



May 22, 2024

The Honorable Cathy McMorris Rodgers
Chairman
U.S. House Committee on Energy &
Commerce
Washington, D.C. 20515

The Honorable Frank Pallone
Ranking Member
U.S. House Committee on Energy &
Commerce
Washington, D.C. 20515

The Honorable Gus Bilirakis
Chairman
U.S. House Subcommittee on Innovation,
Data, and Commerce
Washington, D.C. 20515

The Honorable Jan Schakowsky
Ranking Member
U.S. House Subcommittee on Innovation,
Data, and Commerce
Washington, D.C. 20515

Re: Main Street Privacy Coalition's Opposition to the American Privacy Rights Act as Drafted

Dear Chairman Rodgers, Ranking Member Pallone, Chairman Bilirakis, and Ranking Member Schakowsky,

The Main Street Privacy Coalition (MSPC) and its undersigned national trade association members appreciate the ongoing engagement on developing a national privacy framework, however, we are opposed to the current draft of the American Privacy Rights Act of 2024 (APRA) released last night for the markup tomorrow, May 23. We appreciate the revised language intended to address concerns related to customer loyalty programs and the treatment of covered entities with common branding, but our significant concerns remain with the private right of action, preemption, and service provider sections we previously raised in our letter of April 16, 2024, and thoughtfully and constructively addressed in suggested redlined edits to the Committee. The below comments are to be taken in conjunction with the redline edits previously provided to the draft legislative text that would mitigate our concerns.

As conveyed in conversations with Members and staff, most problematic to us and over a million American businesses we collectively represent is the inclusion of a private right of action that will expose Main Street businesses to thousands of demand letters threatening frivolous litigation. In addition, we feel further work is needed during the committee process to improve the effectiveness of the preemption provision, and strengthen legal obligations for downstream business partners that ensure businesses are accountable for their own practices and not for those of other businesses. It is our desire to work collaboratively with the Committee to address these needs in the APRA discussion draft prior to its consideration in a full committee markup. Unfortunately, without improvements to these sections that address our significant concerns, the undersigned associations cannot support the legislation.

The MSPC is comprised of 20 national trade associations that together represent more than a million American businesses—a broad array of companies that line America's Main Streets¹ and interact with consumers day in and day out. From retailers to REALTORS®, hotels to home builders, grocery stores to restaurants, gas stations to travel plazas, and self-storage to convenience stores, including franchise establishments, the businesses represented by MSPC member associations can be found in every town, city, and state, providing jobs, supporting our economy, and serving Americans as a vital part of their communities.

¹ The Main Street Privacy Coalition website and member list may be accessed at: <https://mainstreetprivacy.com>.

Collectively, the industries that MSPC members represent directly employ approximately 34 million Americans and constitute over one-fifth of the U.S. economy by contributing \$4.5 trillion (or 21.8%) to the U.S. gross domestic product (GDP). Our success depends on maintaining *trusted* relationships with our customers and clients: trust that goods and services we provide are high quality and offered at competitive prices; and trust that information customers provide to us while we are serving them is kept secure and used responsibly. For these reasons, our associations have been actively engaged for many years with policymakers on data privacy legislation and regulations.

The MSPC continues to be concerned with the inclusion in the APRA of a private right of action (PRA) that, as drafted, will have a disproportionate impact on Main Street businesses. In its current form, the bill would allow persons or classes of persons to bring a civil action in federal court seeking actual damages, injunctive and declaratory relief, and reasonable attorney's fees and litigation costs. Additionally, its scope has been expanded from the Committee's prior legislation, the American Data Privacy and Protection Act (ADPPA), to explicitly cover almost every critical requirement of the bill placed on covered entities, including loyalty programs, the exercise of "reasonable care" in selecting business partners like a service provider and third parties, and novel data minimization requirements that now exclude service providers, to name just a few. Worse yet, the proposed PRA would have a buzzsaw-like effect, becoming effective a mere six months following enactment of the bill, while simultaneously denying businesses the right they have in every state privacy law to "cure" alleged violations when facing lawsuits with damages claims. The ability to cure alleged violations in the APRA's notice and cure provision is limited only to injunctive relief, and plaintiffs are not required to even prove harm has occurred when pursuing lawsuits against Main Street businesses that typically do not use pre-dispute arbitration clauses like big tech companies and ISPs.

