



MORTGAGE BANKERS ASSOCIATION

July 20, 2022

The Honorable Frank Pallone, Jr.
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20510

The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Pallone and Ranking Member McMorris Rodgers:

On behalf of the Mortgage Bankers Association (MBA)¹, I am writing to express our views on the Amendment in the Nature of a Substitute (ANS) to H.R. 8152, the *American Data Privacy and Protection Act (ADPPA)*, scheduled to be considered for markup by the Committee on Energy and Commerce on July 20, 2022.

MBA members are strong proponents of protecting consumer data and privacy. Protecting consumer financial data is a cornerstone of the trust customers place in those with whom they do business. Our members have been subject to extensive federal privacy and data protection laws and regulations for several decades. While we support privacy and security protections for consumer data generally, we have serious concerns about several provisions included in the ADPPA. We urge the Committee to carefully consider these concerns before proceeding with this legislation.

Gramm-Leach Bliley Act and Data Privacy

The primary privacy and data security consumer protection law for consumer financial data is Title V of the Gramm-Leach Bliley Act (GLBA). With the GLBA, Congress appropriately 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 finance, money laundering and terrorist financing. 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

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 2,200 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.

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.

While MBA supports legislation to put in place a national privacy standard, as currently framed, the ADPPA does not include unambiguous language for financial institutions to understand their exemption from the bill. If the ADPPA were enacted as is, institutions under the Federal Trade Commission's (FTC) jurisdiction – but not covered by the GLBA – must comply with the ADPPA. However, those under FTC jurisdiction that are regulated by the GLBA are exempt from certain provisions of the ADPPA – but only with respect to the data subject to GLBA requirements, effectively regulating institutions under two laws. And still those institutions not under FTC's jurisdiction must comply with the GLBA. This is not even considering the duplicative and conflicting patchwork of state laws that are exempt from federal preemption. In short, such a framework will lead to duplicative and conflicting requirements for financial institutions.

The current framework will be disruptive to the financial system, consumers, and the economy. The ADPPA should be amended to broaden the provision to exempt all GLBA regulated institutions to avoid such disruption.

Enforcement

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 an expectation of privacy and protection that must be respected, but it should also be well understood that the company is also a victim of theft of their information and unlawful intrusion into their system. For this reason, a private right of action is inappropriate.

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 thus, *ex post facto* the security and 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 do not support provisions in the ADPPA that would authorize private rights of action and believe the GLBA's existing regulatory enforcement structure for financial institutions should be preserved. These agencies now involved 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.

Finally, introducing a poorly limited private right of action for inchoate privacy violations with uncertain concrete harms – but statutory damages and awards of fees – will lead to an explosion of litigation that provides little benefit to consumer protection. Litigation trends after enactment of the Telephone Consumer Protection Act (TCPA) are instructive. Open-ended and unbounded consent provisions and a legislative framework that could not anticipate new technology, along with uncertain statutory coverage requirements, led to a massive explosion in lawsuits, frequently from class action lawsuits against American companies spurred on by plaintiffs' attorneys seeking

multi-million-dollar settlements. Nor were bad actors — often overseas spoof callers — deterred, though the costs of litigation fell heavily on American small businesses and financial institutions.

Preemption of State Law

The growing patchwork of state privacy and data breach laws must be replaced by a federal standard. In our view, it is critical that any new federal privacy law preempt existing state laws to avoid duplicative and conflicting requirements that will disrupt financial transactions and the financial system. 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 ADPPA would preempt many state laws, it also provides numerous exceptions that undermine the preemption, including several highly litigated state privacy laws. That is, the ADPPA would in fact codify a patchwork of federal and state privacy laws. The ADPPA 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.

Conclusion

MBA 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 duplicate and conflict with those laws. Congress must also provide robust, 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 (including banks). Finally, the national privacy standard must eliminate the current inconsistent patchwork of state laws on privacy and data security. A national standard containing these elements would provide consistent protections for consumers regardless of where they may live.

As explained, the ADPPA contains several provisions that raise significant concerns for our members. MBA strongly urges the Committee not to move forward without addressing these concerns.

Sincerely,



Bill Killmer
Senior Vice President
Legislative and Political Affairs

cc: All Members, House Committee on Energy and Commerce