

June 4, 2018

By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Notice and Request for Information Regarding Bureau Public Reporting Practices
of Consumer Complaint Information; 83 Fed. Reg. 9,499 (Mar. 6, 2018) [Docket
No. CFPB-2018-0006]

Dear Acting Director Mulvaney:

The American Bankers Association¹ (ABA) appreciates your leadership in exposing the policies and procedures of the Bureau of Consumer Financial Protection to public review and comment through the Request for Information (RFI) process. This process provides a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it carries out its important mission.

Like all government agencies, the Bureau must pursue its objectives in full conformity with other important values, including fairness to those it regulates. Unfortunately, the Bureau's early focus all too often has been on increasing the scope of its authority, rather than on ensuring that its authority is exercised wisely and fully for the benefit of consumers, an approach that will usually be enshrined in and consistent with law and due process. The failure to observe both customer interests and fairness to regulated entities is exemplified by the Bureau's legacy decision to publish unverified consumer complaints, despite the harm to consumers from feeding them potentially misleading information and the absence of authority from Congress to take this action. This decision has eroded customer privacy, impaired the confidential nature of the exchange between customer and banker, compromised the supervisory process, and introduced unreliable and misleading information into the market. We urge the Bureau to return its focus to its statutory mission of (1) ensuring that customer complaints and concerns are addressed individually and confidentially with each customer, in a prompt and effective manner; (2) appropriately using information and data from consumer complaints to inform Bureau policy and enforcement initiatives; and (3) reporting aggregate complaint data annually to Congress.

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

Summary of Comment

Financial institutions welcome consumer feedback on the financial products and services their customers use. Customer satisfaction is key to franchise value. For each customer, respect for personal circumstances and confidential treatment are paramount, particularly when customers are asserting individual complaints about their private financial affairs.

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

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) underscores Congress' endorsement of this long-standing consideration.² Congress sought to ensure that responses were confidentially handled and the interests of each customer appropriately and directly addressed, individually and personally with that customer. Congress also directed the Bureau to analyze complaint data for supervisory oversight and policy-making purposes and to report aggregate complaint data annually to Congress. Significantly, Congress was careful *not* to authorize the publication of individual consumer complaints.

ABA supports Congress' directive to the Bureau to facilitate individual responses to consumer complaints.³ Unfortunately, under orders from former Director Cordray, the Bureau deviated significantly from its statutory mandate. Beginning in 2012, the Bureau established a public Consumer Complaint Database (Database) containing credit card complaints,⁴ expanded the Database to include complaints related to other financial products and services,⁵ and then further expanded it to include unstructured narratives supplied by complainants.⁶ The Bureau chose to establish and expand the Database via "policy statements"—not required notice-and-comment rulemaking under the Administrative Procedure Act (APA)—and failed to conduct an analysis of the costs and benefits to consumers, companies, and the Federal Government of establishing and maintaining such a public Database.

In disregarding its statutory limitations, the Bureau has published complaints through the Database without making any effort to verify the factual allegations contained in each

² Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (July 21, 2010) [hereinafter Dodd-Frank Act].

³ *Id.* § 1013(b)(3)(A).

⁴ Notice of Final Policy Statement, Disclosure of Certain Credit Card Complaint Data, 77 Fed. Reg. 37,558 (June 22, 2012) [hereinafter 2012 Final Policy Statement].

⁵ Final Policy Statement, Disclosure of Consumer Complaint Data, 78 Fed. Reg. 21,218 (Apr. 10, 2013).

⁶ Final Policy Statement, Disclosure of Consumer Complaint Narrative Data, 80 Fed. Reg. 15,572 (Mar. 24, 2015).

complaint.⁷ Instead of fostering informed and responsible consumer choice, the Bureau has introduced unreliable, misleading, and potentially false information into the market, under the imprimatur of “An official website of the United States government” emblazoned at the top of every page of the Bureau’s website. Much more can and should be expected of a website that trades on the reputation—and legitimacy—of the U.S. Government.

ABA supports your recent statements that you are “committed to fulfill the Bureau’s statutory responsibilities, but go no further.”⁸ We urge the Bureau to cease publication of such complaint data and unverified individual complaint narratives on the public Database. We also urge the Bureau to discontinue permanently the “Monthly Complaint Reports” that it published between July 2015 and October 2017. These reports are mentioned nowhere in the Dodd-Frank Act, provide no meaningful context for the information presented, and impose unjustified reputational harm on the companies listed in the reports, without any evidence that the reports propagate accurate information or provide utility to consumers.⁹

Instead, the Bureau should focus on its statutory mandate: overseeing the individual responses to consumer complaints, analyzing complaint data for supervisory oversight and policy-making purposes, and providing aggregate reporting to Congress.¹⁰

I. The Bureau Has No Statutory Authority to Maintain a Public Complaint Database

An analysis of the statutory structure and background of Title X of the Dodd-Frank Act, as well as the text of sections 1013 and 1034 of that Act, unequivocally demonstrates that Congress considered, and clearly defined, the precise role of the Bureau with regard to consumer complaint management and disclosure. That role is to—

- (1) “facilitate the centralized collection of, monitoring of, and response to consumer complaints”;¹¹
- (2) “route” complaints to the Federal Trade Commission or other Federal and State agencies, where appropriate;¹²
- (3) present annual and semiannual reports to Congress with aggregate data on complaints;¹³ and

⁷ See 2012 Final Policy Statement, 77 Fed. Reg. at 37,561 (acknowledging that “the Bureau does not validate the factual allegations of complaints”).

