MORTGAGE BANKERS ASSOCIATION

November 21, 2017

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: Notice of proposed policy guidance with request for public comment; Docket No. CFPB-2017-0025

Dear Ms. Jackson:

The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to comment on the Consumer Financial Protection Bureau's proposed *Policy Guidance on Disclosure of Loan-Level Home Mortgage Disclosure Act (HMDA) Data* (the proposal).[2] The proposal describes modifications that the Bureau intends to apply to the loan-level HMDA data before the data is disclosed to the public. The proposed policy guidance would apply to HMDA data to be reported effective January 1, 2018 and made available to the public beginning in 2019.

The comments set forth in this letter specifically address **business-purpose mortgage loans secured by multifamily properties**. In preparing this response, MBA has worked with its commercial/multifamily finance membership, including mortgage bankers, life insurance companies, banks, multifamily lenders and other industry participants in commercial real estate finance. MBA comments addressing single-family (1-4 unit) home mortgage loans are included in a separate letter submitted by MBA and other groups.

I. EXECUTIVE SUMMARY

As a threshold matter, we recommend that the Bureau exempt all business-purpose loans including those secured by multifamily properties, from HMDA reporting requirements. The regulatory burden of reporting business-purpose transaction data under a statute and

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

[2] 82 Fed. Reg. 44586 (Sept. 25, 2017); see also Home Mortgage Disclosure Act, 12 U.S.C. § 2801-2810.

regulations designed for single-family lending outweighs potential public policy benefits – and exempting multifamily properties from HMDA reporting would address privacy issues raised by the proposal as to multifamily lending transactions. HMDA reporting should be "appropriately tailored" to apply only to single-family lending.

If business-purpose loans secured by multifamily lending remain subject to HMDA reporting, we would recommend that loan-level information for multifamily properties not be released at all, or that it be addressed only in a manner "appropriately tailored" to address the risk that multifamily borrowers could be re-identified as we describe below. The proposal, in its current form, all but guarantees that at least some multifamily borrowers will be re-identified and exposed to reputational risk.

II. HMDA AND MULTIFAMILY GENERALLY

HMDA was designed and enacted with single-family consumer mortgage transactions in mind. In enacting HMDA, Congress found that some depository institutions had failed to provide adequate home financing to qualified applicants on reasonable terms and conditions.[3] HMDA's principal focus in the decades since enactment has been on single-family housing finance, and the Loan Application Register (LAR) developed under HMDA is designed to collect data on single-family mortgage lending to consumers — that is, natural persons. As the HMDA regulations specify, a number of HMDA data elements simply do not apply to multifamily lending transactions.

Differences between single-family (1-4 units) and multifamily (5 or more units) lending go beyond numbers of units. For example, multifamily mortgage loan borrowers are often corporations, limited liability companies and partnerships, rather than natural persons. These borrowers utilize commercial real estate mortgages for the commercial purpose of acquiring or refinancing an income-producing property. Multifamily mortgage loans are business-purpose loans made on income-producing assets and are often non-recourse. As a result, underwriting of these projects is very different from underwriting associated with the extension of home mortgage loans to consumers. For example, unlike single-family lending, underwriting for business-purpose loans secured by multifamily properties considers expected cash flows from the property and assessments of value of the underlying property as an income-producing asset.

In addition, and in further contrast to single-family home mortgage finance, which currently relies heavily on government programs and standardized terms, capital sources available for multifamily mortgage lending are diverse, including GSEs, banks, life insurance companies, FHA and CMBS markets. Multifamily loan programs and requirements therefore vary based on investment criteria and compete with other alternative non-mortgage investments. Lending programs are proprietary, terms may be negotiated, and loan structure may be tailored to mitigate risks associated with the property, borrower, market and loan terms, as well as the needs of investors in the loan.

As a result of these differences, we believe the public policy benefit of collecting HMDA data does not outweigh the considerable regulatory burden of collecting and reporting it.

[3] 12 U.S.C. § 2801.

Accordingly, we strongly recommend that the Bureau exempt business-purpose loans secured by multifamily properties from HMDA reporting, which would globally address privacy concerns with the proposal at it relates to such borrowers and properties.

We believe this recommendation is consistent both with a reasonable application of HMDA and its underlying public policy objectives as well as with current federal policy as outlined in the *Core Principles for Regulating the United States Financial System,*[4] including the Core Principle that regulations should be "efficient, effective and appropriately tailored." Consistent with that Core Principle, HMDA reporting should be "appropriately tailored" to apply only to single-family lending transactions.

