American Bankers Association
Building Success. Together.

THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

MORTGAGE BANKERS ASSOCIATION
Investing in communities

CBA CONSUMER BANKERS ASSOCIATION

September 26, 2011

By electronic delivery to:
www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1801 L Street, N.W.
Washington, D.C. 20036

Re: Interim Final Rules on Investigations, Docket No. CFPB-2011-0007, and Interim Final Rules of Practice Governing Adjudication Proceedings, Docket No. CFPB-2011-0006

Ladies and Gentlemen:

The American Bankers Association,[1] the Consumer Bankers Association,[2] the Financial Services Roundtable[3], and the Mortgage Bankers Association[4] (collectively, the

---

[1] The American Bankers Association (ABA) represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets.

[2] The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[3] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

[4] 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 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, Wall Street

Associations) appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (Bureau) Interim Final Rules on investigations[5] and the Interim Final Rules of Practice Governing Adjudication Proceedings.[6] Due to the close association between administrative investigations and adjudications, as well as the commonality of the concerns our members have with the proposed procedures for each, we are submitting one comment letter that addresses both interim final rules (collectively, the Rules).

We recognize that the resulting Rules are largely a blend of existing agency procedures and that the Bureau has applied those elements of existing procedural rules, often using identical language, that it believes will best promote administrative efficiency "while protecting parties' rights to fair and impartial proceedings."[7] Nevertheless, we offer the following comments to further improve upon the Rules to help ensure the reasonableness of civil investigative demands, the confidentiality of investigations, and that the Bureau's emphasis on speed and efficiency does not come at the expense of due process and does not impede the development of a fair and complete administrative record.

Comments on the Interim Final Rules on Investigations

The interim final rules on investigations (Investigation Rules) are designed to implement the Bureau's authority to conduct investigations pursuant to section 1052 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA).[8] As the Bureau notes in the supplemental materials, the Bureau drew most heavily from the FTC's nonadjudicative procedures in promulgating these rules.[9] The Investigation Rules are intended to describe the Bureau's authority to conduct investigations and the rights of persons from whom the Bureau seeks to compel information in response to a civil investigative demand (CID). Our comments focus on three areas of opportunity for improving the Investigation Rules: (1) timing of petitions to modify or set aside CIDs; (2) scope of CIDs; and (3) confidentiality protections.

1. *The Investigation Rules should be amended to provide that extensions of time to file a Petition modifying or setting aside a CID will be liberally granted.*

The Investigation Rules describe how an entity will be notified of an investigation; section 1080.5 provides that "Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, or any combination of such

---

conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.

[5] 76 Fed. Reg. 45168 (July 28, 2011).

[6] 76 Fed. Reg. 45338 (July 28, 2011).

[7] *Id*. at 45338.

[8] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1337, *to be codified at* 12 U.S.C. §1052.

[9] *See* 16 C.F.R. Part 2 *et seq.*

material … shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation."[10] Thus, a respondent's first notice that it is the subject of an investigation may be upon receipt of a notice and a CID requiring production of a broad and exhaustive list of documentary material, tangible things, written reports and answers to questions, and prescribing the date, time, and place at which oral testimony will be required.[11] Experience with CIDs issued by the FTC demonstrates that CIDs are intentionally broad and open-ended, requiring respondents to undertake an extensive, labor-intensive and time-consuming review of policies, procedures, processes, operations, and record-keeping systems of the responding entity and its service providers to begin to identify the range of responsive materials, to determine what to produce, and to generate the necessary copies and reports. Often, these reviews are further complicated by the fact that mergers and acquisitions require the review of legacy operations and record-keeping systems which complicate efforts to access documents and to generate copies and reports.

The Investigation Rules state that a CID shall provide a "reasonable" period of time within which the material demanded is to be assembled and made available for inspection and copying. In addition, they authorize the Assistant Director of the Division of Enforcement (Assistant Director) "to negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good cause shown, [to] extend the time prescribed for compliance."[12] Other provisions of the rule, however, work to limit the period of time within which a respondent must file a petition for an order modifying or setting aside a civil investigative demand, thereby undermining the requirement for a "reasonable" time to respond. Section 1080(d) requires that such a petition be filed within *twenty days* of service of the CID *or less,* if the return date on the CID is less than twenty days after service. Moreover, section 1080(d)(2) provides that requests for extension of time to file a petition are disfavored.[13]

Thus, in reality, respondents will need to complete the arduous and time consuming review and identification of responsive materials described above within approximately two weeks, leaving less than a week to make decisions about what documents are privileged or otherwise protected and to draft and file a motion articulating the legal and factual basis for all assertions of privilege and all objections to the scope and breadth of the demand.[14]

Anticipating the breadth of documents and information requested by CIDs, we believe that twenty days often will be an impossibly short period of time to complete these

---

[10] 12 C.F.R. §1080.5.
[11] 12 C.F.R. §1080.6.
[12] §1080.6(c).
[13] §1080.6(d)(2).
[14] §1080.6(d)(1). In addition, section 1080(d)(1) requires that each Petition be accompanied by a signed statement representing that counsel has conferred with counsel for the Bureau in a good faith effort to resolve by agreement the issues raised by the Petition and has been unable to reach such an agreement.

tasks, yet the failure to do so will risk the disclosure of privileged or otherwise protected information. We also note that it is at odds with the underlying statute which clearly authorizes a date for filing a petition in excess of twenty days. DFA §1052 permits a "period exceeding 20 days after service … as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand."[15] Finally, other provisions of section 1080.6 grant the Assistant Director general authority "to negotiate and approve the terms of satisfactory compliance with civil investigative demands, and for good cause shown, to extend the time prescribed for compliance."[16]

Accordingly, the Associations urge the Bureau to delete the statement that extensions of time are disfavored and to expressly recognize that fairness and the parties' mutual interests in developing a complete investigative record require liberal periods of time to respond to CIDs and, when necessary, to file a petition to modify or set aside the CID.

