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MORTGAGE BANKERS ASSOCIATION

March 15, 2019

The Honorable Mike Crapo
Chairman
Committee on Banking, Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Sherrod Brown
Ranking Member
Committee on Banking, Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Crapo and Ranking Member Brown:

On behalf of the Mortgage Bankers Association ("MBA"),[1] we are writing to provide feedback on the collection, use and protection of sensitive information by financial regulators and private companies. As you have mentioned in your February 13, 2019, request for feedback from interested stakeholders, the collection of consumer information has grown rapidly. The use of "big data" has been a function of increased technological capacity to collect and analyze information as well as a desire to provide consumers with the most effective customer experience. As consumers continue to provide more of their personal information to businesses, personal privacy and data security becomes an increasingly necessary focus. Our legal system recognizes that our expectations of privacy and security reflect changes in society, but rapid innovation requires education and oversight to ensure consumers are aware of how their information is used. MBA appreciates this effort to understand and offer feedback on how important and beneficial innovations impact consumer privacy.

Since the enactment of the Gramm-Leach-Bliley Act ("GLBA") in 1999, financial institutions have adhered to federal guidelines and standards for data privacy and data security. Consequently, participants in the real estate finance industry are required to implement certain privacy and security controls. Our members are acutely aware of their responsibility to protect consumer information and ensure that the data they collect is used for appropriate purposes.

Mortgage lenders understand the importance of protecting their customer's information and privacy. We support efforts to ensure that no consumer unwittingly exposes themselves to harm by unintentionally providing their personal data to unscrupulous actors. However, we also want to be careful not to prevent the careful use of data to improve the efficiency of mortgage origination.

The need to evaluate how digital information is collected and protected is coming under greater scrutiny across all industries. As recently as this month, the Federal Trade Commission ("FTC")

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets, to expand homeownership, and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,300 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. For additional information, visit MBA's Web site: www.mba.org.

announced proposed changes to its regulations over privacy and data security. Over the last several months, many states have begun moving forward with comprehensive and sometimes conflicting changes to their privacy and data security laws and regulations. Many of these sweeping changes have come in response to well-publicized attacks but have failed to take account of the difficulties associated with rapidly implementing detailed changes or confronting emerging threats across a broad spectrum of small and large businesses.

Legislators and regulators must understand that a breach does not necessarily indicate that a company did not have robust policies and systems in place to protect consumer privacy. This is especially true in light of the types of attacks the United States has seen in the last several years. Foreign governments, organized crime, and even terrorist organizations have been engaged in cyber warfare with the United States, its consumers, and its businesses. It is especially important that legislators recognize that the data security challenge is also a national security concern that requires the attention of the entire federal government and its regulatory, law enforcement and national security agencies.

1) What could be done through legislation, regulation, or by implementing best practices that would give consumers more control over and enhance the protection of consumer financial data, and ensure that consumers are notified of breaches in a timely and consistent manner?

Breach notification is an area rife with inconsistency and conflicting regulations. While at the federal level there have been data security efforts for specific industries,[2] there is not a widespread standard for breach notifications. Sensitive information is increasingly targeted by foreign governments or transnational criminal organizations. Consumers *and* the entities attempting to protect their data are victims of these attacks. In light of this, data security is a national security issue and can cross jurisdictions and state lines. As such, data security standards and breach notifications merit a preemptive federal requirement.

Currently, the United States has over fifty different data breach notification laws. State governments have created additional standards over the top of federal requirements. Their efforts are well-intentioned, and they seek to protect their residents. However, these laws can have significant variations or subtle differences that require increasingly complex systems to ensure compliance. Entities engaged in business across the United States do not have separate computer systems for each state. To develop and maintain systems for each state would be cost prohibitive, with the likely result that some businesses would choose not to offer services in every state. Moreover, conflicting standards and excessive complexity can undermine effective data security.

As it is, significant investment is necessary to defend against veiled adversaries. For businesses whose operations span multiple states, variations in requirements result in varied responses with high potential for confusion. Some states require the Attorney General to be notified prior to any notification to affected consumers,[3] while others require the opposite or simultaneous notification.[4]

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[2] Health Insurance Portability and Accountability Act, 45 C.F.R. § 164.400-414; *Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice*, 70 Fed. Reg. 15736 (March 29, 2005). *See also*, Gramm-Leach-Bliley Act, 15 U.S.C. § 6801, *et seq.*

[3] Maryland Code Ann., Com. Law. §14-3501 *et seq.*; N.J. Stat. Ann. § 56:8-161 *et seq.*; N.Y. Gen. Bus. Law § 899-aa.

[4] Vt. Stat. Ann. Tit. 9, § 2430 *et seq.*; Mont. Code Ann. § 30-14-1701 *et seq.*

Additionally, there are variations to the *content* of information required in notifications.[5] Though some states include exceptions for compliance with other federal requirements,[6] these federal requirements are not preemptive, thereby allowing states to continue adding piecemeal requirements on entities operating in multiple states. Inconsistencies across states as well as continual legislative change requires the expenditure of significant funds to comply with differing state requirements, often with no improvement to the protection of consumer data.

