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March 23, 2015

The Honorable Michael C. Burgess M.D.
Chairman
U.S. House of Representatives Commerce,
Manufacturing, and Trade Subcommittee
2336 Rayburn House Office Building
Washington, DC 20515

The Honorable Jan Schakowsky
Ranking Member
U.S. House of Representatives Commerce,
Manufacturing, and Trade Subcommittee
2367 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Burgess and Ranking Member Schakowsky:

On behalf of the more than 1 million members of the National Association of REALTORS® (NAR) and more than 1400 local REALTOR® associations, I write to address the discussion draft bill entitled the Data Security and Breach Notification Act of 2015 (the "Bill"), dated March 12, 2015, that is the subject of the Energy and Commerce Committee Subcommittee on Commerce, Manufacturing and Trade's hearing. The bill seeks to establish a single federal standard concerning data security and data breach notification.

NAR recognizes that for businesses operating in multiple states, compliance with a patchwork of state requirements creates confusion and uneven protection. For this reason NAR supports a single federal standard for data breach notification.

While REALTORS® support a single standard and have long been supportive of efforts to protect consumers' sensitive personal information, NAR also strongly believes that any new federal data security requirements must be carefully and narrowly tailored to minimize the regulatory burden such a law could place on small businesses that are just now beginning to experience a fragile economic recovery.

Real estate firms vary widely in size, but the overwhelming majority is composed of very small entities. NAR's most recent surveys indicate that more than half of all realty firms have less than twenty-five agents, and the typical sales agent is affiliated with an independent realty firm with only one office. This unique industry structure can make compliance with regulatory burdens crafted without consideration of the size and sophistication of the regulated entities particularly onerous.

Further compounding this concern is the independent contractor status of the overwhelming majority of real estate sales professionals. Any new data security requirements will necessarily impact the individual real estate agent who is a legal business entity separate from the real estate company with which they are affiliated thus making crafting realistic compliance requirements an especially important consideration for our industry.

For these reasons, I share the following concerns with the discussion draft Bill.

Reasonable Security Measures Standard is Vague

First, the Bill fails to articulate the minimum data security standards that would constitute "reasonable security measures and practices" as set forth in Section 2. As a result, we are concerned that the Bill would establish data security standards through litigation and multiple judicial interpretations. Since most of our members are small businesses without legal or compliance staffs, this vague standard is of significant concern. It is difficult to imagine how a small real estate firm or agent could determine what comprises a "reasonable security measure and practice" under the proposed law.



Expanded Enforcement Authority

Second, the Bill's information security requirement in Section 2 could be interpreted to expand the Federal Trade Commission's (FTC) enforcement authority rather than limit it by creating an additional four-factor test for reasonableness that considers 1) size 2) complexity 3) nature and 4) scope of a business's activities in addition to the general "reasonableness" standard that is the generally accepted standard measured under Section 5 of the FTC Act today. As a result, a business could be found to be unreasonable as to any one of these four factors specified in Section 2 rather than a general finding of unreasonableness. NAR believes that a general standard similar to the FTC Act's Section 5 prohibition on "unfair or deceptive" practices is a more appropriate standard to apply in this case.

Notice Obligations Should Apply to All Breached Entities

Finally, the Association is also concerned that the Bill exempts third party service providers from the requirement to notify affected consumers when the service provider experiences a data breach. In fact, under the Bill, if a service provider or third party suffers a data breach, all that firm is required to do is notify the business—which in our industry and others could be a one or two person business - whose data may have been hosted by the service provider. The result would be that the small real estate business is now responsible for the costs of notice and potential fines and penalties, while the business responsible for the breach nearly entirely escapes responsibility. This result is fundamentally unfair and does not create the proper incentives for service providers to create a sound data security environment. Only data security standards that apply to all businesses that handle sensitive personal information will allow Congress to achieve the data security ecosystem it seeks to create.

Given the importance of this issue to consumers and businesses of all sizes, it is extremely important the Congress fully assess the ramifications of any new requirements. We thank you for your work on these important security and consumer issues, and look forward to working with you and your staff to advance legislation that will both protect consumers and create an environment where businesses and innovation can flourish.

Sincerely,

A handwritten signature in dark ink, appearing to read "C. Polychron", with a stylized, flowing script.

Chris Polychron
2015 President, National Association of REALTORS®

cc: U.S. House of Representatives Commerce, Manufacturing, and Trade Subcommittee