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MORTGAGE BANKERS ASSOCIATION

December 21, 2018

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

**Re: Request for Information Regarding Bureau Data Collections,  
Docket No, CFPB-2018-0031**

Dear Ms. Jackson:

The Mortgage Bankers Association (“MBA”)<sup>1</sup> appreciates the opportunity to comment on the Bureau of Consumer Financial Protection’s (the “Bureau”) Request for Information (“RFI”) regarding the Bureau’s data collections.<sup>2</sup> The Bureau’s effort to assess the overall efficiency and effectiveness of its Data Governance Program and Data Collections, while considering any appropriate changes, is a welcome step toward protecting consumer privacy and ensuring industry best practices.

As an initial note, we urge the Bureau to place consumer privacy concerns at the forefront of its data collection efforts. Keeping consumer data secure is of paramount importance to our members, and it is important that any data that is shared be treated with the great care. The Bureau should constantly review and update its data collection policies to consider both emerging security risks and the possible evolutions of the consumer understanding of data privacy. Finally, experience has shown that government systems are not immune to intrusion.<sup>3</sup> Thus, the Bureau should be modest in what it seeks to collect initially, transparent if its data is compromised and have clear and predefined policies to identify how it intends to respond to a data breach. MBA has offered thoughts on this broad topic in the past. We recommended that the Bureau consider the risks

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<sup>1</sup> The 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 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 Web site: [www.mba.org](http://www.mba.org).

<sup>2</sup> 83 Fed. Reg. 49072, Docket No. CFPB-2018-0031 (Sept. 28, 2018).

<sup>3</sup> See generally, Office of Professional Management, Cybersecurity Incidents, available at <https://www.opm.gov/cybersecurity/cybersecurity-incidents/>. See also, The Washington Post, “The Cybersecurity 202: ‘A wake up call.’ OPM data stolen years ago surfacing now in financial fraud case. June 20, 2018. Available at [https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/06/20/the-cybersecurity-202-a-wake-up-call-opm-data-stolen-years-ago-surfacing-now-in-financial-fraud-case/5b2924ca1b326b3967989b66/?utm\\_term=.9039e523eb77](https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/06/20/the-cybersecurity-202-a-wake-up-call-opm-data-stolen-years-ago-surfacing-now-in-financial-fraud-case/5b2924ca1b326b3967989b66/?utm_term=.9039e523eb77).

associated with re-identification of consumer information.<sup>4,5</sup> In comments submitted during the Bureau's RFI initiative, MBA urged the Bureau to be mindful of collecting documents subject to attorney-client privilege.<sup>6</sup> During the Bureau's lookback assessment of the Real Estate Settlement Procedures Act ("RESPA") servicing rule, MBA commented that data requests should be reasonable and institutions that volunteer to provide such data should be masked or anonymized.<sup>7</sup> Throughout various letters MBA has urged the adoption of the industry standards issued by the Mortgage Industry Standards Organization ("MISMO") to help provide uniformity and reduce the volume of errors in reporting. These previous comments stressed the importance of data security, industry standards, and encouraged the Bureau to afford the proper weight to consumer privacy risks.

### **I. Avoid the collection and use of privileged data.**

The Bureau should exclude from its data collections work product that is subject to the attorney-client privilege. While there may be times when accessing attorney-client communications is the appropriate supervisory decision, the Bureau's practice has been to seek these materials as a matter of course. This should be the rare exception, not the standard.

The Bureau should also not view seeking legal advice as an instance of non-cooperation. Examiners should be mindful that consulting with attorneys for the purpose of receiving legal advice reflects a prudent and careful judgment on the part of that institution. This fact was underscored in *BCFP v. Cashcall*, where the court reduced the tier level of the civil money penalty because the institution sought legal counsel in structuring its practices in compliance with the applicable law.<sup>8</sup> Finally, privileged materials collected as part of the supervisory process should never be shared with the enforcement staff. Federal courts and the rules of evidence regarding discovery provide a strong presumption of attorney-client privilege. Circumventing this privilege would be an inappropriate use of supervisory authority.

### **II. Limit the scope of the burden placed on industry during section 1022 reviews.**

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<sup>4</sup> See MBA, Joint-trades, "Re: Disclosure of Loan-Level HMDA Data." Docket No. CFPB-2017-0025. Comment letter to BCFP, Nov. 24, 2017.

<sup>5</sup> 82 Fed. Reg. 44586 (Sept. 25, 2017). While this RFI indicates that the Bureau is not seeking comments on the substance of any particular rule with separate information collection requirements, 83 Fed. Reg. at 49073, because of the importance of the issues to our members, we note here that MBA remains concerned with the Bureau's current proposed disclosure policy and with current regulations around HMDA. We look forward to the opportunity to further address concerns regarding re-identification or insufficient privacy protections, the inappropriate inclusion of business-to-business loans secured by multifamily loans in the reportable data (i.e., reducing that reporting burden would not hinder the Bureau's ability to accomplish its statutory objectives, see RFI Question 5), and other related issues, in the forthcoming HMDA rulemakings announced in the Bureau's Spring 2018 Regulatory Agenda and in its Fall 2018 Rulemaking Agenda. See BCFP, Fall 2018 Rulemaking Agenda (Oct. 17, 2018). Available at

[https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3170&Image58.x=52&Image58.y=3&Image58=Submit](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3170&Image58.x=52&Image58.y=3&Image58=Submit)

<sup>6</sup> See MBA, "Re: Request for Information Regarding the Bureau's Supervision Program." Docket No. CFPB-2018-0004.

