Congress of the United States
Washington, DC 20515

April 10, 2013

The Honorable Ben Bernanke
Chairman
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

The Honorable Thomas Curry
Comptroller of the Currency
Administrator of National Banks
Washington, DC 20219

Dear Chairman Bernanke and Comptroller Curry:

We are writing to urge you to reconsider the position relayed by your staff at a meeting yesterday that you will not provide any documents in response to our January 31, 2013, request as Members of Congress relating to systemic and widespread violations of law committed by mortgage servicing companies.

Two years ago this week, your offices issued a public report announcing that you determined that 14 mortgage servicing companies were engaging in "violations of applicable federal and state law." You found that these abuses have "widespread consequences for the national housing market and borrowers." You also explicitly referenced instances of abuse, including illegal foreclosures against our nation's men and women in uniform who are protected by the Servicemembers Civil Relief Act (SCRA).

Based on these findings, you issued consent orders requiring these mortgage servicers to retain independent consulting firms to conduct a thorough review of their foreclosure actions in 2009 and 2010. Before this Independent Foreclosure Review (IFR) process was completed, however, and before a single borrower had received remediation, you finalized settlement agreements in February 2013 terminating the review process with 11 of these servicers.

We have requested information about the process used to conduct this review and the extent to which violations of law were found. We made 14 specific requests in our letter to you in January, and to date you have provided only one full response, three partial or minimal responses, and no responses to nine of the requests (see Appendix A). You have provided little specific information on what the review actually found, such as the number of improper foreclosures, the amount and number of instances of inflated fees, or the extent of abusive practices by each mortgage servicer.

You have, however, provided several salient facts: (1) mortgage servicing companies spent approximately $2 billion on this review; (2) although more than 800,000 loan files were identified for review, only about 114,000 were reviewed by independent consultants by the end of 2012; and (3) remediation will be paid to injured borrowers starting at the end of this week, though the remedial compensation is not based directly on findings from the review.

At the meeting yesterday, Federal Reserve staff argued that the documents relating to widespread legal violations are the "trade secrets" of mortgage servicing companies. In addition, staff from the Office of the Comptroller of the Currency (OCC) argued that these documents should be withheld from Members of Congress because producing them could be interpreted as a waiver of their authority to prevent disclosure to the public of confidential supervisory bank examination information.

We strongly believe that documents should not be withheld from any Member of Congress based on the flawed argument that illegal activity by banks is somehow their proprietary business information. Breaking the law is not a corporate trade secret. As regulators, you identified systemic and widespread abuses two years ago, and concealing important information about these violations limits our ability to fulfill our responsibility to conduct oversight over the actions of mortgage servicing companies and to develop legislation to protect our constituents from further abuse.

The position conveyed by your staff is even more troubling given that the abuses you identified are apparently more widespread than previously known. For example, one press account recently reported that the review found that "the nation's biggest banks wrongfully foreclosed on more than 700 military members during the housing crisis."[1] On Tuesday, however, your staff informed us that more than 1,000 servicemembers will receive compensation under the settlement for actual or potential SCRA violations involving illegal foreclosures. Despite these violations, your staff refused repeatedly to identify the number of servicemembers illegally foreclosed on by each mortgage servicer. In fact, your staff refused to identify information about any illegal activities by any specific mortgage servicer.

Your staff also stated that the performance of one of the independent consultants conducting foreclosure reviews was so poor that you issued a letter faulting the company and directing it to cure its deficiencies. Your staff would not elaborate, however, and they declined to identify the independent consultant or the mortgage servicing company involved.

Last week, the Government Accountability Office (GAO) issued a report finding that the "[c]omplexity of the reviews, overly broad guidance, and limited monitoring for consistency impeded the ability of the Office of the Comptroller of the Currency (OCC) and the Board of

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[1] *Banks Find More Wrongful Foreclosures Among Military Members*, New York Times (Mar. 3, 2013) (online at http://dealbook.nytimes.com/2013/03/03/banks-find-more-wrongful-foreclosures-among-military-members/).

Governors of the Federal Reserve System (Federal Reserve) to achieve the goals of the foreclosure review." The report concluded that "limited communication with borrowers and the public adversely impacted transparency and public confidence."[2]

Although we do not know the extent to which you were involved in your staff's preparation for yesterday's meeting, it is our sincere hope that we can work toward an accommodation that is mutually acceptable and serves the interests of both your offices and Members of Congress. The remainder of this letter provides additional background on our requests.

