INDEPENDENT COMMUNITY BANKERS of AMERICA®

Preston L. Kennedy, *Chairman*
Noah W. Wilcox, *Chairman-Elect*
Robert M. Fisher, *Vice Chairman*
Kathryn Underwood, *Treasurer*
Alice P. Frazier, *Secretary*
Timothy K. Zimmerman, *Immediate Past Chairman*
Rebeca Romero Rainey, *President and CEO*

August 2, 2019

April J. Tabor, Acting Secretary
Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th Street, SW
5th Floor, Suite 5610 (Annex B)
Washington, D.C. 20024

Re: Notice of Proposed Rulemaking: Request for Public Comment, "Standards for Safeguarding Customer Information" RIN 3084-AB35. Federal Register Vol. 84, No. 65. 13158-13177.

Dear Ms. Tabor:

The Independent Community Bankers of America ("ICBA")[1] appreciates the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") notice of proposed rulemaking and request for public comments on Standards for Safeguarding Customer Information ("Safeguards Rule" or "Rule").

Background

The Federal Trade Commission issued a notice of proposed rulemaking on its proposal to amend the Standards for Safeguarding Customer Information on April 4, 2019. The proposal contains five main modifications to the existing Rule. First, it expands the definition of "financial institutions" to include entities engaged in activities that the Federal Reserve Board determines to be incidental to financial activities. Second, it adds provisions designed to provide covered financial institutions under its jurisdiction ("FTC entities") with more guidance on how to

[1] *The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans and are the only physical banking presence in one in five U.S. counties. Holding more than $4.9 trillion in assets, $3.9 trillion in deposits, and $3.4 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.*

develop and implement specific aspects of an overall information security program. Third, it adds provisions designed to improve the accountability of FTC entities' information security programs. Fourth, it exempts small businesses from certain requirements. Finally, the Commission proposes to include the definition of "financial institution" and related examples in the Rule itself rather than cross-reference them from a related FTC rule, the Privacy of Consumer Financial Information Rule.

The standards established by the Federal Trade Commission under the Safeguards Rule apply to financial institutions under the jurisdiction of the Federal Trade Commission,[2] which includes financial institutions or other persons not subject to the jurisdiction of the prudential agencies.[3] This specifically excludes banks under the supervision of the Federal Deposit Insurance Corporation ("FDIC"), the Office of the Comptroller of the Currency ("OCC)," and the Federal Reserve Board of Governors ("Federal Reserve"). In other words, this proposed rulemaking does not apply to community banks. Like all financial institutions not under FTC jurisdiction, community banks are regulated by federal and state banking regulators and are subject to the Safeguards Rule as promulgated by the agencies. However, the proposed rule does apply to other entities within the financial system that handle sensitive customer financial information, such as personally identifiable information.

ICBA Comments

ICBA consistently advocates that all participants in the payments and financial systems, including merchants, aggregators and other entities with access to customer financial information – as well as those under FTC jurisdiction[4] - should be subject to Gramm-Leach-Bliley Act ("GLBA")-like data security standards. Similarly, any entity that processes or holds personally sensitive information about consumers should be required to safeguard that information, just as banks are required. Under GLBA, retailers and other parties that process or store sensitive consumer information are not subject to the same federal data security standards and oversight as financial institutions. Securing personally sensitive data at financial institutions is of limited value if it remains exposed at the point-of-sale and other processing and collecting points. To effectively secure customer data, all entities that store or process sensitive personal information, as well as all entities with access to customer financial information, should be subject to and maintain well-recognized standards such as those in the GLBA and the Safeguards Rule.

This proposed rule helps FTC entities raise the bar on securing customer information. Regardless of the type of supervision to which a financial institution is subject, safeguarding customer information is central to maintaining public trust and retaining customers.

---

[2] 16 CFR Section 314.1.

[3] See Paragraphs (1) through (6) of 15 U.S. Code § 6805.

[4] For example, the 2017 Equifax data breach demonstrated how important it is that the credit rating agencies (CRAs) and other collectors/aggregators of customer financial data be subject to examination and supervision by prudential regulators. The release of this information has the potential to adversely affect American consumers for the remainder of their lives and presents unique challenges for all financial institutions in authenticating new and existing customers. Subjecting CRAs and similar organizations to this level of oversight may prevent future breaches.

ICBA supports and urges the following:

- Expansion of the definition of financial institutions subject to FTC jurisdiction to include entities called "finders."
- Inclusion of additional FTC entities to promote a more secure environment.
- General consistency of the proposed rule with the Federal Financial Institutions Examination Council Interagency Guidelines Establishing Standards for Safeguarding Customer Information.
- FTC review of the elements in the proposed rule to ensure they are appropriately tailored for an FTC entity's risk, size, scope and complexity.
- Parity between the proposed Rule and the existing Guidelines with regard to exempt entities.