Ultimately, this leads to inconsistency for consumers based on their residence despite the identical harms suffered. A clear solution to this problem is a non-prescriptive, preemptive federal data breach notification law with clear requirements to notify affected consumers as well as state and federal regulators. Similar to the cybersecurity framework established by the National Institute of Standards and Technology ("NIST") and other industry-developed frameworks,[7] national guidelines can spur the widespread adoption of best practices. With requirements that describe the necessary controls, industry can work towards developing the framework necessary to implement those controls. Regulated entities and their consumers can be provided with clear expectations and become aware of routine procedures, and the entire response mechanism becomes more fluid for both consumers and the entities reporting. Importantly, this method allows for adaptability of best practices in the face of evolving dangers. The importance of a comprehensive standard cannot be overstated. As recently as this month in a Senate subcommittee hearing, the FTC's Bureau of Consumer Protection Director, Andrew Smith, pointedly restated the FTC's "longstanding bipartisan call for enactment of a comprehensive federal data security law."[8] Addressing the issue in any other way would fail to improve the status quo, prescribing varying requirements to a universal problem.

Redress following a data breach is also subject to several conflicting doctrines across the states. Certain states have sought to provide consumers with recourse with expansive private rights of action, but as discussed above, many, if not most, data breaches arise from criminal activity by an external force. Laying fault at a business, which itself is a victim of criminal activity, is targeting punishment at the *wronged* actor. For these reasons, any data breach-related legislation should limit private rights of action to the reckless disregard of a known risk. Malfeasance in the face of expected harms merits civil liability. Appropriately, this is in contrast to attempting to quantify unknown risks and the associated compliance difficulties, which are correctly addressed by supervision and enforcement from the appropriate regulators.

As it relates to participants in the mortgage industry, another data protection risk is the breadth of information entities are required to collect and then maintain for several years. The Bureau of Consumer Financial Protection's ("CFPB" or "the Bureau") Regulation Z under the Truth-in-Lending Act ("TILA") requires mortgage loan creditors to retain evidence of compliance for three

[5] The definition of "personal information" varies significantly throughout the fifty states. Some states also further categorize information as "sensitive" or "nonpublic." Additionally, some states provide safe harbors for personal information that is either encrypted or has been de-identified. With these subtle but important differences, the information included in breach notices vary.
[6] *See supra*, note 1.
[7] *See* NIST Cybersecurity Framework Version 1.1, ISO/IEC 27000 family of information security management systems.
[8] *Examining Private Sector Data Breaches*, Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, 116th Congress, pg. 2 (2019) (Testimony of Andrew Smith).

years.[9] Additionally, Regulation Z provides a safe harbor and presumption of compliance for qualified mortgages ("QM").[10] The QM safe harbor is a defense at foreclosure, which requires entities to maintain copious amounts of sensitive information for the life of the loan. As custodians of significant amounts of sensitive consumer information, the risk to the mortgage industry is exacerbated by the necessity to retain information for an extensive period of time. For purposes of compliance, retaining consumer data is inevitable, but reducing the amount of data collected has the potential to reduce the likelihood and severity of a data breach.

2) What could be done through legislation, regulation, or by implementing best practices to ensure that financial regulators and private financial companies (including third-parties that share information with financial regulators and private financial companies) provide adequate disclosure to citizens and consumers about the information that is being collected about them and for what purposes?

What constitutes an adequate disclosure to consumers has evolved significantly over the last several decades. Technology has driven consumer expectations, and delivery mechanisms of news, social media, and information generally have become increasingly streamlined. These channels of delivery were established by industry, so industry should be a helpful partner to use its consumer experience and knowledge of consumer expectations to determine the best delivery channel for such disclosures. This takes into account the various forms of transactions that take place and will allow consumers to receive disclosures in the form they are most comfortable with based on the context of the relevant interaction. As regulators have noted in the past, a single disclosure regime would not be effective for every type of business transaction in the United States. Regulators should set guidelines for the general breadth of content that must be delivered, while allowing industry to determine the best form of delivery.

Notably, in the mortgage arena disclosures are meticulously detailed and include a vast amount of information.[11] The CFPB has acknowledged the benefits of industry aiding in establishing adequate disclosure forms and channels. Specifically, the Bureau is in the process of implementing a *Disclosure Sandbox* that grants participants the opportunity to determine the most effective method to deliver innovative disclosures to consumers.[12] Upon approval, participants are given a green light make use a custom disclosure. Consumers will potentially benefit from improved communication, and the Bureau is given an opportunity to evaluate the changing landscape. Similar to the Bureau's program, any regulatory action in this space should acknowledge the value of industry expertise and encourage trial disclosures and development of effective delivery methods rather than a prescriptive solution. Such a solution should be adaptive and reflect the product/service, consumer, and types of businesses involved in these transactions. An approach such as this provides the flexibility needed to stay in step with consumer expectations while also ensuring consumers are receiving the information they need in the most appropriate fashion.

