June 26, 2024

The Honorable Cathy McMorris Rodgers
Chair
U.S. House of Representatives
Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone
Ranking Member
U.S. House of Representatives
Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, DC 20515

RE: Concerns with the American Privacy Rights Act

Dear Chair McMorris-Rodgers and Ranking Member Pallone:

We appreciate that the latest draft of the American Privacy Rights Act (APRA) makes significant improvements to the provisions relating to big technology companies that act as service providers to Main Street businesses, but there remain problems with these provisions and with the private right of action that could make Main Street businesses liable for activity that they do not engage in and cannot control. We urge you to correct these problems before reporting legislation out of the House Energy and Commerce Committee. The risks to Main Street and consumers if these issues are not addressed are too significant to allow them to persist.

In particular, the consumer right to access to their data in section 105 cannot be effectuated under the current draft bill. That is because the right, set out in section 105(a)(1)(A), makes Main Street businesses ("covered entities" in the bill) responsible for providing consumers with access to all covered data that went through the Main Street business – even if that business no longer has possession of the data and the data is held only by a tech company (a "service provider" in the bill). The tech company is not required to provide consumer access to that data and cannot be sued by the consumer if they refuse to provide such access.

While section 111 of the bill does require the tech company to "assist" the Main Street business with providing that access, neither the Main Street business nor consumers have any recourse to proceed against the tech company if it fails or refuses to do so. The exemption for tech companies from the private right of action in the bill for their responsibilities under section 111 is conspicuous and provides them with a much lower level of accountability for compliance than other businesses that must comply with the APRA.

The same problems are present with respect to the right for consumers to have an export of their data (section 105(a)(4)) and the deletion of data relating to a covered child (section 105(a)(5)).

The unequal application of the private right of action in the bill drives these shortcomings. The private right of action applies to section 111(d) of the bill, but not to the rest of section 111. Subsection 111(d) requires Main Street businesses to use reasonable care in selecting the tech companies (service providers) they work with. By having the private right of action apply to that subsection, Main Street businesses become vicariously liable for virtually any failure of tech companies to comply with the bill. If, for example, a consumer requests transparency regarding their data and the Main Street business complies and asks the tech company to do the same – any failure of the tech company to provide that transparency can lead

to a lawsuit by the consumer against the Main Street business. Further, that consumer has no right to sue the tech company directly. Those problems could be remedied if the private right of action applied to subsections 111(a) and (b) of the bill, but not to subsection 111(d). That straightforward change would make every business in the data chain responsible for its own compliance with the bill and remove vicarious liability for Main Street businesses.

In addition, the private right of action in the bill leaves Main Street businesses with no protection from abusive lawsuits. There are no penalties for plaintiffs' lawyers bombarding businesses with demand letters and extracting funds simply because the businesses want to avoid the legal costs of defending themselves. The bill, for example, does not give businesses any right to cure alleged violations of the law to avoid litigation when they are sued for money. There are no protections against privacy litigation "trolls" that we have seen proliferate in other areas (such as patents), and there are no structural litigation reforms to discipline the cases that are brought (such as through having the loser of the litigation pay the other side's attorneys' fees).

In order to have a bill with a private right of action, there must be some structural mechanism allowing Main Street businesses to fend off bad litigation without losing money by paying their lawyers to extensively litigate a claim. Nothing in the bill currently provides such protection. This is particularly striking given that every state privacy law has rejected the idea of giving its citizens the right to sue for privacy violations. Even the Governor of Vermont just vetoed an attempt to have a privacy bill with a private right of action. There is no reason for Congress to go farther than all the states in opening up privacy lawsuits without protecting against misuse of that right.

We appreciate the Committee's diligent efforts to move federal privacy legislation. We share the goal of Congress passing a federal privacy law. We hope that these issues can be addressed so that we can move toward that goal without creating undue risk for Main Street businesses and consumers, and unjustified loopholes for the tech sector.

Sincerely,

General Counsel
NACS

cc: Members of the Committee on Energy & Commerce