October 24, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006

RE: Docket No. CFPB-2016-0039, RIN 3170–AA63 (Proposed Amendments Relating to Disclosure of Records and Information)

Dear Ms. Jackson

This letter is submitted on behalf of the Consumer Data Industry Association (“CDIA”). The CDIA is an international trade association with over 140 corporate members that educates policymakers, consumers, and others on the benefits of using consumer data responsibly. The CDIA also provides companies with information and tools to manage risks and protect consumers.

On August 24, 2016, the Consumer Financial Protection Bureau (“CFPB”) proposed amendments to its rules regarding the disclosure of records and information pursuant to the Freedom of Information Act (“FOIA”), the Privacy Act of 1974, and in legal proceedings (the “Proposed Rule”). This letter focuses on several proposed changes to the existing rules that CDIA believes are overbroad, inconsistent with the practices of other federal agencies or the intent of the Dodd-Frank Act, or potentially harmful to companies’ confidentiality or business interests.

The Proposed Definition of “Agency” Is Overbroad and Inconsistent with the Same Term’s Definition under the Dodd-Frank Act.

The proposed rule would add a new section 1070.2(a)\(^1\) defining “agency” to include “a Federal, State, or foreign governmental authority or an entity exercising governmental authority.” The CFPB has indicated that this definition is meant to clarify

\(^1\) Unless otherwise noted, citations refer to the Proposed Rule.
that the CFPB’s ability to share confidential information extends to foreign regulators as well as quasi-governmental entities that have some limited grant of governmental authority, such as licensing, registration or disciplinary organizations.

This definition is overbroad, as it could permit the CFPB to share confidential information with any quasi-governmental organizations, including State or local task forces, boards, commissions, licensing bodies, ombudsmen, or self-regulatory organizations. It could also permit the CFPB to share confidential information with courts of law.

The proposed definition is particularly overbroad when coupled with the proposed amendment to permit the CFPB to disclose confidential information to any “agency” to which the confidential information is merely “relevant to the exercise of the agency’s authority,” as discussed in greater detail below. This overbroad definition is unnecessary and potentially harmful. Under the Proposed Rule, the CFPB could share a company’s confidential information with “agencies” that do not have jurisdiction over the company or, if they do have jurisdiction over the company in some regard, lack jurisdiction over the company with respect to the subject matter of the confidential information.

In addition, to the extent information shared with such “agencies” is privileged, there is a risk that sharing such information with agencies outside the scope of those listed in 12 U.S.C. § 1828(x) and 1821(t) could waive that privilege. Uncertainty regarding the scope or strength of privilege could have unintended adverse consequences. Companies could be less willing to engage counsel or obtain written advice, which could negatively impact compliance. Companies may also feel compelled to more vigorously object to requests for information or documents based on privilege, which could reduce cooperation in supervisory matters. Other agencies, including the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”), have expressly recognized these concerns in developing their policies with respect to privileged material. DOJ, for example, makes clear in its U.S. Attorneys’ Manual that “a company is not required to waive its attorney-client privilege and attorney work product protection” to obtain cooperation credit. USAM 9-28.600. The Manual further notes that in seeking cooperation from companies, “prosecutors should

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2 It is not clear that the CFPB’s Proposed Rule seeking stronger protections for privileged information that the CFPB discloses to other federal and State agencies would resolve this, particularly for the agencies not listed in 12 U.S.C. § 1821(t). See section 1070.47(f). And, it seems unlikely that this provision would protect privileged information disclosed to foreign agencies which would not have the ability to compel production of that information directly.
recognize that attorney-client communications are often essential to a corporation’s
efforts to comply with complex regulatory and legal regimes, and that . . . cooperation is
not measured by the waiver of attorney-client privilege and work product protection . . .
..” USAM 9-28.1500. The SEC’s Enforcement Manual similarly provides that SEC “staff
must respect legitimate assertions of the attorney-client privilege and attorney work
product protection. As a matter of public policy, the SEC wants to encourage
individuals, corporate officers and employees to consult counsel about the requirements
and potential violations of the securities laws,” and for this reason the SEC does not
condition cooperation credit on waiver of privilege. SEC Enforcement Manual § 4.3.

