

**American Financial Services Association
Mortgage Bankers Association**

February 9, 2011

Claire Stapleton
Consumer Financial Protection Bureau Implementation Team
1801 L Street, NW
Washington, DC 20036

**Re: Notice of Proposed Privacy Act System of Records (Treasury/DO.315—CFPB
Implementation Team Consumer Inquiry and Complaint Database)**

Ms. Stapleton,

The American Financial Services Association (“AFSA”) and the Mortgage Bankers Association (“MBA”) appreciate the opportunity to comment on the subject Notice of the Consumer Financial Protection Bureau (“CFPB”) Implementation Team’s Consumer Inquiry and Complaint Database.

AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

MBA is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, commercial mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field.

The CFPB Implementation Team released the Notice of Proposed Privacy Act System of Records (“Notice”) in accordance with the Privacy Act of 1974, 5 U.S.C. § 552a – As Amended, (“Privacy Act”) and under the authority given to them by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).

GENERAL COMMENT

While the undersigned have several specific concerns regarding the Notice that will be discussed below, we take the opportunity here to emphasize two overarching and fundamental concerns with the proposed Consumer Inquiry and Complaint Database

(hereinafter, the “System”) itself and the process pursuant to which it is being implemented. Both of these concerns are driven by the fact that this System will by definition be enormously important and have significant implications for industry, consumers, and the nation’s economy for years to come.

With that in mind, our first general comment relates to the stated effective date of the System. The Notice provides that the System will be effective today, February 9, 2011, which happens to be the same day comments are due. In our view this is simply an untenable result insofar as it obviously precludes any time for a thoughtful and necessary review of public comments. A reasonable amount of time must be afforded for such input before the System is allowed to become operational. In addition, the authority that permits the System to become effective prior to the CFPB obtaining jurisdiction over, and control of, the System is unclear.

Our second general comment is somewhat related to the first one. We strongly believe that before this System is established, it must be subject to the appropriate notice and rulemaking process. This would include, among other things, solicitation and receipt of input from all relevant stakeholders to ensure the System is constructed in such a way as to ensure it is as efficient, secure and effective as possible in protecting consumer privacy and confidential financial business information while concomitantly serving its defined purposes. Absent such a process, this System could have the unintended consequences of unnecessarily increasing the burden and costs to industry or the consumers it is ultimately intended to serve. We offer these comments to assist the CFPB’s planning for that process.

SPECIFIC COMMENTS

Introductory Comment

Both the Privacy Act and the Dodd-Frank Act contain express provisions that impose limitations on the collection and storage of data. These limitations, more fully described below, are not addressed or incorporated under the Notice, and we would strongly urge the CFPB Implementation Team to incorporate them into the descriptions and practices relating to the System. In addition, we are concerned that the routine uses of records maintained in the System as detailed in the Notice will not effectively protect individual consumer and financial information. Finally, we note that the System does not address the issue of frivolous complaints.

Limitations under the Privacy Act

As the new System will undoubtedly contain sensitive individual consumer information and financial information, we strongly urge the CFPB Implementation Team to ensure that adequate protections are in place to limit access to and misuse of information contained in the System. We agree with the statement made in the Department of Commerce’s December 2010 green paper, *Commercial Data Privacy and Innovation in the Internet Economy: A Dynamic Policy Framework*, that “privacy protections are crucial to maintain the consumer trust.” The paper

recommends that, “the U.S. government articulate certain core privacy principles—in order to assure baseline consumer protections—and that, collectively, the government and stakeholders come together to address specific privacy issues as they arise.” We hope that the CFPB Implementation Team will tailor the System to better conform to the Privacy Act and so provide better protection for consumers’ private information.

The Notice issued by the CFPB Implementation Team does not contain a provision for getting prior written consent from an individual or obtaining written consent from an individual before disclosing the data gathered. Section 552a (b) of the Privacy Act states, “No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains.” This prohibition provides important protection for individuals. AFSA and MBA ask that the CFPB provide further information regarding how this consent will be obtained in connection with the disclosure of information contained in the new System.

