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June 12, 2019

VIA ELECTRONIC SUBMISSION

Kathy Kraninger
Director
Consumer Financial Protection Bureau
1700 G Street N.W.
Washington, D.C. 20552

Re: Opposition to Proposed Changes to HMDA Reporting Thresholds
Docket No. CFPB-2019-0021/RIN 3170-AA76

Dear Director Kraninger:

The New York State Attorney General ("NYAG") submits the following comments on the Consumer Financial Protection Bureau's (the "CFPB") Notice of Proposed Rulemaking to increase the reporting thresholds under the Home Mortgage Disclosure Act ("HMDA") (Docket No. CFPB-2019-0021/RIN 3170-AA76) ("Proposed Rule"). By increasing the reporting threshold to either 50 or 100 loans for closed-end mortgages and 200 for open-end mortgages, the CFPB would exempt thousands of lenders from reporting data that they have been reporting for decades, and that is instrumental in achieving HMDA's goal of preventing discrimination in the mortgage market.

The Proposed Rule would substantially undermine the NYAG's ability to investigate and bring disparate impact claims under federal, state, or local fair housing laws by concealing data that underlie such claims.[1] The NYAG opposes the Proposed Rule on the grounds that it would, if finalized, undermine HMDA's purpose, inhibit the ability of communities and state and local law enforcement to ensure fair mortgage lending in New York and elsewhere, and violate the Administrative Procedure Act ("APA").

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[1] Laura Meckler and Delvin Barrett, *Trump Administration Considers Rollback of Anti-discrimination Rules*, THE WASHINGTON POST (January 3, 2019), *available at* https://www.washingtonpost.com/local/education/trump-administration-considers-rollback-of-anti-discrimination-rules/2019/01/02/f96347ea-046d-11e9-b5df-5d3874f1ac36_story.html?utm_term=.a647fe32770d.

I. The CFPB's Current Proposal Would Undermine the NYAG's Ability to Enforce Fair Lending Laws in New York

Because HMDA data provides details on the race, gender, income, loan-to-value ratio, and census tracts by mortgage lender, it is instrumental in detecting and ending unfair mortgage lending practices at the local level. For example, in 2014, the NYAG used HMDA data to identify racially-discriminatory lending by a Buffalo-based bank, Evans Bank. The data showed that less than one percent (1%) of Evans Bank's mortgage lending applications were from Buffalo's Eastside neighborhoods, where the majority of Buffalo's African-American population lives. This lending pattern was the result of Evans Bank's failure to advertise its mortgage products in those neighborhoods. The NYAG sued Evans Bank for violations of federal, state and local fair lending laws, eventually settling with a consent order requiring Evans Bank to market in Buffalo's Eastside neighborhoods.[2] In 2015, after an investigation, the NYAG entered into a settlement with New York-based Five Star Bank. HMDA data had revealed that Five Star Bank had originated loans at a disproportionately low rate in majority-minority communities in Rochester.[3] Even before the 2008 financial crisis, the NYAG used HMDA data to enforce fair lending laws. In 2007, after HMDA data revealed that GreenPoint Mortgage Funding, Inc. was originating higher-cost loans to minority homeowners in New York as compared to white homeowners, the NYAG obtained a consent order to correct this discriminatory lending.[4] These examples highlight the critical role that HMDA data has played in revealing discriminatory lending practices that resulted in successful enforcement actions.

a. Increases To the Closed-End Loan Reporting Threshold Will Exempt A Large Number of Depository Institutions

By increasing the reporting threshold from 25 closed-end loans per year to either 50 or 100 per year based on a two-year look-back period, the Proposed Rule would exempt from HMDA reporting an additional 17% to 39% of depository institutions, or 745 to 1,682 institutions.[5] At the 50 loan threshold, this amounts to a loss of approximately one in five lenders that currently are required to report HMDA data, and two in five lenders at the 100 loan threshold. As a result, under the CFPB's current proposal, major lenders would be exempt from any reporting. Dime Savings Bank, an important New York City lender is one example (Dime reported 33 loans to HMDA in 2017 and 82 in 2018). Lack of data on these lenders would

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[2] Press Release, NYAG, *A.G. Schneiderman Secures Agreement With Evans Bank Ending Discriminatory Mortgage Redlining in Buffalo* (Sept. 10, 2015), *available at* https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-evans-bank-ending-discriminatory-mortgage-redlining; *see also, The People of the State of New York v. Evans Bancorp, Inc. et al.*, 14-CV-00726, (W.D.N.Y. Sept. 2, 2014), *available at* http://www.ag.ny.gov/pdfs/Evans%20Bank%20Complaint%20as%20filed.pdf.

