PUBLIC SUBMISSION

Comment Submitted by American Escrow Association

Posted by the **Federal Trade Commission** on Feb 7, 2022

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Please see the comments of the American Escrow Association attached.

Attachments 1

AEA_FTC_DKT2021-0071-0001final020722send

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Your Voice in Federal Decision Making

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American Escrow Association
Dedicated to Moving the Escrow Settlement Industry Forward

February 7, 2022

BY ELECTRONIC TRANSMISSION ONLY TO:
www.regulations.gov
re: Standards for Safeguarding Customer Information
Safeguards Rule, 16 CFR part 314, Project No. P145407

Federal Trade Commission (FTC)
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex B)
Washington, DC 20580

Dear Commissioners:

I am writing on behalf of the members of the American Escrow Association (AEA), the nation's trade association on federal matters for real estate settlement agents. Our members work for businesses who provide escrow and other forms of settlement (closing) services. We are submitting our views on this proposed rule issued with request for public comment.

This is a continuation of the FTC's Safeguards Rule developments. We commented on the 2019 proposal that is now finalized as amended and adopted in October 2021, and the AEA was recognized in the preamble to that final rule for our comments. We have and will continue to educate our members on the amended Rule including those features which become effective later this year on December 10, 2022. We appreciate the ongoing open process and this opportunity to place our comments in the public record for the consideration of the FTC.

As settlement agents AEA members have substantial experience in closing residential (and other) real estate transactions. "Closing" or "Settlement" is not a discrete point in time; it consists of numerous steps which occur through a regular sequence of events. Escrow opens early in the sequence and closes once all the terms

and conditions of the parties, including the principals, lenders, real estate brokers and agents and others are met. There are also post-closing events in some transactions.

As a general matter AEA members do not have access to the systems of the other business services and product providers, nor for that matter the financial accounts of the principals. Rather internal systems for the management of contractual and other guiding documents in the escrow file and pooled dollar trust fund insured bank accounts at financial institutes are the business features of an escrow operation. With the flow of dollars the safeguards of greatest importance relate to wire fraud avoidance. As to data handling and storage the hallmark of a viable escrow operation has been and continues to be (1) acting neutrally for all parties; and (2) eternal vigilance in safeguarding non-public personal information as well as recording public information in the county records for the benefit and legal protection of the parties.

This vigilance well preceded the Gramm-Leach Bliley Act of 1999 (GLBA) and is an essential pre-requisite to the ongoing existence of any escrow operation. Accordingly no operation takes shortcuts; rather they employ internal employee, and external vendor, expertise to handle such information in a safe and secure manner at all times. That being said of course we recognize a security event can occur.

Additionally we recognize the FTC's jurisdiction to issue additional rules such as this one relating to a security event under the GLBA. As worded it does not appear to be onerous as a reporting matter and we also agree with the FTC's conclusion that there would not be a significant impact on small business. Notwithstanding both of these points we have a similar view to what is summarized as an opposing view of another organization (which had been expressed in comments to the amended Rule proposal). That view was summarized in the preamble to this proposal that if adopted it--"would simply add another layer on top of an already crowded list of federal and state law enforcement contacts and state breach reporting requirements." We also have concerns about the proposal's specific coverage (but not the 1,000 consumer threshold) which would be as follows:

> "the Commission proposes limiting the reporting requirement to only those security events where the financial institutions determine misuse of customer information has occurred or is reasonably likely, and where at least 1,000 consumers have been affected or reasonably may be affected."

We agree with the other organization's comments requesting consideration of alternative factual bases and legal standards to establish a duty to report—for example reporting only on those that could lead to consumer harm. A related matter for further

consideration is federal standing to sue cases (see TransUnion v. Ramirez 141 S. Ct. 2190 (2021) —which require concrete harm, an injury in fact for the plaintiff to go forward in their suit. If none then no standing to sue. Of relevance to this proposal, in his majority opinion Justice Kavanaugh opined on what could readily be a concrete injury-- "[v]arious intangible harms," such as "reputational harms, disclosure of private information, and intrusion upon seclusion." (TransUnion, 141 S. Ct. at 2204).

For, these reasons we believe this new reporting duty should arise from a national starting point but it should be the Congress through uniform federal legislation including hearings that would establish the legal framework and criteria for the duty to arise.

The above comments are primarily directed to Q's 6, 7 and 8 of the proposal and our summarizing comment is to recommend the FTC defer to future congressional action in this decision.

Thank you in advance for your consideration of our comments.

Our primary drafter and his contact information for questions is:

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Sincerely,

Donna Inman

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2021-2022 President
American Escrow Association