Findings of Violations of Federal and State Law

Two years ago, your offices concluded that mortgage servicing companies engaged in widespread and systemic violations of federal law. In April 2011, your offices joined the then-Office of Thrift Supervision in issuing a joint report summarizing the results of "horizontal reviews" you conducted of the nation's 14 largest mortgage servicers. The summary stated:

> The reviews found critical weaknesses in servicers' foreclosure governance practices, foreclosure document preparation processes, and oversight and monitoring of third-party vendors, including foreclosure attorneys. ... [T]he weaknesses at each servicer, individually or collectively, resulted in unsafe and unsound practices and **violations of applicable federal and state law and requirements**.[3]

The summary also described the widespread nature of these legal violations:

> The results elevated the agencies' concern that widespread risks may be presented—to consumers, communities, various market participants and the overall mortgage market. The servicers included in this review represent more than two-thirds of the servicing market. Thus, the agencies consider problems cited within this report to have **widespread consequences for the national housing market and borrowers.**[4]

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[2] Government Accountability Office, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities Under Amended Consent Orders* (GAO-13-277) (Apr. 4, 2013) (online at www.gao.gov/products/GAO-13-277).

[3] Federal Reserve System, Office of the Comptroller of the Currency, and Office of Thrift Supervision, *Interagency Review of Foreclosure Policies and Practices* (Apr. 13, 2011) (online at www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf) (emphasis added).

[4] *Id.* (emphasis added).

In addition, although your staff seemed unaware of it during our meeting yesterday, your 2011 report also identified specific cases of improper foreclosures that violated the SCRA, a federal law with criminal sanctions passed by Congress to provide additional foreclosure protections for members of our military:

> [E]xaminers did note cases in which **foreclosures should not have proceeded** due to an intervening event or condition, such as the borrower (a) was covered by the Servicemembers Civil Relief Act, (b) filed for bankruptcy shortly before the foreclosure action, or (c) qualified for or was paying in accordance with a trial modification.[5]

You also concluded that mortgage servicing companies filed false documents with courts. For example, you found that Bank of America, N.A.:

> filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records; … [and] failed to sufficiently oversee outside counsel and other third-party providers handling foreclosure-related services.[6]

To address these widespread and systemic violations of law, you entered into consent orders requiring mortgage servicing companies to retain independent firms to conduct a thorough review of foreclosure actions that were pending from January 1, 2009, through December 31, 2010, to identify as many borrowers as possible who were financially harmed by the banks' deficient practices. You also directed the mortgage servicers to submit for your approval "engagement letters" establishing the terms of the reviews to be conducted by the independent firms, including the specific review methodologies to be employed.[7]

On January 7, 2013, your offices announced that you were suddenly terminating the independent review process for many of the servicers subject to the April 2011 consent orders.[8]

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[5] *Id.* (emphasis added).

[6] *In the Matter of Bank of America, NA*, Case No.: AA-EC-11-12, *Consent Order* (Office of the Comptroller of the Currency, Apr. 13, 2011) (online at www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47b.pdf).

[7] *Id.*

[8] Board of Governors of the Federal Reserve System and Office of the Comptroller of the Currency, *Joint Press Release* (Jan. 7, 2013) (online at www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-3.html).

On February 28, 2013, formal agreements were executed in which these servicers agreed to pay $9.3 billion in "cash payments and other assistance" to borrowers, including $3.6 billion in direct payments to borrowers who had homes in foreclosure in 2009 or 2010.[9]

Significant questions have been raised by this decision, including the extent of abuses identified during the review and whether the sum the banks agreed to pay was appropriate to fully compensate borrowers for the legal violations committed. At our meeting yesterday, your staff refused to identify the number of violations or errors found during the review process committed by each mortgage servicer that entered into an amended consent order. Your staff also stated that they had not decided whether to provide individual borrowers with information identified during the review process about the harm their own mortgage servicers may have caused so they could seek redress. In addition to providing information about these abuses to Members of Congress, we believe you should disclose to borrowers information in your possession that would help them address the harm they suffered.