III. THE PROPOSAL, MULTIFAMILY LENDING, AND THE BALANCING TEST

HMDA, as amended by the Dodd-Frank Act, requires the Bureau to conduct a balancing test in connection with the public disclosure of HMDA information.[5] That test includes weighing potential harm from re-identification of individual borrowers against potential public policy benefits of making information available to the public. Consistent with the Core Principles described above, that process should aim to "appropriately tailor" treatment of each data element to strike the right balance.

A. Multifamily lending requires a balancing test separate from single-family

Based on the notice, the balancing test appears to be based on single-family lending to consumers, including implicit assumptions as to origination transaction volumes, loan size and similarity across transactions. Those assumptions are not applicable to business-purpose loans secured by multifamily properties as we describe above and as is illustrated from the following data.

As reflected in 2016 HMDA data and MBA's *2016 Annual Report on Multifamily Lending*:

- **Origination volume (by loan count).** Single-family origination volume by loan count for 2016 was **more than 160 times larger** than the multifamily origination loan count for the same period or, put another way, the number of multifamily originations was about **0.6 percent** of the number of single-family originations (**7.8 million vs. 46,575**); and

- **Average loan size.** The average loan size for multifamily loans in 2016 was **more than 20 times larger** than the single-family average loan size or, put another way, the single-family average loan size was about **4 percent** of the multifamily average (**$5.8 million vs. $253,775**).

This demonstrates that these are two very different contexts. Significantly, differences in numbers of origination and loan size are relevant to assessing re-identification risk. We therefore believe that the release of HMDA information on business-purpose loans secured

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[4] Executive Order 13772 (Feb. 3, 2017).

[5] See Dodd-Frank Act, § 1094(3); codified at 12 U.S.C. § 2803(h)(1)(E), (h)(3)(B).

by multifamily properties deserves its own balancing test, and that such a test would result in substantial modifications to the proposed public release of data points, as we describe below, if not a complete exemption of these loans from HMDA reporting.

B. Data points that pose elevated re-identification risk

Certain data points pose elevated re-identification risk for business-purpose loans secured by multifamily properties. As a result, we recommend that the Bureau not disclose these data points at all or that the Bureau do so only in a way that is “appropriately tailored” to address the risk of re-identification as we describe below.

Census tract. The proposed guidance would withhold property addresses to protect borrower privacy but would disclose the census tract, county, and state without modification.

This approach would not protect the privacy of multifamily borrowers. Consistent with the lower origination volume of transactions secured by multifamily properties as described above, there are relatively few multifamily mortgages originated in any region of the country in any year. For example, our review of 2016 HMDA reporting at the county level reveals that **94 percent of counties reported fewer than 100 multifamily originations** in 2016 – and that **47 percent of counties reported fewer than 5 multifamily originations** during 2016. At the census tract level, of course, there would be even fewer of these originations for each geographical unit in each reporting year.

Compounding re-identification risk, each multifamily property has relatively unique characteristics, which may make it impossible to protect borrower identify at the census tract or even county level. There will seldom be a large enough volume of multifamily properties in each census tract or county with enough similar combinations of loan-level characteristics to prevent ready re-identification. Therefore, we recommend that the Bureau release HMDA data for business-purpose multifamily loan transactions only at the state or national level – and at a state level only for states with sufficient numbers of multifamily property originations to make re-identification risk remote.

Loan Amount and Property Value. In its proposal, the Bureau proposes to modify the disclosure of Loan Amount and Property Value by disclosing the midpoint for the $10,000 interval in which the reported value falls.

This approach, which appears to be designed for single-family lending and its relatively lower loan amounts and property values, is inadequate to protect multifamily borrower identities. For example, as we describe above, our analysis shows that **the average size for multifamily loans is more than 20 times larger than single-family loan size average ($5.8 million multifamily vs. $253,775 single-family**). As a result, the relatively small proposed modification would not materially reduce the re-identification risk for multifamily borrowers.

We recommend therefore that the Bureau not disclose the loan amount or property value where a geographic unit does not include enough multifamily properties or lending transactions to protect borrower identities. Where there is a sufficient number, we recommend that the Bureau disclose loan amount and property value only in buckets broad enough to address re-identification risk (e.g., less than $5 million or $5 million or more).

Total Units. The Bureau proposes to disclose Total Units without modification.

Such disclosure would create a high risk of re-identification of multifamily borrowers. For multifamily mortgages, the total number of units in a property can vary widely across properties and therefore may identify specific properties and borrowers. As a result, releasing the total numbers of units poses high levels of re-identification risk when combined with other disclosed data (such as reporting year and the census tract, county or even state in some cases).

