

American Financial Services Association Consumer Mortgage Coalition

September 4, 2013

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G St, N.W.
Washington, D.C. 20548

Re: The CFPB's Complaint Database Lacks Consumer Privacy Protections

Dear Comptroller Dodaro:

This letter discusses the consumer Financial Protection Bureau's ("CFPB") consumer complaint databases as it covers mortgage complaints. We believe it may inform the study you are currently conducting of the CFPB's complaint database. We are concerned that the database divulges information from which it will be possible, or sometimes easy, to discover nonpublic personal information in many instances. We describe below how Congress prohibited this practice.

The CFPB collects and makes public a substantial volume of consumer complaint information without adequate warning to consumers that information about their complaint will be made public, and without adequate consideration of applicable privacy protections on the use of consumer information.

The CFPB disseminates, on its website in [searchable form](#), information the CFPB obtains about consumer complaints about financial products and services. The CFPB invites consumer complaints, routes each to the financial services provider that is the subject of the complaint for response, then forwards the response to the consumer. The CFPB publishes the consumer's zip code, the date and category of the complaint, the identity of the financial services provider, and the category of the outcome. The CFPB does not otherwise verify the factual basis for the complaints or the reasons they are filed. As the CFPB [explains](#), "We don't verify the accuracy of all facts alleged in these complaints but we do take steps to confirm a commercial relationship between the consumer and the identified company." The information is readily searchable by the several data elements.

Congress Does Not Permit the CFPB to Avoid Gramm Leach Bliley Act Privacy Protections

Congress was clear that when a financial services provider cannot divulge protected

information, the CFPB cannot avoid that protection by obtaining the information and releasing it:

In collecting information from any person, publicly releasing 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 section 552(b) [exemptions from mandatory disclosure under the Freedom of Information Act] or 552a of title 5, United States Code, [the Privacy Act of 1974] *or any other provision of law*, is not made public under this title.¹

“Any other provision of law” includes the Gramm Leach Bliley Act (“GLBA”)² and its implementing regulations. Thus, Congress mandated that the CFPB must follow the privacy provisions outlined in GLBA. When the GLBA and its regulations apply, the CFPB must “take steps to ensure” that the protected information “is not made public.” Who might make it public is not relevant. When a financial services provider may not make information public, the CFPB cannot do so either.

Under the GLBA, if a consumer lodges a complaint with a financial services provider, that provider cannot make public the existence or substance of that complaint. The financial services provider cannot make public its response to the complaint, or even the fact that it responded.

The Gramm Leach Bliley Act Prohibits Financial Services Providers From Making Complaint Information Public

GLBA protects the confidentiality of “nonpublic personal information.” Protected nonpublic personal information includes “personally identifiable financial information.”³

- (1) Personally identifiable financial information means any information:
 - (i) A consumer provides to you to obtain a financial product or service from you;
 - (ii) About a consumer resulting from any transaction involving a financial product or service between you and a consumer; or
 - (iii) You otherwise obtain about a consumer in connection with providing a financial product or service to that consumer.
- (2) Examples.
 - (i) Information included. Personally identifiable financial information includes:

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1022(c)(8), 124 Stat. 1376, 1984 (2010) (emphasis added) (the “Dodd-Frank Act” or “Dodd-Frank”).

² Gramm-Leach-Bliley Act, Pub. L. No. 106-102, §§ 501 – 509, 113 Stat. 1338, 1436-45 (1999), codified at 15 U.S.C. § 6801 – 6809.

³ 12 C.F.R. § 1016.3(p)(2). Eight federal agencies, including the CFPB, have a substantially similar regulation. Citations herein are to the CFPB’s Regulation P.

- (A) Information a consumer provides to you on an application to obtain a loan, a credit card, a credit union membership, or other financial product or service;
- (B) Account balance information, payment history, overdraft history, and credit or debit card purchase information;
- (C) The fact that an individual is or has been one of your customers or has obtained a financial product or service from you;
- (D) Any information about your consumer if it is disclosed in a manner that indicates that the individual is or has been your consumer;
- (E) Any information that a consumer provides to you or that you or your agent otherwise obtain in connection with collecting on, or servicing, a loan or a credit account;
- (F) Any information you collect through an internet “cookie” (an information collecting device from a Web server); and
- (G) Information from a consumer report.⁴

The source of the information is irrelevant. The institution is restricted from divulging the fact that it obtained a complaint about a product or service from a consumer, the contents of the complaint, and how it responded.⁵ Nonpublic personal information further includes information derived using nonpublic personally identifiable financial information:

Nonpublic personal information means . . . [a]ny list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available.⁶

The CFPB’s database is derived using personally identifiable financial information that is not publicly available. As Congress decreed in the Gramm Leach Bliley Act—

(a) **PRIVACY OBLIGATION POLICY.**—It is the policy of the Congress that each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers’ nonpublic personal information.⁷

In enacting Dodd-Frank, Congress required that the CFPB maintain the confidentiality of information broadly:

⁴ 12 C.F.R. § 1016.3(q)(1)(iii).