Declining to Produce Documents Relating to Violations of Law

In response to our request for documents relating to violations of law committed by mortgage servicing companies, your staff made two arguments: first, that documents relating to these widespread violations are the "trade secrets" of mortgage servicing companies; and second, that these documents should be withheld from Congress to avoid waiving the authority to withhold bank examination materials from the public. We believe the decision not to provide these documents is a mistake, and we respectfully request that you reconsider your staff's approach.

First, according to the Court of Appeals for the District of Columbia Circuit, the definition of a "trade secret" is:

> [A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.[10]

Obviously, this definition does not encompass illegal activity. It would be very surprising indeed if mortgage servicing companies argued that their ability to engage in illegal

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[9] Board of Governors of the Federal Reserve System and Office of the Comptroller of the Currency, *Joint Press Release* (Feb. 28, 2013) (online at www.federalreserve.gov/newsevents/press/enforcement/20130228a.htm).

[10] *Public Citizen Health Research Group v. FDA,* 704 F.2d 1280, 1288 (D.C. Cir. 1983) (citing Restatement (First) of Torts § 757 cmt. b (1939) ("A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it").

foreclosures and charge inflated fees is a commercially viable plan derived from corporate "innovation."

Second, your staff argued that producing these documents to Members of Congress who are not Committee chairs could be viewed as a waiver of your agencies' authority to withhold confidential and proprietary information from the public. This argument is misplaced. You may protect against such a waiver by including standard language in a cover letter explaining that providing documents to Members of Congress, even if normally not disclosed to the public because of their proprietary or confidential nature, does not constitute a waiver.

Other agencies and offices have taken precisely this approach. For example, on May 24, 2012, the Federal Housing Finance Agency (FHFA) provided documents relating to mortgage servicing issues in response to a request from Ranking Member Cummings and Oversight Committee Member John Tierney. In its cover letter, FHFA stated:

> FHFA staff has collected documents responsive to your requests and compiled these in the attached disks. ... Materials provided include information related to the Enterprises and to FHFA internal deliberations that, in many cases, fall within the category of proprietary, confidential, non-public information that would not be released by FHFA.[11]

Finally, your staff referenced regulations protecting against public disclosure of "bank examination" and "confidential supervisory information." These regulations make clear that, although you may choose to deny our requests because they do not come with the threat of a Committee subpoena, you have discretion to comply with such requests when they serve the nation's interests, as this one does.[12] These regulations are based on exemptions to the Freedom of Information Act (FOIA), which states that it is "not authority to withhold information from Congress." More than 30 years ago, the Department of Justice issued the following guidance on responding to requests from Members of Congress:

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[11] Alfred M. Pollard, General Counsel, Federal Housing Finance Agency, to Ranking Member Elijah E. Cummings and Ranking Member John F. Tierney, House Committee on Oversight and Government Reform (May 24, 2012). *See also* Alfred M. Pollard, General Counsel, Federal Housing Finance Agency, to Ranking Member Elijah E. Cummings and Ranking Member John F. Tierney, House Committee on Oversight and Government Reform (Apr. 12, 2012) ("FHFA has collected documents responsive to your request and this production reflects the materials from Fannie Mae and Freddie Mac that relate to the pilot programs. The documents from Fannie Mae and Freddie Mac (Enterprises) contain confidential, proprietary, non-public information that would not be released by the FHFA or the Enterprises.").

[12] *See* 12 C.F.R. § 4.36 (governing OCC discretion to disclose non-public information); and 12 C.F.R. § 261.22 (governing the Federal Reserve's discretion to disclose non-public information).

> From a policy perspective, there is significant practical importance in maintaining a proper flow of information not only to Congress and its committees and subcommittees but also to individual members. ... Thus, when Members of Congress request information, agencies properly give due weight and sympathetic consideration. The legislator may have a need for access to documents which fall outside the public's right to know under FOIA. The individual member may seek information in his or her official capacity to assist a constituent, to develop and decide on proposed legislation, or to participate in the work of committees or subcommittees to which the member may belong or before which the member may appear. An agency should not lightly deny a request even for records exempt under FOIA if the member of Congress needs the records to carry out an official function.[13]