2. *The Investigation Rules should be amended to limit the scope of CIDs and to require that the Bureau confer with respondents to set expectations on what respondents are required to produce.*

To further ensure the efficiency of the process, and to provide protection to respondents against unreasonable and burdensome investigative demands, the Associations propose that the Bureau amend the language of section 1080.6 to state that a CID shall not be unreasonable or unduly burdensome and to require that all requests for documents, tangible things, written reports or answers to questions, and oral testimony be reasonably related to the matter under investigation and not excessive in scope.

In addition, building on section 1052(f)'s express authorization for extension of the time period for filing a petition, we suggest that within ten days of service of the notice and CID, the Bureau *require* a conference between the respondent and the Assistant Director to negotiate and approve the terms of satisfactory compliance. We envision a conference analogous to the discovery planning conference under the Federal Rules of Civil Procedure[17] at which the parties discuss the requests for information; appropriate limitations on the scope of requests; issues about the disclosure or discovery of electronically stored information, including the form in which it should be produced; issues regarding claims of privilege or the protection of confidential information; and a reasonable time period for compliance. We believe that such a conference will better ensure the prompt and efficient production of material and information germane to the investigation than the unilateral imposition of rigid time periods within which to comply with a CID or file a petition to modify the demand.

---

[15] *See* 12 U.S.C. §1052(f)(1).
[16] §1080.6(c).
[17] *See* Fed. R. Civ. P. 26(f).

3. The Investigation Rules should be amended to provide stronger confidentiality protections for respondents.

As discussed at length in the joint comment letter filed by the Associations in response to the Interim Rule on the Disclosure of Records and Information,[18] we strongly urge the Bureau to provide the maximum protection for confidential and proprietary documents and information obtained from covered persons during the course of an investigation. Section 1080.14(a) provides: "Documentary materials and tangible things the Bureau receives pursuant to a civil investigative demand are subject to the requirements and procedures relating to the disclosure of records and information set forth in part 1070 of this chapter." Without repeating our comments to the interim final rules on confidentiality, we refer the Bureau to the Associations' comment letter, attached.

However, not only must the Bureau protect confidential and proprietary documents and information received during the course of an investigation from disclosure, the Bureau must also ensure the confidentiality of the investigation itself. To fail to permit an entity to respond to charges in a confidential setting risks inflicting significant reputational damage on the entity that cannot be undone, even if it is later found not to have committed the alleged violation. In addition, the failure to conduct investigations confidentially will increase litigation risk. The Investigation Rules, however, do not guarantee this confidentiality. Instead, section 1080.14(b) provides that "Bureau investigations *generally* are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation"(emphasis added). We urge the Bureau to delete this language and replace it with language similar to that of the FDIC, "Investigations conducted pursuant to section 10(c) shall be confidential."[19]

Finally, section 1080.11 governs the disposition of investigations. Subparagraph (a) describes the Bureau's authority to file a judicial or administrative enforcement action, and it concludes with the following statement, "Where appropriate, the Bureau also may refer investigations to appropriate federal, state, or foreign governmental agencies." We urge the Bureau to amend this language to ensure the confidentiality of investigations and the materials in an investigative file. We do not support the referral of investigations and investigatory files except where expressly authorized by DFA Title X, the Consumer Financial Protection Act (CFPA). Thus, we urge the Bureau to amend section 1080.11 as follows, "When expressly permitted by the Consumer Financial Protection Act, any Enumerated Consumer Law, as defined in section 1002 of the Consumer Financial Protection Act, or other Federal law, the Bureau also may refer investigations to appropriate federal, state, or foreign governmental agencies."

[18] 76 Fed. Reg. 45,372 (July 28, 2011).
[19] 12 C.F.R. §308.147.

Comments on the Interim Final Rules of Practice for Adjudication Proceedings

The interim final rules of practice for adjudication proceedings (Adjudication Rules) are intended to govern administrative proceedings brought under DFA section 1053 which authorizes the Bureau to use administrative adjudications to ensure or enforce compliance with the CFPA, rules prescribed by the Bureau under the CFPA, and any of the enumerated consumer laws or regulations the Bureau is authorized to enforce.[20] In the supplemental materials, the Bureau explains that it "endeavored to create a process that simultaneously provides for expeditious resolution of claims and ensures that parties who appear before the Bureau receive a fair hearing."[21] In support of the expeditious resolution of claims, the Adjudication Rules set an ambitious 300-day time period (after service of the notice of charges) within which an adjudication must be resolved. This arbitrary time frame, in turn, requires all stages of the proceedings to be placed on an accelerated schedule, one that the Associations believe may compromise the fairness of the proceedings and the development of a complete administrative record. In particular, we note three shortcomings that appear to be driven by the 300-day timeframe currently set forth in the Adjudication Rules: (1) the time to file an answer or appeal an adverse decision; (2) the availability of extensions of time or other postponements or adjournments of proceedings; and (3) the scope of discovery afforded to respondents.

