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May 16, 2014

Mr. Alfred M. Pollard
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400 Seventh Street, SW
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Re. “Privacy Act of 1974; System of Records – Notice of Revision and Request for Comments re. the National Mortgage Database,” No. 2014-N-03.

Dear Mr. Pollard:

These comments are submitted on behalf of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness (“CCMC”). The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

CCMC appreciates the opportunity to submit this letter in connection with the System of Records Notice regarding the National Mortgage Database (“NMD”). We have commented in the past on the burdens and risks that significant government data collections can pose to companies, as well as the privacy dangers they can pose to consumers. Given these risks, we think that such data collections must be clearly authorized, no broader than necessary to meet statutory responsibilities, and fully transparent.¹ The NMD fails these basic tests.

¹ See, e.g., Letter from David T. Hirschmann to Hon. Richard Cordray (June 19, 2013), *available at* <http://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/2013-6-19-CFPB-letter-on-data-collection.pdf> (detailing concerns about scope and lack of legal authority for the Consumer Financial Protection Bureau’s demand that regulated entities provide it with vast amounts of sensitive and private transaction-level data); Letter from David T. Hirschmann to Marcia E. Asquith re. FINRA Regulatory Notice 13-42: FINRA Requests Comments on a Concept Proposal to Develop the Comprehensive Automated Risk Data System (Mar. 20, 2014), *available at*

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Just two weeks ago, the White House released a study – *Big Data: Seizing Opportunities, Preserving Values* – that included this warning, “Because the government bears a special responsibility to protect its citizens when exercising power and authority for the public good, how big data should be put to use in the public sector, as well as what controls and limitations should apply, must be carefully considered. If unchecked, big data could be a tool that substantially expands government power over citizens.”² We couldn’t agree more, and believe that an open, transparent process for developing government programs like the FHFAs is critical to ensuring agencies remain accountable to the American people.

While we understand the need for government agencies to collect economic data on the markets they monitor we are concerned that the Federal Housing Finance Agency (“FHFA”) is following the lead of the Consumer Financial Protection Bureau by assembling an unnecessarily vast database that, in this case, contains both monthly, loan-level performance data on millions of mortgages, and detailed financial information on the holders of those mortgages, from one-year prior to taking out their first mortgage until death.³ More concerning, perhaps, is that this information was also connected to data on the individual’s religion, gender, ethnicity, employment records, military status and other such personal information, all without a clear explanation of the program’s purpose, data sources, or data integrity and security protocols.

Americans value their privacy—including the privacy of their financial information, which long has been broadly protected from government intrusion by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 et seq. Likewise, American companies properly are concerned about any government data gathering that undermines consumer confidence in the protection of sensitive financial information or that increases the risk of identity theft and fraud (the costs of which largely will be borne by American companies). Accordingly, we think it a matter of basic good government—and common sense—for federal agencies to maintain the

<http://www.centerforcapitalmarkets.com/wp-content/uploads/2014/03/2014-3.20-Chamber-Comment-FINRA-CARDS-FINAL.pdf> (detailing the increased burden to the marketplace, and the data security risks associated with collecting, maintaining, and transmitting huge volumes of sensitive financial data from broker-dealers).

² See Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* 22 (May 1, 2014), *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

³ See Robert Avery et al., *The National Mortgage Database (NMDB)* at 4, Presentation at the International Conference on Collateral Risk: Moderating Housing Cycles and their Systemic Impact (July 31, 2013), *available at* http://www.aei.org/files/2013/07/30/-avery-the-national-mortgage-database_10521884102.pdf.

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highest levels of transparency and public engagement in the creation of any large-scale database of Americans' personal information.

To date, the FHFA has released extremely limited information about the NMD. Its two System of Records Notices, published on December 10, 2012 and April 16, 2014,⁴ include only the barest description of the database. Even more troublingly, these two notices are inconsistent with each other and with statements about the NMD made in press releases or by staff of the FHFA and other agencies.⁵ The FHFA never has provided the detail necessary for interested parties to understand—let alone comment upon—the asserted need for the NMD, its contents, or how data security will be maintained.

We urge the FHFA to adopt a transparent process for the development of the NMD. Without a meaningful opportunity for public scrutiny and stakeholder comment, we believe that the NMD will intrude unnecessarily upon Americans' privacy, increase the risk of financial fraud and identity theft, and undermine consumer confidence in the security of their financial information. The FHFA clearly can fulfill its statutory responsibilities to oversee Fannie Mae and Freddie Mac, and to strengthen and secure the secondary mortgage market without exposing Americans and the companies serving them to these risks. Consequently, before advancing further with the development of the NMD, the FHFA should:

- Articulate its plans and goals for the NMD in a clear, public, and thorough manner;
- Solicit public comment; and
- Give full consideration to this input before deciding whether or how to proceed with the NMD.

We have listed below ten questions that we believe will help the FHFA take the first step of describing the need for the NMD, as well as its purpose, content, and

⁴ See Federal Housing Finance Agency, Privacy Act of 1974; System of Records, No. 2012-N-18, 77 Fed. Reg. 73464 (Dec. 10, 2012) ("2012 Notice"); Federal Housing Finance Agency, Privacy Act of 1974; System of Records, No. 2014-N-03, 79 Fed. Reg. 21458 (Apr. 16, 2014) ("2014 Notice").

⁵ We recognize that the 2014 Notice is framed as a revision of the 2012 Notice. However, the changes reflected in the 2014 Notice are so significant as to indicate that the 2012 Notice provided a vision of the NMD that, even if accurate at the time, did not control its subsequent development.

risks. We ask the FHFA to provide public answers to these important questions as it begins a transparent discussion about the NMD.