⁸ Bureau of Consumer Fin. Protection (Bureau), *Bureau of Consumer Financial Protection Strategic Plan: FY 2018-2022*, at 2 (Feb. 12, 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf.

⁹ The Bureau’s primary motivation in issuing these reports appears to be to publish the names of companies that received the highest number of complaints. Invariably—and unsurprisingly—the Bureau’s list of most complained-about companies is comprised of the largest financial companies in the United States. The Bureau has made no effort to normalize or contextualize this number, such as by listing the size of the company, number of customers, or number of customer interactions the company has had.

¹⁰ Dodd-Frank Act §§ 1034, 1013(b), 1016.

¹¹ *Id.* § 1013(b)(3)(A).

¹² *Id.* § 1013(b)(3).

¹³ *Id.* §§ 1013(b)(3)(C) & 1016(c)(4).

- (4) share data with Federal and State agencies for the purpose of “facilitat[ing]” preparation of the mandated reports to Congress, and for the Bureau’s “supervision and enforcement activities.”¹⁴

As explained in greater detail in ABA’s comment to the Bureau’s 2014 proposal to publish complaint narratives (attached),¹⁵ nothing in the statute contemplates the establishment of a public database of consumer complaints or publication of the Monthly Complaint Reports. There is no provision of authority to *publish* individual complaints. This contrasts with Congress’ specific direction that the Bureau “publish[]” market-related information.¹⁶ It also contrasts significantly with Congress’ decision only two years earlier, in the Consumer Product Safety Improvement Act, to direct the Consumer Product Safety Commission to “establish and maintain a *database* on the safety of consumer products . . . that is- (A) *publicly* available; (B) searchable; and (C) *accessible through the Internet website* of the Commission.”¹⁷

In addition, the statutory history of the Dodd-Frank Act confirms Congress’ intent not to create a database of individual complaints: 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 nothing in that text suggests Congress ever intended the establishment of a public database of complaints. As the Supreme Court’s seminal decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, makes clear, the Bureau is compelled to “give effect” to Congress’ “unambiguously expressed intent” and may not substitute its own judgment or intentions in place of the will of Congress.¹⁸ Congress chose not to establish a public database of individual complaints, and the Bureau cannot make law in Congress’ place. As you stated in a recent interview, “[w]e will not be making law. We will not be making stuff up as we go.”¹⁹

II. The Bureau Improperly Established the Database Through a Policy Statement—Not APA Rulemaking—and Failed to Conduct an Analysis of the Costs and Benefits of a Database of Unverified Complaints

The method by which the Bureau established the Database—through a “policy statement,” not rulemaking—also contravened the APA and its procedural and substantive standards designed to promote transparency, accountability, and evidence-based decision-making.

¹⁴ *Id.* § 1013(b)(3)(D).

¹⁵ Letter from Frank Keating, Pres. & CEO, Am. Bankers Ass’n, to Richard Cordray, Dir., Bureau of Consumer Fin. Protection (Sept. 22, 2014), <http://www.aba.com/Advocacy/commentletters/Documents/clComplaintNarrative2014Sept.pdf> [hereinafter ABA 2014 Letter]. That letter is attached in an Appendix; pages 4-15 present ABA’s analysis of the Bureau’s lack of statutory authority to establish a public database of individual complaints.

¹⁶ Dodd-Frank Act § 1021(c)(3); *cf. Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 176-77 (1994) (when Congress creates liability in one provision, but is silent on liability in a separate provision, a court cannot construe the silence to imply the *creation* of liability).

¹⁷ 15 U.S.C. § 2055a(a)(1) (2012) (emphasis added).

¹⁸ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁹ Interview by Major Garrett with J. Michael Mulvaney, Dir., Bureau of Consumer Fin. Protection, Face the Nation (Feb. 11, 2018), <https://www.cbsnews.com/news/transcript-omb-director-mick-mulvaney-on-face-the-nation-feb-11-2018/>.

It is well established that a statement of policy that has a “binding effect” is a “legislative rule” subject to the notice-and-comment procedures set forth in the APA.²⁰ The Bureau’s action to establish the Database clearly has had binding effect: the Bureau *requires* that banks and other companies subject to the Bureau’s supervision use the Company Portal (Portal) to respond to complaints. Those complaints, as well as the company’s response, are uploaded to the Database. Companies have no power to object to the publication of a complaint or the company’s response. Since the Database and Portal have binding effect (requiring companies to provide information that will explicitly be published), the Bureau was required to use APA notice-and-comment rulemaking before imposing these mandates on companies under its supervision.

