October 21, 2022

Federal Trade Commission, Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B)
Washington, DC 20580.

Re: Commercial Surveillance ANPR, R111004

Dear: April Tabor, Secretary of the Commission

The Mortgage Bankers Association (MBA)[1] appreciates the opportunity to comment on the Federal Trade Commission's (FTC) Advanced Notice of Proposed Rulemaking (ANPR) on the issues of data privacy and protection.

Maintaining up-to-date data security practices remains a top priority for the real estate finance industry. Since the Gramm-Leach-Bliley Act (GLBA) passed in 1999, the financial services sector has operated under a comprehensive data privacy and security regime. Protecting personal information is an existing regulatory requirement and allows MBA members to maintain the trust of their customers. Each year, firms expend significant amounts of time and resources to safeguard consumer data, provide appropriate disclosures to consumers, and protect data from malicious actors.

The existing regulatory scheme as well as firm practices show that the mortgage industry should largely be exempt from this current rulemaking. MBA members support strong, uniform data security practices. Maintaining strong data security and privacy practices are essential in preserving the trust of their customers. We offer the following key principles below in response to the ANPR and provide answers to selected specific questions in the attached appendix.

Existing Regulatory Environment

Any rulemaking should consider the existing regulatory requirements placed on the financial services industry and industry practice to conform to those responsibilities.

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 390,000 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.

1. *The Mortgage Industry is Already Regulated Under Data Security Standards*

MBA members already devote a great deal of attention to compliance and data security regulations. These regulations and guidelines are enforced by dozens of regulatory bodies exercising overlapping jurisdiction, including but not limited to the Commodity Futures Trading Commission, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Reserve System, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Financial Industry Regulatory Authority, the Consumer Protection Financial Bureau (CFPB) and state financial regulators. Many other data security regulatory requirements have been issued in accordance with the GLBA, a law specifically tailored to consider the needs of financial institutions and their customers. GLBA's implementing regulations set uniform requirements with respect to the development and maintenance of comprehensive data security programs. This comprehensive infrastructure covers all areas of data protection and consumer privacy.

The mortgage industry also follows voluntary standards in addition to this regulatory regime. Our members already use internal data privacy tools such as:

- SOC 2 – auditing criteria for managing customer data by the American Institute of CPAs,
- PCI – a compliance guide to secure credit and debit card transactions, and
- Other third-party risk management tools to set their own security standards.

The FTC should consider both the regulatory requirements as well as the extensive voluntary efforts to secure private consumer data in this rulemaking.

2. *The Mortgage Industry Should be Exempt from Duplicative Rulemaking*

The primary privacy and data security consumer protection law for consumer financial data is Title V of the 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 judicial process, and protection from fraud, illicit financing, and money laundering. Further, 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 for marketing purposes without first providing consumers with an opportunity to opt out of such sharing. The GLBA provides an effective and successful balance between providing a clear consumer notice framework for financial institutions and allowing beneficial consumer financial transactions to take place by providing data transfers that are necessary to effect, administer, or enforce a consumer requested transaction.

Within the overview of the proposed rule, the FTC acknowledged many states "have enacted laws and regulations that impose restrictions on companies' collection, use, analysis, retention, transfer, sharing, and sale or other monetization of consumer data." Further, states such as California, Virginia, Colorado, Utah, and Connecticut include some rights comparable to the European Union's General Data Protection Regulation, with other states considering similar laws. It is important to note that most states with existing similar laws and regulations provide for an entity level GLBA exemption. The fact that these states evaluated the need for comprehensive privacy laws yet determined that financial institutions and/or data subject to GLBA are exempt, suggests the determination that the GLBA offers effective privacy protections and there is no need for duplication.

MBA recommends implementing a GLBA exemption in any broad rulemaking by the FTC. The existing regulatory framework has been created as the result of close collaboration. As mentioned above, the mortgage industry is regulated by multiple federal and state agencies with shared interests in keeping consumers' private information secure. A GLBA exemption is essential to continuing to provide clear data privacy standards while avoiding a duplicative and burdensome regulatory environment.