⁵ If a type of disclosure is described in a privacy notice and the consumer declines to “opt out,” the disclosure is permitted. However, the CFPB’s complaint database does not limit its database to consumers who received a privacy notice describing the CFPB’s possible disclosures, or to consumers who decline to opt out.

⁶ 12 C.F.R. § 1016.3(p)(1)(ii).

⁷ GLBA § 502(a), 15 U.S.C. § 6802(a).

The Bureau is required to take steps to ensure that proprietary, personal or confidential information is protected from public disclosure.⁸

The CFPB's Mortgage Data Contain Personally Identifiable Information

Protected nonpublic personal information does not include “[i]nformation that does not identify a consumer, such as aggregate information or blind data that does not contain personal identifiers such as account numbers, names, or addresses.”⁹

Certain mortgage information is public, including the identity of the property owner (consumer), the lender, and the location or address of the mortgaged property, and it is available online in many or most jurisdictions. Who services mortgage loans is often published in lender, servicer, or securitization filings with the SEC, which are also available online.

The CFPB posts, in readily searchable format, the zip codes of complainants, the topic of the complaint, the financial institution, and the product type. The public can search by any of these criteria individually, or, in “advance mode,” by more than one of them simultaneously. The public can search zip codes with only one complaint about a particular lender. If one zip code has multiple complaints, the public can “filter” the search by zip code, lender, product, and complaint type, all at the same time, until there is only one complaint that meets all the search criteria. It is possible to use the CFPB’s database, with other public information, to derive personally identifiable information that is not otherwise public. For example, suppose the CFPB discloses that a consumer in a specific zip code complained on a specified date about settlement costs on an FHA loan from an identified lender. The CFPB makes information of this type public, while the lender is prohibited from divulging this information. It would be easy to use the CFPB’s database, plus public land records, and determine whose loan this is, at least in some cases. Public land records are available online in all or most states, often readily searchable.

The CFPB specifically encourages the public to mine its data:

The database allows users to easily track, sort, search, and download information. The data is also available via API (application programming interface), which allows developers to build applications, conduct analyses, and perform research. . . . The CFPB is encouraging the public, including consumers, analysts, developers, data scientists, civic hackers, and companies that serve consumers, to analyze, augment, and build on the public database to develop ways for consumers to access the complaint data or mash it up with other public data sets. The CFPB would like the public to highlight innovative uses of the data, from visualizations to new tools, by tweeting @CFPB using the hashtag #CFPBdata.¹⁰

⁸ S. Rep. No. 111-176, at 165 (2010) (discussing Dodd-Frank § 1022).

⁹ 12 C.F.R. § 1016.3(q)(2)(ii)(b).

¹⁰ CFPB [Press Release](#), March 28, 2013.

Especially in zip codes with smaller population sizes, for smaller financial services providers, or during periods when complaints rates are low, it will be possible to easily marry public data and the information available in the CFPB's public database and surmise the identity of the consumer who filed a complaint against a mortgage lender or servicer. The CFPB's database shows many zip codes with only one complaint per product type or per financial services provider. Even if a zip code has multiple complaints, the public can drill down farther by product type, lender, and so on. The possibility of matching data means the data in the CFPB's public database cannot reasonably be presumed to be anonymous or not "personally identifiable." Rather, it contains nonpublic personal information that the GLBA and the Dodd-Frank Act are designed to protect.

Congress Did Not Intend Public Dissemination of Complaint Data

The CFPB certainly should collect certain information. It is required to monitor the marketplace for consumer risks, for example,¹¹ by collecting information.¹² But in doing so, it must not use its authority "for the purpose of gathering or analyzing the personally identifiable information of consumers."¹³ If the CFPB does not have authority to gather or analyze personally identifiable information, it follows that it may not gather and publish that information for the general public to analyze.

The CFPB is required to share some complaint information, but not in disregard of the GLBA privacy protections that apply to the CFPB, and not to the public. The CFPB is required to share complaint information with federal regulatory agencies, subject to privacy protections, but not with the general public.¹⁴ The CFPB is also required to respond to consumers about complaints it receives. This requires the CFPB to inform the complainant of:

- (1) Steps that have been taken by the regulator in response to the complaint or inquiry of the consumer;
- (2) Any responses received by the regulator from the covered person; and
- (3) Any follow-up actions or planned follow-up actions by the regulator in response to the complaint or inquiry of the consumer.¹⁵

A duty to respond to a complainant is not authority to inform the general public. Financial services providers, or "covered persons," are required to respond to regulators about a consumer complaint or information request, in the singular.¹⁶ A covered person's duty to respond to an individual complainant or request is not authority for the CFPB to release complaint and other data to the general public.