1. *The Adjudication Rules should be amended to provide respondents with at least 20 days to file an answer and 30 days to file a notice of appeal.*

Section 1081.201 requires a respondent to file an answer to the notice of charges, but it allows only 14 days for the respondent to do so. As the Bureau recognizes, the answer is important as it helps focus and narrow the matters at issue. Accordingly, section 1081.201 requires an answer to "specifically respond to each paragraph or allegation of fact contained in the notice," and states that denials must "fairly meet the substance of each allegation of fact denied."[22] Reviewing the notice of charges, investigating the factual and legal allegations, determining the appropriate response, and finally, drafting an answer takes a considerable amount of time; however, as stated above, the answer must be filed within 14 days of service of the notice of charges.[23] Moreover, the failure of a respondent to file an answer within the time provided is deemed a waiver of the right to appear and consent to the entry of an order granting the relief sought by the Bureau.[24]

As a practical matter, the Bureau's proposed adoption of an "affirmative disclosure" process for discovery further limits the useful time available for preparing an answer. Pursuant to the affirmative disclosure discovery process outlined in these rules, the

---

[20] 12 U.S.C. §1053.
[21] 76 Fed.Reg., *supra at* 45338.
[22] §1081.201(b).
[23] §1081.201(a).
[24] §1081.201(d)(1).

Division of Enforcement will provide any party to an adjudicative enforcement proceeding with an opportunity to inspect and copy certain non-privileged materials gathered during the course of an investigation, including documents gathered from other entities, and certain categories of non-privileged documents created by the Bureau. However, section 1081.206 imposes a seven day delay after service of the notice before the Division of Enforcement is required to make these documents available to the respondent. As a result, during half of the time that the respondent has to draft an answer, the respondent will not have access to material evidence relied on by the Bureau in its decision to initiate an enforcement action.

We note that the procedural rules of the federal banking agencies allow 20 days for the filing of an answer, and even with the extra time, respondents usually need – and are routinely granted – extensions of time. The Adjudication Rules, in contrast, shorten this time period by six days and strongly discourage motions for extension of time.[25] Similarly, the rules shorten another important time period, the time for filing a notice of appeal. Section 1081.402 provides that a party must file a notice of appeal with the Executive Secretary within 10 days of service of the hearing officer's recommended decision, 20 days less than allowed by the federal banking agencies. The Associations urge the Bureau not to trade speed and efficiency for due process; we request that the Bureau grant respondents at least 20 days to file an answer and 30 days to file a notice of an appeal.

2. *The Adjudication Rules should be amended to permit extensions of time or other postponements or adjournments "for good cause shown."*

In addition, we request that the Bureau delete section 1081.115(b) which directs the Director or hearing officer to "adhere to a policy of strongly disfavoring granting [motions for postponement, adjournment, or extension of time] except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case" and describes the factors relevant to such a determination. Instead, we urge the Bureau to recognize that the factual and legal issues to be determined in administrative enforcement actions are usually complex and the relief sought may be identical to that sought in a civil action. Therefore, the Bureau should not seek to impose unrealistic filing deadlines, and like the federal banking agencies, we believe the Bureau should grant extensions of time "for good cause shown."

3. *The Adjudication Rules should be amended to provide respondents with more expansive discovery*.

Similarly, the Associations urge the Bureau to reconsider its decision not to allow discovery except for the previously described "affirmative disclosure" required of the Bureau. Under the Adjudication Rules, there are no depositions (other than depositions

[25] *See* §1081.115.

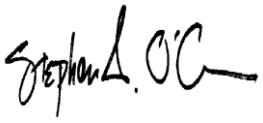
of witnesses unavailable for the hearing) or interrogatories, and subpoenas can only be enforced by the hearing officer. Clearly, this places the respondent at a significant disadvantage to the Bureau. After all, the Bureau does not need discovery; before initiating a proceeding, it will have gathered all of the information it needs through examinations and investigative proceedings as well as through its broad powers to collect consumer complaints and to collect information from covered persons.[26] Again, we caution the Bureau against choosing speed and efficiency over fairness and the development of a complete administrative record. We urge the Bureau to allow respondents to depose third parties who have direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, to issue and enforce subpoenas for documents and testimony, and to serve third parties with interrogatories as necessary to ensure that a respondent has an adequate opportunity to marshal evidence in support of its defense

Thank you again for the opportunity to share our views with you on these important matters. If you have any questions, please feel free to contact any of the trade associations listed below.

Sincerely,

Virginia O'Neill
Senior Counsel
ABA Center for Regulatory Compliance
American Bankers Association
1120 Connecticut Ave., N.W.
Washington, D.C 20036
(202) 663-5073

Steven I. Zeisel
Vice President &
General Counsel
Consumer Bankers Association
1000 Wilson Blvd., Suite 2500
Arlington, VA 22209
(703) 276-3871



Stephen A. O'Connor
Senior Vice President
Public Policy and Industry Relations
Mortgage Bankers Association
1717 Rhode Island Ave, N.W.
Washington, D.C 20036
(202) 557-2867

Richard M. Whiting
Executive Director & General Counsel
The Financial Services Roundtable
1001 Pennsylvania Ave, N.W.
Suite 500 South
Washington, D.C. 20004
(202) 289-4322

[26] *See* 12 U.S.C. §1022.

American Bankers Association
Consumer Bankers Association
The Financial Services Roundtable
Mortgage Bankers Association

September 26, 2011

Submited via http://www.regulations.gov

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1801 L Street, NW
Washington, DC 20036

Re: Docket No. CFPB-2011-0003

Dear Ms. Jackson:

The undersigned trade associations[1] appreciate the opportunity to comment on Consumer Financial Protection Bureau's (the "CFPB" or the "Bureau") Interim Final Rule on Disclosure of Records and Information ("Rule"), [2] which is intended to establish procedures for the public to obtain information from the CFPB in various contexts, including under the Freedom of Information Act ("FOIA"), and establishing rules regarding the confidential treatment of information obtained by the CFPB in connection with the exercise of its authorities under federal consumer financial law.