3. *MBA Members Must Maintain Minimum Amount of Data and Need to Transfer Personal Information Between Parties*

Lending decisions are made using a wide variety of data and underwriting decisions. Under TILA and CFPB's QM rules, many underwriting factors must be considered, and this requires a large amount of data collection. Underwriting requires a significant amount of data, and different data points may be used differently depending on the transaction of financial profile of the individual consumer. For example, to verify income, a standard bundle of information is often collected but may not be all used in every transaction. However, it is impossible to know ahead of time which pieces of data will be relied on in the final decision. Any rulemaking must acknowledge that both as practice and as a legal requirement the mortgage industry must "over collect" consumer data before lending decisions are made.

As it relates to consumer control over their information, the GLBA currently requires financial institutions to provide an opt-out mechanism for consumers. This provides consumers with sufficient ability to have their information exempt from being shared with unaffiliated third parties. Regulators should take into consideration the well-known and widely implemented GLBA opt-out mechanism and propose any necessary changes for regulated entities within those frameworks before considering duplicative or conflicting requirements.

The ability to share data with third parties is essential to finance mortgage lending. Selling servicing rights and selling mortgage loans that will be securitized in the secondary market are essential components of how lenders acquire capital to lend to more borrowers. The gains on sale or the value of the servicing rights directly impact the price of the loan, providing a hidden "value" to the consumer in the form of lower transaction costs or rates. Eliminating or burdening

this process will create problems with mortgage funding and interrupt lending pipelines that are essential to the market. Interrupting the securitization of mortgages will lead to less affordable opportunities for borrowers.

Current law requires that mortgage lenders retain customer data for several years, which would be incompatible with data minimization requirements. The CFPB's Regulation Z under the Truth in Lending Act (TILA) requires mortgage loan creditors to retain evidence of compliance for three years. Additionally, Regulation Z provides a safe harbor and presumption of compliance for Qualified Mortgages (QM) and allows for improper loan originator compensation claims to be brought as a defense to foreclosure, which could occur at any time over the course of a typical 30-year mortgage. A borrower challenging whether they had the Ability To Repay (ATR) is an additional defense at foreclosure, which requires entities to maintain sensitive information for the life of the loan.

4. *The Mortgage Industry Clearly Discloses Fees and Costs*

Dark patterns are a way of presenting information or options that are designed in a way to manipulate users to make one choice over another. The FTC recently released a report on dark patterns, addressing several "problematic" instances of dark patterns usage.[2] One example of problematic dark patterns includes design elements that induce false beliefs and design elements that hide or delay disclosure of material information. This practice is described as burying key terms of the product or hidden fees in dense Terms of Service documents. The callout includes a portion of a federally prescribed disclosure with further explanation to explain certain costs that follow it. The use of a Truth in Lending Act (TILA) regulation's prescribed form at the top of a screen and more explanation immediately following should never be considered a Dark Pattern, despite a consumer having to scroll down several screens when viewing the material on a mobile phone.

One of the CFPB's most extensive rulemaking projects was the TILA-RESPA Integrated Disclosure (TRID) rulemaking. The TRID rulemaking merged the mortgage disclosures previously required by TILA and the Real Estate Settlement Procedures Act (RESPA) into one set of shopping disclosures and one set of pre-consummation disclosures. TRID was intended to ensure more reliable and uniform estimates, allowing a borrower to more easily understand key terms and fees, and compare those to the terms and fees of competing lenders.

TRID is an extremely granular and prescriptive advance disclosure regime. TRID features strict provisions that require early disclosure of the fees charged and "locking in" of these fees prohibiting certain changes to ensure that borrowers can shop and compare those fees between different lenders. Thus, lenders and settlement service providers are prohibited from engaging in fee underestimation to gain competitive advantage. The fees are also then disclosed before

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[2] Staff Report, Federal Trade Commission, Bringing Dark Patterns to Light, Sept. 2022, available at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf.

consummation with a mandatory waiting period to ensure borrowers have time to review and fully understand the associated costs of credit. Put simply, the process requires both a clear disclosure of comparable fees before a borrower chooses a lender and clear disclosure of the fees associated with the loan well before the closing occurs.

Our members believe advanced and clear disclosure of mortgage fees is necessary and important. The industry has spent extraordinary resources to come into compliance and ensure continued compliance with TRID.[3] The prescriptive nature of TRID and its highly technical requirements continue to impose real costs on the marketplace and consumers due to the highly technical nature of the due diligence and compliance reviews. The CFPB undertook significant consumer testing in the development of the rule[4] and subsequently determined that there is significant evidence that the TRID forms have improved consumer understanding of costs and fees when promulgating the rule[5] and ratified those conclusions in its statutorily mandated assessment of the rule.[6] There is meaningful information on all pages of the Closing Disclosure. This necessary and required information would be further down the screen and many swipes away on a mobile device.