The Bureau, however, chose to proceed via “policy statement,” which inadequately analyzed the privacy risks presented and failed to evaluate how to manage those risks, did not include a quantitative evaluation of the potential benefits and costs to consumers and industry, and completely disregarded consideration of alternative means to inform consumer decision making about financial products and services.

Both the APA and Dodd-Frank Act section 1022 require an empirical analysis of the costs to *maintain* the Database and the benefits to consumers. Although we are unaware of any effort to conduct this analysis, presumably there are significant ongoing IT and personnel costs to maintain the Database and the three-part “scrubbing” process for removing personally identifiable information (PII) from each narrative.²¹

A cost-benefit analysis would also have required the Bureau to confront the significant risks to consumer privacy inherent in the publication of individual complaints and complaint narratives. In 2015, the Bureau retained Booz Allen Hamilton to assess the effectiveness of the Bureau’s “scrubbing system” to protect consumer privacy.²² Booz Allen Hamilton’s review found that the

²⁰ See *Pac. Gas & Elec. Co. v. Fed. Power Comm’n*, 506 F.2d 33, 38 (D.C. Cir. 1974) (“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.”) (internal citation omitted).

²¹ Bureau, *Narrative Scrubbing Standard* (Mar. 2015),

https://files.consumerfinance.gov/a/assets/201503_cfbp_Narrative-Scrubbing-Standard.pdf. The Bureau describes the scrubbing process as follows:

We scrub personal information from your complaint narrative by performing a rigorous three-step procedure. First, we run your narrative through a computer program to identify personal information. This computer review is designed to scrub much of your personal information. Second, a trained human reviewer reads your narrative to scrub additional personal information that our computer program may have missed. Third, a quality assurance specialist reviews your narrative to look for any personal information that the computer and previous human review may have missed. If the quality assurance specialist determines that your personal information was not scrubbed according to our standard, your narrative will be reprocessed and corrected before publication.

Id. at 3.

²² Bureau, *Evaluation of Narrative Scrubbing Standard and Process 2* (Sept. 2015),

https://files.consumerfinance.gov/f/201509_cfbp_evaluation-of-narrative-scrubbing-standard-and-process.pdf.

Bureau had a 0.5% “Leakage Rate,” defined as the “amount of high-risk identifiers such as names, addresses, and bank account numbers that are published in the Consumer Complaint Database.”²³ As of today (June 4, 2018), the Database contained 289,155 complaint narratives. Applying a Leakage Rate of 0.5% against the published complaint narratives, an estimated 1,446 complaints were published with unredacted PII. That infringement of consumer privacy is significant and, at a minimum, should have been reflected in the Bureau’s cost-benefit analysis prior to establishment of the Database and decision to publish complaint narratives.

A proper cost-benefit analysis would also have determined the benefits, if any, provided by the Database to consumers. As described above, the Bureau scrubs complaints of PII, which removes significant amounts of information from the complaint. The Bureau also prevents individuals submitting complaints from attaching documents (due to the likelihood that an attachment will contain PII), which eliminates another source of information related to the complaint. The Bureau has never demonstrated that these heavily redacted complaints (where successfully redacted to protect privacy) provide useful information to consumers. Moreover, the complaints themselves are unverified and may contain misleading and potentially false information, as described in greater detail below.

In addition, the Bureau has never shown that real consumers actually use the published Database to inform their personal financial decisions, despite ABA’s repeated recommendations that the Bureau determine this critical fact,²⁴ and despite ample opportunity for the Bureau to do so. Indeed, over the years, there has been little use of the Database by advocates, academics, the press, and entrepreneurs, which the Bureau predicted and asserted as a benefit to justify its costs.

Since the Bureau avoided the critical step of conducting a cost-benefit analysis, the Bureau established a Database that provides no demonstrated value to consumers or the financial services marketplace, in contravention of the APA, the Dodd-Frank Act, and public policy.

III. Unverified Consumer Complaints Are Unreliable and Should Not Be Published

Aside from the lack of legal authority for the Bureau to publish the consumer complaints, it is bad policy. Congress has stated clearly that any information that the Federal Government *publishes* must be reliable and provide utility to the public. The deeply flawed process that led to the Bureau’s unlawful establishment of the Database has resulted in the publication of complaint information that is not reliable and therefore risks harm rather than benefit to consumers. Moreover, the Bureau has failed to implement measures to mitigate these shortcomings. To conform to Congress’ data quality mandate and the Bureau’s own data quality requirements and to further sound public policy, the Bureau should cease publication of individual complaints.

²³ *Id.* at 3.

²⁴ See ABA 2014 Letter, *supra* note 15, at 21-23; Letter from Kate Larson, Consumer Bankers Ass’n, and Jonathan Thessin, Am. Bankers Ass’n, to Bureau of Consumer Fin. Prot. 4-5 (Sept. 30, 2016), <http://www.aba.com/Advocacy/commentletters/Documents/cl-CFPB-ConsumerSurvey2016.pdf> [hereinafter CBA/ABA Letter].