As we have shared with Members of the Committee and their staff for the last few years, Main Street businesses have serious concerns that this PRA language as drafted would enable trial lawyers to primarily target Main Street businesses in so-called privacy "troll" campaigns that will send thousands of demand letters to companies seeking quick settlement payments for businesses to avoid class action lawsuits for alleged violations that may not have actually occurred or caused any harm. We have discussed at length our experience with this trolling practice of unscrupulous trial lawyers in other areas of the law, such as the alleged patent infringement claims and ADA website accessibility-related lawsuits where Main Street businesses have been besieged by the onslaught of demand letters that force them to settle, while smaller entities can face bankruptcy by these monetary demands. A federal data privacy law enforced by such a robust PRA that targets consumer-facing businesses will only result in lawful Main Street businesses being forced to fight never-ending lawsuits pursued on baseless allegations instead of truly protecting consumers and their personal data from bad actors. Additionally, the need to reallocate resources to pay settlements or fight lawsuits without merit will cost Americans jobs.

All MSPC member associations firmly believe that consumers across the nation should be empowered to control the data that they have shared with businesses who serve them. We continue to be strong advocates for a preemptive federal data privacy law that creates a single, uniform national standard that applies consistent protections for consumers and obligations for businesses rather than a patchwork of state privacy laws that are confusing and burdensome for consumers and businesses alike. While we appreciate the ARPA's attempt to establish a federally preemptive framework, we are concerned that the bill as drafted includes far too many carveouts for other relevant state-level privacy laws, consumer protection laws, and laws that govern both employee and biometric data, among others. These carveouts essentially nullify the bill's preemptive effect and would require businesses to continue complying with the multitude of federal and state data privacy laws that already exist today. The end result is that this could lead to profound levels of confusion for consumers who want to protect their personal information

in a simple and understandable way as states work around the holes in the bill's preemption clause to continue to create inconsistent standards with the national framework.

Virtually every industry sector—whether consumer-facing or business-to-business—handles significant volumes of consumer information, and the MSPC member associations believe that all industry stakeholders within the digital ecosystem should have statutory obligations under federal data privacy legislation so that no consumer is left unprotected. We recognize that consumer-facing businesses like the Main Street businesses represented by the MSPC are often the businesses with whom consumers directly share their personal information, but Main Street businesses do not monetize consumer data in opaque and deceitful ways and should not be held liable for potential data privacy violations committed by their service providers or other downstream business partners. Therefore, we urge the Committee to better align the APRA's service provider and third-party requirements to match the provisions that were negotiated among several stakeholders and finalized within the text of the ADPPA as reported by the Committee. Doing so would not only help small businesses across the country in their contractual negotiations by requiring service providers and third parties to meet their obligations or otherwise be in violation of the law; more importantly, it would ensure that there are no privacy loopholes that leave consumers unprotected when their personal data is handled by any business, regardless of where they live.

Finally, the MSPC appreciates that the latest draft of the APRA aims to preserve customer loyalty programs and, upon initial review, the revised language in the draft released for markup appears to confirm that covered entities must offer the same rights and protections to customers participating in customer loyalty plans as they do today under all comprehensive state privacy laws. Loyalty programs are a critical and ever-growing facet of nearly all Main Street businesses, and most importantly are already "privacy protective" in that they are solely established and maintained on an opt-in basis in which consumers affirmatively consent to participate. We agree with the Committee that customers should not be discriminated against for choosing to exercise one of their privacy rights, and we look forward to working with the Committee to ensure the revisions to this section do not unintentionally inhibit the ability of consumers and businesses to voluntarily establish mutually beneficial business-customer relationships and set the terms of those relationships.

We appreciate your consideration of our significant concerns with the APRA as it is currently drafted and urge you to work with us to ensure the legislation does not disproportionately impact Main Street businesses. We stand ready to work with Members of the subcommittee and full committee to address these concerns prior to the full committee markup of the APRA.

Sincerely,

American Hotel & Lodging Association
American Beverage Licensees
American Pizza Community
American Resort Development Association
Direct Selling Association
Energy Marketers of America
FMI – The Food Industry Association
International Franchise Association
National Association of Convenience Stores
National Association of Home Builders

National Council of Chain Restaurants
National Grocers Association
National Restaurant Association
National Retail Federation
NATSO, Representing America's Travel Centers
and Truck Stops
Retail Industry Leaders Association
Self Storage Association
SIGMA: America's Leading Fuel Marketers
Small Business & Entrepreneurship Council

cc: Members of the House Committee on Energy and Commerce