The proposed definition of “agency” reads out the requirement in section
1022(c)(6)(C) of the Dodd-Frank Act. The Dodd-Frank Act limits access by other
regulators to CFPB examination reports to “a prudential regulator, a State regulator, or
any other Federal agency having jurisdiction over a covered person or service
provider.” The Dodd-Frank Act similarly limits access by other regulators to CFPB
reports to “a prudential regulator or other agency having jurisdiction over a covered
person or service provider,” in the CFPB’s discretion. By removing the requirement
that the agency have jurisdiction over the entity at issue, the CFPB’s proposed definition
of “agency” goes beyond that contemplated by the Dodd-Frank Act. The CFPB’s
explanation for its proposed change is that the change would align the standards for
confidential information and confidential supervisory information and therefore
facilitate information-sharing among agencies. 81 Fed. Reg. 58,310, 58,317 (Aug. 24,
2016). The CFPB acknowledges that it previously interpreted the Dodd-Frank Act “to
set forth a positive grant of authority that limits the Bureau’s discretion to disclose
confidential supervisory information,” but asserts that “it now believes that the better
interpretation . . . is that [the Dodd-Frank Act] establishes part of an information-
sharing regime with a limited set of other agencies” and “does not limit the Bureau’s
discretion to draft rules related to the disclosure of confidential supervisory
information.” Id. at 58,310-11. The Dodd-Frank Act clearly contemplates a
jurisdictional limit on the sharing of confidential supervisory information. Each of the
four sub-paragraphs of section 1022(c)(6)(C) expressly discusses information-sharing
among agencies “having jurisdiction over a covered person.” The CFPB cannot choose
to read out of the statute language that, as even the CFPB once acknowledged, is clearly
limiting.

For these reasons, we recommend removing the proposed definition of “agency,”
or limiting the definition to be consistent with the regulators identified in the Dodd-
Frank Act.
The Proposed Amendment Broadening Permitted Disclosures of Confidential Supervisory Information to Agencies “to the extent that the disclosure of the information is relevant to the exercise of the [agency’s] statutory or regulatory authority” Is Overbroad and Inconsistent with the Dodd-Frank Act and Other Regulators’ Practices.

Section 1070.43(b)(1) currently permits the CFPB to disclose confidential information to an agency “to the extent that the disclosure of the information is relevant to the exercise of the [Agency’s] statutory or regulatory authority,” but only permits the CFPB to disclose confidential supervisory information to agencies “having jurisdiction over a supervised financial institution.” The CFPB’s Proposed Rule would permit the CFPB to disclose confidential supervisory information under the same circumstances as confidential information.

Particularly when coupled with the broad proposed definition of “agency,” this proposed amendment would permit the CFPB to share confidential supervisory information with an overbroad range of government organizations, potentially including courts, disciplinary and licensing authorities, and foreign regulators. As described above, this could result in unnecessary disclosures to “agencies” that have no authority over the company that is the subject of the disclosure, and also could result in waiver of privilege.

Furthermore, this amendment would go beyond the authority granted to the CFPB by the Dodd-Frank Act, which only permits the disclosure of examination reports to regulators “having jurisdiction over a covered person or service provider” and even then, only with reasonable assurances of confidentiality. See section 1022(c)(6)(C) of the Dodd-Frank Act. In addition, the proposed amendment is out of sync with a parallel Federal Reserve Board rule. The Federal Reserve Board permits disclosure of confidential supervisory information to the Office of the Comptroller of the Currency (“OCC”), the Federal Deposit Insurance Corporation, the Federal Home Loan Bank board, and certain state financial institution supervisory agencies. 12 C.F.R. §§ 261.20(c)-(d). Both the Federal Reserve Board and the OCC treat non-public information as “confidential and privileged.” 12 C.F.R. § 261.22(a); 12 C.F.R. 4.36(b). Similarly, the Federal Trade Commission (“FTC”) only permits disclosure of nonpublic records to foreign law enforcement agencies where they are to be “used for purposes of investigating, or engaging in enforcement proceedings related to, possible violations of: (1) Foreign laws prohibiting fraudulent or deceptive practices . . . ; (2) A law administered by the Commission . . . ; or (3) With the approval of the Attorney General, other foreign criminal laws . . . ,” among other restrictions. 16 C.F.R. § 4.11(j)(3)(ii)(B). Although the CFPB claims a need for collaboration and greater information-sharing
among agencies, 81 Fed. Reg. at 58,311, 58,317, it fails to explain why this degree of flexibility is necessary in light of the existing practices of other agencies.