A. The Publication of Unverified Complaints Contravenes Government-Mandated Quality Standards

Congress passed the Data Quality Act (DQA)²⁵ to ensure that government agencies publish information *only* after the Federal agency has taken steps to “maximiz[e] the quality, objectivity, utility, and integrity” of the information published.²⁶ In furtherance of the DQA, the Office of Management and Budget (OMB) directs that each agency “make certain that the information [it publishes] conforms to OMB guidance on information quality.”²⁷ Pursuant to that directive, the Bureau has adopted its own Information Quality Guidelines (Guidelines), which impose three requirements when a Bureau office disseminates information: (1) to “consider how the public will use the information”; (2) to “consider whether the disseminated information is accurate, clear, complete, and unbiased”; and (3) to prevent “falsification of information.”²⁸

The Bureau’s publication of complaints fails all three of the Guidelines’ tests. The Bureau has never studied how the published complaint information will inform consumer choices and eschews responsibility for ensuring that published narratives are accurate, complete, and unbiased, and not based on false information. To the contrary, the Bureau acknowledges that complaint “narratives may contain factually incorrect information,”²⁹ and that its staff “don’t verify all the facts alleged in these complaints” or review complaint narratives.³⁰ The inescapable conclusion is that the Bureau has done little to avoid being a broadcaster of false and misleading information, in direct contravention of the agency’s mission of policing the integrity of marketplace information.³¹

Congressional voices have expressed concern that complaints whose factual allegations have not been verified lack a minimum level of quality. Legislation has even been introduced that would prohibit the publication of a complaint “*without* first verifying the accuracy of all facts alleged in such complaint.”³² We agree that unverified allegations do not provide utility to consumers and in fact may misinform consumer purchasing decisions.

Besides publishing complaints that are potentially false and misleading, the Bureau also publishes complaints that provide little, if any, utility to other consumers, because the “complaint” may be (a) an *inquiry* about a product or service; (b) based on a misunderstanding or

²⁵ The Data Quality Act was enacted as section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554 § 515 [hereinafter Data Quality Act].

²⁶ *Id.* § 515(b)(2).

²⁷ Memorandum from Peter R. Orszag, Dir. Office of Mgmt. & Budget, to Heads of Exec. Dep’ts and Agencies, Open Government Directive 3 (Dec. 8, 2009), <https://www.treasury.gov/open/Documents/m10-06.pdf>.

²⁸ Bureau, Information Quality Guidelines, <https://www.consumerfinance.gov/open-government/information-quality-guidelines/> (last visited May 18, 2018).

²⁹ Notice of Proposed Policy Statement with Request for Public Comment, 79 Fed. Reg. 42,765, 42,767 (July 23, 2014).

³⁰ Bureau of Consumer Fin. Prot., Consumer Complaint Database, <https://www.consumerfinance.gov/data-research/consumer-complaints/> (last visited May 18, 2018).

³¹ See Dodd-Frank Act §§ 1021(b)(1) (one Bureau objective is to ensure consumers receive “timely and understandable information to make responsible decisions about financial transactions”); 1021(c)(3) (one Bureau function is to “monitor[]” and “publish[]” information in the marketplace for consumer financial products).

³² H.R. 5491, 114th Cong. (2016) (emphasis added).

dislike of the product's terms of service; (c) a complaint about a non-financial company's action; or (d) a "rant" about a company or industry practice that is not founded on a specific interaction between a consumer and the company.³³ Since many complaints fall into one of these categories, the Bureau should refer to the "complaints" it receives as consumer "reports," as the Federal Trade Commission now does.³⁴

The Bureau's statistics on how banks and other financial companies respond to complaints illustrate how consumers can be misled by the publication of unverified complaints. In 2017, the Bureau's public summary of complaints reported that companies provided "relief" to a complaining consumer in only 14% of all complaints, either in the form of monetary relief (4% of complaints) or non-monetary relief (10% of complaints).³⁵ The clear majority of complaints—75%—were "closed with explanation," which the Bureau defines as a response that "provide[s] an explanation that substantively meets the consumer's desired resolution or explains why no further action will be taken by your company."³⁶ When a company responds to a complaint by closing it with an explanation, the company has determined that, after investigating the facts alleged in the complaint, relief to the consumer was not warranted. Bureau publication of such complaints provides no benefit to other consumers, but instead it could mislead consumers by implying that each complaint reflects the company's error or wrongful conduct.

B. The Bureau Has Failed to Promote the Reliability and Utility of the Complaint Information It Has Published or to Determine Whether Consumers Benefit from Reviewing Published Complaints

The Bureau has failed to implement measures to promote the reliability or utility of the complaint information it has published or to determine whether consumers use or benefit from the information reported in the public Database.

³³ The U.S. Department of the Treasury, under Secretary Steven T. Mnuchin's leadership, reached the same conclusion that the Database "lacks appropriate safeguards," noting criticism that the "database may provide misleading or incomplete information to consumers because it does not indicate whether a complaint reflects dissatisfaction with legitimate terms of service, as opposed to actual wrongdoing, and does not provide information on the size of the relevant market." U.S. Dep't of Treas., *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* 87 (June 2017), <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>.