In the Supplementary Information accompanying the Rule, the CFPB indicates that it "has sought to provide the maximum protection for confidential information, while ensuring its ability to share or disclose information to the extent necessary to achieve its mission."[3]

We appreciate the CFPB's sensitivity to the need for maximum protection of confidentiality. However, we believe that several provisions of the Rule could lead to frequent and routine disclosure of confidential information to third parties and that such disclosure would do little, if anything, to advance the mission of the CFPB, while causing considerable harm to financial institutions,[4] their customers and the economy as a whole. We believe that, except in very limited circumstances, it is in the CFPB's interest to maintain the confidentiality of supervisory information. In addition, we believe that

---

[1] Information about the Associations is provided at the end of this letter.

[2] Disclosure of Records and Information, 76 Fed. Reg. 45,372 (July 28, 2011).

[3] *Id*. at 45,374.

[4] Financial institution, as defined by § 1070.2(l) of the Rule means any person involved in the offering or provision of a ''financial product or service,'' including a ''covered person'' or ''service provider,'' as those terms are defined by 12 U.S.C. 5481. *Id.* at 45,378.

several provisions of the Rule endanger the confidentiality of sensitive nonpublic information in ways that can undermine the CFPB's mission. Frequent or routine disclosure of confidential information to third parties beyond other financial institution supervisory authorities is likely to inhibit the CFPB's effective pursuit of its mission.

As discussed below, we strongly recommend that the Bureau amend the Rule to:

- Ensure that supervisory information generally remains confidential and is not disclosed to third parties except in very limited circumstances so as to promote the sort of ongoing dialogue and transparency between the Bureau and its supervised institutions that is essential to an effective and successful supervisory process.
- Take into account established limitations on the investigative powers of state attorneys general ("AGs") (and other state law enforcement officials) and limit the disclosure of confidential supervisory information[5] to such state officials to circumstances where those officials exercise authority to enforce applicable law within a judicial process.
- Limit any regular sharing of confidential information to those federal and state agencies that also have financial institution supervisory authority over the institutions that the CFPB supervises.
- State that the CFPB will not normally share confidential information with third parties, apart from other relevant financial institution supervisory authorities.

Confidentiality in the Supervisory Process Will Promote the CFPB's Mission

A strong relationship of trust and confidence between the CFPB and its supervised institutions will promote open and ongoing disclosure and dialogue that will assist the CFPB in effective rule writing, supervision, enforcement, gathering market information and identifying risks to consumers. For example, it is not uncommon for examiners from the prudential regulators to attend business meetings where proprietary and confidential information regarding such sensitive matters as products and consumer concerns is distributed and reviewed. Access to this type of information enhances the regulators' ability to perform their supervisory functions over both the specific institutions and the industry as a whole. The essential predicate to providing examiners with such open access to sensitive information is that supervised institutions are confident that the

[5] Confidential information, as defined by Section 1070.2(i) of the Rule, includes various materials that the CFPB generates or receives that relate to the examination of financial institutions. These materials include, first, examination, inspection, visitation, operating, condition, and compliance reports, and any information contained in, relating to, or derived from such reports. Second, the term includes documentary materials, including reports of examination that the CFPB prepares or that are prepared by others for use by the CFPB in exercising its supervisory authority over financial institutions, as well as information derived from such documentary materials. Third, the term includes the CFPB's communications with financial institutions and agencies to the extent that such communications relate to the exercise of the CFPB's supervisory authority over financial institutions. Fourth, confidential supervisory information includes information that financial institutions provide to the CFPB to help it to evaluate the risks associated with consumer financial products and services and whether institutions should be deemed ''covered persons,'' as that term is defined by 12 U.S.C. 5481. Finally, the term includes other supervision-related information that is exempt from public disclosure under the FOIA pursuant to 5 U.S.C. 552(b)(8). 76 Fed. Reg. 45,372, 45,378 (July 28, 2011).

information will remain confidential and will not be shared with any other parties. If that predicate is lacking, then supervised institutions are unlikely to engage in ongoing, informal exchanges of information with the CFPB.

We recognize that the core mission of the CFPB is to protect consumers in connection with financial transactions. The CFPB's mission, however, also includes consistent enforcement of consumer financial laws to promote fair competition, and ensuring that markets for consumer financial services and products operate transparently and efficiently to facilitate access and innovation.[6] In certain limited circumstances, the disclosure by the CFPB of confidential information to another governmental entity may potentially benefit the CFPB's efforts to protect consumers. But, any such potential benefit of disclosure must be weighed carefully against the possibility that such disclosure could lead to safety and soundness concerns, litigation and reputation risks, and have a "chilling effect" on the flow of information in ways that impair the CFPB's ability to ensure fair competition, access to and innovation in financial services and products.

Ultimately, we believe that maintaining the confidentiality of examination and other information is in the best interest of the CFPB and the institutions its supervises, and that doing so will promote the CFPB's overall mission.

Permit Sharing of Confidential Information with State Attorneys General as Authorized by the CFPA

The Consumer Financial Protection Act ("CFPA") does not authorize the CFPB to provide confidential information to state agencies in support of actions against financial institutions that are unrelated to the CFPA and other federal consumer financial laws under which the states have enforcement authority. In the case of state authorities, the focus of the CFPA is that examination reports should only be disclosed to "[s]tate regulator[s] . . . having jurisdictions over a covered person or service provider,"[7] and even then, only after the CFPB has received reasonable assurances that the information will be maintained in confidence.