In updating those guidelines several years later, the Department advised that releasing information to Members of Congress does not impact the ability to use applicable FOIA exemptions in response to other requests:

> Recognizing the importance of federal information flow to effective congressional relations, Executive Branch agencies should of course give very careful consideration to any access request received from a Member of Congress, with discretionary disclosure often a possibility. And where an agency makes such a discretionary disclosure in furtherance of a legitimate governmental interest, together with careful restrictions on further dissemination, it should be able to resist an argument that such action constitutes a "waiver" of FOIA exemptions.[14]

GAO Study Finds Extensive Flaws with IFR Process

Last week, GAO issued a report describing significant flaws with the design and implementation of the IFR, as well as a lack of transparency that has undermined confidence in its findings. For example, although the independent consultants were directed "to identify as many harmed borrowers as possible and ensure similar results for similarly situated borrowers," GAO warned that "regulators' limited monitoring of consistency of the consultants' sampling methodologies and review processes" actually "risked not achieving the intended goals." GAO warned that "this remains a challenge for the servicers continuing the foreclosure review." Specifically, GAO concluded:

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[13] Department of Justice, Office of Information Policy, *Release of Exempt Information to Members of Congress: The Impact of the Murphy Decision*, FOIA Update, Vol. I, No. 4 (1980) (online at www.justice.gov/oip/foia_updates/Vol_I_4/page3.htm).

[14] Department of Justice, Office of Information Policy, *Congressional Access Under FOIA*, FOIA Update, Vol. V, No. 1 (1984) (online at www.justice.gov/oip/foia_updates/Vol_V_1/page3.htm).

> Our analysis found that the regulators' sampling approach did not include mechanisms to facilitate their oversight of the extent to which consultants would have reached as many harmed borrowers as possible. For example, the regulators' sampling approach did not provide an objective method for regulators to use in determining if consultants had conducted sufficient reviews and could stop their review activities, except in those cases where there were few or no errors. …
>
> In addition, the regulators' sampling approach did not provide a clear mechanism for regulators to assess the extent to which consultants had identified the appropriate high- and low-risk loan categories to confirm that those categories were accurate and to signal if there were additional potential high-risk loan categories that had not been identified, but warranted additional sampling and review.[15]

As your staffs conceded yesterday, foreclosure reviews for 11 mortgage servicers have now been terminated even though only a fraction of the files identified for review have been completed and even though the sampling techniques and oversight methodologies have not enabled regulators to determine the full extent of harm suffered by borrowers.

Despite these deficiencies, GAO reported that now, "[u]sing a framework provided by regulators and characteristics of borrowers' loans, **servicers will categorize borrowers, and regulators will develop a distribution plan and direct a payment administrator to distribute cash payments.**"[16] In other words, the same mortgage servicers that you determined had engaged in widespread abuses are now placing borrowers into categories to receive remediation based on a review process that GAO has found to be deeply deficient.

GAO reported that your offices "did not describe plans to release additional information about the procedures servicers are using to categorize borrowers" and stated that "neither regulator had made decisions about what information to provide to borrowers."[17] In addition, as your staffs conceded yesterday, borrowers will have no mechanism by which to contest their placement in a certain category or the level of remediation offered to them.

GAO proposed significant changes going forward, recommending that your offices "identify and apply lessons from the foreclosure review process, such as enhancing planning and monitoring activities to achieve goals, as they develop and implement the activities under the amended consent orders." GAO also warned: "Absent a clear strategy to guide regular communications with individual borrowers and the general public, regulators face risks to transparency and public confidence similar to those experienced in the foreclosure review."

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[15] Government Accountability Office, *Foreclosure Review: Lessons Learned Could Enhance Continuing Reviews and Activities Under Amended Consent Orders* (GAO-13-277) (Apr. 4, 2013) (online at www.gao.gov/products/GAO-13-277).

[16] *Id.* (emphasis added).

[17] *Id.*

Conclusion

Given the circumstances of this case—in which your offices have identified systemic and widespread violations of federal law, including wrongful foreclosures, excessive fees, and fraudulent affidavits filed in court—access by Members of Congress to additional information about these violations is not only warranted, but imperative. For these reasons, we hope that you will reconsider your staff's positions and work with us to achieve a mutually agreeable accommodation that serves both of our interests. Thank you for your continued assistance.