[3] Press Release, NYAG, *A.G. Schneiderman Secures Agreement With Five Star Bank to End Racially Discriminatory Lending Practices in Rochester* (Jan. 19, 2015) *available at*, https://ag.ny.gov/press-release/ag-schneiderman-secures-agreement-five-star-bank-end-racially-discriminatory-mortgage.

[4] *In the Matter of Greenpoint Mortgage Funding, Inc.*, Assurance of Discontinuance (March 26, 2007), *available at* https://ag.ny.gov/sites/default/files/pdfs/bureaus/civil_rights/Greenpoint%20AOD%20Final%20PDF.pdf.

[5] Home Mortgage Disclosure (Regulation C), 55 Fed. Reg. 20972, 20977 (May 13, 2019), *available at* https://www.federalregister.gov/documents/2019/05/13/2019-08983/home-mortgage-disclosure-regulation-c.

significantly inhibit the NYAG's ability to ensure that all New Yorkers are able to access affordable credit free from discrimination.

Increasing the thresholds above the 50 to 100 proposed threshold for closed-end loans would further undermine HMDA's purpose. At a 250 mortgage threshold, 67% of depository institutions, or 2,850 lenders, would no longer report HMDA data; at 500 mortgage loans, 81% of depository institutions, or 3,465 lenders, would be exempt.[6] This would cripple the NYAG's ability to stop discriminatory lending. Banks like Emigrant Saving Bank, which was found guilty of discriminatory lending in 2016[7] and whose residential mortgage company only reported 204 loans to HMDA in 2017, would evade detection. Evans Bank, which reported only 366 mortgages in 2017, would also be exempt at higher thresholds. Increasing the thresholds beyond the current 25 loans per year is not only unwarranted; it exceeds the CFPB's lawful authority and would be an end-run around the administrative process.

b. Discriminatory Lending in Rural And Apartment Lending Markets Will Be Left Unchecked

Further, the proposed closed-end threshold reporting requirements would all but eliminate the NYAG's ability to enforce fair lending in the hyper-localized lending markets in rural areas and in New York City's multifamily lending.

In rural areas and manufactured homes parks, small, local lenders are disproportionately represented.[8] Even at the current 25 loan per year threshold, much data is lost regarding lending to these communities.[9] To raise the reporting threshold to 50 or 100 loans per year would mean that most banks that lend in rural areas could evade fair lending laws. And it would make these areas, already vulnerable to high-cost and abusive lending, even more susceptible to discriminatory practices.[10]

Further, only a small number of lenders provide financing for multifamily properties, usually only offering a Consolidation Extension Modification Agreement ("CEMA") for multifamily mortgage refinances. Because CEMAs are only available in New York, they were not required to be reported to HMDA prior to 2018. But in 2015, when the CFPB overhauled HMDA to make it more effective in ensuring that mortgage lending was meeting the needs of communities, it determined that capturing these CEMAs in HMDA data reporting was

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[6] Home Mortgage Disclosure (Regulation C), 55 Fed. Reg. 20972, 20978 (May 13, 2019), *available at* https://www.federalregister.gov/d/2019-08983/p-102.

[7] Press Release, Legal Services NYC, *Jury Finds Emigrant bank Liable for Discrimination in First Reverse Redlining Case to Be Tried in Federal Court* (June 30, 2016), available at https://www.legalservicesnyc.org/news-and-events/press-releases/1033-jury-finds-emigrant-bank-liable-for-discrimination-in-first-reverse-redlining-case-to-be-tried-in-federal-court.

[8] Housing Assistance Council, *Rural Mortgage Activity Increases, But Certain Populations Continue to Struggle with Elevated Denials and High-Cost Lending*, RURAL RESEARCH NOTE (November 2017), *available at* http://www.ruralhome.org/storage/documents/publications/rrnotes/rrn-hmda-2017.pdf.

[9] *Id*. at 4.

[10] *Id.* at 3.

essential.[11] These changes went into effect in 2018, making New York CEMAs reportable under the HMDA for the first time. If the Proposed Rule were adopted and the two-year look back period were applied, many of New York City's multifamily lenders would continue to be exempted for the next several years. This is a regulatory about-face lacking a justification and is in contravention of the purpose underlying the 2015 decision to include CEMAs as HMDA-reportable.[12] As a result, the NYAG will continue to be denied access to important data that is only reported to HMDA regarding the type of lending extended to multifamily buildings. Without this key data, the NYAG is limited in its ability to enforce fair lending laws as they pertain to buildings that house the majority of New York City residents[13] and that are an important source of affordable housing in urban areas across New York State. For example, Signature Bank, a New York City-based bank whose bulk of business is CEMA lending, only reported 64 loans to HMDA in 2017, even though it provided a substantial number of CEMAs. But under the CFPB's Proposed Rule, especially if the reporting threshold is raised to 100, Signature and many other multifamily lenders will continue to be exempt from HMDA reporting for the next few years even though they have a significant impact on mortgage lending for many New York's urban residents.

