



October 16, 2013

Scott Pluta
Office of Consumer Response
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, DC 20552

Re: Company Portal Services Agreement

Dear Mr. Pluta:

The American Financial Services Association (“AFSA”)¹ welcomes the opportunity to comment on the Consumer Financial Protection Bureau’s (“CFPB”) proposed Company Portal Services Agreement (“Agreement”). The Agreement is to be entered into between the CFPB and the signer of the Agreement or “User” of the CFPB’s Consumer Response Portal (“Company Portal”), an electronic delivery system operated by the CFPB that provides secure access to various complaints from Persons and those who submit complaints on their behalf about the business practices of others.

AFSA has three overall points, and several specific suggestions for the Agreement. To make our comments easy to read, we have made suggested changes to the Agreement using “track changes” mode. We will explain those changes and make a few additional suggestions section-by-section below.

Summary of the Agreement

We respectfully request that the CFPB provide a summary of the Agreement that would include additional information, analysis, and context related to the CFPB’s objectives. We would like to know why the CFPB created the Agreement and what the Agreement is intended to protect. Some of the sections in the Agreement seem to govern access to the Company Portal, while others appear to be drafted to protect the “Consumer Complaint Data.”

If the Agreement is intended to limit access to the Company Portal, the procedures that are used to access the Company Portal should be clearly explained. The Agreement uses the term “Credential,” which is defined as any cryptographic tool issued or assigned by the CFPB. However, AFSA members were not issued or assigned a cryptographic tool, a unique login, password, or certificate. Instead AFSA members were asked to provide a spreadsheet to the CFPB with the names and email addresses of the employees who would access the Company Portal. The authorized employees were then able to access the Company Portal using their email address and a password they themselves set up. Is the intent of the Agreement to ask Users to train the authorized employees to not share usernames and passwords and monitor the authorized employees’ compliance? If so, the Agreement should be significantly changed.

Or is the purpose of the Agreement to protect the Consumer Complaint Data? If so, we question the need for the Agreement. Users have no incentive to publish the Consumer Complaint Data and every incentive to protect it. Moreover, Users already have and protect any personally identifiable information present in the Consumer Complaint Data, since the Consumer Complaint Data is from the Users customers.

¹ AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. Its more than 350 members include consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers.

Furthermore, the Consumer Complaint Data that the CFPB publishes contains information that, when pieced together from various data sets, could disclose nonpublic personally identifiable financial information about consumers.

The Agreement also does not state whether Users will be required to sign the Agreement and what the consequences of refusing to sign would be. If a company refuses to sign, can the company not use the Company Portal? If so, this is not really an agreement, but mandatory terms and conditions. Along those same lines, if a User terminates the Agreement, does that mean the User no longer has access to the Company Portal and so cannot respond to complaints? If terminating the Agreement means that the User no longer has access, there really is no ability to terminate.

Additionally, AFSA is concerned that the Agreement could limit a User's ability to pursue litigation against a borrower in the normal course of business who happens to have filed a complaint.

Federal Register Notice

The CFPB should publish the proposed Agreement in the *Federal Register* in order to allow for public notice and comment. Given the fact that the proposed Agreement will impact all covered institutions that use the CFPB's Company Portal, such publication would provide those institutions and other stakeholders with notice and a reasonable time period to provide input.

Publication of the proposed Agreement in the *Federal Register* would provide institutions and other stakeholders with additional information, analysis, and context related to the CFPB's objectives. Such information would help stakeholders provide the most beneficial input to the CFPB.

Statutory and Regulatory Provisions

The proposed Agreement generally lays out the obligations for Users to safeguard Consumer Complaint Data, but it does not reference the statutory and regulatory provisions that govern the CFPB's obligations to protect the confidentiality, security, and use of such Data. AFSA maintains that the CFPB should incorporate reference to such provisions in the proposed Agreement.

SECTION-BY-SECTION

Section I – Definitions

The CFPB uses the terms "Agreement" and "Consumer," throughout the Agreement but does not define these terms. We suggest that the CFPB include definitions for both of these terms. We ask that the CFPB use the definition of "Affiliate" and "Consumer" in Section 1002 of the Dodd-Frank Wall Street Reform and Consumer Protection Act instead of the proposed definition in Section 1.1.

The definition of "Third Party" makes it difficult to distinguish between a consumer making a complaint and a "Third Party." The definition of "Third Party" does also not draw a distinction between a third party who submitted the complaint and one who gets involved later in the process.