1. What statute authorizes the FHFA to build the NMD?

In establishing the FHFA in the Housing and Economic Recovery Act of 2008,⁶ Congress explicitly tasked the new agency with creating two public use databases relating to mortgages purchased by Frannie Mae and Freddie Mac, and the Federal Home Loan Banks.⁷ In contrast, Congress did not explicitly require (or even explicitly authorize) the FHFA to build anything resembling the NMD, begging the question whether the FHFA has the necessary authority to do so now.

In December 2012, the FHFA attempted to answer that question. It indicated that it is authorized to create the NMD by 12 U.S.C. § 4544.⁸ That statutory section requires the Director of the FHFA to submit an annual report to Congress on the activities of Fannie Mae and Freddie Mac.⁹ To fulfill that responsibility, that section allows the Director to conduct a monthly survey on mortgage markets.¹⁰ The Director is required to make the results of any such survey public, with the Director responsible for ensuring that published information does not “permit[] the identity of a borrower to which the information relates to be reasonably inferred by either direct or indirect means.”¹¹

The NMD, as presently described, will include vastly more information, including personally identifiable information, than is necessary for the Director to complete the annual report to Congress on the activities of Fannie Mae and Freddie Mac. Moreover, the connection between the NMD and the Section 4544 report is itself uncertain. Neither the 2012 Notice nor the 2014 Notice mentions the monthly survey contemplated by Section 4544. The FHFA in fact has indicated that it will undertake a separate *quarterly* survey—to be known as the National Survey of Mortgage Borrowers—to incorporate detailed consumer behavior data into the

⁶ Pub. L. 110-289 (2008) (“HERA”).

⁷ See HERA § 1126 (amending 12 U.S.C. § 4543 to require public database relating to Frannie Mae and Freddie Mac); HERA § 1212 (amending 12 U.S.C. § 1430 to require public database relating to Federal Home Loan Banks).

⁸ See 2012 Notice, 77 Fed. Reg. at 73465.

⁹ See 12 U.S.C. § 4544 (requiring annual report to Congress on “the activities of each enterprise”); *id.* § 4502 (defining “Enterprise” to mean “(A) the Federal National Mortgage Association and any affiliate thereof; and (B) the Federal Home Loan Mortgage Corporation and any affiliate thereof”).

¹⁰ *Id.* § 4544(c)(1)-(2).

¹¹ *Id.* § 4544(c)(3)-(4).

NMD.¹² As such, even if elements of the NMD may help the FHFA fulfill its responsibilities under Section 4544, it is clear that this Section neither authorizes nor motivates the collection of the full set of data to be included in the NMD.

Presumably having recognized as much, the FHFA now claims three additional bases of authority for building the NMD: 12 U.S.C. §§ 4511, 4513, 4543. However, those statutory sections likewise do not provide the FHFA with clear authority to build the NMD:

- 12 U.S.C. § 4511 provides the Director of the FHFA general regulatory authority over regulated entities, not a roving authority, unrelated to the regulation of those entities, to do what he sees fit.¹³
- 12 U.S.C. § 4513 provides the Director of the FHFA incidental powers necessary or appropriate for the performance of his or her statutory duties.¹⁴ Here, however, the FHFA Director could not claim to draw this purported “incidental” authority from any actual authority.¹⁵ Nothing in the stated authorities of the FHFA, for example, justifies the collection of information about Americans’ religion, credit card history, military service, employment status, or other loan information. The Director may not rely on a claim of “incidental” authority where relevant actual authority is lacking.

¹² See Federal Housing Finance Agency, No. 2013-N-07, Proposed Collection; Comment Request, 78 Fed. Reg. 24420 (Apr. 25, 2013) (describing quarterly survey sent to approximately 7,000 new mortgage borrowers, consisting of approximately 80-85 multiple choice and short answer questions); Federal Housing Finance Agency, No. 2013-N-08, Proposed Collection; Comment Request, 78 Fed. Reg. 39290 (July 1, 2013) (submitting this survey to the Office of Management and Budget for approval).

¹³ See 12 U.S.C. § 4511(b)(2) (entitled “Authority over Fannie Mae, Freddie Mac, the Federal Home Loan Banks, and the Office of Finance”) (“The Director shall have general regulatory authority over each regulated entity and the Office of Finance, and shall exercise such general regulatory authority, including such duties and authorities set forth under section 4513 of this title, to ensure that the purposes of this Act, the authorizing statutes, and any other applicable law are carried out.”).

¹⁴ See *id.* § 4513(a)(2)(B) (authorizing FHFA Director “to exercise such incidental powers as may be necessary or appropriate to fulfill the duties and responsibilities of the Director in the supervision and regulation of each regulated entity”).

¹⁵ See Black’s Law Dictionary (9th ed. 2009) (defining “incidental authority” as the “[a]uthority needed to carry out actual or apparent authority”).

- 12 U.S.C. § 4543 requires the Director to publish information it gathers as part of the surveys required by Section 4544. It has no bearing on the authority of the FHFA to establish the NMD.