For these reasons, we recommend eliminating this proposed section.

Reclassification of Employees of the Federal Reserve Board Inspector General as “Employees” of the CFPB Could Impede the Federal Reserve Board Inspector General’s Functions.

The proposed amendments would modify the definition of “employee” in section 1070.2(l) to classify employees of the Federal Reserve Board Inspector General as “employees” of the CFPB thereby restricting the ability of these individuals to disclose confidential CFPB information. This could impair the Federal Reserve Board Inspector General’s ability to perform his or her function. For example, the restriction on disclosure of confidential information outside of the CFPB in section 1070.41 could prevent the Inspector General from conducting investigations and publishing reports of the examination or supervision process, or other reports of investigations into the internal workings of the CFPB.

We note that section 1070.48(a) provides that “[n]othing in this subpart [D] shall limit the discretion of the Office of the Inspector General of the Board of Governors of the Federal Reserve System and the Consumer Financial Protection Bureau to disclose confidential information as needed in accordance with the Inspector General Act of 1978, 5 U.S.C. App. 3.” Although this language may be intended to resolve CDIA’s concern, it is unclear to what extent the “as needed” qualifier may still limit the Inspector General’s ability to publish reports. We recommend deleting the proposed designation of Inspector General employees as CFPB employees, deleting the proposed “as needed” language, or otherwise clarifying the extent to which the Inspector General may disclose confidential information.

The Proposed Elimination of Language Limiting How the CFPB May Use Information Provided by FOIA Requesters Is Overbroad to Meet its Stated Purpose.

The CFPB proposes to eliminate section 1070.14(c)(4)’s current language limiting the CFPB from using information provided by a requester under FOIA to the FOIA Public Liaison for any purpose other than determining the appropriate fee category. The CFPB indicates that the elimination of this restriction will permit the CFPB to assist the requester, such as by “aiding a requester in clarifying the scope of a request, assisting in identifying records sought by a requester, and helping to resolve disputes related to a request.” 81 Fed. Reg. at 51,313.
The elimination of this restriction could permit the CFPB to utilize information obtained by a FOIA requester in any manner. The CFPB’s proposed elimination of the restriction is overbroad to accomplish its stated goal of aiding requesters. A narrower revision, such as the following, would accomplish the same result, and would make clear the CFPB’s stated intent: “The CFPB will use any information provided to the FOIA Public Liaison solely for the purposes of determining the appropriate fee category that applies to the requester or otherwise aiding the requester in clarifying the scope of the request, identifying the records sought, or resolving disputes related to a request.”

The Proposed Elimination of Required Notification of a Congressional Request for Confidential Information Could Result in Companies Not Being Notified of Disclosures of Confidential Information to Congress.

The CFPB proposes to amend section 1070.45(a)(2) to state that the CFPB “may notify” the financial institution of the receipt of a request from Congress for confidential information, rather than that the CFPB “shall notify” the institution.

This amendment could permit the CFPB to disclose confidential information to Congress without notifying the financial institution of the disclosure or even of the request, and could prevent the financial institution from having an opportunity to object to the request. There is no other provision that would require the CFPB to notify a financial institution before disclosing confidential information to Congress. Companies should be informed about any disclosure of confidential information to Congress. Congressional inquiries are often highly publicized and highly politicized. The Proposed Rule would prevent a company from preparing for potential fallout from disclosure of confidential information to Congress or preparing to assist Congress in any investigation, much less from objecting to the disclosure in the first place.

The amendment is out of sync with the FTC’s parallel rule, which provides that “[u]pon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive.” 16 C.F.R. § 4.11(b). The CFPB claims its proposed amendment will provide greater “flexibility”, 81 Fed. Reg. at 58,319, but neglects to explain why such flexibility is necessary or why this concern trumps a company’s interest in being able to object to or prepare for disclosures of its information to Congress.