Section II – Confidentiality, Security, And Use of Consumer Complaint Data

The Agreement needs to include a reasonable standard of care. Users cannot guarantee that all Consumer Complaint Data will be kept confidential; they can only agree to provide safeguards. Users cannot "ensure" that Consumer Complaint Data will be used only for certain purposes; they can only limit the use of the Data. Moreover, if implemented, these proposed steps would create a risk to a User's system

because they ask, in effect, the User to keep a door in its system open for the CFPB that would not otherwise exist. AFSA believes that the changes we suggest place a more reasonable standard of care on the Users, while still including the necessary protections.

This section also puts the CFPB's responsibilities onto the Users. The CFPB is in a far better place to monitor the security of – and to look for – breaches related to the Company Portal. Instead, the User should have an obligation to tell the CFPB in a timely manner of concerns related to the Company Portal or Credentials. The Agreement should include reciprocal language that the CFPB has an obligation to notify Users if a breach of the Company Portal occurs so that users may analyze potential damage to consumers.

AFSA is concerned with Section 2.7 because User would find it nearly impossible to keep track of what has been in the complaint system from a litigation standpoint. Users are subpoenaed for information in a customer's loan file in matters such as collection suits or divorce actions. If the User gets a subpoena and responds, as required by law, with information that was in a Complaint, the User could inadvertently violate this Agreement.

Depending on who is asking and why, the User might not be able to do any of the requested activities, hence the addition of the qualification, "to the extent allowable under applicable law" in the attached red-lined Agreement. But, if the User receives a request and it is otherwise legally valid, the User has to respond or face sanctions. So, the User can notify the CFPB and the CFPB can do whatever it deems appropriate. That is standard industry practice. The proposed Agreement, however, imposes on the User a burden that supersedes standard industry practice. To expect the User to get a demand, talk with the CFPB, and then at the User's own cost, fight and defend against this in basically any manner that the CFPB desires is unreasonable.

The User has no ability to achieve the standard in Section 2.8. Thus, this section should be revised. "Best efforts" is a very high standard to hold the User to when the User would be asking the party currently in an adversarial situation with the User.

Lastly, AFSA notes that Section 2.7, as written, might be read to prevent Users from communicating directly with their customers regarding the Complaint. If this is not the CFPB's intent, we ask that the CFPB clarify that Users are permitted to communicate with the customer about his or her Complaint and that Users can share information in the Complaint.

Section III – Disclaimer of Warranties

AFSA asks the CFPB to remove this section for the reasons listed below.

- First, if the Customer Complaint Data is related to the consumer suing the User, the User does not have to permit Third Party access to Consumer Complaint Data held by the User. If the Customer Complaint Data that the Third Party is seeking is for other consumers, then it would be as a result of a subpoena or some other discovery request and a process is set forth in the previous section that addresses this possibility.
- Second, AFSA does not believe that the information is really held by the User, but that the User has access to the information through the Company Portal.
- Third, we ask that the CFPB clarify how this applies if a Third Party (e.g. consumer's attorney) seeks access, but did not and does not seek to submit a complaint on behalf of a consumer, which is a requirement of the definition of Third Party Authorization in Section 1.8.

- Fourth, with the obligations the User has with respect to the Consumer Complaint Data and the Credentials, it seems unlikely that the User would give access to this Data to an unrelated Third Party over which the User has no control. If it did so, the User would open itself up to liability under this Agreement and would violate its other obligations under this Agreement.
- Fifth, it is unfair for the User to be responsible for determining the legal necessity, accuracy, and sufficiency of such authorization, but not be authorized to exercise discretion as well.
- Sixth, the standards in this section appear to contradict the standards in Section 2. Lastly, we note that a court will most likely be responsible for determining the legal necessity, accuracy, and sufficiency of such authorization, not the User.

It is also circular to prohibit Users from discussing/disclosing Consumer Complaint Data to an unauthorized Third Party, but also require Users to validate such Third Party's authorization prior to discussing Consumer Complaint Data. The definition of "Consumer Complaint Data" appears to include the fact of the complaint itself, so unless User already has in its files an authorization for a Third Party who submitted a complaint on behalf of a consumer, Users are left with no choice but to simply close out the complaint with no substantive response.

Section IV – Term and Termination

AFSA asks the CFPB clarify that either party can terminate the Agreement, both parties do not need to sign an agreement to terminate. We also believe that the CFPB should explain what the ramifications of terminating the agreement are.

Additionally, we note that the list of reasons why the CFPB may terminate the Agreement is unnecessary, since both Parties have the absolute right for any reason to terminate the Agreement upon 30 days' notice.