It is also important to recognize that the sharing of information with state AGs could impair the CFPB's pursuit of its own mission. Thus, for example, such information sharing during the course of a CFPB examination may result in premature law enforcement action that disrupts the examination process and impairs important supervisory activities. There can also be significant safety and soundness consequences when a potential compliance issue and related information are prematurely shared outside the supervisory process, resulting in disruptive and possibly unnecessary litigation, as well as serious reputational risks. In short, there is good reason for the CFPB to establish and adhere to strict limits on its sharing of confidential information with state AGs and other state law enforcement authorities.

---

[6] The Consumer Financial Protection Act of 2010, Pub. L. No 111-203, § 1021(b), 124 Stat. 1964, 1980 (2010) (codified as amended at 12 U.S.C. § 5511(b) (2011)..

[7] CFPA §§1022(c)(6)-(8) (codified as 12 U.S.C. §5512 (c)(6)-(8)).

Despite these considerations, the Rule appears to permit frequent and routine sharing of information with state AGs in circumstances where the state AGs do not necessarily have the authority to enforce an applicable law within a judicial process. If so applied, the Rule will have the effect of expanding state investigative powers well beyond the limits established by Section 1047[8] of the CFPA and by the U.S. Supreme Court's decision in *Cuomo v. Clearing House Association*.[9] In this regard, consistent with the *Cuomo* decision, Section 1047 limits the investigative powers of state AGs over national banks to those situations where an AG exercises authority "to bring an action . . . in a court of appropriate jurisdiction to enforce applicable law." The *Cuomo* decision expressly rejected a state AG's authority to obtain information directly from national banks outside the context of a judicial process. That is, the decision upheld a state AG's authority to obtain information from a national bank only when seeking to enforce applicable law within a judicial process. By codifying *Cuomo*, Congress could not have intend for state AGs to be able to obtain, through information sharing arrangements with the CFPB, confidential information relating to national banks that the AGs could not otherwise obtain directly.

Nonetheless, the Rule appears to permit the sharing of confidential information with state AGs in non-judicial circumstances where those state AGs would not have authority to obtain the information directly from a national bank. We believe that it is critical that the CFPB take into account the relevant limitations on state AG authority reflected in *Cuomo* and in Section 1047. Specifically, we believe that the CFPB should generally limit its disclosure of confidential information to a state AG to circumstances where the state AG exercises authority to enforce an applicable law within a judicial process and such disclosure relates to the AG's exercise of that authority. Such a limitation would in no way contravene the CFPB's underlying mission, and would conform to the limitations laid down by *Cuomo* and Section 1047.

Share Confidential Information Only in Limited Circumstances

Well-established principles of bank supervision recognize that confidential information should be disclosed to third parties only in very limited circumstances. We believe that the CFPB should be guided by such a standard. In fact, this is the standard that the federal banking agencies have historically followed. For example, the rules of the Board of Governors of the Federal Reserve System ("FRB") and the Office of the Comptroller of the Currency ("OCC") dealing with the disclosure of non-public information provide that non-public agency information "is confidential and privileged" and that the agencies "will not normally disclose this information to" third parties.[10]

We urge the CFPB to amend the Rule to clarify that it will not normally share

[8] CFPA § 1047 (codified as amended at 12 U.S.C. §25b and 12 U.S.C. § 1465 (2011))

[9] *See* State Law Preemption Standards for National Banks and Subsidiaries Clarified, 12 U.S.C. § 25b(i); *see also* 129 S. Ct. 2710 (2009).

[10] Other Disclosure of Confidential Supervisory Information, 12 C.F.R. § 261.22(a) (2011); Disclosure of Non-Public OCC Information,12 C.F.R. §§ 4.36a-b (2011).

confidential information with third parties, apart from other relevant financial institution supervisory authorities. Such a policy would allow the sharing of confidential information with those federal agencies and those state agencies that also have financial institution supervisory authority over the institution that has provided the information to the CFPB. But, as discussed further below, we believe that more stringent standards should apply to the sharing of confidential information with government agencies and other entities that do not have such supervisory authority.

Engage with Fellow Regulators[11] Before Disclosing Confidential Information

We also note that the disclosure of confidential information to third parties could lead to significant safety and soundness concerns for a financial institution. We encourage the CFPB to be cognizant of such concerns and consult with prudential regulators regarding potential disclosures of confidential information to third parties. An institution's prudential regulator will have unique insight regarding the potential safety and soundness implications of a disclosure of confidential information on the financial institution in question. Prior consultation with a financial institution's prudential regulator can provide the CFPB with critical information and perspective into the safety and soundness implications of disclosure of confidential information to a third party.

Limit the Sharing of Confidential Information with Government Agencies

With respect to confidential information, Section 1022 of the CFPA distinguishes between the sharing of examination reports and the sharing of other confidential information. The former is required to be shared, upon request and given reasonable assurances of confidentiality, with "a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider." The latter is within the discretion of the CFPB to share with "a prudential regulator or other agency having jurisdiction over a covered person or service provider."