Sincerely,

Elizabeth Warren
Senator

Elijah E. Cummings
Member of Congress

cc: The Honorable Tim Johnson, Chairman, Senate Committee on Banking, Housing and Urban Affairs

The Honorable Mike Crapo, Ranking Member, Senate Committee on Banking, Housing and Urban Affairs

The Honorable Sherrod Brown, Chairman, Subcommittee on Financial Institutions and Consumer Protection

The Honorable Pat Toomey, Ranking Member, Subcommittee on Financial Institutions and Consumer Protection

The Honorable Robert Menendez, Member, Senate Committee on Banking, Housing and Urban Affairs

The Honorable Darrell E. Issa, Chairman, House Committee on Oversight and Government Reform

The Honorable Jeb Hensarling, Chairman, House Committee on Financial Services

The Honorable Maxine Waters, Ranking Member, House Committee on Financial Services

Appendix A

Warren/Cummings Request	Federal Reserve/OCC Response
1. **Performance reviews:** The results of all performance reviews conducted by the Federal Reserve or the OCC over the Independent Foreclosure Review, including: a. all documents reviewing the performance of each of the independent contractors engaged by mortgage servicers to conduct reviews of borrower files under the terms of the consent orders issued in April 2011, b. all documents detailing the nature of any instances of unsatisfactory performance found by the Federal Reserve or the OCC, c. all documents detailing any corrective actions ordered by the Federal Reserve or the OCC to be taken by any mortgage servicer subject to the April 2011 consent orders or by any independent contractor conducting borrower file reviews, and d. all documents describing the adequacy of any corrective action taken by any mortgage servicer subject to the April 2011 consent order or by any independent contractor engaged to review borrower files;	1. *No response*. 1a. *No response*. 1b. *No response*. 1c. *No response*. 1d. *No response*
2. **Updates to OCC/Fed from servicers and consultants:** All documents and reports prepared by the mortgage servicers subject to the April 2011 consent orders or the independent contractors engaged by mortgage servicers to conduct reviews of borrower files under the terms of the consent orders issued in April 2011, describing, reviewing, or updating on the Independent Foreclosure Review process, and supplied to the OCC or the Federal Reserve; and,	2. *No response*.
3. **Amounts paid to consultants:** All documents compiled by the Federal Reserve or the OCC indicating the total amount of settlement funds paid to each independent contractor engaged by the 14 mortgage servicers subject to the April 2011 consent orders and all documents compiled by the Federal Reserve or the OCC indicating itemizations of specific work performed by each contractor.	3. *Minimal response*: The OCC and Fed have disclosed the total amount spent on the consultants - $2 billion – but no documents have been provided that detail the amount paid to each contractor or that itemize the specific work performed by each

	contractor.
4. **Information on borrowers:** The total number of eligible borrowers who requested reviews of their foreclosure files by gender, race, zip code, and property value	4. *Minimal response*: The OCC and Fed have disclosed the total number of eligible borrowers who requested reviews and, in September 2012, the Federal Reserve and the OCC released county-by-county data on (1) borrowers mailed a form to request a file review and (2) borrowers who submitted a request for review up to that date. However, no data broken down by gender, race, zip code, and property value have been provided.
5. **IFR findings:** The total number of reviews of borrower files initiated by each of the independent contractors engaged by the 14 mortgage servicers subject to the April 2011 consent orders, including a. the number of reviews completed by January 7, 2013 by each independent contractor, b. the number of borrower files in which unsafe or unsound practices were found, c. the amount of remediation each borrower who experienced an unsafe or unsound practice was recommended to receive, and d. the amount of remediation paid out to borrowers as part of the Independent Foreclosure Review process; and	5. *Partial response:* The OCC and Fed have disclosed the total number of borrower files identified for review – 744,685 – but these have not been broken down by consultant. 5a. *Partial response:* The OCC and Fed have identified the total number of reviews completed – 103,820 – but these have not been broken down by consultant. 5b. *No response*. 5c. *No response*. 5d. *Full response.* The OCC and Fed have indicated that no remediation has been paid out.

6. **Consultant time spent per file:** The average time each independent contractor engaged by the 14 mortgage servicers subject to the April 2011 consent orders required to complete a review of a borrower's file.	6. *No response*.