America's Credit Unions

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May 23, 2024

The Honorable Gus Bilirakis
Chairman
Committee on Energy & Commerce
Subcommittee on Innovation, Data, and Commerce
U.S. House of Representatives
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member
Committee on Energy & Commerce
Subcommittee on Innovation, Data, and Commerce
U.S. House of Representatives
Washington, DC 20515

Re: Today's Markup of the American Privacy Rights Act

Dear Chairman Bilirakis and Ranking Member Schakowsky:

On behalf of America's Credit Unions, I am writing to share our thoughts regarding the draft American Privacy Rights Act (APRA) ahead of today's Subcommittee markup. America's Credit Unions is the voice of consumers' best option for financial services: credit unions. We advocate for policies that allow the industry to effectively meet the needs of their more than 142 million members nationwide.

We applaud the efforts of Chair McMorris Rodgers and Chairwoman Cantwell in crafting comprehensive data privacy legislation and attempting to advance this issue. Credit unions strongly support the idea of a national data security and data privacy regime that includes robust security standards that apply to all who collect or hold personal data, recognizes existing Gramm-Leach-Bliley Act (GLBA) standards, and is preemptive of state laws. We firmly believe that there can be no data privacy until there is strong data security.

Stringent information security and privacy practices have long been a part of the financial services industries' business practices and are necessary as financial services are entrusted with consumers' personal information. This responsibility is reflected in the strong information security and privacy laws that govern data practices for the financial services industry as set forth in the GLBA. The GLBA's protection requirements are strengthened by federal and state regulators' examinations for compliance with the GLBA's requirements and robust enforcement for violations.

There are three key tenets that credit unions believe must be addressed in any new national data privacy law: a recognition of GLBA standards in place for financial institutions and a strong exemption from new burdensome requirements; a strong federal preemption from the myriad of various state laws for those in compliance with national privacy and GLBA standards; and protection from frivolous lawsuits created by a private right of action. While the draft APRA addresses many of these areas, we believe it falls short of addressing credit unions' concerns and we cannot support it as currently drafted.

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GLBA Exemption

We are concerned that the bill does not have an entity-level exemption for those in compliance with the GLBA, but instead creates a complex data-level GLBA exemption. While this would provide some exemption for credit unions from a number of the bill's provisions, it may not address certain new requirements that lack any comparable analogue in either the GLBA or the Fair Credit Reporting Act (FCRA), such as data portability provisions in Section 5 of the bill. The data-level exemption in the bill, unlike an entity-level exemption, will only apply to the extent the GLBA addresses uses of data that match equivalent activities regulated by the bill.

Some covered entities may achieve GLBA compliance under different rules promulgated by different regulators (i.e., the Federal Trade Commission versus banking regulators), and some credit unions may receive different treatment under the bill depending on whether they are federally- or state-chartered. Application of the APRA's enforcement language amplifies differences across charter types and could result in new burdens falling on state-chartered credit unions. We would urge changes to strengthen the GLBA exemption to an entity level to include all credit unions before moving forward.

Federal Preemption

The APRA would generally preempt state privacy and data security laws, but there is a long list of carveouts for existing state laws built into the legislation. America's Credit Unions has concerns with some of these exceptions. Some of the most problematic of these exceptions to preemption are state laws addressing unfair or unconscionable practices—a catchall that could be used to erode the entire purpose of a uniform federal standard through incremental expansions of state authority or amorphous legal interpretations.

Additionally, the exception for breach notification opens the door for inconsistent state cyber-incident reporting standards, which could be longer or shorter than what is currently required by the National Credit Union Administration (72 hours) and relevant federal law, such as the Cyber Incident Reporting for Critical Infrastructure Act. For the section of law regarding banking and financial records, many FCRA rights could rest within this domain. State laws that are not "inconsistent" with the FCRA—including state laws that are more protective of consumers than the FCRA—are not entirely preempted by the FCRA itself—and might not be preempted by this bill.

Furthermore, the carveout for state laws addressing banking records could also lead to inconsistencies across states in terms of how liability is allocated between data providers and third parties that avail themselves of the Consumer Financial Protection Bureau's proposed rules governing consumer data portability under Section 1033 of the Dodd-Frank Act.

We would urge removal and greater clarity on these exemptions before moving forward with this legislation.

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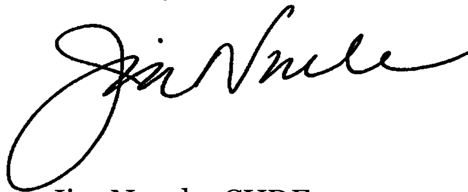
Private Right of Action

In general, the APRA establishes a broad private right of action covering most parts of the bill, including Section 9 which relates to data privacy to the extent a claim alleges a data breach arising from a violation of Section 9(a) (general data security practices), or a regulation promulgated thereunder. Individuals could be awarded actual damages, injunctive relief, declaratory relief, and reasonable attorney fees and litigation costs. While a covered entity would have the opportunity to cure actions or violations in response to a claim for injunctive relief with 30 days' notice, the notice requirement would be waved in cases involving substantial harm (which could be overly broad). We are concerned that this could still lead to frivolous legal action given the exceptions.

Finally, we would urge a stronger data security section be added to strengthen data security requirements for those handling personal financial data that are not already subject to GLBA provisions. As noted above, we firmly believe that there can be no data privacy until there is strong data security for individuals.

In conclusion, while we appreciate the efforts in the draft APRA to create a national privacy standard, we believe the bill still needs to be improved before advancing in the legislative process. On behalf of America's Credit Unions and the more than 142 million credit union members, thank you for the opportunity to share our views. We look forward to continuing to work with you to create an environment where credit union members can thrive.

Sincerely,



Jim Nussle, CUDE
President & CEO

cc: Members of the Subcommittee on Innovation, Data, and Commerce

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