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, Disclosure of Records and Information

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 establishes 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

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[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

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[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 sharing 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 it 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.

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[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 intended 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]

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[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).

We urge the CFPB to amend the Rule to clarify that it will not normally share 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.[12] 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*,

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[11] Prudential regulator, as defined by Section 1002(24) the CFPA means (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.

[12] 12 U.S.C. § 5512(c)(6)(C).

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 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.[13] 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[14] − the references to other agencies "having jurisdiction" over covered persons and service providers 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[15]), 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.

[13] *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).

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

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

- 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 confidential information to circumstances where the requesting agency seeks such information for the purpose of appropriately exercising its authority to enforce applicable law.[16] 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.[17]

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.[18] 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.[19] 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

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[16] 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.

[17] 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).

[18] 76 Fed. Reg. at 45,375.

[19] *Id*.

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 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."[20]

Limit Disclosures to Contractors and Consultants

Section 1070.41 of the Rule addresses CFPB disclosure of confidential information to "contractors" and "consultants."[21] 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.

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

[21] 76 Fed. Reg. 45,372, 45,389 (July 28, 2011) (interim rule at 12 C.F.R. § 1070.41(b)).

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, as provided for in 12 U.S.C. § 5562(d)(2)."[22] This provision of the CFPA expressly permits the CFPB to notify a supervised financial institution[23] prior to such a disclosure to Congress.[24] 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 so 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,

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[22] 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.

[23] 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).

[24] 12 U.S.C. § 1052(d)(2) (2011).

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 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.[25] 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

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[25] 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).

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 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."[26] This type of 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

[26] 76 Fed. Reg. at 45,374.

disclosed to third parties generally will "remain the property of the CFPB."[27] 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 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.

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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

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

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.