



February 17, 2011

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

**Re: Protecting Consumer Privacy in an Era of Rapid Change  
A Proposed Framework for Businesses and Policymakers**

Dear Mr. Clark:

The Mortgage Bankers Association<sup>1</sup> (MBA) appreciates the opportunity to comment on the Federal Trade Commission's (FTC) preliminary FTC Staff Report, "Protecting Consumer Privacy in an Era of Rapid Change—a Proposed Framework for Businesses and Policymakers." We appreciate the FTC's attention to this issue and the opportunity to express our views as you further develop and recommend policy concerning any privacy framework.

MBA supports commercial data privacy protections that safeguard consumer information and the integrity of transactions performed in the digital economy. In fashioning such protections, MBA recommends adopting a flexible approach that allows companies to continue to innovate in order to meet the needs of their customers. Protections should be guided by the following principles.

**I. Consumer privacy is already well regulated for financial institutions.**

The financial community is already subject to the Fair Credit Reporting Act<sup>2</sup> (FCRA) and the Gramm-Leach-Bliley Act<sup>3</sup> (GLB), which requires, among other things, that institutions notify consumers of their information-sharing practices and inform consumers of their right to opt out of certain sharing practices. These laws authorized the FTC, in conjunction with other federal agencies, to issue a new model privacy notice to advise consumers of the type of information a financial institution collects and uses. The privacy laws provide a safe harbor for those using the form to meet their disclosure obligations.

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<sup>1</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 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 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 over 2,100 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

<sup>2</sup> Fair Credit Reporting Act, Pub. L. 91-508, 84 Stat. 114 (1970).

<sup>3</sup> Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (1999).

## **II. Non-regulatory approaches to privacy protection should be encouraged in lieu of more intrusive regulation.**

In examining alternatives, non-regulatory approaches should be favored over more intrusive regulation.

The FTC Staff Report suggests establishment of a “Do Not Track<sup>4</sup>” (DNT) mechanism for online behavioral advertising which would likely involve “placing a persistent cookie on a consumer’s browser conveying that setting to sites that the browser visits, to signal whether or not the consumer wants to be tracked or receive targeted advertisements.”<sup>5</sup> The report also suggests that such a mechanism could be accomplished by legislation or potentially through robust, enforceable self-regulation.

We agree that many existing browsers permit users to change settings to prevent the download of or allow for deletion of cookies on their machines. This solution is easily accomplished by the consumer, on their own computer, without the need to visit websites to record such information. However, considering that the problem could largely be addressed by consumers’ use of browser settings, we do not believe legislation or even enforceable self-regulation is necessary.

Also, in addressing concerns, regulators should be mindful of the introduction of new technologies. For example, we understand a new Hypertext Transfer Protocol (HTTP) header has been introduced that would more efficiently permit the consumer to change the setting to permit or deny tracking. The HTTP header, containing the consumer’s tracking preference, would be transmitted with every web request from the consumer. This approach would require modification to browsers. However, many browsers already have add-ons that would allow the additional HTTP header to be used for DNT. This additional header would be read by the receiving institution and would immediately communicate a consumer’s preference regarding tracking. The HTTP header also will require that the institution adhere to the consumer’s preference.

In order to make a browser-based approach work, consumer education is essential. We suggest that the FTC include information about using browser settings on its Web site. The FTC site could enable consumers to learn more about browser capabilities in an accessible online environment.

## **III. Any introduction of new disclosures must be considered carefully since additional disclosures may paradoxically serve to lessen, not increase, consumer understanding.**

Consumers today are inundated with disclosures during the mortgage process to carry out an array of laws. Considering this, Congress and regulatory agencies should use the utmost caution in determining whether to introduce new disclosures. MBA believes privacy policy disclosure requirements assist consumers in navigating the many choices available to them. However, we also caution that the layering of multiple disclosure requirements could cause consumers to be inundated and confused by an excessive array of forms.

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<sup>4</sup> *Id.*, pg. 66.

<sup>5</sup> *Id.*

**IV. Any new rules should avoid unintended consequences to consumers and businesses.**

While some approaches may appear useful, they lead to unintended consequences that neither serves consumers or businesses. For example, while the report suggests new restrictions on data brokers; it fails to acknowledge the consequences of such restrictions and the impact on legitimate business practices. For example, mortgage lenders obtain data from third parties and data brokers to check tax filings, flood plain restrictions and to confirm that there are not liens against a property. Additionally, lenders rely on third-party data providers to keep them informed of the value of collateral, and to check borrower assertions made during the lending process. Undue restrictions on the availability of data could hamper the operations of lenders, lessen the availability of financing and increase costs to borrowers.

**V. A consistent, unified approach to regulation best serves consumers and businesses alike.**

MBA notes that various agencies have recently presented approaches to privacy regulation. For example, the Department of Commerce and the FTC both released privacy frameworks. We also note that the new Consumer Financial Protection Bureau (Bureau) has been granted broad powers and authorities with respect to consumer financial products and services to ensure “markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.”<sup>6</sup> It is unclear at this point to what extent the Bureau’s authority overlaps those of the FTC and Commerce Department.

It is crucial that government entities work together to establish a uniform privacy framework. Additionally, MBA believes that federal regulatory agencies should ensure there is adequate time for stakeholders to consider proposals and provide needed input. To this end, we urge the Department of Commerce to work in tandem with the FTC and the Bureau to avoid duplicative, overlapping or confusing guidance concerning privacy.

**VI. Conclusion**

MBA supports protection of consumer privacy. However, as any framework is developed, we believe that the principles outlined here should be carefully considered to assure the ability of lenders to continue to offer products and services to benefit consumers. We look forward to assisting the FTC as it further reviews a privacy framework.

For questions, or further information, please contact Sandra Troutman, Director of Public Policy, at [stroutman@mortgagebankers.org](mailto:stroutman@mortgagebankers.org), or at (202) 557-2858.

Sincerely,

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John A. Courson  
President and Chief Executive Officer  
Mortgage Bankers Association

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<sup>6</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1021(b)(5), 124 Stat. 1376, 1980 (2010).