Date: December 28, 2023

To: Members, California Privacy Protection Agency

Subject: Draft Automated Decisionmaking Technology Regulations

Dear Members of the Board:

The California Mortgage Bankers Association, the Mortgage Bankers Association, the California Bankers Association, and the California Credit Union League, representing the real estate finance industry, appreciates the opportunity to preliminarily comment on the draft regulations noticed on the agenda and discussed at the December 8, 2023, meeting of the California Privacy Protection Agency Board. We look forward to providing more comprehensive comments as the rulemaking process progresses.

We believe the Draft Automated Decisionmaking Technology Regulations (The Proposal) would create significant compliance challenges for lenders that originate mortgage loans. The Proposal would require lenders to allow borrowers to opt-out of the use of Automated Decisionmaking Technology and conduct an exhaustive risk assessment. The use of certain automated decisionmaking technology is necessary to complete a consumer requested transaction and personal information processed by an automated decisionmaking technology is exempt pursuant to the California Consumer Privacy Act (CCPA) which expressly exempts personal information collected, processed, sold, or disclosed subject to the federal Gramm-Leach-Bliley Act (GLBA) and implementing regulations. The GLBA exemption was originally included in the CCPA because legislators were concerned about inconsistent state requirements that would impair the availability of credit for California residents. Underwriting data clearly falls within the scope of the federal GLBA.

As drafted, the Proposal opt-out exemption is inadequate because it excludes a business when a reasonable alternative method of processing exists that has been used. Manual underwriting has been used in lending, but the opt-out exemption is only applicable if the business can demonstrate the use of a non-automated process would be futile, not as valid, reliable, and fair, or the use would impose extreme hardship upon the business. To make use of the exemption, lenders would expose themselves to unnecessary liability and the burden of evidencing these facts exist. Imposing this burden is unnecessary and unreasonable because underwriting models and practices are already highly regulated, as further explained below. Imposing additional potentially conflicting opt-out regulations upon lenders would disrupt the extension of credit for California residents.

Lenders must rely on third-party artificial intelligence and automated decisionmaking technologies that they do not create, including Automated Underwriting Systems (AUSs) to have a loan guaranteed, the use of credit scoring models required by Government-Sponsored Enterprise's (GSEs), Department of Housing and Urban Development (HUD), and the Veterans Administration (VA), and automatic valuation models (AVMs) used by third-party appraisers.

These technologies are developed by government agencies or by entities directly regulated by the agencies. AUSs are developed by the insurer or investor, including the affordable housing programs of the federal government, i.e., the Federal Housing Administration (FHA), the VA, Fannie Mae, and Freddie Mac (GSEs). For example, Desktop Underwriter (DU) and Loan Prospector (LP) are developed and controlled by the GSEs, while HUD has their own AUS for FHA and VA loan products. As the GSE's prudential regulator, the Federal Housing Finance Agency (FHFA) regulates DU/LP AUSs. Similarly, FHA and VA regulate their systems. The Proposal is misguided in its efforts to require lenders to conduct risk assessments of automated decisionmaking tools given to them by the government.

Similarly, credit scores are a significant factor in lending decisions, where certain lenders may not have a choice in the use of FICO as the GSEs, HUD, and the VA require their use. Credit scoring models are produced using proprietary technology and do not have a comparable product. Lenders have little if any ability to verify the representations made by credit scoring models developers.

Lenders must rely upon the appraisal process and the use of an Automated Valuation Model (AVMs) used by third-party appraisers, however, the GSE's mandate appraiser independence requirements that prevent lenders from playing a part in the appraisal process. The Dodd-Frank Act and other federal mandates have intentionally distanced the lender from the appraisal process.

Lastly, automated decisionmaking technologies have been used for many years by lenders and regulations already exist under the Equal Credit Opportunity Act (ECOA) that were promulgated by the Consumer Financial Protection Bureau (CFPB) to prevent the consumer harm contemplated by the Proposal. ECOA prohibits lenders from using automated decision tools to discriminate against applicants. Lenders are also required to provide applicants with the underlying reasons to deny credit. This adverse action notice must be specific and indicate the principal reasons for the adverse action. Further, under CFPB Circular 2022-03, creditors cannot merely rely on the output of an automated decision tool as a reason to deny credit and must disclose a specific reason for the denial. As the CFPB noted in the Circular, this requirement helps prevent discrimination because a creditor must explain their decisions and cannot place blame on the technology utilized, which discourages creditors from engaging in discriminatory practices.

We appreciate the opportunity to provide these comments.

Respectfully,

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