Section V – Miscellaneous

The concept of "applicable" should be added to Section 5.1 because not all of those statutes apply to every Covered Person. Adding "applicable" to this section will eliminate the possibility of an inference arising that, merely by executing the Agreement a Covered Person is acknowledging that it is subject to all those statutes, including those that may not directly apply such as the Fair Debt Collection Practices Act.

Section 5.6 should be modified to take into account the statements and representations that Users receive from the CFPB through the ticket process on the Company Portal. Users rightfully rely on the responses they receive from the CFPB through the ticket process the CFPB established. If the CFPB provides information through its own processes that might conflict with this Agreement, then Users should still be able to rely on the statements and representations of the CFPB.

Finally, AFSA has some questions that we ask the CFPB to address in this section, or in an additional section: (1) How would the CFPB determine that a User violated the Agreement? (2) What are the consequences of a violation? (3) How does this Agreement address Use of Name restrictions? and (4) Is there indemnification of the User if the User suffers a loss because of the CFPB's malfeasance?

Conclusion

We look forward to working with the CFPB on this Agreement. Please contact me by phone, 202-466-8616, or e-mail, bhimpler@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads "Bill Himpler". The signature is fluid and cursive, with the first name "Bill" being larger and more prominent than the last name "Himpler".

Bill Himpler
Executive Vice President
American Financial Services Association



Company Portal Services Agreement

This Company Portal Services Agreement (“Agreement”) is entered into between the Consumer Financial Protection Bureau (“CFPB”) and the undersigned user (the “User”) of the CFPB’s Consumer Response Company Portal (“Company Portal”), an electronic delivery system operated by the CFPB that provides secure access to various complaints from Persons and those who submit complaints on their behalf about the business practices of others. The purpose of this Agreement is to facilitate the confidential transmission of Consumer Complaint Data (defined below) to the User, pursuant to the terms and conditions set forth below.

Section I Definitions

- 1.1 ~~For purposes of this Agreement,~~ “Affiliate” means any Person that ~~directly or indirectly~~ controls, is controlled by, or is under common control with, another Person, ~~for so long as such control exists.~~
- 1.2 “Complaint” means any submission to the CFPB concerning a financial product or service that expresses dissatisfaction with, or communicates suspicion of wrongful conduct by, an identifiable Person.
- 1.3 “Consumer Complaint Data” means the Complaint information shared by the CFPB with the User through the Company Portal. Consumer Complaint Data may include, among other things, the names of companies and representatives; the identity of the products or services involved; consumer identifying information, including the consumer’s Social Security Number or account number; related image files, and specific complaints. Consumer Complaint Data is not information that is already in possession of a User or statistics or other information that does not identify individual consumers.
- 1.4 “Credential” means any cryptographic tool issued or assigned by the CFPB, including unique login, password, or certificate, to be used by the User to securely access the Company Portal.
- 1.5 “Party” means either the User or the CFPB. The User and the CFPB collectively are the “Parties.”
- 1.6 “Person” means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.
- 1.7 “Third Party” means a Person who is not a party to this Agreement.
- 1.8 “Third Party Authorization,” means a signed, written document or an oral statement made by a consumer granting a representative or agent the authority to submit a complaint on the consumer’s behalf and, if applicable, perform specified acts related to such complaints.
- 1.8.9 “Consumer” means an individual or an agent, trustee, or representative acting on behalf of an individual.

Section II Confidentiality, Security and Use of Consumer Complaint Data

- 2.1 Consumer Complaint Data shall at all times remain the property of the CFPB.
- 2.2 The User agrees that it shall use the same means that it uses to protect its own similar information that it does not want disclosed to the public to keep all Consumer Complaint Data confidential and shall not

disclose or disseminate ~~this Data~~, without the prior written consent of the CFPB or as otherwise provided in this Agreement.