The term "regulator" is not generally understood to include a state AG since an AG generally operates through an enforcement process rather than a supervisory or regulatory process. Accordingly, we urge the CFPB to clarify in the Rule that "state regulator" does not include a state AG or similar state law enforcement official. As discussed above, a contrary position would appear to be at odds with Section 1047 of the CFPA which codified the limits on state AG authority to obtain information from national banks that were recognized by the Supreme Court in the *Cuomo* decision. Again, that case affirmed the right of a state AG to obtain information directly from a national bank only in the context of a judicial proceeding to enforce applicable state law. In codifying *Cuomo,* Congress gave no indication that it intended for state AGs to be able to obtain, through information sharing arrangements with the CFPB, access to confidential examination

[11] Prudential regulator, as defined by Section 1002(24) the CFPAmeans (A) in the case of an insured depository institution or depository institution holding company (as defined in section 3 of the Federal Deposit Insurance Act), or subsidiary of such institution or company, the appropriate Federal banking agency, as that term is defined in section 3 of the Federal Deposit Insurance Act; and (B) in the case of an insured credit union, the National Credit Union Administration.

reports or other confidential information relating to national banks that they could not obtain directly from such banks.

Similarly, we strongly urge the CFPB to provide in the Rule that the agencies with "jurisdiction" over a covered person or service provider are only those agencies with financial institution supervisory authority over such entities. If left undefined, the "jurisdiction" reference could be misconstrued to allow virtually any state or federal agency to obtain confidential examination reports simply by giving an assurance of confidentiality. Moreover, such an interpretation would be consistent with the long-recognized precept of statutory construction that general terms used together with more specific terms should generally be construed in light of the more specific terms.[12] Here, given that the specific terms "prudential regulator" and "state regulator" clearly refer to agencies with financial institution supervisory authority − indeed, "prudential regulator" is effectively so defined in the CFPA[13] − the references to other agencies "having jurisdiction" over covered persons and service provides should be interpreted in the same manner.

In order to distinguish appropriately among the different types of information sharing contemplated by the CFPA, we recommend that CFPB substantially revise Section 1070.43 of the Rule. As indicated above, we believe it is appropriate to allow the regular sharing of confidential information with those federal and state agencies that also have financial institution supervisory authority over the institution to which the information relates. With respect to the sharing of confidential information with other types of government agencies (other than where another federal statute mandates disclosure to an agency),[14] we believe that the Rule should require at least the following:

- A letter requesting the confidential information from the head of the requesting agency in order to ensure that the request has been fully considered and authorized by senior officials of the agency;
- An explanation by the requesting agency of the law enforcement purpose or other purpose for which the information will be used;
- An explanation as to why the requesting agency cannot obtain the information directly from the institution;
- A representation by the requesting agency that it has implemented and maintains a comprehensive information security program that contains robust and risk-based information security controls to protect all confidential information; and.
- A commitment by the requesting agency that it will maintain the confidentiality of the relevant information, except insofar as necessary to enforce applicable law.

In applying such requirements, we urge the CFPB generally to limit the disclosure of

---

[12] *See, e.g., Liberty Mut. Ins. Co. v. East Cent. Okla. Elec. Co-op.,* 97 F.3d 383, 390 (9th Cir. 1996); *Berniger v. Meadow Green-Wildcat Corp.,* 945 F.2d 4, 8 (1st Cir. 1991).

[13] *See* 12 U.S.C. § 5481(24) (2011).

[14] *See* 15 U.S.C. §§ 1691(e)-(g) (2011).

confidential information to circumstances where the requesting agency seeks such information for the purpose of appropriately exercising its authority to enforce applicable law.[15] Additionally, we believe that, prior to sharing confidential information pursuant to such a request, the CFPB should confer with the relevant prudential regulator(s) and take into account any potential safety and soundness concerns and national policy interests that might be implicated as a result of the sharing (and the possible further disclosure) of the particular confidential information. As previously noted, such an approach is important not only to the affected institution, but also to fostering a supervisory environment that will further the CFPB's mission.[16]

Limit Discretionary Disclosures to Those Authorized by the CFPA

Section 1070.46 of the Rule provides that the CFPB may disclose confidential information in circumstances where Subpart D of the Rule would otherwise restrict such disclosure. It is important to note that the CFPA does not require this type of discretionary disclosure.

In the Supplementary Information accompanying the Rule, the CFPB states that it "does not intend for this provision to eviscerate" the limitations in the Rule.[17] Instead, the CFPB explains that this provision is intended "to account for circumstances in which there is an unforeseen and exigent need for the CFPB to disclose confidential information for purposes or in a manner not otherwise provided for" under the Rule.[18] The Rule, however, does not capture or reflect the CFPB's stated intent. In order to do so, the CFPB should revise Section 1070.46 to state that these discretionary disclosures may only be made: (1) where such disclosure is expressly permitted under the CFPA; and (2) when there is an actual exigent need for such disclosure in order for the CFPB to perform a statutorily required duty under applicable law.

Enforce Redisclosure Limitations

Sections 1070.41 and 1070.47 of the Rule impose redisclosure limitations on recipients of information from the CFPB. In particular, Section 1070.47(a)(2) prohibits any person to whom confidential information has been made available under Subpart D of the Rule from making any further disclosure of such information "without the prior written permission of the [CFPB's] General Counsel." We view this restriction as critical given

---

[15] For example, the disclosure of confidential information to a state AG should generally be limited to situations where the AG is engaged in exercising authority to enforce applicable law within a judicial process consistent with the *Cuomo* decision.

[16] In this regard, we note that the OCC rule regarding the disclosure of non-public OCC information narrowly limits the types of state agencies to whom the OCC will disclose such information. In particular, the OCC rule provides that where disclosure is not prohibited by law, the OCC may, in its sole discretion, disclose non-public OCC information to "state agencies with authority to investigate violations of criminal law" or "state bank and state savings association regulatory agencies" for such agencies use, "when necessary, in the performance of their official duties." 12 C.F.R. § 4.37(c). *See also* 12 C.F.R. § 261.21 (similar FRB rule).

