

September 7, 2022

The Honorable Nancy Pelosi  
Speaker  
United States House of Representatives  
Washington, District of Columbia 20510

The Honorable Chuck Schumer  
Majority Leader  
United States Senate  
Washington, District of Columbia 20510

The Honorable Kevin McCarthy  
Minority Leader  
United States House of Representatives  
Washington, District of Columbia 20515

The Honorable Mitch McConnell  
Minority Leader  
United States Senate  
Washington, District of Columbia 20510

**RE: ACT | The App Association Support of Federal Privacy Legislation**

Dear Speaker Pelosi, Minority Leader McCarthy, Majority Leader Schumer, and Minority Leader McConnell,

ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a \$6.3 trillion global ecosystem<sup>1</sup> led by U.S. companies and employing 720,010 jobs in California, 301,030 in New York, and 37,140 in Kentucky.<sup>2</sup> Our member companies create the software that brings your smart devices to life. They also make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

We applaud the 117th Congress' unprecedented progress toward a comprehensive federal privacy regime clarifying and enhancing the privacy and data security authorities of the Federal Trade Commission (FTC or Commission). Congress has never been closer to a compromise bill that would set a single, national set of rules for data privacy and security across all 50 states and the territories, while better protecting consumers and limiting unnecessary compliance costs and legal gamesmanship. We are especially pleased that Congress is taking meaningful steps toward a federal privacy framework, which policymakers should pursue to the exclusion of antitrust proposals that would manifestly weaken data privacy and security protections for your constituents.

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<sup>1</sup> 1 ACT | THE APP ASSOCIATION, APP ECONOMY FAST FACTS (May 2022), available at <https://actonline.org/wpcontent/uploads/About-the-App-Economy.pdf>.

<sup>2</sup> 2 ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020 (7th Ed.), available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

Here is a summary of our takeaways from key provisions of the American Data Privacy and Protection Act (ADPPA):

#### *Preemption, Sec. 404(b)*

We have advocated for a federal privacy framework to include a preemption provision expressly preempting state laws for years now and appreciate that ADPPA includes one. The Information Technology and Innovation Foundation (ITIF) recently estimated the costs on businesses if 50 states enacted their own separate privacy regimes.<sup>3</sup> The study projected an annual cost of \$98 to \$112 billion for out-of-state companies, with \$20 to \$23 billion of that cost landing on small firms like App Association members. If we sound like a broken record on preemption, it is because these costs are avoidable and not necessary to meaningfully protect consumers from data privacy and security harms.

The overarching preemption language is reasonably strong, providing that no state or political subdivision of a state may “adopt, maintain, enforce, prescribe, or continue in effect” any law or provision having the force and effect of law, “covered by” the provisions of ADPPA or regulations promulgated under it. This construct should capture the general-applicability privacy laws that would create the most significant confusion, conflict, and compliance issues we have urged Congress to avoid as states enact slightly differing privacy requirements. However, we would recommend that the negotiators amend the provision to preempt any state provision “related to” the provisions of ADPPA. The Supreme Court has interpreted the “covered by” construct more narrowly than “related to,” such that courts have upheld state laws directly regulating the subject of a federal law with “covered by” preemption language.<sup>4</sup> A strong, federal privacy law that comprehensively regulates data privacy and security activities should supersede state laws that address the same conduct, even if they have a narrower scope or more detailed requirements. Similarly, each exception to the preemption language adds further uncertainty as to Congress’ intent with respect to establishing a single set of rules rather than simply placing a federal layer on top of a divergent state patchwork.

#### *Private right of action, Sec. 403*

The negotiators have arrived at a reasonable compromise on a private right of action (PRA), which provides a good basis for potential further improvement. The PRA in ADPPA would apply to the entire Act and its regulations—except for data minimization, privacy by design, or data security requirements—and to any person or class injured by a violation. This provides especially broad coverage in terms of both which kinds of violations can give

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<sup>3</sup> INFO. TECH. & INNOVATION FOUNDATION, THE LOOMING COST OF A PATCHWORK OF STATE PRIVACY LAWS (Jan. 2022), available at

<https://cdn.sanity.io/files/03hnmfyj/production/2ecc8714efc329b2494f47cede821a40c9a0e6d5.pdf>

<sup>4</sup> See *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (interpreting a “covered by” preemption clause); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 382 (1992) (interpreting a “relating to” preemption provision)

rise to a PRA and which categories of consumers may bring a PRA. For example, the PRA in the legislation is available for almost all violations of the ADPPA and is not limited to a subset of injury types from a violation. Similarly, Sec. 404(b) prohibits pre-dispute arbitration agreements in certain circumstances (for example, with respect to individuals under the age of 18). Finally, the PRA in ADPPA would make powerful remedies available to individuals. In addition to compensatory damages, an individual litigant could seek and obtain an injunction for a violation of ADPPA or any of its regulations.

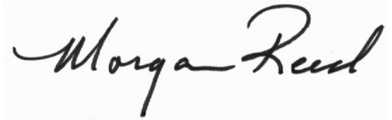
Importantly, the PRA provision addresses concerns we voiced with how private litigants could use it to inappropriately target smaller companies covered by ADPPA. Specifically, the PRA in ADPPA as reported to the full chamber does not apply to covered companies with \$25 million or less in annual revenue, if they handle data on fewer than 50,000 individuals and derive less than 50 percent of their revenue from transferring covered data. Similarly, if individuals accuse a company of violating ADPPA, that company could in most cases demonstrate that they have rectified the problem before the claim can go to court. That provision is similar to the “right to cure” provisions found in some of the state laws already on the books. Without guardrails like these, the attractive payouts PRAs offer can pose a risk of opportunistic litigation strategies involving a pattern of suing and settling for frivolous reasons unrelated to protecting consumers. Therefore, we appreciate the safeguards negotiators adopted in the latest version of ADPPA to help prevent abuse.

#### *Small business compliance program*

Sec. 304 appropriately provides a compliance program for small businesses adhering to Commission-approved compliance guidelines that “meet or exceed” ADPPA’s requirements, with a reasonable threshold described at 209(b). Notably, 209(b)’s threshold is pegged at \$41 million in annual revenue or processing data on 200,000 or fewer individuals—as opposed to devices—per year on average over the most recent three-year period. We appreciate the negotiators’ recognition that the number of connected devices per household has doubled over the past few years, and therefore a threshold based on number of devices may be a less accurate reflection of the breadth of a company’s impact on consumers. ADPPA would also deem companies that participate in approved compliance programs as complying with ADPPA itself, providing a legal presumption that would allow small companies to demonstrate privacy competence without being subject to immediate civil penalties for even relatively small violations. The compliance program would ensure that App Association members are rightfully viewed as—and held accountable for—complying with a federal framework, while alleviating liability concerns and compliance burdens.

We commend the negotiators on both sides of the Capitol for their groundbreaking work on federal privacy legislation, and we hope our input is a constructive addition to this important effort. We look forward to further assisting these efforts as the process continues.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is fluid and cursive, with the first name "Morgan" and last name "Reed" clearly distinguishable.

Morgan Reed  
President

ACT | The App Association  
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