The Privacy Act also includes § 552a (e) (6) that states that each agency that maintains a system of records shall, “prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes.” Again, the Notice does not include a provision requiring that the CFPB Implementation Team make these reasonable efforts.

In sum, the undersigned strongly believe that the CFPB Implementation Team must incorporate further limitations and restrictions on access to the description of the new System of records consistent with those reflected in the Privacy Act.

Scope of System/Authority and Requirements under Dodd-Frank Act

The undersigned respectfully suggest that, to avoid confusion, the Notice limit the stated purpose of the System to the purpose described in §1013(b)(3)(A) of the Dodd-Frank Act. Therefore, we suggest that the stated purpose read, “The information in the system is being collected to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services.”

The Notice states that once the CFPB is fully operational, it will administer, enforce, and implement federal consumer financial protection law, as well as have authority to protect consumers from unfair, deceptive, and abusive practices when obtaining consumer financial products or services. Under §1034 of the Dodd-Frank Act, as of the Designated Transfer Date, the CFPB has an obligation to establish reasonable procedures to respond to consumer complaints against, or inquiries concerning, covered persons. As the CFPB will not take over responsibility for responding to these consumer complaints until such Designated Transfer Date, it is unclear from the information published in the Notice what authority the CFPB is acting under in establishing the proposed System.

We strongly support and believe that accurate, complete, timely and relevant complaints should be reviewed and responded to in a timely manner. This is in the best interests of both consumers and covered entities. However, consumers will be expecting the CFPB to assist them in resolving such complaints, and we are concerned that implementing a system to store consumer complaints and inquiries prior to the CFPB having the infrastructure and statutory authority to address and respond to the complaints will result in significant delays and frustration for consumers. We recommend that until the Designated Transfer Date, any complaints and/or inquiries be forwarded to the existing agency with responsibility for the subject matter of the complaint, to ensure timely handling and response.

Further, §1022 of the Dodd-Frank Act sets forth a number of requirements relating to collection of information, the confidentiality of information, and privacy considerations that we believe are extremely important for protection of confidential and sensitive consumer and business information.

Under §1022(c)(4) of the Dodd-Frank Act, the CFPB is granted “the authority to gather information from time to time regarding the organization, business conduct, markets, and activities of covered persons and service providers.” This section also contemplates that the CFPB will use consumer complaints as one of the means of gathering information.

Although not specifically required to be addressed in connection with the establishment of the system of records, §1022(c)(6) of the Dodd-Frank Act requires that the CFPB “prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authority under Federal consumer finance law.” AFSA and MBA believe that these rules, regarding the confidentiality of information obtained from persons in the CFPB's exercise of its authority, are a critical piece of the bigger picture that must be addressed before the CFPB begins its data collection efforts relating to consumer complaints, consumer inquiries or otherwise.

Lastly, §1022(c)(8) of the Dodd-Frank Act provides that “[i]n collecting information from any person, publicly releasing any information held by the Bureau, or requiring covered persons to publicly report information, the Bureau shall take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under 552(b) of 552a of title 5, United States Code, or any other provision of law, is not made public under this title.”

As was previously addressed above, given the CFPB's rulewriting obligations under §1034 of the Dodd-Frank Act with respect to the complaint process, and lack of clarity about its statutory authority to issue rules before the Designated Transfer date, the undersigned believe it would be prudent to delay the System's effective date until such time as pertinent rules and effective safeguards are in place. We strongly believe the broad categories listed in the Notice and the fact that there is no control placed over the data once it has been disclosed to the currently permitted persons and entities is so open-ended that disclosure will be tantamount to making

the data public. Both the Dodd-Frank Act and the Privacy Act make clear Congress's intent to safeguard this information and protect it from unauthorized disclosure and distribution.

Routine Uses of Records

The categories of routine uses of records as detailed in the Notice are far too broad and too inclusive. These open-ended categories have potentially grave implications to consumers and industry alike. Without adequate restrictions, we have significant concerns about effectively protecting individual consumer and financial information contained in the System, as well as preventing consumer access to information protected under §1034(c)(2) of the Dodd-Frank Act.

