



MORTGAGE BANKERS ASSOCIATION

February 28, 2023

The Honorable Patrick McHenry
Chairman
Committee on Financial Services
U.S. House of Representatives
2134 Rayburn House Office Building
Washington, DC 20515

The Honorable Maxine Waters
Ranking Member
Committee on Financial Services
U.S. House of Representatives
2221 Rayburn House Office Building
Washington, DC 20515

Dear Chairman McHenry and Ranking Member Waters:

On behalf of the Mortgage Bankers Association¹(MBA), I am writing to express our views regarding the House Financial Services Committee’s markup of the Amendment in the Nature of a Substitute (ANS) to H.R. 1165, the *Data Privacy Act of 2023*, scheduled for consideration on February 28, 2023.

MBA commends the Committee for addressing the important topic of data privacy. As an industry, we recognize the collection of consumer information has grown rapidly in recent years. The use of “big data” has been a function of increased technological capacity to collect and analyze information – combined with the desire to provide consumers with the most effective customer experience. As consumers continue to provide more and more of their personal information to businesses, the protection of personal privacy and maintaining data security have become increasingly necessary points of emphasis. Rapid innovation requires education and oversight to ensure consumers are aware of how their information is used.

The need to evaluate how digital information is collected and protected is coming under greater scrutiny across all industries. Maintaining up-to-date data security practices remains a top priority for the mortgage industry. 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. Protecting personal information within this existing regulatory framework helps

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.

to allow MBA members to maintain the trust of their customers. Nonetheless, MBA supports further efforts to ensure that no consumer unwittingly exposes themselves to harm by unintentionally providing their personal data to unscrupulous actors. We also want to be careful not to prevent the responsible use of data to improve the efficiency of mortgage origination or the operation of the securitization market.

Under the current GLBA, states may add additional regulatory requirements regarding data privacy. Over the last several months, 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 adequate account of the operational difficulties associated with rapidly implementing detailed changes or confronting emerging threats.

Legislators and regulators must understand that a breach does not necessarily indicate a company did not have robust policies and systems in place to protect consumer information. This is especially true in light of the types of attacks the United States has experienced over the last several years. Foreign governments, elements of organized crime, and even terrorist organizations have been engaged in cyber warfare with the United States, its citizens, and its businesses. Therefore, it is imperative that policymakers recognize that the data security challenge is first and foremost a national security concern that requires the attention of the entire federal government and its regulatory, law enforcement, and security-related agencies.

Strengthen Federal Preemption

MBA is concerned that the scope for establishing a federal standard for preemption within the ANS is too narrow in its current form. MBA supports efforts to create a single data security and privacy standard that sets clear expectations for the industry. However, while the bill preempts state laws on the collection, disclosure, access, and deletion of personal information, it does not preempt state laws on the use or correction of personal information. As noted earlier, individual states have started to regulate the use and correction of data. For instance, under the *California Consumer Privacy Rights Act (CCPA)*, a financial institution's use of data must be necessary and proportionate to the consumer expectation of how data will be used. Without these preemptions, states may continue to create the patchwork of data privacy regulation this bill is intended to stop. MBA recommends the legislation make clear and explicit that state laws on the use and collection of data should be fully preempted.

Private Right of Action

The GLBA construct has worked well for business entities and consumers because it provides a scalable and flexible framework for covered entities to utilize in their attempts to comply. A clear reading of the ANS reveals there is no new enforcement mechanism

within this most current version of the legislation. MBA opposes any private right of action that may be offered as an amendment to the ANS during the markup or going forward. As we see with the application of the Telephone Consumer Protection Act (TCPA), a private right of action has led to frivolous lawsuits and associated high costs for covered entities, with no clear evidence of solving the underlying root problem of noncompliance.

Duty to Delete Personal Information

MBA supports the recent inclusion of exemptions within the ANS to the requirement for financial institutions to delete data. The deletion exemptions should mirror exemptions on the collection, disclosure, and access to data in the underlying legislation. Numerous transactions occur in the secondary mortgage market that are necessary to ensure liquidity and the proper functioning of the capital markets tied to housing. For example, these secondary market transactions provide a broader array of options and more affordable products to consumers on the retail side of the transaction, while simultaneously requiring that lenders share certain loan level information with entities not involved at the retail point of the transaction.

While MBA supports the exemptions to delete data within the ANS, the bill should also include exceptions for retention of data used in consumer disputes or to evidence compliance with other federal regulations. In the current version, such an exemption exists for Fair Credit Reporting Act (FCRA) disputes, but should be extended to include all disputes and relevant regulations. For instance, under the Ability to Repay (ATR) and Qualified Mortgage (QM) rules, a creditor must make a reasonable, good faith determination of a consumer's ability to repay their loan and maintain evidence of compliance. Additionally, MBA recommends there should be an exemption from deletion for contractually required information retention. Separately, instead of requiring deletion of personal information after one year, MBA further recommends that the bill should only require deletion after a set amount of years or according to a reasonably disclosed corporate policy.

Conclusion

Thank you in advance for your consideration of the views expressed within this letter. Notwithstanding the reservations expressed, MBA stands ready to work with this Committee and its members, and all other committees with jurisdiction over this important topic, to help create a robust data privacy regime that works for both consumers and lenders.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Killmer", with a long horizontal flourish extending to the right.

Bill Killmer
Senior Vice President
Legislative and Political Affairs

cc: All Members, Committee on Financial Services, U.S. House of Representatives