



NATIONAL ASSOCIATION OF REALTORS®

*The Voice For Real Estate®*

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June 4, 2010

The Honorable Rick Boucher, Chairman  
House Energy and Commerce Subcommittee on  
Communications, Technology and the Internet  
2187 Rayburn House Office Building  
Washington DC, 20515

The Honorable Cliff Stearns, Ranking Member  
House Energy and Commerce Subcommittee on  
Communications, Technology and the Internet  
2370 Rayburn House Office Building  
Washington, DC 20515

Dear Representatives Boucher and Stearns:

On behalf of the 1.1 million members of the National Association of REALTORS® I am writing to communicate our concerns with the privacy discussion draft legislation (“Draft”). We are concerned that the Draft will impose a difficult and costly compliance burden on our industry especially impacting independent contractors and small businesses who make up the majority of our membership. More specifically, we believe that this burden, particularly in today’s difficult economic climate, could easily put some Realtors® out of business just at a time when our nation's economy and the real estate industry are beginning to show signs of improvement represent. We fear that the fragile economic and housing recovery we see today could be harmed by increases in unemployment and could further damage the future home ownership aspirations of many Americans.

While we believe the Draft provides an important platform for public discussion of privacy principles, we have significant concerns that it will have a number of serious unintended consequences both for Realtors® and for home buying consumers.

The stated intention of the discussion draft is to encourage greater levels of electronic commerce by providing to Internet users the assurance that their experience online will be more secure. We believe the Draft would have precisely the opposite impact and would actually have a chilling effect on e-commerce innovation resulting in increased costs for the self-employed and businesses which will ultimately be borne by consumers. We believe that this is especially true in the case of the real estate sales industry.

It is difficult to characterize the typical real estate firm since firms vary widely in size and specialize in a variety of business activities. Some firms have just a few salespeople and engage primarily in residential sales while others have hundreds of salespeople and generate revenue from a variety of activities such as commercial brokerage and property management. Our most recent surveys indicate that 26% of agents are affiliated with realty firms with 5 or fewer agents; half of all firms have less than 25 agents.

Further compounding the industry's complex structure—and our concerns with the Draft—is the independent contractor status of the overwhelming majority of real estate sales professionals. The individual real estate agents who assist consumers buy or sell a home or find a rental unit are not employees of the realty offices with which they are affiliated. They are independent contractors, a separate legal business entity from the real estate company with which they are affiliated.

Realtors® have long been strongly supportive of efforts to protect consumers' sensitive personal information. The Realtor® Code of Ethics and Standards of Practice explicitly acknowledge a Realtor's® obligation to preserve the confidentiality of personal information provided by clients in the course of any agency or non-agency relationship - both during and after the termination of these business relationships. Protection of client personal information is an important part of the trusted relationship our members enjoy with their clients.

However, in its current form, the Draft raises a number of serious concerns, the most urgent of which we outline below. NAR feels strongly that federal consumer privacy efforts would be most beneficial to consumers if they are focused on increased enforcement of existing privacy laws and privacy policies, encouraging implementation of industry best practices and enhanced consumer privacy education.

### **Broad Application**

Due to the very broad definition of “covered information” and “sensitive information” and the limited carve-outs from the definition of “covered entity,” the Draft would apply to virtually all Realtors® whether doing business online or in traditional brick and mortar operations, whether operating as an independent contractor, sole-proprietor or large, multi-service business entity. Realtors® in the course of a typical real estate transaction will be likely to collect financial information deemed by the Draft to be “sensitive information” and will be a “covered entity” regardless of the number of records collected by the entity. As a result, even the many small business and sole proprietor Realtors® will be fully impacted by the requirements mandated by the Draft.

Moreover, business models in the real estate industry are increasingly complex and constantly changing. Non-brokerage activities are an important part of larger firms' business models. Services such as mortgage lending, escrow services, settlement services and even home improvement services are business activities that some real estate firms offer to their clients. Given this, it is possible that a single given firm could be considered a “covered entity,” “service provider” and “unaffiliated third party.” As currently drafted, it is unclear whether an entity could be considered a “covered entity” and at the same time, be considered a “service provider.” This confusion will create compliance burdens that are costly to implement and manage.

The Draft's prescriptive notice requirements will require nearly every sales agent and realty firm, even those who currently enforce a privacy policy, to incur the cost of reexamining and rewriting their privacy policies to reflect new legal obligations imposed by the Draft. Most would be required to update their privacy policies to address issues such as data retention, storage and disposal that are not typically addressed by privacy policies today.

We believe a better approach is to encourage businesses to adopt privacy policies that reflect their industries' best practices. With the rapid advancement of technology and new uses of consumer data, a heavily prescriptive notice requirement will quickly become outdated and obsolete thereby imposing significant cost on businesses while conferring little benefit for consumers.

## **Offline Privacy Notifications**

While privacy policies can be made available much more easily in the online context, the Draft requires written privacy notifications before the collection of any “covered Information” or “sensitive information.” This requirement will be burdensome and costly to implement, difficult to enforce especially in the real estate context where the Draft would require real estate professionals to provide a written copy of a privacy policy prior to each consumer they encounter. This requirement will be costly to implement and burdensome to enforce.

## **Conflict with Existing Federal Privacy Law**


The Draft specifies that it will have no effect on existing privacy laws, like the Gramm-Leach-Bliley Act (GLBA), Health Insurance Portability and Accountability Act of 1996 (HIPAA), Children's Online Privacy Protection Act (COPPA), and CAN SPAM Act of 2003 (CAN SPAM), but aspects of the bill conflict with those laws. For example, the Draft requires opt-in consent before disclosing personal information to unaffiliated third parties, whereas GLBA allows for an opt-out approach for third party disclosures. Without clarification, the Draft would create overlapping and inconsistent regulation leading to confusion and additional regulatory burden on real estate professionals many of whom already comply with various federal privacy laws including GLBA, FCRA and CAN SPAM.

## **No Safe Harbor for Industry Best Practices**

We are disappointed to see that the Draft contains no safe harbor exemption of businesses complying with industry best practices. Today there exist a number of tools for businesses across a wide spectrum of industries to implement privacy policies that reflect industry best practices and are responsive to changes brought about by technological innovation and evolving market practices. Organizations like TRUSTe are creating innovative new ways for businesses to efficiently and cost-effectively disclose and enforce data use practices. Any comprehensive federal privacy bill should acknowledge and embrace these industry best practices.

In closing, we believe that protecting consumer privacy while creating an open data environment that allows for business innovation is an important and complex issue. While we believe the Draft is significant first step, we urge the committee to consider our concerns. As always we look forward to working with you on this matter in the months ahead.

Sincerely,



Vicki Cox Golder, CRB  
2010 President, National Association of REALTORS®