For these reasons, we recommend eliminating this proposed amendment.

The CFPB proposes to delete the reference to information collected for monitoring risks to consumers in the definition of confidential supervisory information in section 1070.2(j)(1)(iv). The CFPB proposes to replace the reference to information collected for monitoring activities with a reference to information collected for purposes of detecting and assessing risks to consumers, as a part of the CFPB’s supervisory and examination activities.

Information collected by the CFPB in connection with its “monitoring” activities under 12 U.S.C. § 5512(c) would no longer receive confidential supervisory information protection and would only be protected as confidential information if it were entitled to another FOIA exemption, such as confidential or trade secret information:

The Bureau believes that it is not necessary to classify such information as ‘confidential supervisory information’ if it is not used for supervisory purposes. In accordance with the definition of ‘confidential information’ in § 1070.2(g), market monitoring information will continue to be classified and protected as ‘confidential information’ to the extent that it is exempt from disclosure pursuant to one or more of the statutory exemptions to the FOIA.

See 81 Fed. Reg. at 58,312. We disagree with the CFPB’s reasoning that it is unnecessary to offer additional protection to information collected in connection with “monitoring” activities, especially to the extent that such information is gathered from a supervised entity and, if gathered through the supervisory process, would have been subject to all of the confidentiality protections of that process. With respect to supervised entities, the CFPB effectively has two methods of “monitoring,” but one of those methods offers significantly greater protection to the company that is the subject of the information.

For these reasons, we recommend eliminating this proposed amendment.

The Proposed Elevation of Rules for the Disclosure of Confidential Investigative Information Would Make Uncertain What Information an Institution May Disclose and to Whom.

The CFPB proposes to amend section 1070.42 to subject confidential investigative information to the same standards as confidential supervisory information, raising questions about the ability to disclose the fact of a civil investigative demand (“CID”) to
a third party, a vendor, as required by contract, in connection with securities reporting obligations, or otherwise. More specifically, under proposed section 1070.42(b), a person in possession of confidential investigative information would only be permitted to disclose it to certain employees and other specific listed parties or “[a]nother person, with the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending.” See proposed § 1070.42(b). And, the CFPB appears to be taking the position that a civil investigative demand would be subsumed within the term “confidential investigative information.” See 81 Fed. Reg. at 58,316 (defining “confidential investigative information” to include civil investigative demands).

This would represent a major shift in CFPB practice. CFPB CIDs currently do not require that recipients keep the CID confidential. Instead, current CFPB CIDs merely seek the recipient’s voluntary cooperation in not disclosing the CID until the CFPB completes its investigation, and, even then, only in the context of third-party CIDs, where disclosure to the target might run the risk of compromising the investigation.

Similarly, the Proposed Rule is inconsistent with the practices of other federal agencies, which require the agency to treat the fact of a CID as confidential, but are silent with respect to disclosure of the fact of the CID by its target. See 15 U.S.C. § 57b-2(b); 16 C.F.R. § 4.10 (Federal Trade Comm’n); 17 C.F.R. § 203.2 (Sec. and Exch. Comm’n).

Some companies may have a practice of disclosing investigations, even at an early stage, and the CFPB’s Proposed Rule could cause such companies to alter their practices or treat CFPB CIDs differently than other agencies’ CIDs, which could lead to a negative reaction by investors, rating agencies, analysts, counterparties or others. Companies may conclude that they have a legal obligation to disclose the CID, such as under the securities laws, may be contractually obligated to disclose CIDs to their counterparties, or may have practical or business reasons to disclose CIDs. In addition, companies may be interested in obtaining assistance in responding to a CID from trade associations or consultants or other targets of similar investigations, pursuant to a joint or common defense agreement.

For similar reasons, the Proposed Rule would appear to present First Amendment concerns. The Proposed Rule imposes both a prior restraint and content-based restriction on speech, and would therefore be unconstitutional. The CFPB has expressed no compelling interest that would suffice to overcome these constitutional hurdles. Indeed, it would be difficult for the CFPB to provide such a reason. The CFPB has not historically required CID recipients to treat CIDs as confidential, and has conducted numerous investigations without such power.
Furthermore, there is a clear public interest in recipients of CIDs or targets of investigations being able to disclose the existence of such investigations. CFPB Director Richard Cordray has routinely reminded the public that “sunlight is the best disinfectant,”3 and this mantra is equally true with respect to the CFPB’s investigative and enforcement authority. The public has an interest in ensuring accountability with respect to such authority, which it cannot do if it lacks knowledge about the CFPB’s investigations.