We recommend therefore that the Bureau not disclose total units where the relevant geographic area does not include enough multifamily lending or properties. Where there is a sufficient number, we recommend that the Bureau disclose total unit only in buckets broad enough to reduce re-identification risk. For example, the buckets could distinguish between small and large multifamily properties (e.g., 5-49 units or 50 or more units).[6]

Multifamily Affordable Units. The Bureau proposes to disclose Multifamily Affordable Units without modification.

Such disclosure would create a high risk of re-identification of multifamily borrowers. As we describe above, disclosing numbers of units creates high risk of re-identification, and the same risk arises in connection with disclosing numbers of *affordable* units.

We recommend therefore that the Bureau not disclose any information as to multifamily affordable units where a census tract does not include enough multifamily lending to protect all borrower identities. Where there is a sufficient number, we recommend that the Bureau disclose multifamily affordable units on a percentage basis only.

C. Data points that pose heightened re-identification risk and risk of harm

As with any risk assessment, an assessment of re-identification risk must focus both the likelihood of re-identification as well as the severity of harm that would result from an occurrence of re-identification. The two data points described below are relevant to both.

- **Action Taken.** This data point allows for six possible responses: *Originated, Approved but not accepted, Denied, Withdrawn by applicant, Closed as incomplete,* and *Purchased*.

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[6] The Department of Housing and Urban Development (HUD) has similarly used 50 units as the threshold between larger and smaller multifamily properties, for example, in its annual Rental Housing Finance Surveys. Properties with fewer than 5 units would not be multifamily.

- **Reason for Denial.** The Reasons for Denial data point collects "the principal reason or reasons for denial," which may include one to four of the following reasons: *DTI, Employment History, Credit History, Collateral, Insufficient cash, Unverifiable Information, Credit Application Incomplete, Mortgage insurance Denied* and *Other (must type in the reason)*.

The proposed guidance would make both of these data points public without modification,[7] which would create re-identification risk and pose a substantial reputational risk upon an occurrence of re-identification.

We believe that an appropriate balancing would result in a decision to exclude this information in connection with business-purpose loans secured by multifamily properties. First, the proposed decision to release these data elements without modification is based, at least in part, on an explicit assumption that re-identification risk is low in cases where a loan is not originated.[8] We believe that assumption is not true in any case, particularly for multifamily properties, where relatively low transaction volumes and unique property features makes re-identification of applicants or borrowers particularly high.

In addition, the harm from re-identification of a multifamily borrower could be substantial because borrowers in multifamily finance are generally business enterprises that operate in a reputation-driven environment. The negative reputational harm from the release of certain responses to Action Taken (i.e., *Denied, Withdrawn by applicant, Closed as incomplete*), or any information as to a denial, could result in adverse impacts on business relationships and on whether, or on what terms, others who would do business with a borrower. Moreover, a borrower may not be able to effectively detect or mitigate that harm. The Bureau as gatekeeper of these data points may be the only one in a position to protect borrowers.

Accordingly, we strongly recommend that the Bureau not release Action Taken or Reason for Denial information in connection with multifamily lending, in any form. At least some multifamily borrowers would be likely to be re-identified no matter what steps the Bureau takes (again, small number of business-purpose loans secured by multifamily properties in each census tract for each reporting year, and any other data points disclosed), and public disclosure of Action Taken and Reason for Denial would cause borrowers substantial harm. Together, those factors tip the balance strongly in favor of non-disclosure of Action Taken and Reason for Denial.

IV. CONCLUSION

As a threshold matter, business-purpose multifamily lending does not pose the same public policy concerns as single-family lending, so the considerable regulatory burden of collecting and reporting HMDA data would not be outweighed by corresponding public policy benefits. Therefore, as we describe above, we recommend that the Bureau modify HMDA regulations

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[7] We note that the proposal would appropriately not release narrative reasons for denial.

[8] See 82 Fed. Reg. at 44598, note 75.

to exempt business-purpose loans secured by multifamily properties from HMDA reporting, which would globally resolve borrower privacy issues we have addressed in this letter.

In addition, the Bureau appears to have based its proposed treatment of HMDA information on a single-family balancing exercise. Unfortunately, the results of that balancing create high likelihood that individual business-purpose multifamily borrowers will be re-identified and suffer reputational harm as a result. MBA therefore strongly recommends that the Bureau not disclose any HMDA information on business-purpose loans secured by multifamily properties or that, at a minimum, the Bureau "appropriately tailor" such disclosure to protect multifamily borrowers from re-identification risk and reputational harm.

MBA appreciates the Bureau's efforts implementing HMDA and its consideration of these comments. Should you have questions or wish to discuss these comments, please contact Kathy Marquardt, MBA Vice President, at (202) 557-2742 or kmarquardt@mba.org.

Sincerely,

David H. Stevens, CMB
President and Chief Executive Officer