Mortgage lenders already exist under an incredibly precise and prescriptive disclosure regime that has been consumer tested. Material terms and fees are appropriately disclosed according to the CFPB's TRID Disclosure rules. No additional rulemaking by other agencies is necessary given this regulatory regime.

5. *Remedies for Violations of New Rulemaking Should be Concrete and Defined*

The MBA opposes the use of algorithmic disgorgement as a remedy for violations of this rulemaking. The FTC has asked whether algorithmic disgorgement – a penalty where firms lose the profits from products created using faulty automated systems – is an appropriate remedy. Under this penalty, firms would lose either all profits or profits on a part of the product produced

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[3] *See* Comment letter jointly submitted by the American Bankers Association, American Financial Services Association, Consumer Bankers Association, Housing Policy Council, and Mortgage Bankers Association in response to the CFPB's Request for Information Regarding the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) Rule Assessment [Docket No. CFPB-2019-0055] (Jan. 21, 2020), available at https://www.regulations.gov/comment/CFPB-2019-0055-0136).

[4] *See* Part III of the Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79730 (Dec. 31, 2013) (for discussion of consumer testing conducted in the development of the TRID disclosures); *See also* Kleimann Communication Group, Inc., *Know Before You Owe: Evolution of the Integrated TILA-RESPA Disclosures* (July 2012), available at http://files.consumerfinance.gov/f/201207_cfpb_report_tila-respa-testing.pdf.

[5] *See* Integrated Mortgage Disclosures under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z) (August 2012 Proposed Rule), 77 Fed. Reg. 5116, 51211 (Aug. 23, 2012) (for discussion on how TRID disclosures improved consumer understanding of closing services and costs).

[6] *See generally* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) Rule Assessment (Oct. 2020), available at https://files.consumerfinance.gov/f/documents/cfpb_trid-rule-assessment_report.pdf.

by algorithms. However, to quantify damages, firms would need to reveal the full algorithm and its workings in order to establish how much of the profit of the product came from using the algorithm. This would essentially require members to give up trade secrets in order to limit damages. This penalty would chill innovation in the use of algorithms as firms would be concerned with releasing their process in a subsequent lawsuit. Rather than disgorgement, the FTC should instead tie penalties to the harm to the consumer. These remedial penalties will make plaintiffs whole. Penalties for violations of future regulations should be for specific harm with concrete damages that do not force firms to divulge trade secrets.

Conclusion

MBA members support strong, uniform data security practices. The FTC must recognize the strong privacy and data security standards already in place for financial institutions under the GLBA and other financial privacy laws. MBA encourages the FTC to avoid provisions that duplicate and conflict with those laws. The FTC must allow exclusive enforcement of this national standard by the appropriate federal or state financial regulators, including preserving GLBA's existing administrative enforcement structure for financial institutions.

Sincerely,

Pete Mills
Senior Vice President
Residential Policy and Strategic Industry Engagement
Mortgage Bankers Association

APPENDIX – RESPONSES

2) Which measures do companies use to protect consumer data?

- MBA members already devote a great deal of attention to compliance and data security regulations. These regulations, requirements, and guidelines are enforced by dozens of federal and state regulatory bodies exercising overlapping jurisdiction. Many data security regulatory requirements have been issued in accordance with the GLBA, a law specifically tailored to consider the needs of financial institutions and their customers. GLBA's implementing regulations set uniform requirements with respect to the development and maintenance of comprehensive data security programs.

30) To what extent are existing legal authorities and extralegal measures, including self-regulation, sufficient? To what extent, if at all, are self-regulatory principles effective?

- In addition, to GLBA and state law requirements, the mortgage industry follows voluntary standards in addition to this regulatory regime. Our members already use internal data privacy tools such as SOC 2 – auditing criteria for managing customer data by the American Institute of CPAs – PCI – a compliance guide to secure credit and debit card transactions – and other third-party risk management tools to set their own security standards. The FTC should consider both the regulatory requirements as well as the extensive voluntary efforts to secure private consumer data in this rulemaking.

35) Should the Commission take into account other laws at the state and federal level that already include data security requirements. If so, how?