For these reasons, we recommend that the CFPB make clear that a CID recipient (or the subject of any investigation) is permitted to disclose confidential investigative information.

The Proposed Amendment Would Remove the Requirement that CFPB Contractors and Consultants Sign a Nondisclosure Agreement.

The CFPB proposes to remove the requirement under section 1074.41(b) that CFPB contractors and consultants sign a written agreement that they will treat confidential information in accordance with the rules. Instead, the Proposed Rule will simply state that CFPB contractors and consultants are required to treat confidential information in accordance with the rules. The CFPB frequently hires consultants to review confidential algorithms and business processes. Such consultants should be required to provide a written certification that they will not disclose the information to any third party or use it for their own purposes, so that they understand the gravity of the situation and their nondisclosure obligations can be more easily enforced. The CFPB has explained that this proposed change will “in no way alter the Bureau’s current practices related to requiring contractors and consultants to sign non-disclosure

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agreements.” 81 Fed. Reg. at 58,315. The CFPB indicated that the Proposed Rule is “intended to clarify that contractors and consultants are subject” to the rule, “irrespective of any affirmative certification.” Id. However, given the benefits of the written certification, the rule should be revised to provide the clarity the CFPB seeks, while still requiring the CFPB to obtain a written certification from its contractors or consultants.

**The Proposed Amendments Would Permit the CFPB to Disclose Confidential Information to a Supervised Entity’s Service Providers, Rather Than Leaving Such Disclosures to the Entity Itself.**

Under the current rule, the CFPB has discretion to disclose confidential supervisory information to a supervised entity and its affiliates. The CFPB proposes to amend section 1070.42 to permit the CFPB to disclose confidential supervisory information and confidential investigative information to a company’s service providers. The company itself, however, should be the one to determine which service providers have access to confidential supervisory or investigative information, rather than the CFPB. Disclosure of confidential supervisory or confidential investigative information could seriously interfere with the contractual relationships between a company and its critical vendors, particularly where such information has not been adjudicated through the supervisory or enforcement process. If there is a final public action ultimately taken by the CFPB, that can be disclosed by the subject company to its service providers at that time – there is no need to “poison the well” with a company’s vendors based on preliminary allegations of wrongdoing. We recommend eliminating the proposal to permit the CFPB to disclose confidential supervisory or investigative information to a company’s service providers.

**The Proposed Amendments Would Limit the Ability of a Company to Disclose Confidential Information to Its Insurers.**

The CFPB’s proposed amendments to section 1070.42(b)(2) would limit a company’s ability to disclose confidential supervisory or investigative information to its insurers to situations where a claim has been made under an existing policy and only if (a) the CFPB has not precluded reimbursement of the claim and (b) the information disclosed is used solely for the administration of a claim.

There may, however, be instances where confidential supervisory or investigative information does not meet both of these requirements, but nonetheless a company should be able to disclose the information to its insurer. For example, a contract for insurance may require a company to timely notify its insurer of any claims made during the policy year, and under the terms of the policy, a claim might include
the receipt of a CID or other initiation of regulatory proceedings. In this context, a company would have no idea whether the CFPB had disallowed reimbursement of the claim, until the CFPB has concluded its investigation and entered into a Consent Order – and waiting until that time to notify the insurer might preclude recovery for the claim. In addition, following the enforcement action, the company may be subject to a private class action suit, and should be permitted to disclose information to its insurers in order to obtain reimbursement for legal or other expenses associated with the follow-on lawsuit. We therefore recommend eliminating these proposed limitations.

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We appreciate the opportunity to comment on the CFPB’s proposed amendments to its rules regarding the disclosure of records and confidential information, and hope the CFPB will find these comments useful as it considers the proposals.

Sincerely,

Eric J. Ellman
Interim President and CEO