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Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, D.C. 20552

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Re: **Docket No. CFPB-2014-0016,
Disclosure of Consumer Complaint Narrative Data¹**

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Dear Ms. Jackson:

For nearly 100 years, the American Civil Liberties Union (“ACLU”) has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, or national origin.

We write in support of the Consumer Financial Protection Bureau’s effort to augment public access to the information contained in consumer complaints while simultaneously safeguarding the privacy rights of complainants, as described in the above-captioned Notice of Proposed Policy Statement with Request for Public Comment. The Notice and Request seeks comment on the proposal to include detailed consumer complaint narratives alongside the other complaint information currently available in the publically-accessible online database (“Consumer Complaint Database” or “the Database”) maintained by the Consumer Financial Protection Bureau (“CFPB”).

¹ 79 Fed. Reg. 42765 (July 23, 2014).

The inclusion of the narratives would enhance enormously the power and utility of the database for consumers and advocates, and it is possible to substantially mitigate the risks to privacy posed by their release.

The ACLU is perhaps uniquely well-situated to evaluate CFPB's proposal, given our institutional expertise on a number of relevant issues. First, the ACLU appreciates the importance of data that describes the experiences of individuals, and thus of impacted communities, in the financial marketplace. The ACLU's Racial Justice Program engages in a nationwide program of litigation and advocacy to enforce and protect the constitutional and civil rights of people who have been historically denied their rights on the basis of race. In recent years, the Racial Justice Program has focused on exposing the targeting of communities of color during the subprime lending boom and mitigating the subsequent impacts of the foreclosure crisis on these communities.² The ACLU has long worked to combat housing discrimination in whatever form it arises,³ and people of color have been disproportionately harmed by this crisis. However, very little data about mortgage servicing at the individual or community level is publicly available. The release of CFPB's complaint narratives will begin to fill that gap, potentially providing important information about disparities in mortgage servicing. For these reasons, the ACLU has recently represented MFY Legal Services, Inc., in its request for consumer complaint narratives from CFPB pursuant to the Freedom of Information Act ("FOIA").

Second, the ACLU values open government and advocates forcefully for transparency at the state and federal levels, including for robust freedom of information laws. We also frequently litigate using these laws to expose unauthorized or abusive government practices.⁴ The ACLU recognizes the immense importance to democracy of an informed citizenry and believes that full public access to government records is imperative.

Third, the ACLU works to safeguard individuals' right to privacy. Our work on privacy issues, in recent years, has centered around the importance of regulating and securing the vast quantities of data about individuals generated as we move through the digital landscape. We advocate for an updated, modern Electronic Communications

² See *Adkins v. Morgan Stanley*, No. 12-cv-07667 (S.D.N.Y. filed Oct. 15, 2012) (Fair Housing Act challenge to Morgan Stanley's policies and practices of securitizing subprime mortgage loans in a manner that caused disproportionate harm to African-American borrowers in the Detroit region); *Alliance of Californians for Community Empowerment v. FHFA*, No. 13-cv-05618 (N.D. Cal. filed Dec. 5, 2013) (Freedom of Information Act suit seeking FHFA records concerning its attempt to stop municipalities hard-hit by the foreclosure crisis from employing eminent domain to fix underwater mortgages).

³ See, e.g., *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1035 (8th Cir. 1979), cert. denied, 445 U.S. 905 (1980) (Fair Housing Act challenge to zoning ordinance that blocked construction of integrated housing development); *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (Fair Housing Act challenge to redlining in homeowner's insurance business); *United States v. C.B.M. Group, Inc.*, No. 01-857-PA (D. Or. filed June 8, 2001) (Fair Housing Act challenge to application of "zero-tolerance for violence" policies to victims of domestic violence as disparate impact discrimination based on sex).

⁴ See, e.g., *Am. Civil Liberties Union v. City of Ferguson*, No. 34 (Mo. Cir. Ct. filed Aug. 15, 2014) (seeking public disclosure of incident report concerning shooting of Michael Brown in Ferguson, Missouri); *Am. Civil Liberties Union v. Dep't of Def.*, 04 CIV. 4151 AKH, 2014 WL 4243307 (S.D.N.Y. Aug. 27, 2014) (seeking release of Abu Ghraib photographs); *Am. Civil Liberties Union of N. California v. Dep't of Justice*, CV 13-4003 (N.D. Cal. filed July 31, 2012) (seeking information about federal government's use of location tracking technology); *Am. Civil Liberties Union v. Cent. Intelligence Agency*, 892 F.Supp.2d 234 (D.D.C. 2012) (seeking reports detailing unauthorized interrogation techniques).