For example, the broad authority to access the System puts consumers submitting personal information to the database at risk for identity theft. Accordingly, we strongly believe all personally identifiable and other sensitive consumer information should be required to be redacted from complaints recorded in the System prior to any disclosure to any person other than: (1) the entity about whom a complaint is recorded, or (2) the individual making the complaint.

AFSA and MBA respectfully request that the CFPB Implementation Team limit disclosure to only those entities that fall into Category [1]. If the CFPB Implementation Team must allow disclosure to additional entities, AFSA and MBA ask that those entities to which the information may be disclosed provide appropriate justification for access to the data. Additionally, we believe that it is imperative that the CFPB Implementation Team impose limitations on subsequent re-disclosure of information by parties to whom disclosure is authorized. As currently written, once information is disclosed, there are no further restrictions on re-disclosure. By including a condition that an entity requesting data provide appropriate justification to access the data and be prohibited from re-disclosing the data, the purpose implied by each category would still be met. This would somewhat mitigate the harm of widespread distribution of frivolous, unsubstantiated, misleading, or false data.

Although the undersigned oppose the inclusion of the additional categories, we nonetheless take this opportunity to make the following specific comments on the specific proposed routine uses, as detailed below:

Category [1] – The System must provide that entities that fall into Category [1] receive notice of the complaint or inquiry and have the reasonable opportunity to respond to the request for disclosure or inquiry and to oppose any disclosure of the data. A record of that response should be attached to the complaint or inquiry and provided with any disclosure thereof and should be accessible by the same people who have access to the complaint letters.

Category [2] – This category should be limited to permit only the disclosure of System records either relevant or potentially relevant to the court, magistrate, or administrative tribunal. Disclosure of personally identifiable consumer information should be prohibited.

Category [4] – This category effectively permits disclosure of System records to any person from whom the CFPB determines it may need information. This category should be eliminated or restricted to permit only very limited disclosure when standards for determining that the disclosure is necessary are met. Disclosure of personally identifiable consumer information should be prohibited.

Category [6] – The Congressional office must be required to make a specific inquiry in writing identifying the individual requesting the records, and should be prohibited from disclosing the data obtained. Disclosure of personally identifiable consumer information regarding any person (other than the individual making the request to the Congressional office) should be prohibited.

Category [7] – This category should be limited to permit disclosures only to appropriate governmental, Tribal, or self-regulatory organizations. Additionally, entities in this category should be required to have both subject matter jurisdiction and regulatory jurisdiction over the entity identified in the records. Professional organizations are unlikely to fall within this category, and the mention of them should be eliminated.

Category [12] – This category is overly inclusive. For example, this category would cover a company that hires a contractor or agent for the purpose of getting access, through this database, to a competitor’s data. This category should be limited to agents or contractors of persons to whom disclosure of System records is permitted, and any re-disclosure should be prohibited. This category should also prohibit requests for multiple, personally identifiable, consumer records in the System.

Category [13] – This category would be unnecessary if the CFPB Implementation Team mandated that all users of the data provide justification for access to the data.

Category [14] – The “other Federal agencies, and State agencies,” should be specified.

Category [15] – The phrase “the public” should be struck from this category. Additionally, the word “individual” should be removed.

Category [16] – This category should limit disclosure of System records to the individual about whom the disclosed records pertain. To the extent this section must include “victims,” the CFPB must set reasonable standards for determining which specific individuals are “victims” and limit any disclosure to such individuals to the progress or results of an investigation or case involving the specific individual.

Frivolous Complaints

As required under the Privacy Act, the Notice includes a list of proposed categories of records to be included in the System. We urge the CFPB to follow the Privacy Act’s general requirements applicable to any records contained in a System of Record. Specifically, we urge the CFPB to implement practices to ensure that the records contained in the System are accurate, complete, timely, and relevant in accordance with §522a (e)(6) of the Privacy Act.

Neither the stated “categories of records” section of the Notice nor any other section of the Notice provides for reasonable efforts to limit inclusion of, or adequately identify, frivolous or unfounded complaints in the System. In particular, because the Notice permits the inclusion of complaints filed by third parties on behalf of consumers, the System runs the risk of being

inundated with “complaints” from credit repair organizations, debt settlement companies, advocacy groups, politicians, competitors, and even blog sites dedicated to airing gripes about specific companies, similar to the rash of frivolous “disputes” filed with consumer reporting agencies by unscrupulous credit repair organizations and debt settlement companies.¹ Providers of consumer financial products or services about whom complaints are recorded should, at the very least, have a reasonable opportunity to comment on complaints before they are disclosed, and any such disclosures should include such providers’ comments.