³⁴ See Fed. Trade Comm'n, *Consumer Sentinel Network: Databook 2017*, at 2 (Mar. 2018), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2017/consumer_sentinel_data_book_2017.pdf.

³⁵ Bureau, *Consumer Response Annual Report: Jan. 1 – Dec. 31, 2017*, at 44 (Mar. 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-response-annual-report_2017.pdf. The Bureau provides the following examples of non-monetary relief: "Foreclosure alternative without direct monetary value to the consumer; Ceasing debt collection telephone calls or other company-to-consumer contacts; Correcting submissions to a credit bureau; Changing account terms; Changing solicitation practices or materials; Restoring/removing a credit line; Reopening of account; Prospective rate changes; or Addressing formerly unmet customer service issue." Bureau, *Company Portal Manual Version 3.0*, at 36-37 (Apr. 2017), https://www.insidearm.com/documents/674/MosCompanyPortalManual_v_3.0_april_17.pdf [hereinafter *Company Portal Manual Version 3.0*] (emphasis in original).

³⁶ Bureau, *Company Portal Manual Version 3.0*, *supra* note 35, at 34.

For example, the Bureau has denied companies the opportunity to correct inaccurate categorizations of complaints. Complaints can be inaccurately categorized in several different ways, based on information that the consumer is asked to enter when submitting a complaint. The consumer could mis-identify the product and/or the sub-product and the consumer could mis-identify the issue and/or sub-issue of the complaint. When consumers do not select the correct choice for each category when submitting a complaint, the publication of complaint information potentially misleads the public about the type of conduct that allegedly occurred. The Bureau does not check for accuracy or correct inaccurate categorization.

Second, the Bureau has made no attempt to “normalize”—i.e., provide context to—the complaint information it publishes, despite seeking comment *three* years ago on how it should normalize this information.³⁷ As noted in ABA’s comment, normalization as the Bureau proposed would not improve the accuracy or integrity of the unverified complaint information reported in the Database.³⁸ However, the Bureau could have normalized three discrete categories of measurable, verifiable facts:

- (1) the status of the financial institution’s response to the consumer;
- (2) whether the institution responded in a timely manner; and
- (3) whether the consumer disputed the institution’s response.³⁹

If the Bureau had sought, in good faith, to make the Database useful to consumers, it would have normalized these data elements. By not doing so, the Bureau has appeared unconcerned with making the Database useful to consumers.

Third, the Bureau has never studied whether consumers use and benefit from the information reported in the Database. ABA has called for the Bureau to convene focus groups to review a random sample of unverified, de-identified complaint narratives to investigate whether consumers are willing to read the narratives and whether they can glean salient information from the narratives that they would rely on to inform their personal financial decisions.⁴⁰ To our knowledge, the Bureau has not taken any action to understand the value provided to consumers by the Database.

IV. The Bureau Should Discontinue the Closing Survey

ABA has questions about the value of the Bureau’s current survey that asks consumers who have submitted complaints to provide feedback on the company’s handling of the consumer’s complaint (Closing Survey).⁴¹ While we appreciate the value of customer input, that value

³⁷ See Request for Information Regarding the Consumer Complaint Database: Data Normalization, 80 Fed. Reg. 37,237 (June 30, 2015) (requesting information regarding “best practices” for normalizing data in the Database).

³⁸ Letter from Jonathan Thessin, Am. Bankers Ass’n, to Monica Jackson, Bureau of Consumer Fin. Prot. 4 (Aug. 31, 2015), <http://www.aba.com/Advocacy/commentletters/Documents/cl-ConsumerComplaintDB-Aug2015.pdf>.

³⁹ *Id.* Because of the Bureau’s continuing refusal to verify the facts in complaints that are published, or to take any other steps to improve the integrity or utility of the information published, there are no other data that can be trusted to be normalized without misleading the public.

⁴⁰ See ABA 2014 Letter, *supra* note 15, at 22 & 25; CBA/ABA Letter, *supra* note 24, at 4-5.

⁴¹ The Closing Survey permits a customer who has submitted a complaint to provide feedback on the company’s handling of the complaint by answering three questions with a “yes” or “no” response: (1) “The company’s response

increases to the extent that the customer is providing informed information. By the time that the second survey is provided, the customer issue will in most cases already be put to rest; there could be little general interest by consumers to reply, skewing the information.

Moreover, the Bureau's use of the Closing Survey contravenes the Paperwork Reduction Act,⁴² because the Survey provides minimal, if any, utility to the company or to the Bureau. The Bureau provides the results of the Closing Survey to the company that handled the complaint, ostensibly to help the company strengthen its complaint handling processes. Although seemingly well-intentioned, the survey results do not provide utility to the company, as the PRA requires for information disseminated by the Federal Government.⁴³ The survey aggregates ratings and narrative feedback that are based on views of a narrow field of consumers—those that file complaints—subjectively measured by the complainants' expectation of the relief to which they believed or hoped that they were due. A customer that submits a complaint based on a misunderstanding about a product or service or one that submits a generalized expression of frustration against a company will be dissatisfied if the company declines to provide the requested relief—relief to which the complainant may not be entitled. These are the customers likely to respond to the survey. Their evaluations, presumably expressions of dissatisfaction, will not provide useful information to companies that the companies do not already have. Companies expend extensive effort, including internal reviews, prior to responding to a complaint. It is highly unlikely that a customer responding to the survey will provide new information that the company had not already considered in providing its response to the complaint.⁴⁴