3) What could be done through legislation, regulation or by implementing best practices to give citizens and consumers control over how financial regulators and private financial companies

[9] 12 C.F.R. § 1026.25(c)(1)(i).
[10] 12 C.F.R. § 1026.43(e)(1).
[11] TILA-RESPA Integrated Disclosures, 12 C.F.R. § 1026.
[12] *Policy to Encourage Trial Disclosure Programs*, 83 Fed. Reg. 45574 (September 10, 2018).

(including third-parties that share information with financial regulators and private financial companies) use consumer data?

The use of "big data" is prevalent in several industries, but not all these industries are treated equally. This is particularly true as it relates to protecting consumer information and the level of consumer access. Whether an entity is collecting information, processing information, or sharing that information, ensuring its protection or granting reasonable access are concurrent responsibilities. The financial services industry is subject to legislation and regulations under the GLBA that impose requirements related to privacy, data protection, and disclosure. With the value of consumer data increasing and its subsequent commercialization, consumers' oversight of their own information is understandably an area of focus. In order to accommodate oversight, however, regulators must be considerate the necessary protection requirements.

If data are required to be encrypted or redacted under one regulatory scheme, it may be unlawful, impractical, or impossible to then maintain an identifiable tag for purposes of consumer review. There is a need to strike a balance between providing access to consumers, while also protecting their information. Regulators should consider allowing entities to provide summarized information in response to a consumer request through a defined channel. As it relates to consumer control over their information, the GLBA currently requires financial institutions to provide an opt-out mechanism for consumers. Legislators should take into consideration the well-known and widely implemented GLBA opt-out mechanism when considering a similar requirement for other industries. This would provide consumers with sufficient ability to have their information exempt from being shared with unaffiliated third parties.

It is important to note that many entities make use of third party vendors to process certain components of a transaction. This form of "sharing data" is necessary and already carries the privacy and security principles applicable to the primary entity. By way of contract and current regulations, a third party vendor is already obligated to maintain the specific level of responsibility that is applied to the primary business. Any form of legislation or regulation must be conscious of this business necessity and exempt third party data sharing, *for the purposes of administering, effecting, or enforcing the underlying transaction*, from any additional onerous requirements.

4) What could be done through legislation, regulation, or by implementing best practices by credit bureaus to protect consumer data and to make sure that information contained in a credit file is accurate?

Regulators currently maintain significant oversight of the credit bureaus. As discussed above, the FTC has begun consideration of amendments to its Safeguards Rule, which requires financial institutions (including credit reporting agencies) to develop, implement, and maintain a comprehensive information security program.[13] Credit reporting agencies ("CRA") are subject to the requirements of the Safeguards Rule under the GLBA. As the FTC maintains authority over the Safeguards Rule, they are the most appropriate regulator to consider changes to how CRAs protect consumer data. The regulator in this case should be allowed to conduct its ongoing notice-and-comment rulemaking and make any appropriate changes in light of stakeholder and public input.

[13] Safeguards Rule, 16 C.F.R. § 314.

As it relates to the accuracy of a credit file, the CFPB maintains rulemaking authority over a significant portion of the Fair Credit Reporting Act ("FCRA"), including provisions regarding the accuracy and integrity of consumer information. Similarly to the FTC, the CFPB should be encouraged to engage in notice-and-comment rulemaking to consider any potential changes necessary to ensure the accuracy of consumer information within a credit file.

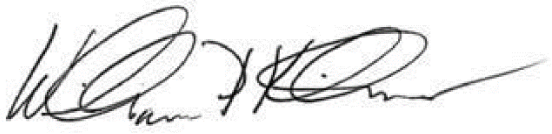
5) What could be done through legislation, regulation, or by implementing best practices so a consumer can easily identify and exercise control of data that is being (a) collected and shared by data brokers and other firms and (b) used as a factor in establishing a consumer's eligibility for credit, insurance, employment, or other purposes.

With the growth of data brokers, it is understandable that consumers would seek insight on the information collected about them. This is also an issue that crosses state lines and merits a national view. Legislators should carefully consider the necessity of an appropriate federal regulator and the implications of inconsistent regulations. Similarly, data used in establishing consumer eligibility for credit, insurance, employment, or other purposes involves several unique data sets. Entities that engage in the collection of the relevant information can potentially conduct business in a multitude of regulatory environments. This requires a certain level of expertise that is best exercised by regulators in combination with stakeholder input.

Conclusion

MBA appreciates your consideration of these comments and the Committee's willingness to engage with the public and stakeholders on issues surrounding consumer data privacy and data security. Our association will continue to refine its policy on these important topics. We hope this exercise is the beginning of a productive conversation with a broad range of stakeholders on how best to address the different, but related, issues of data security and data privacy. Should you have any questions or wish to discuss any aspects of these comments, please contact me at (202)-557-2736 or bkillmer@mba.org or Tallman Johnson, Associate Vice President of Legislative Affairs, at (202) 557-2866 or tjohnson@mba.org.

Sincerely,



Bill Killmer
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