Privacy Act and improvements in privacy protections for consumers, and against overreaches in surveillance by the National Security Agency. The ACLU has also worked at the intersection of these issues before, most recently as a signatory, along with other civil rights groups, to the Civil Rights Principles for the Era of Big Data.⁵

The ACLU is pleased to submit these comments, which reflect our balancing of the important interests at stake here.

I. Complaint Narrative Data Will Enhance Understanding of Disparities in Mortgage Servicing and Foreclosure and Thus the Impacts of the Foreclosure Crisis in Communities of Color.

During the explosion in subprime lending that preceded the current crisis, lenders peddling toxic mortgages flooded communities of color with their most predatory products.⁶ The effect was so significant that African-American and Latino borrowers were approximately 30% more likely to get higher-rate subprime loans than white borrowers with similar risk characteristics.⁷ As a result of this intense, neighborhood-level targeting, the degree of residential segregation in a particular metropolitan area is among the best predictors of its foreclosure rate.⁸ Substantial disparities exist in rates of foreclosure by race, whether measured at the individual or neighborhood level.⁹ The foreclosure rate among African-Americans and Latinos is twice as high as that for non-Hispanic whites, and this disparity only increases for households at higher income levels.¹⁰ Moreover, the disparities do not end at the moment a home is foreclosed upon—across the country, the maintenance of foreclosed, vacant properties in African-American and Latino neighborhoods is significantly inferior to the maintenance of similar properties in white neighborhoods.¹¹

⁵ “Civil Rights Principles for the Era of Big Data.” <http://www.civilrights.org/press/2014/civil-rights-principles-big-data.html>.

⁶ Debbie Gruenstein Bocian, et al., Ctr. for Responsible Lending, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* 16 (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

⁷ Debbie Gruenstein Bocian, et al., Ctr. for Responsible Lending, *Unfair Lending: The Effect of Race and Ethnicity on the Price of Subprime Mortgages* 3 (2006), available at http://www.responsiblelending.org/mortgage-lending/research-analysis/rr011-Unfair_Lending-0506.pdf.

⁸ Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 Am. Soc. Rev. 629, 644 (2010); see also U.S. Dep’t of Treasury & U.S. Dep’t of Hous. and Urban Dev., *Curbing Predatory Home Mortgage Lending: A Joint Report* 48 (2000) (finding that borrowers in black neighborhoods were five times as likely to refinance in the subprime market as borrowers in white neighborhoods, even when controlling for income. Worse, the report indicated that these disparities could not be linked to preexisting differences in economic conditions, because “borrowers in *upper-income* black neighborhoods were twice as likely as homeowners in *low-income* white neighborhoods to refinance with a subprime loan.”).

⁹ Debbie Gruenstein Bocian, et al., Ctr. for Responsible Lending, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures* 18, 29 (2011), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf>. Preliminary data show that African-American homeowners were nearly twice as likely as their white counterparts to become renters during the period from 2009-2011. Gregory Sharp & Matthew Hall, *Emerging Forms of Racial Inequality in Homeownership Exit, 1968–2009*, 61 Soc. Probs. 427, 442 (2014).

¹⁰ Gruenstein Bocian, et al., *supra* note 7, at 18, 20.

¹¹ Nat’l Fair Hous. Alliance, *The Banks Are Back – Our Neighborhoods Are Not: Discrimination in the*

Communities of color have been disproportionately harmed by the subprime crisis in every aspect that has been measured, so it is not surprising that disparities also exist with respect to mortgage servicing.¹² Nonetheless, there is a great need for additional information about the way loan servicers treat individuals in various communities. For instance, although settlements of mortgage-related enforcement actions have secured the distribution of significant relief to struggling homeowners, most of these settlements have not required servicers to disclose information about which communities receive that relief, or whether members of protected classes have received their fair share.¹³

The Consumer Complaint Database, including the complaint narratives, can begin to fill this gap. Indeed, at least one preliminary analysis from Yale University researchers has already demonstrated that the Database reveals statistically significant disparities in complaint rates dependent upon zip-code level demographics, pointing toward the need for additional research.¹⁴ With the addition of complaint narratives, and the level of detail that they provide, researchers and advocates will be better able to understand the nature of these disparities; currently, the level of generality of complaint categories (e.g. “Problems when you are unable to pay: loan modification, foreclosure”) prevents any robust analysis of the types of issues various complainants report. For example, the broad category of “Problems when you are unable to pay” includes issues ranging from delays in approving a trial loan modification to denial of a permanent modification to inappropriate fees tacked on during the course of foreclosure. And, with respect to mortgage-related complaints, the devil is in the details: the fact that a borrower in a particular location has filed a complaint about a particular company tells us far less about that consumer’s experience than it would with the narrative attached. In the aggregate, this information opens up areas of inquiry about, e.g., the particular types of problems securing a loan modification that borrowers in various communities are facing.

