MORTGAGE BANKERS ASSOCIATION

May 23, 2024

The Honorable Gus Bilirakis
Chair
Subcommittee on Innovation, Data, and Commerce
Committee on Energy and Commerce
U.S. House of Representatives
2306 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Jan Schakowsky
Ranking Member
Subcommittee on Innovation, Data, and Commerce
Committee on Energy and Commerce
U.S. House of Representatives
2408 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Bilirakis and Ranking Member Schakowsky:

As you know, mortgage companies have been subject to extensive federal privacy and data protection laws and regulations for several decades. Thus, real estate finance firms believe protecting consumer financial data is a cornerstone of the trust their customers place in them.

Accordingly, the Mortgage Bankers Association (MBA)[1] appreciates this opportunity to comment on the most recent text of the *American Privacy Rights Act* of 2024 ("APRA"). MBA has concerns with a number of provisions included in the bill (as currently proposed). Therefore, we respectfully urge your Subcommittee (and, in turn, the full Committee) to carefully consider these concerns as the APRA proceeds to an initial markup later this week.

Financial Institutions That Are Subject to The GLBA Should Be Exempt from APRA

The primary privacy protection law for consumer financial data is Title V of the *Gramm-Leach Bliley Act* (GLBA). With the GLBA, Congress constructed a privacy and data security regime to provide an effective and successful balance between providing a clear framework for financial institutions and ensuring that consumer financial transactions take place in a safe and secure environment. In particular, the GLBA regime has been carefully structured to ensure compliance with existing laws and regulations, adherence to the judicial process, and protection from fraud, illicit finance, and money laundering. Further, the GLBA grants federal financial regulators broad authority to adopt necessary regulations to enact these standards, allowing the regulatory regime to adapt over time as privacy concerns evolve. Notably, the GLBA requires that financial institutions provide consumers with notice of their privacy practices and generally prohibits such institutions from disclosing financial and other consumer information to third parties without first providing consumers with an opportunity to opt out of such sharing.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 275,000 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 more than 2,000 companies includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. For additional information, visit MBA's website: www.mba.org.

As currently drafted, the APRA does not include a full exemption for entities subject to the GLBA. Under section 120(b)(3) of the proposal, a covered entity is deemed to be in compliance with the APRA if it complies with the GLBA – but only with respect to the data subject to the GLBA. This "data-level exemption" does not offer sufficient coverage to truly opt MBA members out of coverage of laws with similar provisions. MBA has consistently advocated for an entity-level GLBA exemption.[2] This is the approach taken by most individual states with a data privacy law and would fully exempt covered mortgage companies.[3] Additionally, an entity that would otherwise be exempt from the APRA under section 120(b)(3) is not exempt from Section 109, concerning data security requirements. MBA believes entities subject to the GLBA should be exempt from all of the APRA, including section 109. The Federal Trade Commission (FTC) recently updated their Safeguards Rule with modern and precise data security requirements for financial institutions.[4] Thus, the APRA carve-out for Section 109 is unnecessary because the mortgage companies that would need to comply with Section 109 must also comply with the FTC Safeguards Rule.

APRA's Private Right of Action Should Be Removed

Many data breaches are the result of criminals or nation-state actors improperly accessing a company's database or misappropriating that company's information. Consumers have expectations of privacy and protection that must be respected, but with an understanding that the company is also a victim of theft of their information and unlawful intrusion into their data systems. For this reason, a private right of action is inappropriate.

Section 119(a) of the APRA would create a private right of action with very few limitations. While a private right of action, in theory, will only implicate companies that do not follow the appropriate standards, it will likely be utilized by plaintiffs' attorneys in any instance where there is a data breach. The simple fact that data was taken – and the implication that privacy protections were inadequate – is likely to be the core of a speculative complaint. Speculative litigation and the reputational costs of further litigation will further encourage class actions even for minor compliance infractions or following any breach.

As such, our members oppose provisions in the APRA that would authorize private rights of action and believe the GLBA's existing regulatory enforcement structure for financial institutions should be preserved. These GLBA regulators have experience in evaluating privacy and data protection regimes, are in regular contact with regulated entities, and can best update their expectations to keep track of data security trends as threats evolve.