In short, although the FHFA needs some data in order to meet its statutory mandates, it lacks clear authority to gather, store, and analyze the vast amounts of sensitive personal and financial information that will be tracked in the NMD (including substantial information that apparently will be gathered solely for the benefit of the Consumer Financial Protection Bureau (“CFPB”)).¹⁶ We thus urge the FHFA to explain its authority to build the NMD. In providing that explanation, we particularly urge the FHFA to consider the general policy against government access to personal financial information, as expressed in the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401 et seq. That Act prevents a government agency from receiving customers’ financial records from a financial institution absent customer consent, appropriate legal process, or the presence of another exception.¹⁷ It may allow the FHFA to receive information as part of its examination function,¹⁸ but would appear to prohibit the FHFA from building the NMD with information it received from “financial institutions” outside its examination authority. Whether it can build the NMD consistently with the policies stated in the Right to Financial Privacy Act is an important question for the FHFA as it analyzes its authority to build the NMD.

2. Does the Privacy Act allow the FHFA to share NMD records with the CFPB?

When the FHFA announced the NMD, it did so jointly with the CFPB. However, Privacy Act notices by the FHFA and the CFPB have made clear that the NMD will be part of the FHFA’s system of records and thus within the FHFA’s

¹⁶ For example, the National Survey of Mortgage Borrowers, discussed *infra* at Question 8, would appear to solicit information that primarily, if not exclusively, is relevant to the CFPB’s responsibilities.

¹⁷ See 12 U.S.C. §§ 3402-3403.

¹⁸ See *id.* § 3413(b) (stating exception for examination and disclosure of financial records by supervisory agency); *id.* § 3413(o) (“This chapter shall not apply to the examination by or disclosure to the Federal Housing Finance Agency or any of the Federal home loan banks of financial records or information in the exercise of the Federal Housing Finance Agency’s authority to extend credit (either directly or through a Federal home loan bank) to financial institutions or others.”).

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exclusive control.¹⁹ The FHFA thus has a number of statutory obligations to control access to the NMD. These include disclosing the contents of the NMD only in defined circumstances. These include a “routine use,” which the Privacy Act defines as “the use of such record for a purpose which is compatible with the purpose for which it was collected.”²⁰ Both the 2012 Notice and the 2014 Notice identify a series of disclosures that the FHFA intends to make as “routine uses” of the NMD.²¹ Both notices include disclosure to the CFPB as a routine use, with the stated purpose of the disclosure being to “facilitate reporting under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203), as well as to conduct research, performance modeling, and examination monitoring.”²²

We believe that this sharing with the CFPB stretches the term “compatible” beyond any reasonable definition. Both the FHFA and the CFPB may intend to use the data collected “to facilitate mandatory reporting as well as to conduct research, performance modeling, and examination monitoring.”²³ The similarities stop there, however. The FHFA must report to Congress on the state of the secondary mortgage industry, while the CFPB must submit reports on various topics relating to consumer financial protection. The FHFA focuses its research and modeling on the health of the mortgage finance market, whereas the CFPB describes itself as “the nation’s first federal agency focused solely on consumer financial protection.”²⁴ And the FHFA and the CFPB perform examinations of different types of financial institutions, to

¹⁹ See CFPB, Privacy Act of 1974; System of Records, 79 Fed. Reg. 21440 (Apr. 16, 2014) (making no reference to the NMD or any database other than the consumer complaint database). See generally 5 U.S.C. § 552a(a)(5) (defining “system of records” as “a group of any records *under the control of any agency* from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual”) (emphasis added).

²⁰ *Id.* § 552a(a)(7).

²¹ See 2012 Notice, 77 Fed. Reg. at 73465-66; 2014 Notice, 79 Fed. Reg. at 21459-60.

²² See 2012 Notice, 77 Fed. Reg. at 73466; 2014 Notice, 79 Fed. Reg. at 21460. Curiously, despite their otherwise identical text in this respect, the 2014 Notice changes the 2012 Notice’s reference to disclosure “*To* the Consumer Financial Protection Bureau” to disclosure “*With* the Consumer Financial Protection Bureau.” We can perceive no basis in the Privacy Act for treating disclosure to the CFPB differently than disclosure to any other Federal Agency (with respect to which the FHFA uses the expected “disclosed . . . *To*” formulation, see 77 Fed. Reg. at 73466 (“(12) *To* a Federal agency . . .”). Nor is it apparent what the FHFA intends by using this special formulation for its reference to the CFPB. We accordingly would recommend that the FHFA revert back from “*With*” to “*To*,” or explain and justify the distinct language used for the CFPB.

²³ See 2012 Notice, 77 Fed. Reg. at 73465 (statement of purpose for FHFA), 73466 (statement of purpose for CFPB); 2014 Notice, 79 Fed. Reg. at 21459 (statement of purpose for FHFA), 21460 (statement of purpose for CFPB).

²⁴ See, e.g., CFPB, Annual Report of the Consumer Financial Protection Bureau Pursuant to Section 1017(e)(4) of the Dodd-Frank Act at 2 (July 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_report_annual-to-house-appropriations-committee.pdf.

different ends. As a result, the purposes that the agency claims are “compatible” actually bear no meaningful relationship to each other.

The data proposed to be collected in the NMD may be relevant to the CFPB’s purposes, but, as the Third Circuit has explained, the purpose of the “compatibility” limitation would be defeated if the agencies were allowed to share information upon a mere showing of relevance.²⁵ The compatibility requirement may not be so readily discarded: it is an integral part of the Privacy Act and reflects Congress’ judgment that “the creation of formal or de facto national data banks, or of centralized Federal information systems without certain statutory guarantees would . . . threaten the observance of the values of privacy and confidentiality in the administrative process.”²⁶ Thus, the FHFA may not, “by the mere publication of broad routine use purposes, evade the statutory requirement that disclosure must be compatible with the purpose for which the material was collected.”²⁷ This Notice relies on exactly that type of invalid broad statement of routine use purposes, using the generic similarity of the agencies’ purposes to suggest compatibility. The FHFA must do more if it intends both to share NMD information with the CFPB and comply with the Privacy Act.