Scope of the Proposed Rule

ICBA supports the expansion of the definition of financial institutions subject to FTC jurisdiction to include entities called "finders," whose activities often involve a collection of financially sensitive personal information, under the Rule.[5] Currently, the Rule applies to all financial institution over which the FTC has jurisdiction.[6] However, the Privacy Rule[7] provides for a more extensive definition of entities subject to FTC jurisdiction:

> Section 313.1(b) Scope. … This part applies to those "financial institutions" and "other persons" over which the Federal Trade Commission has enforcement authority[8]...The "financial institutions" subject to the Commission's enforcement authority are those that are not otherwise subject to the enforcement authority of another regulator under the Gramm-Leach-Bliley Act.[9] More specifically, those entities include, but are not limited to, mortgage lenders, "payday" lenders, finance companies, mortgage brokers, account servicers, check cashers, wire transferors, travel agencies operated in connection with financial services, collection agencies, credit counselors and other financial advisors, tax preparation firms, non-federally insured credit unions, and investment advisors that are not required to register with the Securities and Exchange Commission…

[5] Specifically, the expansion of the definition of financial institutions subject to FTC jurisdiction would include entities engaged in activities that the Federal Reserve Board determines to be incidental to financial activities. Proposed Amendment to Section 314.1 of the Safeguards Rule would apply language from 313.1(b) of the Privacy Rule, relating to the scope of the definition of financial institution to section 314.1(b) of the Safeguards Rule.

[6] This part applies to the handling of customer information by all financial institutions over which the Federal Trade Commission ("FTC" or "Commission") has jurisdiction.

[7] 16 CFR 313, Privacy of Consumer Financial Information. https://www.govinfo.gov/content/pkg/FR-2000-05-24/pdf/00-12755.pdf#page=33

[8] …pursuant to Section 505(a)(7) of the Gramm-Leach-Bliley Act.

[9] Section 505 of the Gramm-Leach-Bliley Act.

> Section 314.2 (f) goes further and defines financial institutions as businesses that engage in activities that are financial in nature or incidental to such financial activities as described in the Bank Holding Company Act[10] These activities include, but are not limited to: a retailer that extends credit by issuing its own credit card directly to consumers, an automobile dealership that leases automobiles on a nonoperating basis for longer than 90 days, a personal property or real estate appraiser, a career counselor specializing in services related to employment with a financial institution, accounting or audit departments of any company, a business that processes and/or sells checks for consumers, a business that regularly wires money to and from consumers, a check cashing business, an accountant or other tax preparation service, a business that operates a travel agency in connection with financial service, an entity that provides real estate settlements services, a mortgage broker, an investment advisory company and a credit counseling service, a company acting as a finder in bringing together one or more buyers and sellers of any product.

These additional classifications move more FTC entities toward a more secure environment in which they operate. While the proposed rule does not raise the bar for all entities that process and handle sensitive customer information, it does raise the bar for more entities, a clear benefit for consumers as there will be more entities required to protect customer information.

Elements of the Proposed Rule

The elements of the proposed rule are generally consistent with the Federal Financial Institutions Examination Council ("FFIEC") Interagency Guidelines Establishing Standards for Safeguarding Customer Information ("FFIEC Guidelines"). For example, the proposed rule would require the development of a comprehensive information security program.[11] A similar requirement exists in the FFIEC Guidelines.[12]

ICBA urges the FTC to review the elements in the proposed rule to ensure they are appropriately tailored for an FTC entity's risk, size, scope and complexity. A key element of GLBA is the scalability of these elements, allowing entities of all sizes the ability to appropriately safeguard customer information.

Finally, the proposed rule provides an exemption for covered financial institutions that maintain customer information concerning fewer than 5,000 consumers. No similar exemption exists for banks that maintain the data of fewer than 5,000 customers under the Interagency Guidelines. ICBA seeks parity between the proposed Rule and the existing Guidelines.

---

[10] Section 4(k) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843 (k).
[11] See Section 314.3 of the proposed rule.
[12] See https://ithandbook.ffiec.gov/it-booklets/management/i-governance/ib-it-responsibilities-and-functions/ib2-information-security.aspx

ICBA appreciates the opportunity to comment on this proposed rule. Should you have additional questions, please contact me at Jeremy.Dalpiaz@icba.org or by phone at 202-651- 8111.

Respectfully Submitted,

/s/
Jeremy J. Dalpiaz
Vice President Cyber and Data Security Policy