Maintenance and Marketing of REO Property 11-14 (2011) (finding racial disparities in the maintenance of foreclosed properties depending on neighborhood racial composition).

¹² The Government Accountability Office (“GAO”) found significant racial disparities with respect to the federal Home Affordable Modification Program (“HAMP”). U.S. Gov’t Accountability Office, GAO-14-117, *Troubled Asset Relief Program: More Efforts Needed on Fair Lending Controls and Access for Non-English Speakers in Housing Programs* 22-23 & App. II (2014), available at <http://www.gao.gov/assets/670/660712.pdf>. See also Cal. Reinvestment Coal., *Race to the Bottom: An Analysis of HAMP Loan Modification Outcomes by Race and Ethnicity for California* (2011), available at <http://calreinvest.org/system/resources/W1siZiIsIjIwMTEvMDcvMTIvMTFfMTBfMjdfOTg3X0hBTVBfUkVQT1JUX0ZJTkFMLnBkZiJdXQ/HAMP%20REPORT%20FINAL.pdf>.

¹³ The National Mortgage Settlement, for example, requires that information about borrowers assisted be reported only at the state level. See, e.g., Consent Judgment, *United States v. Bank of America Corp.*, No. 12-0361, at E9-E10 (D.D.C. Apr. 4, 2012), available at <http://bit.ly/1IXDWUG>. Advocates, including the ACLU, urged the monitor to provide this information at the neighborhood level, in order to monitor fair lending compliance, but the monitor took no action in response. See Letter to Joseph Smith and Members of the Monitoring Committee (Mar. 27, 2013), available at <http://bit.ly/1rYt4ZD>. While the recent Citigroup settlement does direct some relief toward “hardest hit” communities, specifically, it remains unclear what data related to this distribution will be released. Annex 2, *Settlement Agreement between Citigroup and Dep’t of Justice*, <http://www.justice.gov/iso/opa/resources/649201471413721380969.pdf>.

¹⁴ Ian Ayres, Jeff Lingwall & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB’s Consumer Complaints*, Fordham J. of Corporate & Fin. Law 20-22 (forthcoming 2014), available at <http://islandia.law.yale.edu/ayres/CFPB%20paper%20v10.pdf>.

Because racial disparities have also been shown to exist with respect to automobile financing,¹⁵ payday lending,¹⁶ student loans,¹⁷ and debt collection,¹⁸ among other things, there is a similarly strong need for this additional complaint data with respect to financial products and services other than mortgages. So that the CFPB and the public have the tools necessary to assess disparities at both the individual and community level, the complaint database should contain both five-digit zip code information and protected class information, provided by complainants on a voluntary basis, as described below.

The provision of all this information will allow the public to monitor whether CFPB is fulfilling its statutory responsibilities to protect consumers “from discrimination,” and to determine if the risks of particular financial products or services “disproportionately affect traditionally underserved consumers.”¹⁹ Further, the analyses enabled by the release of this information will be highly relevant to consumers determining which companies they choose to do business with.

II. If Properly Executed, CFPB’s Proposal Can Appropriately Balance the Importance of Access to this Data with the Need to Protect Privacy.

CFPB’s Proposed Policy Statement describes a policy which will allow it to better fulfill its statutory mandate to “make public such information obtained . . . as is in the public interest”²⁰ With several modifications, this proposal will allow public access to this vital data while appropriately protecting the privacy of complainants. In submitting these comments, we are mindful that in the era of big data there is no perfect way to guarantee anonymity for complainants, because the risk of re-identification cannot be completely eliminated. However, given the value of the narratives, as detailed above, and the various ways in which that risk can be significantly reduced, the ACLU supports the inclusion of the redacted narratives in the Consumer Complaint Database.

A. Managing Re-Identification Risk

¹⁵ See, e.g., Nat’l Consumer Law Ctr., *Racial Disparities in Auto Lending: A State-by-State Reminder Why Auto Dealers Must be Subject to the Consumer Financial Protection Bureau* (2010), available at http://www.nclc.org/images/pdf/regulatory_reform/issue-brief-auto-dealer-racial-disparites.pdf.