2.3 The User shall take all steps reasonably necessary to secure Consumer Complaint Data and to safeguard its confidentiality in accordance with Section 2.2, including but not limited to the following:

(i) restricting access to the Consumer Complaint Data to only those of the User's officers, employees, contractors, and agents who have a need for such information to perform their assigned duties;

~~(ii) ensuring that using the~~ Consumer Complaint Data ~~shall be used only~~ for purposes of reviewing and responding to consumer complaints, for improving the User's internal processes for reviewing and responding to such complaints, and not for any other purpose;

~~(iii)~~ (iii) establishing and implementing reasonable administrative, technical and physical safeguards to protect the Credentials from loss, theft or unauthorized access from third parties and informing CFPB in a timely manner of any concerns related to the Credentials including upon any loss, theft or unauthorized access, upon termination of the user's relationship with User;

~~(iv)~~ (iv) informing those persons who are provided access to such Consumer Complaint Data of their responsibilities under this Agreement; and

~~(v)~~ (v) establishing and implementing appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any actual or anticipated threats or hazards to their security or integrity, including but not limited to loss, theft, or misuse, and unauthorized access, dissemination, or disclosure of Consumer Complaint Data, to include those safeguards provided below:

~~a. ensuring that the Company Portal and Consumer Complaint Data are not accessible to unauthorized computer systems;~~

~~b. ensuring that access Credentials are protected from loss, theft, and unauthorized distribution and that such Credentials are revoked on CFPB demand or upon termination of user's relationship with the User;~~

~~c. employing security controls that provide for detection, documentation, tracking and reporting of unlawful or unauthorized information system activity to the CFPB; and~~

~~d. notifying the CFPB promptly upon discovery of any breaches of the Company Portal or its integrated information security systems or attempts to penetrate such systems that compromise or reasonably could compromise confidential information.~~

2.4 ~~The disclosure restrictions set forth in~~ This Agreement shall not apply to any Consumer Complaint Data that are available through the CFPB's public database, from public sources, or in the public domain through no fault of the User.



2.5. The User shall designate one of its officers or employees to be responsible for effecting and monitoring the User's ~~compliance with this Agreement~~ Credentials in accordance with this Agreement (the "Access Administrator"). The Access Administrator shall be reasonably available to the CFPB to address any concerns or answer any questions that the CFPB may have concerning the User's compliance with this Agreement. The Access Administrator shall ~~promptly~~ immediately notify the CFPB in the event of any loss, theft, or misuse, and unauthorized access, dissemination, or disclosure of Consumer Complaint Data. As soon as practicable after execution of this Agreement, the User shall advise the CFPB of the name, title, and contact information, including mailing addresses, email addresses, and telephone and fax numbers, for the Access Administrator.

2.6. ~~The Access Administrator will manage the issuance of Credentials. Only those officers, employees, contractors, and agents who have a need to have and use Credentials in connection with the duties expressed in Section 2.3 should be issued Credentials ("authorized users").~~ The Access Administrator must keep (independently of any record kept by the CFPB) details relating to each Credential authorized by the Access Administrator, including the authorized user's identity, work site, and in the event the Credential is revoked for an authorized user, any reason for revocation. The Access Administrator must retain these records for at least one year after termination or expiration of the Credential in question.

2.7. If the User becomes legally compelled to disclose any of the Customer Complaint Data, the User will promptly advise the CFPB of such legal requirement to disclose Customer Complaint Data, to the extent allowed under applicable law, in order that the CFPB may seek a protective order or such other remedy as the CFPB may consider appropriate in the circumstances. The User will disclose only that portion of the Customer Complaint Data that it is legally required to disclose. ~~In the event a Third Party submits to the User a demand or request for access to or copies of Consumer Complaint Data (including, but not limited to, a discovery request, subpoena, or court order), the User shall:~~

- ~~(i) as soon as practicable, notify the CFPB of the demand or request for such Consumer Complaint Data in writing, including a copy of the demand or request;~~
- ~~(ii) before complying with or otherwise responding to the demand or request, consult with the CFPB and, to the extent applicable, give the CFPB a reasonable opportunity to respond to the demand or request and to assert all reasonable and appropriate legal exemptions or privileges that the CFPB may request be asserted on its behalf; and~~
- ~~(i) consent to an application by the CFPB to intervene in any action to preserve, protect, and maintain the confidentiality of such Consumer Complaint Data or any related privilege.~~

2.8. Nothing in this Agreement shall prevent the User from complying with a legally valid and enforceable order of a court of competent jurisdiction, ~~provided that in complying with such an order, the User shall use its best efforts to ensure that the requestor secures an appropriate protective order.~~

Section III Disclaimer of Warranties

~~3.1 The CFPB makes no warranties, express or implied. The CFPB accepts no responsibility and assumes no liability of any kind for any damages, liabilities, and expenses that may be claimed by a Third Party against the User arising from the User's use of the Company Portal or arising from any acts, omissions, or neglect, or fault of the User or its agents, employees, licensees, or contractors; or arising from the User's failure to comply with laws, statutes, ordinances, or regulations applicable to it or its conduct. The CFPB accepts no responsibility and assumes no liability of any kind for damages resulting from interruption,~~