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[2] Mortgage Bankers Association, Protecting Privacy and Helping Homeowners, available at https://www.mba.org/docs/default-source/uploadedfiles/state-relations/real-estate-finance-industry-data-protection-amendment-for-state-bills-final-1-15-20.pdf?sfvrsn=8913137a_0.

[3] *See* CO ST § 6-1-1304(2)(j), FL ST § 501.703(2)(b), TX BUS & COM § 541.002(b)(2), VA ST § 59.1-576(B).

[4] Federal Trade Commission, FTC Strengthens Security Safeguards for Consumer Financial Information Following Widespread Data Breaches (Oct. 27, 2021), available at https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-strengthens-security-safeguards-consumer-financial-information-following-widespread-data, *see also* 16 C.F.R. Part 314.

Congress Should Address Additional Key Concerns

MBA would also note our industry's concerns with other provisions of the APRA, as follows:

- Insufficient Preemption of State Law: The growing patchwork of state privacy laws must be replaced by a federal standard. It is critical that any new federal privacy law preempt existing state laws to avoid duplicative and conflicting requirements that will disrupt financial transactions. A federal standard will also help provide the transparency needed for consumers to understand their rights and responsibilities. More importantly, having a federal standard will ensure that consumers receive the same privacy rights and data protections regardless of where they may live.

  Although the APRA would preempt many state privacy laws, it also provides numerous exceptions that undermine the preemption. Under Section 120(a)(3), the APRA does not preempt provisions of state law concerning, amongst other topics, social security numbers and financial records. Many state data privacy laws control how regulated companies protect social security numbers and financial records as nonpublic personal information, the provisions of which would remain in force under the APRA. The APRA should be amended to create a clear and direct preemption of all state privacy and data protection provisions to clarify the duplicative and conflicting patchwork of requirements imposed on our members.

- Clarify Consumer-Requested "Opt-Out" Requirements for Lenders: Under Section 114(a) of the APRA, an individual can request to opt-out of evaluation by an algorithm for "consequential decisions", including housing and credit opportunities. Algorithms are defined broadly to include, "a computational process [that] facilitates human decision-making by using covered data, which included determining the provision of a product or service." This incredibly broad definition includes many mundane and pre-existing uses of algorithms, such as using a calculator to determine a borrower's total earnings. A lender would be required to offer an opportunity to the borrower to opt-out of this process each time these "algorithms" are used.

  This requirement is additionally burdensome in the context of mortgage lending. Lenders do not create the automated underwriting systems (AUSs) that they rely on to have a loan guaranteed or securitized. These systems are developed by the federal mortgage insurer (the Federal Housing Administration (FHA)) or the Government Sponsored Enterprises (the GSEs – Fannie Mae and Freddie Mac). For example, Desktop Underwriter (DU) and Loan Prospector (LP) are developed and controlled by the GSEs, while the Department of Housing and Urban Development (HUD) has its own AUS for FHA loan products.

  Under Section 114(a), a consumer can opt-out of credit evaluations by an algorithm such as DU/LP. However, allowing consumers to opt-out will result in the imposition of additional costs. Most lenders routinely rely on these automated systems to help them make sound lending decisions. Lenders could underwrite loans manually, but this would be a costly process and those loans may not be accepted by the GSEs or agencies. Although a lender could deny this request, Section 108(b)(3) only allows lenders to decline to provide a product or service if using the algorithms is strictly necessary to provide it

(highly unclear under this scenario). MBA believes Congress should consider enacting a clearer and less restrictive process to allow a lender to decline to provide a product if a borrower opts-out of the use of such automated underwriting systems.

Conclusion

MBA and its members support legislation to create a national privacy standard that recognizes the strong privacy and data security standards already in place for financial institutions under the GLBA and other financial privacy laws. MBA encourages Congress to avoid provisions that run counter to this well-understood framework or create a private right of action.

Consequently, MBA strongly urges the Subcommittee (and, in turn, the full Committee) to amend the APRA, as suggested, to appropriately balance the objectives of protecting consumer data privacy, preserving sound mortgage underwriting practices, and maintaining housing affordability.

Thank you in advance for your consideration of the views expressed within this letter.

Sincerely,

Bill Killmer
Senior Vice President
Legislative and Political Affairs

cc: The Honorable Cathy McMorris Rodgers, Chair, House Committee on Energy and Commerce

The Honorable Frank Pallone, Ranking Member, House Committee on Energy and Commerce

All Members, House Committee on Energy & Commerce