We recognize that the FHFA and the CFPB intend to create the NMD as “a public good,”²⁸ but that does not relieve either agency from complying with specific statutory obligations. The Privacy Act does not allow an agency (here likely acting beyond its authority) to share confidential information with another agency simply because they share similar policy goals. If the FHFA wishes to share information that it properly has gathered, it first must explain how the purpose for which the

²⁵ *Britt v. Naval Investigative Serv.*, 886 F.2d 544, 550 (3d Cir. 1989).

²⁶ *Id.* (quoting S. Rep. No. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6916, 6930). See also Statement of Senator Percy, 120 Cong. Rec. 36893-94 (1974) (“Most people readily accept the fact that data gathering systems are necessary to our institutions if they are to keep pace with the complex needs of a modern society. Without records there would be chaos. The real problem, comes, however, when these information systems are linked with one another and are used to exchange information without the knowledge or consent of the individuals concerned. When personal data collected by one organization for a stated purpose is used and traded by another organization for a completely unrelated purpose, individual rights could be seriously threatened.”), quoted in *Ash v. United States*, 608 F.2d 178, 180 (5th Cir. 1979)).

²⁷ *Britt*, 886 F.2d at 550.

²⁸ Robert Avery et al., The National Mortgage Database (NMDDB) at 8, Presentation at the Association of Public Data Users Annual Conference (Sept. 16, 2013) (“APDU Presentation”), available at <http://apdu.org/wp-content/uploads/2012/11/Avery-The-National-Mortgage-Database.pdf>.

information was gathered is compatible with the purpose to which it would be turned by the recipient agency.²⁹

3. Will personally identifiable information be included in the database, and if so, where will the FHFA acquire it, and how will it be linked to de-identified information?

When the FHFA and the CFPB announced the development of the NMD, their joint press release declared in no uncertain terms that “[t]he database will not contain personally identifiable information.”³⁰ The 2012 Notice likewise did not suggest that the NMD would include personally identifiable information (as opposed to information that could be re-identified, which we discuss below). A presentation by FHFA, CFPB, and Freddie Mac staff in September 2013 similarly emphasized: “No personally identifiable data in NMDB dataset. Serious effort to address privacy issue.”³¹ Even as of the date of this letter, the FHFA website continues to promise: “This database will not contain personally identifiable information.”³²

The FHFA apparently has decided to change its plans. The 2014 Notice details a new category of records, “Borrower/co-borrower information,” that is full of personally identifiable information. Going far beyond the 2012 Notice’s list of personal data to be included in the NMD,³³ the 2014 Notice indicates for the first time that the NMD will include:

²⁹ Alternatively, the CFPB could act under its own authorities and subject to its own notice of a system of records. We would note, however, that in creating the CFPB, Congress expressly prohibited the CFPB, in the exercise of its monitoring function, from “obtain[ing] records from covered persons and service providers participating in consumer financial services markets for purposes of gathering or analyzing the personally identifiable financial information of consumers.” Pub. L. 111-203 § 1022(c)(4)(C). One of the apparent uses of the NMD, fairly stated, would be the analysis of consumers’ personally identifiable financial information. *See also id.* § 1022(c)(9) (subjecting the CFPB to the requirements of the Right to Financial Privacy Act).

³⁰ *See* Press Release, FHFA and CFPB to Partner on Development of National Mortgage Database (“NMD Press Release”) (Nov. 1, 2012), *available at* <http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-and-CFPB-Partner-on-Development-of-National-Mortgage-Database.aspx> and <http://www.consumerfinance.gov/newsroom/federal-housing-finance-agency-and-consumer-financial-protection-bureau-to-partner-on-development-of-national-mortgage-database/>.

³¹ Avery, APDU Presentation at 2.

³² *See* National Mortgage Database (emphasis omitted), *available at* <http://www.fhfa.gov/PolicyProgramsResearch/Programs/Pages/National-Mortgage-Database.aspx>.

³³ The 2012 Notice indicated that the following personal data would be included in the NMD: “Adult composition of household (e.g., single male, married couple, etc.);” “Age of borrower(s);” “Total household income;” “Gender of borrower(s);” “Metric of credit worthiness of borrower(s);” “Debt-to-income ratio of borrower(s);” “Education of borrower(s);” and “Ethnicity of Borrowers.” 77 Fed. Reg. at 73465.

- Name
- Telephone numbers
- Social security number
- Employment status/records
- Address
- Date of birth
- Military status/records

The NMD thus now is intended to include information of the highest sensitivity about millions of Americans, all of which is linked to (or subject to linking to) names and social security numbers. At a minimum, one might expect a thorough explanation of why the FHFA now believes it is necessary to include such information in a government database, where it intends to acquire this information, and how it will be linked to de-identified information. But the 2014 Notice includes nothing to explain this apparent radical change in the anticipated contents of the NMD.

The closest that the 2014 Notice comes to explaining the reason and methodology for the inclusion of massive amounts of personally identifiable information in the NMD are the following four cryptic sentences that were added to the statement of purpose:

In most cases, records will not contain personal identifiers. Records with personal identifiers will be used solely for purposes of matching the records with other datasets, which will better enable FHFA to perform the statutory functions identified above. After the matching is complete, a de-identified copy of the matched dataset will be used for conducting research and analysis. FHFA will use the personal identifiers after the matching only for the purpose of performing similar matches on future data acquisitions.³⁴

The meaning of these sentences is unclear. They ambiguously refer to various undefined datasets without explaining their source, contents, or purpose. They also cite back to the FHFA's statutory functions, but, like the rest of the Notice, do not explain how the personally identifiable information to be included in the NMD will advance the FHFA's purpose of "facilitat[ing] mandatory reporting" and conducting "research, performance modeling, and examination monitoring."³⁵ Nor do they

³⁴ 2014 Notice, 79 Fed. Reg. at 21459.