¹¹ Dodd-Frank Act § 1022(c).

¹² Dodd-Frank Act § 1022(c)(4).

¹³ Dodd-Frank Act § 1022(c)(4)(C).

¹⁴ Dodd-Frank Act § 1013(b)(3)(D).

¹⁵ Dodd-Frank Act § 1034(a).

¹⁶ Dodd-Frank Act § 1034(b) and (c).

The CFPB Does Not Adequately Warn Consumers About What the CFPB Does With Their Information, and Does Not Fully State the Authority on Which it Relies

Consumers can file a complaint on the CFPB's [intake form](#), which includes a link to a "Privacy act statement." We believe the CFPB should make it easy for consumers to find the statement by adding its link on the first complaint page, <http://www.consumerfinance.gov/complaint/>, in addition to the page with the intake form. Also, we believe the CFPB should make the link to the privacy statement bigger and more conspicuous so consumers will not overlook it. The Federal Trade Commission's ("FTC") online [complaint portal](#) encourages consumers to read the FTC privacy policy *before* taking consumers to the complaint page, which the CFPB does not.

The "Privacy act statement" reads as follows:

Privacy act statement

The information you provide will permit the Consumer Financial Protection Bureau to respond to your complaint or inquiry about companies and services we supervise. Information about your complaint or inquiry (including your personally identifiable information) may be shared:

- with the entity that is the subject of your complaint;
- with third parties as necessary to get information relevant to resolving a complaint;
- with a court, a party in litigation, a magistrate, an adjudicative body or administrative tribunal in the course of a proceeding, or the Department of Justice;
- with other federal or state agencies or regulatory authorities for enforcement and statutory purposes; and
- with contractors, agents, and others authorized by the CFPB to receive this information.

We may also share your complaint or inquiry (but not your personally identifiable information) with the public through a public complaint database.

This collection of information is authorized by 12 U.S.C. § 5493.

You are not required to file a complaint or share any identifying information, including your Social Security number, and you may withdraw your complaint at any time. However, if you do not include the requested information, the CFPB may not be able to act on your complaint.

This is misleading.

- The notice says the CFPB does not share personally identifiable information, but at least with respect to mortgage loans, that will not always be true.
- The notice says the information collection is authorized by 12 U.S.C. § 5493 (Dodd-Frank Act § 1013), and cites no other authority. The notice is termed a "Privacy act" statement. A simple internet search for "privacy act" will lead

consumers to the Privacy Act of 1974,¹⁷ which restricts federal agencies' use of certain information about individuals. Neither of these two authorities are as relevant to consumers as 12 U.S.C. § 5512 (Dodd-Frank § 1022), which, among other things, applies GLBA privacy protections to the CFPB.

- The notice cites to authority more narrowly than the CFPB's Final Policy Statement.
- As the complaint database is one of the primary drivers of enforcement actions, we are concerned that private information could come out in court documents. We hope, and expect, that the CFPB or the court would redact personal information, but errors can happen. If the CFPB were to issue an enforcement order against a company, and fail to redact certain information, it would fall on the opposing side to file a motion for a protective order. It is unclear how a company could do this (or even if they would) if the enforcement order has not been through a court. Regardless, the damage would have already been done.

In its Final Policy Statement,¹⁸ the CFPB cites several sources of authority for its database:

Authority: 12 U.S.C. 5492(a), 5493(b)(3), 5496(c)(4), 5511(b)(1), (5), and (c)(3), 5512(c)(3)(B).¹⁹

Even in the Final Policy Statement, the CFPB still does not address § 5512(c)(8), the provision that requires the CFPB to comply with other applicable law, such as the GLBA privacy protections. Nor does the policy statement address the Trade Secrets Act, which criminalizes federal employees' disclosure of information they come across in their official duties when otherwise not permissible.²⁰

Conclusion

We urge the GAO to address the threats to consumer financial privacy resulting from the CFPB's complain database, especially as to mortgage loans, for which a significant amount of information is necessarily public.

Sincerely,

American Financial Services Association
Consumer Mortgage Coalition

¹⁷ 5 U.S.C. § 552a.

¹⁸ 78 Fed. Reg. 21218 (April 10, 2013).

¹⁹ *Id* at 21226.

²⁰ 18 U.S.C. § 1905.