a model for its action but the comparison is not on point due to significant differences in statutory authority and process.

The Associations discussed the gaps in the Bureau's statutory authority earlier in this letter. In contrast, the Consumer Product Safety Commission Improvements Act specifically directs the CPSC to create a searchable online database.⁵⁸ Moreover, Congress took care to build in important due process and fairness protections. One critical provision permits a manufacturer (or a consumer) to ask the CPSC to exclude "materially inaccurate information" from its database.⁵⁹ The definition of materially inaccurate information explicitly acknowledges the financial and reputational damage caused by inaccurate information.⁶⁰ Unlike the CPSC, the Bureau did not propose to include a process by which materially inaccurate information could be excluded.

The CPSIA also permits a manufacturer to request that portions of the database entry be given confidential treatment⁶¹ and required the CPSC to redact the challenged information if it determines that confidential treatment is warranted. The Bureau did not follow the CPSC's example on this point either.

In implementing its statutory authority, the CPSC conducted a thorough and transparent rulemaking process in accordance with the APA. The process began with development and submission to Congress of an implementation plan, followed by a public hearing on the implementation plan and a public workshop, all before the agency published a Notice of Proposed Rulemaking. The CPSC's rulemaking process, which is outlined in Exhibit A, contrasts sharply from the Bureau's process in this matter.

* * * * *

To summarize, the Associations oppose the Bureau's proposed expansion of the complaint database to include published consumer complaint narratives because we believe it will confuse consumers. We believe strongly that the Bureau should reconsider

⁵⁸ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).

⁵⁹ 15 U.S.C. §2055a(c)(4).

⁶⁰ § 1102.26 Determination of materially inaccurate information. 1102.26 (b) Request for determination of materially inaccurate information. Any person or entity reviewing a report of harm or manufacturer comment, either before or after publication in the Database, may request that the report of harm or manufacturer comment, or portions of such report of harm or manufacturer comment, be excluded from the Database or corrected by the Commission because it contains materially inaccurate information is so substantial and important as to affect a reasonable consumer's decisionmaking about the product.

⁶¹ 15 U.S.C. 2055a(c)(2)(C).

its assertion of statutory authority and the process by which it has chosen to act and respect the principles of accountability, transparency, and data-driven decision making which the Bureau advocates. Rather than using a “policy statement” to travel an uncertain path, we urge the Bureau to focus on overseeing responses 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 goals that benefit consumers and enhance customer experience.

The Associations thank you again for the opportunity to share our views and look forward to working with you to achieve our common goals.

Sincerely,



Anne Wallace
Senior Director for Consumer Financial Services
Financial Services Roundtable



Paul Leonard
Senior Vice President of Government Affairs
Housing Policy Council
Financial Services Roundtable

Exhibit A

Legislative History and Implementation of CPSC Public Database

- **Aug. 14, 2008** - Consumer Product Safety Improvement Act signed into law directing CPSC to develop a publicly available and searchable internet database to hold consumer product safety information and allow consumers to report product safety issues.
 - Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (2008).
 - 15 U.S.C. §2055(a).
- **Sept. 9, 2009** - CPSC submitted Public Database implementation plan to Congress as required by statute.
 - CPSC, *Implementation of a Searchable Consumer Product Safety Incident Database*, Special Report to Congress (Sept. 9, 2009) available at <http://www.cpsc.gov/en/About-CPSC/Agency-Reports/>.
- **Nov. 10, 2009** - public hearing on Public Database.
 - Consumer groups, trade associations, research groups, and industry discussed their views on implementation of the public database. Written statements also were accepted. CPSC received fourteen comments, and these comments are available on the CPSC's Web site at <http://www.cpsc.gov/library/foia/foia10/pubcom/pubdb.pdf>. A Webcast of the hearing can be viewed on the CPSC's Web site at <http://www.cpsc.gov/webcast/previous.html>.
 - Publicly Available Consumer Product Safety Information Database; Proposed Rule, 75 Fed. Reg. 99, 29156 (May 24, 2010) (to be codified at 16 C.F.R. pt. 1102) available at <http://www.cpsc.gov/en/Regulations-Laws--Standards/Federal-Register-Notices/2010-Federal-Register-Notices/>.
- **Jan. 11-12, 2010** - Commission staff hosted public workshop to discuss implementation of the Public Database with key stakeholders including manufacturers, retailers, and consumer advocates.
 - "A transcript of the workshops is available at <http://www.cpsc.gov/about/cpsia/pw01112010am.html>, and a Webcast of the workshops is available on the CPSC's Web site at <http://saferproducts.gov/events/pw01112010.html>. The CPSC also invited comments in conjunction with the workshop. CPSC received twenty-two comments.
 - Publicly Available Consumer Product Safety Information Database; Proposed Rule, 75 Fed. Reg. 99, 29156 (May 24, 2010) (to be codified at 16 C.F.R. pt. 1102) available at <http://www.cpsc.gov/en/Regulations-Laws--Standards/Federal-Register-Notices/2010-Federal-Register-Notices/>.

- **Apr. 7, 2010** – CPSC held public meeting to hear staff presentation on the Notice of Proposed Rulemaking (NPR) on the Public Database.
 - <http://www.saferproducts.gov/About.aspx>.
- **Apr. 15, 2010** – CPSC held public meeting to discuss and vote on the NPR.
 - <http://www.saferproducts.gov/About.aspx>.
- **May 24, 2010** – CPSC issued proposed rule on the Public Database and opened public comment period.
 - <http://www.cpsc.gov/en/Regulations-Laws--Standards/Federal-Register-Notices/2010-Federal-Register-Notices/>.
- **July 15, 2010** – CPSC staff presented to the National Association of Manufacturers as part of outreach campaign.
 - <http://www.saferproducts.gov/About.aspx>.
- **July 23, 2010** – Deadline for written comments to proposed rule.
 - Publicly Available Consumer Product Safety Information Database, 75 Fed. Reg. 99, 29156 (May 24, 2010) (to be codified at 16 C.F.R. pt. 1102) *available at* <http://www.cpsc.gov/en/Regulations-Laws--Standards/Federal-Register-Notices/2010-Federal-Register-Notices/>.
- **Sept. 24, 2010** – CPSC staff presented to the Consumer Specialty Products Association as part of outreach campaign.
 - <http://www.saferproducts.gov/About.aspx>.
- **Dec. 9, 2010** – CPSC issued Final Rule implementing section 212 of CPSIA which mandated the creation of the Public Database.
 - Publicly Available Consumer Product Safety Information Database; Final Rule, 75 Fed. Reg. 236, 76832 (May 24, 2010) (to be codified at 16 C.F.R. pt. 1102) *available at* <http://www.cpsc.gov/en/Regulations-Laws--Standards/Rulemaking/Final-and-Proposed-Rules/Publicly-Available-Consumer-Product-Safety-Database/>.
- **Mar. 11, 2011** – SaferProducts.gov database went live to the public.
 - The Consumer Product Incident Database—Saferproducts.gov, *available at* <http://www.consumerfed.org/news/575>.
- **Aug. 12, 2011** – President Obama signed into law H.R. 2715, amending the Consumer Product Safety Act.
 - Amendments provided additional time for CPSC to investigate claims of inaccuracy in the public database and manufacturers to respond to complaints. Also required CPSC to seek product-identifying information associated with consumer complaints—model and serial number or

photograph—but complaints may still appear in the database without this information.

- H.R. 2715: Updates to CPSIA (2011) *available at* <http://www.cpsc.gov/en/Regulations-Laws--Standards/Statutes/>.