³⁵ *Id.* at 21460.

indicate why some records, and not others, include what the Notice calls “personal identifiers.”

Our best guess is that the NMD consists of various datasets of consumers’ financial and personal information.³⁶ At least one of these datasets of unknown origin, it would appear, contains personally identifiable information and personal identifiers that will be used to identify the individual to whom the transaction and personal information pertains. These personal identifiers presumably are attached—through the use of common personally identifiable information—to all the information that enters the NMD in order to string together the various datasets. Finally, a dataset apparently is drawn from the NMD for research purposes, consisting of financial and personal information that has been linked by personal identifiers.³⁷

This apparent structure contradicts the promise made by the FHFA and the CFPB that the NMD would not include personally identifiable information. The FHFA may intend not to give datasets including personally identifiable information to researchers, and the FHFA might plan to order its staff not to intrude into the financial history of identified Americans. These aspirations do not limit the massive risks posed by the NMD’s inclusion of personally identifiable information, however. First, whatever its intentions may be, the fact remains that the FHFA will possess vast amounts of personally identifiable information as part of the NMD, opening up the possibility of abuse. Second, every dataset of “anonymous” data that includes a personal identifier is only one connection away from being a trove of Americans’ most sensitive information. A single compromise of the dataset linking personal identifiers to names, social security numbers, and addresses would have catastrophic consequences for Americans’ privacy.

4. Why is the NMD necessary, and how do its benefits outweigh its risks?

³⁶ The 2014 Notice and the 2012 Notice, as well as the statements made by the FHFA upon announcement of the NMD, suggest that the NMD consists of a single database. However, presentations by FHFA staff have indicated that the NMD in fact consists of four overlapping databases (none of which has been described publicly in meaningful detail). *See, e.g.*, Avery, APDU Presentation at 3. The lack of details on so basic a point as the structure of the NMD illustrates well the FHFA’s failure to give meaningful notice and opportunity to comment on the NMD as currently contemplated.

³⁷ It appears that loan-level data will be housed only on a FHFA/CFPB server, that this server will be behind a firewall, and that no other personally identifiable information will be allowed on that server. *See* Avery, APDU Presentation at 8.

The FHFA has not clearly stated the need for the NMD. The NMD reportedly will help “support the agencies’ policymaking and research efforts” and “help regulators better understand emerging mortgage and housing market trends.”³⁸ In the words of then-FHFA Acting Director Edward J. DeMarco, it also will provide “a unique resource that benefits the government and public as we seek to answer important questions about how the housing finance market is evolving and changing.”³⁹ The practical import of these statements remains unclear, however, as does why existing databases or a more limited version of the NMD might not meet the FHFA’s purposes.

We gather that the perceived advantage of the NMD is that it will put all the information that researchers want in one place.⁴⁰ But there will always be more questions that researchers want to answer and more data that will pique their interest. Making research easier, whether for government employees or academics, is not alone a justification for “the creation of formal or de facto national data banks, or of centralized Federal information systems.”⁴¹ Rather, such a database should be justified by a specific and reasoned statement of the advantages of the proposed system, the inadequacy of more limited alternatives (including alternatives not so filled with personal identifiable information and associated sensitive personal and financial information), and the consequences of failure to act. Nothing approaching such a statement has been offered regarding the FHFA.

The FHFA also must explain why the benefits of the NMD outweigh the enormous risks that it poses to Americans’ personal privacy (not to mention the costs of the database itself). The FHFA apparently has not attempted such an analysis. Surely the severity of the risks to Americans demands that the FHFA perform it now and provide the results to the public.

5. How will the FHFA ensure the data security of the NMD?

³⁸ NMD Press Release.

³⁹ *Id.*

⁴⁰ *See, e.g., id.* (“Multiple federal and state agencies as well as private vendors collect and maintain information, but there is no single database that contains all information in one place.”).

⁴¹ *See* S. Rep. No. 1183, cited *supra* note 26 (sponsor of Privacy Act expressing concern about exactly the federal centralization of data that FHFA uses to justify the NMD).

The 2014 Notice makes clear that the NMD will be an extremely attractive target for identity thieves and other hackers. It is less clear whether the FHFA is taking this threat seriously or why it appears so confident in its security “solution.”

Given the capabilities and determination of sophisticated hackers, as well as the possibility of undiscovered vulnerabilities in even the most trusted software or systems, perfect security is an elusive goal.⁴² Nonetheless, the limited available public information suggests that the FHFA believes it has found a data security “solution” consisting of storing various NMD datasets on different FHFA/CFPB servers and using firewalls.⁴³ This cannot be the full extent of the FHFA’s plans to protect the NMD. At a bare minimum, we hope that the FHFA has compelling answers to the following questions:

- What policies, procedures and ongoing training has the FHFA put into place to prevent even an attempt at re-identification of depersonalized data and to prevent unauthorized access by FHFA personnel, contractors, or other persons whose job responsibilities do not require access to such data?
- What is the third-party oversight mechanism for ensuring that these policies and procedures are adhered to by FHFA employees?
- Beyond training and third-party oversight has the Bureau instituted a whistle-blower program to ensure that employees can report efforts to re-identify data and if so to whom are such communications sent?
- Will servers holding personally identifiable information be air-gapped and will all data thereon be encrypted?⁴⁴

⁴² See, e.g., Nicole Perlroth, *The Year in Hacking, by the Numbers*, The New York Times (Apr. 22, 2013), available at <http://nyti.ms/1awCMI2>.