¹⁶ See, e.g., Wei Li, et al., Ctr. for Responsible Lending, *Predatory Profiling: The Role of Race and Ethnicity in the Location of Payday Lenders in California* (2009), available at <http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling.pdf>.

¹⁷ See, e.g., Caroline Ratcliffe & Signe-Mary McKernan, The Urban Institute, *Forever in Your Debt: Who Has Student Loan Debt, and Who’s Worried?* 2 (2013), available at <http://www.urban.org/UploadedPDF/412849-Forever-in-Your-Debt-Who-Has-Student-Loan-Debt-and-Whos-Worried.pdf>.

¹⁸ See, e.g., Susan Shin & Claudia Wilner, New Economy Project, *The Debt Collection Racket in New York: How the Industry Violates Due Process and Perpetuates Economic Inequality* 5 (2013), available at <http://www.nedap.org/resources/documents/DebtCollectionRacketUpdated.pdf>.

¹⁹ 12 U.S.C. § 5511(b)(2); 12 U.S.C. § 5512 (c)(2)(E).

²⁰ 12 U.S.C. § 5512(c)(3)(B).

In considering the steps that should be taken to reduce the possibility of re-identification to an acceptable level, the ACLU employs a threat model analysis. In conducting that analysis, we consider who might seek to re-identify CFPB complainants, for what purposes, and what harms might arise, and from there, determine how CFPB can minimize these threats. One concern that emerges is the threat that re-identification could enable the creation of a blacklist of complaining customers. (That threat exists regardless of whether complaint narratives are public, since companies already have information about complaining customers.) We remind CFPB and the public that the creators of any such list would be subject to the requirements of the Fair Credit Reporting Act (“FCRA”).²¹ It could be used only for certain limited purposes, and consumers would retain rights to dispute the accuracy of any information about them. CFPB should highlight the need for FCRA compliance when information in the Database is viewed or downloaded, and remain vigilant about enforcing FCRA in this context. Other specific re-identification threats are addressed where appropriate below.

Further, we are pleased to see that CFPB plans to have an independent privacy expert review and test the methodology employed to scrub the narratives of identifying information. In light of the evolving nature of re-identification, it is imperative that this expert evaluate CFPB’s redaction and release policy not just once, but continually going forward, and with threat model analysis in mind. As technology evolves, so must CFPB’s methodology.

B. Consumer Consent to Disclose Narratives

We support CFPB’s proposal to allow consumers the opportunity to opt in to having their complaint narratives placed in the publically-accessible Database, and we agree that informed consent is the proper standard to make this opt-in process meaningful. Usability testing of the opt-in prompts will be crucial to achieving informed consent.²² In particular, CFPB should present the proposed interface to focus groups, have participants experience it, and then ask them to explain what they were agreeing to or declining when they decided whether to check the opt-in box.

Additionally, the opt-in request (and the text of the online complaint form more broadly) should be available in as many languages as possible. The online complaint form is currently available online only in English, despite the fact that CFPB maintains a Spanish-language website. This makes it more likely that complainants who cannot provide truly informed consent in English are nonetheless submitting complaints through the web form, despite the fact that CFPB takes telephonic complaints in many languages.

Further, the language of the form should link the decision to opt in to making the complaint narrative publically-available with the importance of excluding sensitive personal information, so that complainants are aware that CFPB’s scrubbing may not remove all information that the complainants consider to be personal. Additionally, the form should make clear that, whether or not the complainant opts in to disclose the

²¹ 15 U.S.C. § 1681

²² “Usability Evaluation Methods,” U.S. Dep’t of Health and Human Services.
<http://www.usability.gov/how-to-and-tools/methods/usability-evaluation/index.html>.

complaint narrative, other information about her complaint will nonetheless be available in the Database.

Finally, if a complainant has opted in, CFPB should specifically prompt him to view the scrubbed complaint. CFPB could, for example, email each complainant a link to the location where his scrubbed narrative will appear at the time the complaint is filed, or when the scrubbed narrative has been posted to the Database. Its language should encourage the complainant to examine whether, after scrubbing, the narrative properly represents her story or contains personal details. In this way, CFPB can help complainants themselves guard against the threat of reputational harm in their communities; if there is a concern that an individual with enough personal knowledge could re-identify the complainant, the complainant should have the option to suggest modifications or to have the narrative removed from the Database.