~~deletion, error, omission, failure of performance, equipment failure, technological difficulties, theft, breach, or loss due to acts of God, or any delays resulting from causes beyond the reasonable control of the CFPB.~~

~~3.2 — Should a User receive a complaint from a Third Party on behalf of a consumer, the User must verify that any required Third Party Authorization has been provided prior to permitting Third Party access to Consumer Complaint Data held by the User. The CFPB will make reasonable efforts to inform Third Parties of the need to provide to the User proof of the Third Party Authorization prior to accessing Consumer Complaint Data held by the User. The User ultimately is responsible for determining the legal necessity, accuracy and sufficiency of such authorization.~~

Section IV Term and Termination

4.1 This Agreement is effective upon signature by both Parties, and will remain in effect unless and until superseded by ~~the signed, mutual~~ agreement of ~~either one of~~ the Parties. Either Party may withdraw from or otherwise terminate its participation in this Agreement ~~not earlier than upon~~ 30 days ~~after~~ written notice provided to the other Party. ~~CFPB may terminate this Agreement for conditions including, but not limited to, the unauthorized disclosure or sharing of Consumer Complaint Data for purposes other than responding to consumer complaints; the User's pervasive system and data quality challenges despite repeated attempts by the CFPB requesting correction; and the User's lack of responsiveness to consumer complaints.~~ Upon termination of this Agreement, the User shall, upon the reasonable request of the CFPB, return, destroy, delete, or otherwise dispose of any Consumer Complaint Data, including copies thereof, ~~except that (a) one copy of all such Consumer Complaint Data may be retained by the User's legal or compliance department, and (b) any instances of such Consumer Complaint Data in an archived form that are commercially impractical to return may be retained so long as the User does not access such Consumer Complaint Data after receipt of the written request for return from the CFPB, as the CFPB directs.~~ To the extent that the User retains Consumer Complaint Data upon termination of this Agreement, such Consumer Complaint Data shall continue to be treated in accordance with the terms of this Agreement.

Section V Miscellaneous

5.1 This Agreement is in addition to, and not in place of, any applicable legal obligations of the User's legal obligations to safeguard consumer information, including ~~those~~ set forth in the CFPB's regulations, 12 C.F.R. § 1070.40 *et seq.*, and specifically stated in 12 C.F.R. § 1070.47; the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 *et seq.*; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, the Fair Debt Collection Practices Act 15 U.S.C. § 1692 *et seq.*; the Telemarketing Sales Rule, 16 C.F.R. Part 310, and any other applicable federal and state privacy laws.

5.2 In the event a court of competent jurisdiction finds any provision of this Agreement illegal or unenforceable, the remaining provisions shall remain in full force and effect.

5.3 No provision of this Agreement provides any Person not a party to this Agreement with any remedy, claim, liability, reimbursement, or cause of action, or creates any other third-party beneficiary rights.

5.4 All notices permitted or required hereunder shall be in writing and, unless otherwise specifically provided, shall be [instructions]. ~~(We assume that this section is currently incomplete and will be filled in.)~~



5.5 Failure by either party to enforce any provision of this Agreement shall not be deemed a waiver of future enforcement of that or any other provision. Any waiver, amendment, variation or other modification of any provision of this Agreement will be effective only if in writing and signed by the Parties.

5.6 This Agreement between the Parties shall constitute the entire agreement of the Parties with respect to Consumer Complaint Data information shared by the CFPB with the User through the Company Portal.

5.7 ~~As soon as practicable after execution of this Agreement, the User shall advise the CFPB of the name, title, and contact information, including mailing addresses, email addresses, and telephone and fax numbers, for the Access Administrator and any other appropriate officers. (NOTE: Moved to section 2.5)~~

5.8 This Agreement shall be construed in accordance with the laws of ~~the District of Columbia~~the jurisdiction where the counterparty is headquartered without giving effect to its principles or rules of conflict of laws. Any legal actions to enforce, interpret, or negate any term or condition of this Agreement shall be brought in a court of competent jurisdiction in the District of Columbia.

_____ agrees to the above conditions.
Name of Company (User)

Signed: _____
[NAME]
[Title]
[Company]
[Mailing Address]
[Telephone Number]
[E-Mail Address]
[Official Company URL]
[Parent Company Tax EIN]

Dated: _____

Assistant Director, Consumer Response
Consumer Financial Protection Bureau

Dated: _____