⁴³ Avery, APDU Presentation at 8.

⁴⁴ The limited public information suggests that components of the NMD will be remotely accessible by employees of Fannie Mae, Freddie Mac, and the CFPB (and thus by any hacker that can compromise such means of remote access). See Federal Housing Finance Agency, Privacy Impact Assessment, National Mortgage Database (“NMD PIA”) at 10 (Sept. 17, 2012), available at http://www.fhfa.gov/AboutUs/Policies/Documents/Privacy-Impact-Assessments/NMDB_PIA_2012_Redacted_508.pdf (indicating that “selected GSE, CFPB employees will have access to the system through VPB/Citrix security protocols currently in place”).

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- Will data that can be reverse-engineered to allow re-identification be held in the same manner as personally identifiable information?
- If all “NMD loan-level data is physically housed *only* on a FHFA/CFPB server,”⁴⁵ what data will be held on third-party servers?⁴⁶
- What security measures prevent an FHFA or CFPB employee from abusing access to the NMD?
- How quickly would the FHFA be able to identify a breach of the security of the NMD, and what harm does the FHFA expect to occur because of any delay?
- Has the FHFA leveraged the most sophisticated cybersecurity capabilities within the federal government?
- Has the data security of the NMD been tested by “red teams” of private-sector or government experts?
- How will the FHFA ensure that service providers and other third parties that connect to networks connected to the NMD have adequate cybersecurity?
- Under what circumstances will the FHFA notify affected individuals of a breach of the NMD?
- What remedial steps will the FHFA take upon a breach of the NMD? Will it offer free credit-reporting to every individual whose records are in the NMD? Will it indemnify individuals or companies who suffer damages as a result of a breach?

We do not expect or encourage the FHFA to provide a technical description of every detail of its intended data security practices. However, the FHFA can say more about its plans to secure Americans’ most sensitive data without giving hackers a roadmap into its systems. We urge the FHFA to do so. Americans should not be left

⁴⁵ Avery, APDU Presentation at 8.

⁴⁶ See 2014 Notice, 79 Fed. Reg. at 21459.

with the impression that the FHFA has fallen prey to a toxic combination of over-confidence and under-preparedness.

6. Can identities be reverse-engineered from the NMD?

In addition to the risk of direct loss of personally identified sensitive and financial information, the NMD also presents the significant risk of data being reverse-engineered to re-identify the individual to whom it pertains. The FHFA has professed to understand this risk and even has announced that “appropriate precautions will be taken by the agencies to ensure that individual consumers cannot be identified through the database or through any datasets that may be made available to researchers or the public.”⁴⁷ Putting aside the obvious incorrectness of this statement as to the database, which now has been announced to include personal identifiable information, we have little confidence that the FHFA actually will be able to prevent re-identification through data released to researchers. This is not just our view. Instead, it is shared by the FHFA official who is leading the development of the NMD. As discussed in a presentation given by Robert Avery, the NMD includes the date a mortgage was taken out, the size of the mortgage, and census tract – data points that Mr. Avery described as being 95% unique. As a result, for the example of Fairfax County, Virginia that he used, “it’s really easy to find people. It’s online. You don’t have to exert any effort. You can match them to our database.”⁴⁸

The FHFA must prevent any such reverse engineering. Re-identified detailed financial information and personal information – credit score, loan performance data, and religion, to name just a few data elements – must not be allowed to fall into the hands of identity thieves, fraudsters, or other unscrupulous criminals. Indeed, we believe that sensitive personal and financial information that is subject to reverse engineering should be treated the same way as personally identifiable information. We see no principled basis for trusting individuals with access to readily re-identifiable sensitive personal and financial information if the FHFA does not think them trustworthy enough to handle personally identifiable information itself.

⁴⁷ See NMD Press Release.

⁴⁸ See CQ Congressional Transcripts, House Financial Services Committee Holds Hearing on the Consumer Financial Protection Bureau’s Semi-Annual Report at 68-71 (Jan. 28, 2014) (questioning by Rep. Royce, including playing of a video clip of presentation of Robert Avery).

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The existing online publication of substantial amounts of information about home mortgages and purchases does not justify the NMD. Large portions of the NMD clearly are not public information. There is no public repository, for example, of loan performance data, social security numbers, or credit scores. Whether or not limited information about a property transaction may appear on a county website, the privacy concerns of the FHFA assembling as much information as possible about an individual's financial history are still extreme.⁴⁹

The FHFA accordingly should provide a detailed explanation about how it will achieve its stated goal of preventing re-identification of sensitive personal and financial information. This will require a clear statement of the individuals who will have access to the contents of the NMD, which records within the NMD they will be allowed to access, and what conditions will be imposed on that access. For example, the FHFA should answer the following questions:

- How many employees of the federal government, as well as of Freddie Mac and Fannie Mae, are eligible to apply for access to records within the NMD that could be re-identified? To how many such individuals does the FHFA anticipate granting NMD access?
- Public FHFA materials and statements indicate that “researchers” will be given access to the NMD,⁵⁰ but the 2014 Notice does not identify providing information to researchers as a “routine use” of the NMD. Who are the “researchers” to whom the FHFA intends to provide access to the NMD? What records within the NMD will those researchers be able to access? Will those records include information that can be re-identified?
- What information will be made available to the public? Will all the information made available to the public be aggregated to a sufficient level of generality to prevent re-identification?