[17] 76 Fed. Reg. at 45,375.

[18] *Id*.

that Subpart D contemplates various circumstances in which the CFPB may disclose confidential information to third parties. It will be vital that the CFPB strictly enforce the this CFPB "permission" requirement for additional disclosures of confidential information, that the CFPB maintain appropriate records regarding instances in which such permission is sought and obtained and that the CFPB take meaningful action in any instance in which a recipient makes additional disclosure without having obtained such permission.

Prior to Disclosing Confidential Information, Provide Notice and Reasonable Opportunity to Object

As discussed herein, Subpart D of the Rule provides that the CFPB may disclose confidential information relating to a financial institution, including confidential supervisory information, to third parties in a variety of contexts. We encourage the CFPB to amend the Rule to provide that, absent circumstances that compel otherwise, the CFPB will provide prior notice to a financial institution when the CFPB proposes to disclose confidential information relating to the institution to third parties and provide the institution with a reasonable opportunity to object. Such notice would be consistent with the approach adopted by the federal banking agencies. For example, the OCC rule regarding the disclosure of non-public OCC information provides that "[f]ollowing receipt of a request for non-public OCC information, the OCC generally notifies the national bank or Federal savings association that is the subject of the requested information, unless the OCC, in its discretion, determines that to do so would advantage or prejudice any of the parties in the matter at issue."[19]

Limit Disclosures to Contractors and Consultants

Section 1070.41 of the Rule addresses CFPB disclosure of confidential information to "contractors" and "consultants."[20] This provision appears intended to provide the CFPB with the ability to disclose confidential information to third-party service providers retained by the CFPB to assist the agency in carrying out various functions. The provision, however, does not state that CFPB disclosures in this context are solely for the purposes of making information available to third parties necessary to enable them to provide services for, or on behalf of, the CFPB. We believe that Section 1070.41 should be amended to limit disclosures to contractors and consultants, consistent with the limitation on supervised institution disclosures to service providers in Section 1070.42, to those instances where the contractor or consultant needs access to such information "to provide advice to" the CFPB.

Provide Prior Notice of Disclosure to Congress

Section 1070.45 of the Rule provides that the CFPB may disclose confidential information to "either House of Congress or a committee or subcommittee of Congress,

[19] Consideration of Requests,12 C.F.R. § 4.35(a)(5) (2011).

[20] 76 Fed. Reg. 45,372, 45,389 (July 28, 2011) (interim rule at 12 C.F.R. § 1070.41(b)).

as provided for in 12 U.S.C. § 5562(d)(2)."[21] This provision of the CFPA expressly permits the CFPB to notify a supervised financial institution[22] prior to such a disclosure to Congress.[23] The Rule, however, does not provide for such prior notice. The Rule should be amended to clearly state that the CFPB will provide a supervised financial institution notice prior to disclosing confidential information to Congress. In our view, such notice would materially contribute to assuring supervised institutions that the CFPB is exercising appropriate care regarding the disclosure of confidential information to Congress, and in such cases provide the supervised financial institution with an opportunity to protest disclosure.

Moreover, except where required by law, we believe that information provided by the CFPB to Congress should be aggregated or otherwise free of details that identify a specific consumer or financial institution. Finally, we note that the CFPA provides that information should be provided to "either House of Congress or an appropriate committee of the Congress." The statute, however, does not include subcommittees of the House of Representatives or the Senate. Accordingly, we believe that the words "or subcommittee" should be struck from the Rule. Likewise, in applying the Rule to Congressional requests, we urge that the CFPB adhere to the limits of the CFPA that any such request must be appropriately authorized and submitted by the relevant committee itself.

Clarify the Disclosure of Confidential Supervisory Information by Supervised Financial Institutions and Delete the Recordkeeping Requirement Imposed by the Rule

Section 1070.42 of the Rule imposes significant limitations on the ability of supervised financial institutions to disclose confidential supervisory information to third parties. For example, the Rule provides that a supervised financial institution may only disclose confidential supervisory information to a "certified public accountant, legal counsel, or consultant" if it meets certain procedural requirements, including ensuring that such third party does not utilize, make or retain copies of such information.

First, we note that financial institutions have a strong interest in protecting confidential supervisory information that relates to them because of the various risks associated with public disclosure of such information mentioned herein. In fact, financial institutions historically have imposed meaningful controls on service providers with respect to access to, and use of, confidential supervisory information that is shared with such third parties, including, for example, entering into nondisclosure agreements with such third parties.

We also note that a supervised financial institution may have an essential third-party service provider that is not a "certified public account, legal counsel, or consultant" to

---

[21] We note that the Trade Secrets Act applies to the provision of information to Congress. That statute prohibits officers and employees of federal agencies from publishing or disclosing trade secrets and other confidential business information "to any extent not authorized by law." 18 U.S.C. § 1905.

[22] Supervised financial institution as defined by Section 1070.2(p) of the Rule means a financial institution subject to the CFPB's supervisory authority. 76 Fed. Reg. at 45,378 (July 28, 2011).

[23] 12 U.S.C. § 1052(d)(2) (2011).

whom the institution may need to disclose information in connection with a CFPB examination, supervisory activity or enforcement action. For example, such an essential third-party service provider may include a data processor, investigator and/or regulatory compliance advisor. It is not clear whether the term "consultant" is intended to broadly cover all non-accountant and non-counsel third-party service providers. We urge the CFPB to clarify the Rule to indicate that a supervised financial institution may disclose confidential supervisory information to any type of third-party service provider that is acting on the institution's behalf, consistent with the various procedural limitations of the Rule.