For the same reasons, the results of the Closing Survey provide little, if any, utility to Bureau staff. Thus, the results fail Congress' mandate that a Federal agency rely only on information that has "practical utility"⁴⁵ and "strengthens[s] decisionmaking."⁴⁶ Therefore, we recommend that the Bureau discontinue the use of Closing Surveys.

addressed all of my issues"; (2) "I understand the company's response to my complaint"; and (3) "The company did what they said they would do with my complaint." The Survey also provides a text box under each of question where the customer can submit a narrative response in addition, or in place of, the customer's "yes" or "no" response. *See* Office of Mgmt. & Budget, Office of Info. & Regulatory Affairs, Consumer Response Customer Survey, https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201607-3170-004&icID=224625 (last visited May 25, 2018) (providing approved survey).

⁴² Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (May 22, 1995), codified at 44 U.S.C. § 3501 et seq.

⁴³ *Id.* § 3501(2) (one purpose of PRA is to "ensure the greatest possible public benefit from and maximize the utility of information . . . disseminated by or for the Federal Government").

⁴⁴ A more in-depth analysis of the flaws in the Closing Survey is provided in two letters that ABA and the Consumer Bankers Association sent to the Bureau in connection with the Bureau's request for OMB approval, under the PRA, of the survey. *See* Letter from Jonathan Thessin, Am. Bankers Ass'n, and Kate Larson, Consumer Bankers Ass'n, to OMB Desk Officer for the Bureau of Consumer Fin. Prot. (Dec. 28, 2016), *available at* <http://www.aba.com/Advocacy/commentletters/Documents/comment-letter-proposed-consumer-response-company-response-survey.pdf>; CBA/ABA Letter, *supra* note 24.

⁴⁵ 44 U.S.C. § 3508.

⁴⁶ *Id.* § 3501(4).

V. Conclusion

ABA members are committed to the prompt resolution of consumers' complaints. Congress through the Dodd-Frank Act charged the Bureau with facilitating the timely, individual response to complaints, as well as with analyzing aggregate complaint data and providing an annual report to Congress. The Bureau has disregarded this limited mandate and, instead, imposed its own policy preference in place of the will of Congress through the establishment of a public Database of individual complaints and publication of Monthly Complaint Reports. The Bureau's action 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.

We urge the Bureau to stop publishing consumer complaint data and narratives on a public Database and discontinue publishing other public reports that are outside of its statutory authority. Instead, the Bureau should focus on its statutory mandate of overseeing the individual response to consumer complaints, analyzing complaint data for supervisory oversight purposes, and aggregate reporting to Congress.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Thessin". The signature is written in a cursive, flowing style.

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance

APPENDIX



Confidential
 10/22/2014 11:11
 10/22/2014 11:11
 10/22/2014 11:11

Building Business Forward

September 22, 2014

By Christopher Anthony for
www.americanbankers.com

The Honorable Richard Cordray
 Director
 Bureau of Consumer Financial Protection
 1775 F Street, N.W.
 Washington, D.C. 20004

Re: Notice of proposed order to disclose consumer complaint narrative data, Bank
 No. 13-000401-0000

Dear Director Cordray:

The American Bankers Association (ABA)¹ respectfully submits its comments on the Bureau of Consumer Financial Protection's (Bureau) proposed to disclose its Consumer Complaint Database (CCD) to the public in response to requests for information.²

ABA represents a wide range of member financial institutions and services that are critical to the U.S. economy. ABA's members are a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses.

This has long been a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses. ABA's members are also a key part of the financial system, providing a wide range of financial products and services to consumers and businesses.

¹ www.americanbankers.com

² The American Bankers Association is the voice of the nation's \$45 trillion banking industry, which is composed of more than 10,000 banks and credit unions. The ABA is a non-profit organization that represents the interests of its members and the public. The ABA is a non-profit organization that represents the interests of its members and the public. The ABA is a non-profit organization that represents the interests of its members and the public. The ABA is a non-profit organization that represents the interests of its members and the public. The ABA is a non-profit organization that represents the interests of its members and the public.

³ 12 C.F.R. 102.11(a)(1); 12 C.F.R. 102.11(a)(2); 12 C.F.R. 102.11(a)(3)

First, Dodd-Frank Act section 1029(b)(5) describes the manner in which the unit assigned to handle consumer complaints:

(3) COLLECTION AND TRACKING COMPLAINTS

(a) IN GENERAL.—The [SEC] shall establish a unit whose functions shall include establishing a system, utilizing appropriate methods, to collect data on written or printed complaints received by the unit assigned to handle consumer complaints or received by the unit assigned to handle consumer complaints regarding consumer financial products and services. The [SEC] shall ensure that the unit assigned to handle consumer complaints is able to provide appropriate advice to consumers where appropriate.¹⁷

The statutory text is clear, the database Congress envisioned the Bureau using was intended "to facilitate the collection, analysis, and monitoring of, and response to consumer complaints." This language sets the stage for the kind of data collecting, analyzing, and response system of individual and sampling of consumer complaints that is established through the complaint database under such regulations for examination. The process and not whether the agency would use a database as a tool for consumer complaints is contemplated.