⁴⁹ *See id.* at 70 (testimony of CFPB Director Cordray indicating that “in Ohio, the home that I own is on our county auditor’s web site. There are pictures of it. There’s evaluation of it. There’s the amount of taxes I pay. At a time when I had a mortgage, there was the amount of the mortgage that I owed. All that information was public information. . . . [N]onetheless, it doesn’t lessen the privacy concerns.”).

⁵⁰ *See, e.g.*, National Mortgage Database, *supra* note 32 (“The database can be used by policy makers, researchers, and regulators to improve prepayment and default modeling.”).

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- In a public presentation, FHFA staff indicated that there would be “[s]evere penalties” for violating a required “agreement not to reverse engineer identity of borrower or lender.”⁵¹ Who will be required to sign this agreement? What are the “[s]evere penalties” for violations of this agreement?
- What information from the NMD will be made available to Congress, will it be susceptible to re-identification, and what conditions will be placed on any such disclosure?⁵²

The de-identification of data will mean little if NMD records are only an easy step away from being re-associated with Americans’ personally identifiable information. The FHFA should clarify whether its de-identification of NMD data sets provides any meaningful security from identity theft, fraud, or other forms of exploitation, or whether the “anonymization” of the NMD is merely illusory.

7. How will the NMD be used by enforcement agencies?

FHFA officials have indicated that “[d]ata cannot be used for ‘enforcement.’ Users will not have the identity of the servicer.”⁵³ This statement, however, appears to conflict with the 2014 Notice, which includes the following “routine use” for the NMD:

(2) Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether federal, state, local, tribal, foreign or a financial regulatory organization, including the Financial Crimes Enforcement Network and other law enforcement and government entities, as determined by FHFA to be appropriate and that are charged with the responsibility of

⁵¹ Avery, APDU Presentation at 8.

⁵² See 5 U.S.C. § 552a(b)(9) (section of Privacy Act permitting release of information “to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of such joint committee”).

⁵³ Avery, APDU Presentation at 8.

investigating or prosecuting such violation or charged with enforcing or implementing a statute, or rule, regulation or order issued pursuant thereto.⁵⁴

The prospect of law enforcement agencies trawling through the NMD looking for evidence of crimes or civil infractions raises privacy concerns of the highest magnitude. The FHFA should clarify immediately whether that is a contemplated use of the NMD. For example, the FHFA should explain which law enforcement agencies (the FBI, the IRS, state attorneys general, etc.) will have access to the NMD or will receive records from the NMD; whether the FHFA or other agencies will affirmatively use the NMD to look for evidence of criminal activity or civil violations; and whether any review for legal violations will target only loan providers, or whether it also will target individuals.

8. How will information from consumer surveys be used in the NMD?

The FHFA announced last year that it was undertaking a quarterly survey of mortgage borrowers as one element of the NMD.⁵⁵ This survey was to be sent to 7,000 new mortgage borrowers and would consist of approximately 80-85 multiple choice and short answer questions. A version of the questionnaire available on the FHFA's website indicates that such questions generally ask about the borrower's experience in and impressions of the mortgage process.⁵⁶

As discussed above, we have serious doubts about the need for and prudence of the NMD. These doubts are particularly acute with respect to the survey of mortgage borrowers that the FHFA has designed as part of the NMD.

First, we have general concerns about the use of consumer surveys in the policymaking process. Any survey that captures only consumer impressions or

⁵⁴ 2014 Notice, 79 Fed. Reg. at 21460. The 2014 Notice also contemplates release of NMD records, as a routine use, to "any individual during the course of any inquiry or investigation conducted by FHFA, or in connection with civil litigation, if FHFA has reason to believe that the individual to whom the record is disclosed may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry." *Id.*

⁵⁵ See Federal Housing Finance Agency, No. 2013-N-07, Proposed Collection; Comment Request, 78 Fed. Reg. 24420 (Apr. 25, 2013).

⁵⁶ See Federal Housing Finance Agency and Consumer Financial Protection Bureau, "A nationwide survey of mortgage borrowers throughout the United States" ("Nationwide Survey"), *available at* <http://www.fhfa.gov/PolicyProgramsResearch/Programs/Documents/NSMBQuestionnaire.pdf>.

unverified consumer reports about the elements of a financial transaction should be treated with caution, not as a reliable foundation for federal policy. This is particularly true given the better information already available to the FHFA through its supervisory function.

Second, we do not see a basis for the FHFA to inquire into consumer behaviors, attitudes, and impressions. Why is it a matter of the FHFA's concern, for example, "[o]verall, how satisfied [the lender is] with the . . . Lender/broker . . . used; Application process; Loan closing process; The information in mortgage disclosure documents; The timeliness of mortgage disclosure documents; Settlement agent"?⁵⁷ This question and most, if not all, of the rest of the survey, seem to be matters of interest to the CFPB, not the FHFA. But it is the FHFA that has created the NMD and the mortgage borrower survey. The CFPB's interest in a matter does not strike us as a legitimate reason for the FHFA to stray beyond its jurisdiction.

Finally, we believe that the FHFA should state clearly that survey results will not be linked to other elements of the NMD. Both the survey and the accompanying letter indicate that identifying information is not included in the survey results.⁵⁸ But neither those documents nor the 2014 Notice indicate whether a unique identifier will be added to the survey results so that they can be linked to other records in the NMD. We strongly urge the FHFA to refrain from attaching such a personal identifier to survey results since doing so would create entirely unnecessary privacy risks without any clear benefit.