AFSA and MBA members receive a number of complaints that occur naturally as part of the business process. However, many of these complaints are correctly identified as frivolous and or unfounded complaints. We draw your attention to the fact that the federal financial agencies estimated in the Accuracy and Integrity Rule² that the percentage of frivolous or irrelevant disputes could range from 25 percent to 94 percent of all disputes.³ Furthermore, many of these disputes are either unfounded (in that they are based on a misunderstanding of the law) or not complaints at all; rather they are simple requests for information.

Knowing this to be the case, we believe that in order to fulfill the Privacy Act’s requirement that the System’s records are “accurate, complete, timely, and relevant for agency purposes,” the System must provide for some procedure to determine which complaints are valid, and permit disclosure of valid complaints only. For example, the Accuracy and Integrity Rule specifically provides that a furnisher is not required to investigate a direct dispute that it reasonably believes “is submitted by, is prepared on behalf of the consumer by, or is submitted on a form supplied to the consumer by, a credit repair organization, as defined in 15 U.S.C. 1679a(3), or an entity that would be a credit repair organization, but for 15 U.S.C. 1679a(3)(B)(i).”⁴ Disputes or complaints meeting this description should not be disclosed.

Good entities’ reputations can be unfairly tarnished and compromised by frivolous complaints if such complaints are used to form conclusions without the benefit of all of the relevant facts. This is particularly a concern given the broad access to the content and nature of such complaints the Notice contemplates. Therefore, we strongly recommend that the CFPB Implementation Team require that all records included in the System be accurate, complete, timely, and relevant to the purposes for which they are collected.

¹ §41.43 (f) of the FCRA states that a dispute qualifies as frivolous or irrelevant if: (i) The consumer did not provide sufficient information to investigate the disputed information as required by paragraph (d) of this section; (ii) The direct dispute is substantially the same as a dispute previously submitted by or on behalf of the consumer, either directly to the furnisher or through a consumer reporting agency, with respect to which the furnisher has already satisfied the applicable requirements of the Act or this section; provided, however, that a direct dispute is not substantially the same as a dispute previously submitted if the dispute includes information listed in paragraph (d) of this section that had not previously been provided to the furnisher; or (iii) The furnisher is not required to investigate the direct dispute because one or more of the exceptions listed in paragraph (b) of this section applies.

² Procedures To Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies Under Section 312 of the Fair and Accurate Credit Transactions Act. 12 C.F.R. Part 660

³ 74 F.R. 31504

⁴ 16 C.F.R. §660.4(b)(2).

As a potential means of adequately addressing the number of frivolous complaints that will be reported and the deleterious effects of their disclosure, we suggest the CFPB Implementation Team consider the approach utilized by the Better Business Bureau (“BBB”) of notating in the System which complaints are determined to be frivolous. Frivolous complaints could then be removed or excluded for any disclosure or analysis.

Application of Freedom of Information Act Exemptions

We believe the same exemptions that apply to Freedom of Information Act (“FOIA”) requests should apply to requests to access the data in this System. Specific FOIA exemptions that should be included here are:

(b)(4) Exemption – Trade Secrets, Commercial or Financial Information: This exemption protects the interest of both the government and the submitter of information.

(b)(7)(B) Exemption – Investigatory Records Compiled for Law Enforcement Purposes: This exemption prevents disclosure which would deprive a person of a fair trial or an impartial adjudication.

(b)(8) Exemption – Records of Financial Information: This exemption covers examination, operating, or condition reports.

Conclusion

AFSA and MBA appreciate the efforts of the CFPB Implementation Team and the opportunity to comment on the Notice. As stated, we do strongly urge that this System be established through appropriate rulemaking procedures. We trust these comments will be useful in that regard.

Sincerely,

American Financial Services Association
Mortgage Bankers Association