- The GLBA regime has been carefully structured to ensure compliance with existing laws and regulations, adherence to judicial process, and protection from fraud, illicit financing, and money laundering. Further, 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 for marketing purposes without first providing consumers with an opportunity to opt out of such sharing. The GLBA sets a balance between providing a clear consumer notice framework for financial institutions and data transfers that are necessary to effect, administer, or enforce a consumer requested transaction. MBA recommends implementing a GLBA exemption in any broad rulemaking by the FTC. A GLBA exemption is essential to providing clear data privacy standards while avoiding a duplicative and burdensome regulatory environment.

- There is an extensive state regulatory framework that touches on data protection and regulation.[7] The FTC rule should be aware of this framework.

43) To what extent, if at all, should new trade regulation rules impose limitations on companies' collection, use, and retention of consumer data?

- Lending decisions are made using a wide variety of data and underwriting decisions. Under TILA and CFPB's QM rules, many underwriting factors must be considered, and this requires a large amount of data collection. Underwriting requires a significant amount of data, and different data points may be used differently depending on the transaction of financial profile of the individual consumer. For example, to verify income, a standard bundle of information is often collected but may not be all used in every transaction. However, it is impossible to know ahead of time which pieces of data will be relied on in the final decision. Any rulemaking must acknowledge that both as practice and as a legal requirement the mortgage industry must "over collect" consumer data before lending decisions are made.
- Current law requires that mortgage lenders retain customer data for several years, which would be incompatible with data minimization requirements. The CFPB's Regulation Z under the Truth in Lending Act (TILA) requires mortgage loan creditors to retain evidence of compliance for three years. Additionally, Regulation Z provides a safe harbor and presumption of compliance for Qualified Mortgages (QM) and allows for improper loan originator compensation claims to be brought as a defense to foreclosure, which could occur at any time over the course of a typical 30-year mortgage. A borrower challenging whether they had the Ability To Repay (ATR) is an additional defense at foreclosure, which requires entities to maintain sensitive information for the life of the loan.

45) To what extent should the Commission permit use of consumer data that is compatible with, but distinct from, the purpose for which consumers explicitly give their data?

- The ability to share data with third parties is essential to finance mortgage lending. Selling servicing rights and selling mortgage loans that will be securitized in the secondary market are essential components of how lenders acquire capital to lend to more borrowers. The gains on sale or the value of the servicing rights directly impact the price of the loan, providing a hidden "value" to the consumer in the form of lower transaction costs or rates. Eliminating or burdening this process will create problems with mortgage funding and interrupt lending pipelines that are essential to the market. Interrupting the securitization of mortgages will lead to less affordable opportunities for borrowers.

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[7] Cal. Civ. Code § 1798.85, Colo. Rev. Stat. Ann. § 6-1-713.5, Fla. Stat. Ann. § 501.171, Haw. Rev. Stat. § 487R-2, Md. Code Ann., Com. Law § 14-3503, Nev. Rev. Stat. Ann. § 603A.210, N.M. Stat. Ann. § 57-12C-4, N.Y. Comp. Codes R. & Regs. tit. 23, § 500.2, Ohio Rev. Code Ann. § 1354.02, Or. Rev. Stat. Ann. § 646A.622, R.I. Gen. Laws § 11-49.3-2, Tex. Bus. & Com. Code Ann. § 521.052, Utah Code Ann. § 13-44-201, Va. Code Ann. § 59.1-578

94) How should the FTC's authority to implement remedies under the Act determine the form or substance of any potential new trade regulation rules on commercial surveillance?

- The MBA opposes the use of algorithmic disgorgement as a remedy for violations of this rulemaking. The FTC has asked whether algorithmic disgorgement – a penalty where firms lose the profits from products created using faulty automated systems – is an appropriate remedy. Under this penalty, firms would lose either all profits or profits on a part of the product produced by algorithms. However, to quantify damages, firms would need to reveal the full algorithm and its workings in order to establish how much of the profit of the product came from using the algorithm. This would essentially require members to give up trade secrets in order to limit damages. This penalty would chill innovation in the use of algorithms as firms would be concerned with releasing their process in a subsequent lawsuit. Rather than disgorgement, the FTC should instead tie penalties to the harm to the consumer. These remedial penalties will make plaintiffs whole. Penalties for violations of future regulations should be for specific harm with concrete damages that do not force firms to divulge trade secrets.