Indeed, other Dodd-Frank Act provisions require that Congress was specific when assigning to the Bureau regulatory responsibilities related to consumer complaints. Section 1029, discussed the primary functions of the Bureau, including "collecting, analyzing, and responding to consumer complaints."¹⁸ Congress did not just mention the Bureau to address consumer complaints, but a comprehensive mission that includes a database to collect and analyze the data that the unit is required to collect and analyze. The Dodd-Frank Act makes the mission (collecting, analyzing, responding, and monitoring) to be achieved through a comprehensive system for consumer complaints and a database to collect and analyze the data that the unit is required to collect and analyze. The Dodd-Frank Act makes the mission (collecting, analyzing, responding, and monitoring) to be achieved through a comprehensive system for consumer complaints and a database to collect and analyze the data that the unit is required to collect and analyze. The Dodd-Frank Act makes the mission (collecting, analyzing, responding, and monitoring) to be achieved through a comprehensive system for consumer complaints and a database to collect and analyze the data that the unit is required to collect and analyze.

Moreover, Congress addressed the disclosure of consumer complaint information but expressly chose to limit the disclosure of specific information, and not to prohibit it. And only under certain circumstances is disclosure of information on the part of financial institutions required. Section 1029(b)(2) states:

(3) PUBLIC ACCESS TO DATA.—To the extent practicable, State agencies may receive appropriate information from the system established under paragraph (1), and

¹⁷ Dodd-Frank Act section 1029(b)(5).
¹⁸ Dodd-Frank Act section 1029(b)(1).
¹⁹ Dodd-Frank Act section 1029(b)(2).

the State agency system has the functional capacity to receive calls or electronic reports routed for the State system;

- II. the State agency has established any conditions of participation in the system that the Bureau may establish, including treatment of personally identifiable information and sharing of information on consumer complaints or related consumer products or services; and
- III. certification by the State agency including 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 involved in collaboration.

(M) **REPORTS TO THE BUREAU.**—The Bureau shall require an annual report to Congress not later than 1 year after the start of the compliance required 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 other applicable information about resolution of complaints.

(N) **DATA SHARING REQUIREMENTS.**—To facilitate preparation of the reports under subparagraph (M), cooperation and information exchange, 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, and State agencies shall provide to the Bureau, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information, and for data security and integrity,

The highlighted statutory text clearly shows significant Congressional care to limit access to and use of consumer personal information, including a requirement to protect the privacy of personally identifiable information. Data reporting is critical to an agency's ability to identify and address consumer complaints, conduct research, and share regulatory information about resolution of consumer complaints. The statute does not prohibit collection, use, disclosure, or use in litigation of individual consumer information. Shared, non-identifying information is shared with Federal and State agencies, is further restricted as needed.

Rodd-Clark Act authorities, or even contemplates, the public disclosure of consumer complaint data or narratives. Therefore, the establishment and operation of the Consumer Complaint and Narrative Database is outside of the Act, and the Bureau's proposal to add verbatim complaint narratives to the Database should be withdrawn.

III. The Decision to Establish the Database and the Proposal to Publish Consumer Complaint Narratives Cannot Slip 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 requirements of 5 U.S.C. 553(b).¹¹ However, establishing the Database, like the Bureau has suggested its current proposal to "disseminate and make available to the public" information received in 2012 and March 2013, requires more than a "policy statement" and requires "rulemaking" under the Administrative Procedure Act. The Bureau's current proposal, however, is not a "policy statement" for APA rulemaking. The Bureau's suggested change from rulemaking to either an administrative act or the Bureau takes legal authority to conduct any federal program, or the application of legal standards to its activities, is such, the Bureau would be operating under the Act of legal authority for the action and not exercising discretion for policy-making. It is not a legal basis for these actions.

It is well established that a statement of policy that has a "binding effect" is a legislative act subject to notice and comment procedures of 5 U.S.C. 553. In *Seattle City & County v. Fed. Res. Bd.*, the D.C. Circuit applied the binding effect test and is doing so again when the difference between a legislative and non-legislative statement. The court wrote:

A properly adopted administrative rule establishes a standard of conduct which has the force of law... A non-legislative statement of policy, on the other hand, does not establish a "binding effect." It is not directly enforceable as the issue of rights or duties is not set. The agency cannot, with or without a general statement of policy as non-binding, a non-legislative statement of policy only announces what the agency means to establish as policy. A policy statement announces the agency's general intent to act in the future.¹²

While the two impugned Policy Statements did announce the Bureau's intention to establish and implement the Database, they could not have been considered "binding" and non-enforceable. The Bureau did not require agencies subject to its supervisory jurisdiction to furnish consumer complaints through the Consumer Complaint Portal, nor derive from all such complaints were not required participants in the Database-- neither of which would.