c. The CFPB All But Guarantees Predatory Lending By Increasing the Open-End Reporting Threshold to 200

The NYAG also opposes the CFPB's proposal to permit the reporting threshold to remain at 500 for open-end mortgages for the next two years, with a permanent reporting threshold of 200 loans per year thereafter. Open-end mortgages, often called Home Equity Lines of Credit (HELOCs), played a significant role in the 2008 financial crisis. In New York, HELOCs were the life-line of the notorious subprime lending product known as an 80-20 mortgage, where 80% of the home purchase price was provided by a closed-end mortgage and 20% of the purchase price was provided by a HELOC. Because the two loans were provided simultaneously, often with the closed-end mortgage company unaware that the required down payment was really being provided by another loan, the homeowner could evade the requirement to obtain private mortgage insurance. But, with such a substantial debt burden, these 80-20 mortgage products defaulted at significantly higher rates. And without private mortgage insurance, closed-end mortgage companies had less protection and families were at risk of losing their homes. During the lead-up to the financial crisis, HELOCs were not required to be reported to HMDA. That changed with the CFPB's 2015 HMDA Amendments that went into effect in 2018.

The CFPB recognizes the role that HELOCs played in the financial crisis, the harm they caused, and the fact that much of the data that may have revealed discriminatory patterns and led

[11] Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, 66142-66143 (Oct. 28, 2015), *available at* https://www.federalregister.gov/d/2015-26607/p-222.

[12] *Id*. (". . . [I]ndustry professionals familiar with the New York CEMA market believe that the transactions are used on a daily basis in New York State and represent a significant percentage of the refinancings that occur in the State. Requiring reporting of New York CEMAs will improve HMDA data. . . .").

[13] New York City Rent Guidelines Board, *2018 Housing Supply Report*, p. 3-4 (May 24, 2018), available at https://www1.nyc.gov/assets/rentguidelinesboard/pdf/18HSR.pdf.

to enforcement actions was not reported to HMDA.[14] The CFPB provides no logical reason why continuing to hide HELOC lending data, with the proposed higher thresholds, is consistent with the HMDA's statutory purpose. Its analysis was focused almost exclusively on the cost to the lender.[15] Additionally, the CFPB provides no explanation why there should be separate thresholds for closed-end and open-end mortgages. For these reasons, the NYAG opposes the proposed open-end reporting thresholds.

II. Because Institutions Are Already Collecting This Data, Reporting Is Not Overly Burdensome

The sole reason the CFPB provides for increasing the HMDA reporting thresholds for both closed-end and open-end mortgages is lenders' unsubstantiated comments that HMDA reporting is too burdensome and costly. But, the CFPB already rejected these claims in 2015, when it first sought to establish the HMDA reporting threshold for all financial institutions to 25 closed-end loans.[16] In its own balancing of the burden placed on smaller lenders with the goals of HMDA to serve as a tool in eradicating discriminatory mortgage lending, the CFPB determined that the data obtained on the local level with a 25 closed-end mortgage threshold outweighed the burden on lenders.[17]

Additionally, the CFPB's sole focus on the burden on lenders ignores the fact that these lenders have been collecting and reporting HMDA data for over 40 years.[18] The CFPB provides no reason why, in 2019, HMDA data collection has now become too onerous. And, this rationale disregards the fact that these institutions are required to collect this data under the Truth-in-Lending Act ("TILA") and the Real Estate Settlement Procedures Act ("RESPA") Integrated Disclosures rules, as well as in accordance with customary underwriting standards.[19] The CFPB provides no reason why *reporting* data that is already collected is too costly. Or why, any associated costs now, after 40 years, outweigh the benefit of HMDA's goal of ensuring that the

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[14] Home Mortgage Disclosure (Regulation C), 55 Fed. Reg. 20972, 20979 & n. 66 (May 13, 2019), *available at* https://www.federalregister.gov/documents/2019/05/13/2019-08983/home-mortgage-disclosure-regulation-c.

[15] *Id*., 55 Fed. Reg. at 20981-20982.

[16] Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, 66146 (Oct. 28, 2015), *available at* https://www.federalregister.gov/d/2015-26607/p-262.