9. Whose records will be included in the NMD, will they be notified, and can they opt out?

The 2014 Notice indicates that the NMD will be a "nationally representative random sample (1-in-20) rather than a universal registry," adding that it will "be built from representative credit repository data."⁵⁹ This represents an increase, by a factor

⁵⁷ See *id.* at 3 (Question 25).

⁵⁸ See Letter from Sandra Thompson and David Silberman (Mar. 31, 2014), *available at* <http://www.fhfa.gov/PolicyProgramsResearch/Programs/Documents/Survey%20Letter.pdf> ("The questionnaire does not ask for any identifying information, so please do not identify yourself in any way on the envelope or questionnaire. The code numbers on the survey are there to aid in processing and keep track of returned surveys. . . . No names or other identifying information is ever included in the data. The results from this survey are only reported in summary."); Nationwide Survey at 10 (directing respondent not to put name on survey).

⁵⁹ 2014 Notice, 79 Fed. Reg. at 21459.

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of five, in the anticipated sample size since the FHFA described the project in its privacy impact assessment.⁶⁰ Like so many other things relating to the NMD, this change from a 1% sample to a 5% sample has gone unexplained.⁶¹ We believe that the FHFA should explain why it found it necessary to expand the sample size by a factor of five, and how the benefits of doing so justify exposing five times as many Americans to the risks associated with the NMD.

We also urge the FHFA to take two actions to improve transparency for Americans whose financial and personal information is being tracked in the NMD.

First, we believe that the privacy risks and interests associated with the NMD are sufficiently pronounced that the FHFA should notify each American whose records have been included in the NMD. To date, the FHFA has indicated that it will not go beyond bare compliance with the requirements of the Privacy Act and its implementing regulations.⁶² We believe that the FHFA should do more. Notifying affected individuals would not be unduly burdensome given the pronounced countervailing privacy interest. Likewise, we believe that the FHFA should provide meaningful information about the personal information that is held in the NMD. In so doing, the FHFA would meet the Obama Administration's recent statement of support for initiatives that "allow Americans easy, secure access to their own digital data in useful formats."⁶³

Second, the FHFA should allow affected Americans to opt out of the NMD—or at least explain whether an American may not opt out of inclusion of his or her financial records in the NMD. To date, the only public information suggests that the FHFA will *not* allow Americans to opt out of their financial record and personal information being tracked in the NMD.⁶⁴ But surely the FHFA can afford to allow interested individuals to opt out of the NMD if the FHFA initially believed that a five-times smaller sample would be adequate. Presumably as many as 80% of the affected individuals could opt out and the NMD still would function as originally

⁶⁰ NMD PIA at 6 (explaining that NMD "is designed to be a nationally representative sample (1%)").

⁶¹ The 2012 Notice, for example, was entirely silent on the sample size to be included in the NMD.

⁶² See 2014 Notice, 79 Fed. Reg. at 21460-61 (providing for "Notification Procedures," "Record Access Procedures," and "Contesting Record Procedures" "set forth in 12 CFR part 1204").

⁶³ See Executive Office of the President, Big Data: Seizing Opportunities, Preserving Values 67 (May 1, 2014), available at http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

⁶⁴ NMD PIA at 8 ("4.3: Q. Do individuals have the opportunity and/or right to decline to provide information? A. No.").

intended. Nor should opt-out be precluded by any concern that more than 80% of affected Americans will elect not to participate: four out of five Americans choosing not to participate would demonstrate the imprudence of the project, not the need to preclude opting out.

10. What are the next steps in the FHFA’s “broader strategy” to “streamline data” and ensure access to “accurate, comprehensive information”?

In announcing the creation of the NMD, the FHFA stated that “[t]he creation of the National Mortgage Database will be the first step in a broader strategy to help streamline data for research and policy analysis and to ensure accurate, comprehensive information is more easily accessible for monitoring the market.”⁶⁵ The 2014 Notice does not describe the remaining steps in this anticipated broader strategy, however, leaving stakeholders capable only of guessing what they might be.

Because we are concerned that the NMD is unauthorized, unnecessary, and unduly risky as presently contemplated, we believe that any effort to expand or build upon the database will present even greater privacy, security, and liability concerns. The FHFA may not be ready to detail every element of its plans, but surely it can describe the “broader strategy” that it publicized eighteen months ago. We accordingly urge the FHFA to describe the anticipated next steps in its efforts to “streamline data” and ensure access to “accurate, comprehensive information.”

Federal agencies have a duty to conduct their business transparently and to gather, store, and analyze no more sensitive private and financial information than is required to fulfill their statutory mandates. To date, the FHFA has failed to meet these duties in its development of the National Mortgage Database. First, the agency has failed to provide the public with the detail necessary to understand and comment on the NMD in a meaningful manner. Second, despite a lack of clear authority or need, the agency has indicated that the NMD will include vast amounts of personally identifiable information as well as extremely sensitive personal and financial information.

⁶⁵ NMD Press Release.

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Before it proceeds further, we strongly urge the FHFA to provide a detailed, public explanation of the purpose, need, contents, use, and security of the National Mortgage Database, as well as the FHFA's authority to create it and share its contents. The FHFA then should solicit public comment on the NMD, properly described. Only after considering these comments should the FHFA decide whether or how to proceed.

Sincerely,

A handwritten signature in black ink that reads "David Hirschmann". The signature is written in a cursive style with a large, stylized initial "D".

David Hirschmann