A recent case considered by the D.C. Circuit illustrates that the issue is on whether the policy statement is itself an act. Federal private parties are responsible for actions that relate to

¹¹ 77 Fed. Reg. 20,000, 20,001 (Apr. 11, 2012).

¹² 24 Fed. Cl. 606, 607 (1985) (quoting 5 U.S.C. 553).

¹³ 77 Fed. Cl. 606, 607 (1985) (quoting 5 U.S.C. 553).

confront will bring adverse consequences." In *Electronic Privacy Information Center v. Government of Maryland*, 1997, the court concluded that the government's Privacy Agency (GA) action was intended to force persons to go through a voluntary system of registration for a telephone call, and to prevent policy decisions of, and to control the use of, the system. The court found that the government's action in the *Electronic Privacy Information Center* and the *Electronic Privacy Information Center* was a violation of the First Amendment, which was not, therefore, a violation of the First Amendment.

The fact that a consumer has the choice to opt in to the publication of a complaint narrative and that a complaint is an address which is subject to inspection would not result in a different conclusion as to whether the complaint is subject to inspection. In *Electronic Privacy Information Center v. Government of Maryland*, 1997, the court found that the complaint is subject to inspection.

It is true, the complaint can opt for a narrative form, as the TSA contended at oral argument. The agency has not argued that either makes its complaint subject to inspection and has therefore the right to inspect the complaint. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection.

It is clear in the *Electronic Privacy Information Center* that the publication of the complaint narrative would lead to the disclosure of the complaint and would be a violation of the First Amendment. The *Electronic Privacy Information Center* could not be subject to inspection, but it cannot be subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection.

Court also held that policy statements that "bind" the agency are legislative rules that must be subject to notice and comment rulemaking. In *Administrative Procedure Act*, 1946, the *Administrative Procedure Act* is a public statement that "binds" the agency to act in a certain way. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection.

In *Electronic Privacy Information Center v. Government of Maryland*, 1997, the court found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection.

Electronic Privacy Information Center v. Government of Maryland, 1997.

Electronic Privacy Information Center v. Government of Maryland, 1997, 150 F.3d 1041, 1042 (D.C. Cir. 1997).
The court found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection. The court has found that the complaint is not subject to inspection.

Electronic Privacy Information Center v. Government of Maryland, 1997, 150 F.3d 1041, 1042 (D.C. Cir. 1997).

Electronic Privacy Information Center v. Government of Maryland, 1997, 150 F.3d 1041, 1042 (D.C. Cir. 1997).

commentary suggested that the rule, if adopted, might be subject to the same criticisms that the proposed rule is now facing, namely that it will not be sufficient to ensure that the proposed rule will be subject to the same criticisms that the proposed rule is now facing. The proposed rule is now facing the same criticisms that the proposed rule is now facing. The proposed rule is now facing the same criticisms that the proposed rule is now facing.

A. The APA and the Dodd-Frank Act impose (separate) procedural and substantive standards

Neither the Bureau's proposal of its participation in "emergency and urgent engagement" with the public regarding its actions¹⁰ nor its activities in the public in general concern the proposed rule. The proposed rule is subject to the same criticisms that the proposed rule is now facing. The proposed rule is now facing the same criticisms that the proposed rule is now facing.

APA applied, as interpreted by the courts, requiring agency rules under an "arbitrary and capricious" standard.¹¹ The proposed rule is now facing the same criticisms that the proposed rule is now facing.

The rule sets forth the basis and purpose of the rule in a detailed statement ... in which the agency states in the introductory part for its action, including, as required, its reasons for choosing that particular regulatory approach in the proposed rule. The rule sets forth the basis and purpose of the rule in a detailed statement ... in which the agency states in the introductory part for its action, including, as required, its reasons for choosing that particular regulatory approach in the proposed rule. The rule sets forth the basis and purpose of the rule in a detailed statement ... in which the agency states in the introductory part for its action, including, as required, its reasons for choosing that particular regulatory approach in the proposed rule.

Section 304(b) of the Dodd-Frank Act imposes additional standards for rulemaking:

In promulgating a rule under this section or exercising emergency powers, the Bureau shall consider—

- (1) the potential benefits and costs to consumers and covered persons, including the potential reduction of costs to consumers to recover financial products and services resulting from such rulemaking;
- (2) the impact of proposed rules on covered persons, as described in section 303, and the impact on consumers in other areas.

¹⁰ See the Bureau's proposed rulemaking.

¹¹ As stated in pp. 24-25, above, the proposal is deficient in applying the standards of a proposed rule, but should the Bureau apply the standards of a proposed rule, it should do so in a way that is consistent with the standards of a proposed rule.

¹² See, e.g., 12 C.F.R. 101.101, 101.102.

¹³ The proposed rule is subject to the same criticisms that the proposed rule is now facing. The proposed rule is now facing the same criticisms that the proposed rule is now facing.

Sincerely,



Frank Keating

cc. Ms. Monica Jenkins, Office of the Executive Secretary