[17] "[T]he higher closed-end mortgage loan-volume thresholds suggested by industry commenters would have a material negative impact on the availability of data about patterns and trends at the local level." *Id*., 80 Fed. Reg at 66147, available at https://www.federalregister.gov/d/2015-26607/p-288.

[18] In 2015, the CFPB amended HMDA to require lenders to submit significantly more data points. These amendments went into effect on January 1, 2018. However, many lending institutions are already exempted from reporting some of those 2015 Amendment extra data points under the Economic Growth, Regulatory Relief, and Consumer Protection Act ("EGRRCPA") of 2017. What the current Proposed Rule would do, would increase the threshold for reporting any and all data points, including those data points that have been required to be reported since 1975.

[19] Adam Levitan, *New HMDA Regs Require Banks to Collect Lots of Data. . . That They Already Have*, CREDIT SLIPS, (June 15, 2017), *available at* https://www.creditslips.org/creditslips/2017/06/new-hmda-regs-require-banks-to-collect-data-they-already-have.html.

public and public officials have the tools necessary to enforce fair mortgage lending in their communities.

III. The Adoption of CFPB's Proposed Rule Would Violate the APA.

The CFPB is asking for public comment before the public has had a chance to review the 2018 HMDA data. This 2018 HMDA data is critical for meaningful public comments because this is the first data set where the open-end reporting threshold was at 25 loans per year.[20] However, the CFPB has yet to release the 2018 HMDA data. As a result, the public is being asked to provide comment on the efficacy of data it has yet to see.

The APA requires agencies to publish notice of all proposed rulemakings in a manner that "give[s] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c); *see also id.* § 553(b). Asking for comments about data not yet available does not provide the meaningful opportunity for public participation that the APA requires.

The CFPB could have extended the comment period beyond the short 30-day window provided by the Proposed Rule in order to allow the 2018 HMDA data to be published. Indeed, the Executive Orders that govern federal agency rulemaking provide that in most cases, a minimum 60-day comment period is required to allow for meaningful public review and comment. *See* Exec. Order 13,563 at § 2(b); Exec. Order 12,866 at § 6(a)(1). The agency's failure to provide for adequate public comment here is also inconsistent with the APA's procedural requirements. *See N.C. Growers' Ass'n v. UFW*, 702 F.3d 755, 770 (4th Cir. 2012).

Further, the Proposed Rule's cost-benefit analysis fails fully to account for the harms imposed by the proposal, including the costs to States in losing access to helpful data.[21] In initially setting the reporting threshold at 25 closed-end mortgages and 100 open-end mortgages, the CFPB noted that if the cut off was set any higher, ". . . the resulting loss of data at the local level would substantially impede the public's and public officials' ability to understand access to credit in their communities."[22] The CFPB's failure to consider the full costs of its proposal is inconsistent with the agency's substantive obligations under the APA. *See, e.g.*, *California v. Azar*, No. 19-cv-1184, 2019 WL 1877392, at *37-41 (N.D. Cal. Apr. 26, 2019); *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, 365 F. Supp. 3d 28, 53-55 (D.D.C. 2019).

IV. Conclusion

In the wake of the subprime lending crisis that resulted in almost a decade of economic instability which was borne most heavily by communities of color, the CFPB amended HMDA in 2015 to increase the number of institutions covered. In doing so, it recognized the importance HMDA plays in ensuring that no American is denied accessed to fair mortgage lending as a

[20] The CFPB's 2015 HMDA Amendments changed the reporting threshold for open-end mortgages to 25 mortgages per year. But that reporting requirement did not take effect until January 1, 2018. Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128 (Oct. 28, 2015).

[21] Home Mortgage Disclosure (Regulation C), 55 Fed. Reg. 20972, 20996 (May 13, 2019), *available at* https://www.federalregister.gov/d/2019-08983/p-338.

[22] Home Mortgage Disclosure (Regulation C), 55 Fed. Reg. 20972, 20976 (May 13, 2019), *available at* https://www.federalregister.gov/d/2019-08983/p-76. *See also,* Home Mortgage Disclosure (Regulation C), 80 Fed. Reg. 66128, 66147-48 (Oct. 28, 2015), *available at* https://www.federalregister.gov/d/2015-26607/p-273.

result of race, gender, age or some other arbitrary factor and that every American is fairly afforded the opportunity to achieve homeownership. The Proposed Rule, by significantly reducing the number of institutions covered, undermines HMDA's very purpose.

Most important, by allowing a significant proportion of lending institutions to conceal essential data from the public, the CFPB will hinder the ability of state Attorneys General to enforce fair lending laws, subjecting communities that have faced a history of bias in housing to continued unlawful discrimination.

Respectfully submitted,

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