Among the procedural requirements imposed by Section 1070.42, a supervised financial institution must maintain a written account of all disclosures to accountants, counsel and consultants and of the steps the institution has taken to comply with the procedural limitations. We believe that this requirement is overly burdensome without meaningfully contributing to the CFPB's mission, and urge the CFPB to delete it from the Rule.

Clarify the Provisions Relating to FOIA

Section 1071.11(b) of the Rule states in part that, "[e]ven though a FOIA exemption may apply to information or records requested, the CFPB may, if not precluded by law, elect under the circumstances not to apply the exemption." This and other broad statements of discretion in the Rule are a significant concern, particularly because of the absence of a statement that the CFPB will not normally disclose confidential information, as discussed above.

In the context of a FOIA request, we believe that the Rule should specify the circumstances under which the CFPB may disclose confidential information that would otherwise be exempted under FOIA and who within the CFPB would approve the rejection of an otherwise applicable FOIA exemption.[24] In addition, as discussed above, the Rule should specify that the CFPB will provide the financial institution to which the information relates with advance notice and an opportunity to object prior to the disclosure of such information. Financial institutions have historically been willing to openly share records with the federal banking agencies due to the abiding practice of those agencies of regularly applying the relevant FOIA exemptions to prevent the disclosure of protected information to third parties. As a result, the CFPB's regular application of the FOIA exemptions is central to establishing trust in supervised institutions with respect to the confidentiality of information that is provided to the CFPB.

In addition, Section 1071.11(c) of the Rule provides that when the CFPB receives at least three FOIA requests for substantially the same records, the CFPB will make the released records publicly available. We object to this provision and request that it be deleted. The rationale for this provision is not clear; in fact, by referencing the specific number of requests that will lead to public disclosure by the CFPB, the Rule would encourage additional and/or multiple simultaneous requests. Again, we urge the CFPB to delete this

[24] We note that the similar FRB rule specifies who within FRB would approve the rejection of the FOIA exemption. *See* Exemptions from Disclosure, 12 C.F.R. § 261.14(c) (2011).

language and make the determination regarding public release on a case-by-case basis after careful consideration of the information at issue and only where the benefits of such public disclosure outweigh the potential harm. The alternative is an open invitation for persons to file multiple FOIA requests (even at the same time) in order to force the CFPB to make the requested information public. The result would be to allow the manipulation of the Bureau's FOIA process, with no commensurate benefit to consumers or to the compliance process.

Finally, Section 1070.15(c)(1) of the Rule states that where a requested record has been created by an agency other than the CFPB, the CFPB shall refer the record to the originating agency for a direct response to the request. We commend the CFPB for taking this approach which is consistent with the confidentiality process of other agencies. However, we are concerned with section 1070.15(c)(2) which states that when a FOIA request is received for a record created by CFPB that includes information originated by another agency, the CFPB shall *consult* with the originating agency. We encourage the CFPB to amend subsection (2) to indicate that it will refer the request back to the originating agency or obtain the originating agency's *consent*, and not simply consult with the originating agency prior to disclosing the information originated by that agency.

Implement a Robust Data Security System and Ensure that Parties to Whom Confidential Information is Disclosed Implement and Maintain Robust Security Systems

As highlighted in the Supplementary Information, the CFPB recognizes the highly sensitive nature of the information it will collect. Specifically, the CFPB states that it "recognizes that much of the information that it will generate and obtain during the course of its activities will be commercially, competitively, and personally sensitive in nature, and generally warrants heightened protections."[25] This information presents an attractive target to cyber criminals and others who would seek to obtain large quantities of data stored by the CFPB and use that data to commit identity theft or other fraud or corporate espionage or market manipulation

While we do not believe that the Rule must include a specific description of the CFPB's information security controls, we strongly urge the CFPB to implement and maintain a comprehensive information security program that contains robust and risk-based information security controls to protect all confidential information.

It is also critical that prior to disclosing confidential information to a third party the CFPB evaluates that party's ability and commitment to protecting the confidentiality of the information. As the CFPB acknowledges in the Rule, confidential information disclosed to third parties generally will "remain the property of the CFPB."[26] As a result, when a third party receives confidential information from the CFPB, that information is owned by the CFPB, and it is the CFPB's responsibility and obligation to ensure that

[25] 76 Fed. Reg. at 45,374.

[26] Interim Rule § 12 C.F.R. 1070.47(a)(1), 76 Fed. Reg. at 45,390.

such information is effectively protected, as well as to provide notice of any unauthorized access to such information where required by law. We encourage the CFPB to implement a process for evaluating the adequacy of a third party's information security policies and procedures and monitoring the third party's compliance with these requirements.

* * * *

Thank you again for the opportunity to share our views with you on this important matter. If you have any questions, please feel free to contact any of the trade associations listed below.

Respectfully submitted,

American Bankers Association
Consumer Bankers Association
The Financial Services Roundtable
Mortgage Bankers Association

Trade Association Signatories

The **American Bankers Association** represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its 2 million employees. ABA's extensive resources enhance the success of the nation's banks and strengthen America's economy and communities. Learn more at www.aba.com.

The **Consumer Bankers Association** is the only national trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies account directly for $92.7 trillion in managed assets, $1.1 trillion in revenue, and 2.3 million jobs.

The **Mortgage Bankers Association** 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. 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, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mortgagebankers.org.