Comment letter to BCFP, May 21, 2018. Available at [https://www.mba.org/Documents/CFPB\\_Supervision\\_RFI\\_FINAL\(0\).pdf](https://www.mba.org/Documents/CFPB_Supervision_RFI_FINAL(0).pdf).

<sup>7</sup> See MBA, "Re: Real Estate Settlement Procedures Act Servicing Rule Assessment." Docket No. CFPB-2017-0012. Comment letter to BCFP, July 10, 2017. Available at

<https://www.mba.org/Documents/Comment%20Letters/Mortgage%20Servicing%20Rules%20Lookback.pdf>.

<sup>8</sup> See Minutes Findings of Fact and Conclusion of Law, *BCFP v. CashCall, Inc.*, No. 2:15-cv-7522 (C.D. Cal Jan. 19, 2018).

The Dodd-Frank Act requires the Bureau to “conduct an assessment of each significant rule or order adopted by the Bureau...”<sup>9</sup> Under the statute, the evaluation is to be based on evidence that is available and data that the Bureau might “reasonably” collect.<sup>10</sup> The Bureau should thus be mindful of the requests it makes upon its supervised entities to prevent unduly burdensome requests.

As a general matter, satisfying loan-level data requests is particularly burdensome. It is relatively less burdensome to produce enterprise-level data. As such, requests for loan-level data should be issued only when absolutely necessary. When these requests are necessary, the Bureau should utilize sampling techniques to minimize the burden of production.

The Bureau must protect the confidentiality of data provided as part of a section 1022(d) assessment. The Bureau’s broad authority to request information is paired with a corresponding duty to ensure that confidential and proprietary commercial information is protected from public disclosure.<sup>11</sup> An effective 1022(d) assessment requires candor and transparency. It is therefore crucial that company or loan-level information requested by the Bureau be protected by the supervisory privilege. In addition, material provided to the Bureau falls within the Freedom of Information Act (“FOIA”) exemption for “[e]xamination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions[,]” and must be shielded from FOIA requests.<sup>12</sup>

The Bureau must also protect the security of the data by masking the identities of the institutions providing it and combining the data set to safeguard anonymity. The type of information collected by the Bureau may be sensitive to the institution or, when loan-level data is sought, sensitive to the consumer. The Bureau should take steps to minimize the sensitivity of this information by, for example, removing entity identifiers and organizing institution data using broad classifications based on entity size (e.g. total serviced UPB if mortgage servicing is the focus) and/or business model.

To further strengthen anonymity, the Bureau should explore having an independent third party collect and transmit anonymized data.<sup>13</sup> These or other, similar data anonymization measures are consistent with the purpose of the 1022(d) assessment to evaluate the effectiveness of the rule rather than examine any one particular institution through a different statutory mechanism.

### **III. Utilize the existing industry standards issued by MISMO.**

This RFI raises the issue of whether the Bureau should leverage existing industry data standards for particular markets that the Bureau regulates as part of its data collections. The simple answer is yes, and central to that answer is MISMO. Among its activities, MISMO standardizes terms and

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<sup>9</sup> 12 USC § 5512(d)(1).

<sup>10</sup> *Id.*

<sup>11</sup> 12 USC § 5512(c)(8). We also note that property rights in proprietary data are constitutionally protected (*see Ruckelshaus v. Monsanto Co.*, 467 US 986 (1984)).

<sup>12</sup> *See* 5 USC § 552(b)(8).

<sup>13</sup> MBA would be willing to assist in collecting and transmitting anonymized data if supervised entities find this preferable to directly submitting to the BCFP.

definitions for the information collected and disseminated across the entire mortgage process. Standards create a common understanding across all parties to mortgage transactions. The use of industry standards rather than proprietary formats reduces errors and the costly work necessary to correct errors.

MISMO standards are already widely adopted across the mortgage industry. The Government Sponsored Enterprises utilize MISMO for their reporting requirements under the Uniform Mortgage Data Program. Housing agencies such as the FHA also utilize MISMO.

To reduce the burden on the industry, the Bureau should utilize MISMO standards for standard forms and data gathering requirements, including examinations. MISMO standards are available on the MISMO website at [www.mismo.org](http://www.mismo.org). MISMO contributors stand ready to work with the bureau should it require something that might not yet be available in the MISMO standards.

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MBA appreciates your consideration of our comments on how to improve the Bureau's data collection and governance processes. We welcome the opportunity to meet and discuss these crucial functions as well as specific regulatory changes that would benefit consumers, industry, and other stakeholders. Should you have any questions or wish to discuss any aspects of these comments, please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel ([jwiseman@mba.org](mailto:jwiseman@mba.org)) at MBA.

Sincerely,

A handwritten signature in black ink that reads "Stephen A. O'Connor". The signature is written in a cursive, slightly slanted style.

Stephen A. O'Connor  
Senior Vice President  
Public Policy and Industry Relations  
Mortgage Bankers Association