C. Company Response

We agree that the related company should be given an opportunity to post a public response to complaints for which narratives are made public. Indeed, these responses will themselves provide researchers and advocates analyzing the complaints with additional valuable information. In order to protect the privacy of complainants, the company response should itself be subjected to the same scrubbing process used to remove personally-identifying information from the complaint narratives. The quality assurance process for the scrubbing of company responses should be even more rigorous than with respect to the narratives, since complainants will not have any control over the content of the company responses. Further, as with the narratives, complainants should be prompted to view the company response, so that they have the opportunity to consider whether the scrubbed company response appearing in the Database presents a threat that individuals with personal knowledge of the situation could re-identify them. If a complainant has such a concern, he should be able to suggest modifications, or to revoke the opt-in, thereby removing both the narrative and the response from the Database.

D. Personal Information Scrubbing Standard and Methodology

The proposed scrubbing methodology, modeled on the Health Insurance Portability and Accountability Act safe harbor method, strikes us as an essentially sound approach. As discussed above, however, it is crucial that the methodology be re-evaluated as technology evolves. In analyzing the efficacy of scrubbing, CFPB should remain cognizant of the threat that, if complainants discuss their own financial distress in complaint narratives, and are then re-identified, they could become targets for predatory products and services. Further, the human quality assurance step should involve determining not solely whether the algorithm has effectively scrubbed personally-identifying information, but whether the scrubbed narratives present coherent, useful stories.

With respect to the question of zip codes, on which CFPB has specifically sought feedback, CFPB should continue publishing five-digit zip code information. Inclusion of five-digit zip codes allows consumers, researchers, and advocates to understand the experiences of consumers in particular communities. Given the deep history of redlining, and the more recent reverse redlining that drove so much of the subprime lending crisis,

this kind of neighborhood-level analysis is vitally important. Three-digit zip codes encompass enormous numbers of people, in some cases entire cities or regions, and analysis of that level masks disparities experienced by communities of color within those cities. For example, the three-digit zip code “104” encompasses all of the Bronx, NY. Examining the data at that level would obscure differences between patterns of service in the South Bronx zip code 10454, overwhelmingly Black and Latino and poor, and in the Riverdale zip code 10471, majority white and affluent.

Despite the importance of this information, CFPB cannot and should not ignore the risk of re-identification. Re-identification risk increases as the number of individuals who could be represented by a piece of de-identified data decreases. Accordingly, we believe that CFPB can best balance the need for disclosure with the need to protect privacy by omitting five-digit zip code reporting for zip codes with fewer than 10,000 residents. CFPB could still provide four-digit zip codes for those complaints, except where just one five-digit zip code associated with those four digits has fewer than 10,000 residents (preventing the five-digit zip code from being reverse engineered).

E. Protected Class Information.

Currently, CFPB seeks protected class information only where complainants themselves identify discrimination as an issue in their complaint. However, some forms of discrimination emerge only through analysis of aggregated data. Thus, while an individual might not understand himself to be the victim of discrimination, a researcher analyzing the details of his complaint alongside others from complainants who share his protected class status and those who do not will be better positioned to detect these forms of discrimination. Thus, we encourage CFPB to seek protected class information from all complainants on a voluntary basis. Protected class information should include ethnicity, race, marital status, age, source of income, disability status, and gender. CFPB should also consider seeking information about sexual orientation and gender identity. In asking complainants to share this potentially sensitive information, CFPB should include an explanation of its importance for finding and rooting out patterns of discrimination.

Where the re-identification risk is manageable, CFPB should include this information in the Database. Where re-identification risk is heightened, as if the combination of five-digit zip code and protected class information points to a small number of people, CFPB could exclude it. In doing so, CFPB should be sure to exclude enough information to truly de-identify the complainant; if the population of a zip code consists overwhelmingly of members of just two racial groups, and there are a small number of individuals of one of those races, CFPB could not exclude race information just for members of that latter group, lest it be possible to re-engineer race.

III. Conclusion

CFPB deserves credit for seeking public comment on the important questions outlined in the Notice of Proposed Policy Statement with Request for Public Comment. In the era of big data, these issues require a careful consideration of both the need to make crucial data public and the importance of protecting the privacy of complainants, and CFPB’s proposed solution places it at the forefront of this conversation. CFPB’s solution will significantly enrich our understanding of the consumer experiences of all

communities, without harming the privacy of complainants, and we look forward to seeing it implemented.

Please contact Jennifer Bellamy, Legislative Counsel at jbellamy@aclu.org or (202) 715-0828 with any questions.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive style with a long, sweeping tail on the "y".

Laura W. Murphy
Director
Washington Legislative Office

A handwritten signature in black ink that reads "Rachel Goodman". The signature is written in a cursive style with a long, sweeping tail on the "n".

Rachel Goodman
Staff Attorney
Racial Justice Program