

June 26, 2024

The Honorable Cathy McMorris Rodgers
Chair
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

The Honorable Frank Pallone
Ranking Member
Committee on Energy and Commerce
United States House of Representatives
Washington, District of Columbia 20515

Re: The American Privacy Rights Act (APRA, H.R. 8818)

Dear Chair Rodgers and Ranking Member Pallone:

ACT | The App Association (App Association) writes to provide our perspective on H.R. 8818, the American Privacy Rights Act (APRA). The App Association is a global trade association for small and medium-sized technology companies. Our member companies are entrepreneurs, innovators, and independent developers within the global app economy that engage with verticals across every industry.

While the App Association welcomes your renewed efforts to develop a federal data privacy law, we have concerns that APRA's exclusion of small businesses from the definition of "covered entity" may deny them the benefits of preemption from a patchwork of state privacy laws and inadvertently expose them to costly state-by-state compliance and unnecessarily high litigation risks from differing liability regimes. Similarly, we believe that the preemption provision itself would not achieve its purpose of establishing a single, national privacy framework. Lastly, the private right of action (PRA) could be too easily abused as a tool to enrich bad actors at the expense of businesses covered by APRA and consumers who would otherwise benefit from innovation chilled by the threat of lawsuits.

By excluding small businesses from the definition of covered entity, APRA creates uncertainties as to whether small businesses would be regulated by a federal law—or if, instead, they would remain regulated by existing and future state privacy laws. If small businesses are not covered entities under APRA's preemption provision, which seeks to preempt some state laws, they may have to contend with an increasingly burdensome patchwork of state privacy laws while their larger counterparts enjoy at least a partially preemptive federal privacy standard. This would disadvantage small businesses and make it more difficult for them to protect consumers' privacy.

As we have previously indicated in testimony before the House Energy and Commerce Committee, App Association members are not asking to be carved out of federal data privacy legislation, but rather given a path to compliance. Offering small businesses a path to compliance is not only essential to ensuring the law holds them accountable, but also that they have some protection from nuisance lawsuits and are afforded reasonable opportunities to rectify compliance issues in good faith. A 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 other burdens. Accordingly, we applaud the inclusion of service providers in Section 113, enabling them to apply for compliance guidelines approved by the Federal Trade Commission (FTC). This addition will help service providers—which would include many of our small business members despite their exclusion from “covered entity”—come into compliance with APRA while also protecting them from opportunistic litigation.

Notwithstanding the availability of FTC-approved compliance programs, if not narrowly tailored, PRAs can lead to opportunistic lawsuits, where the act of litigation serves as a business strategy instead of a means to rectify actual wrongdoings. We have no problem with courts providing remedies for violations of the law. However, APRA should not create a system in which harassing companies subject to APRA with meritless claims is profitable. To that end, APRA’s PRA should include checks on private lawsuits before they are allowed to proceed, penalties for baseless claims, and limits to prevent abuse or “sue-and-settle” business models that other PRAs have created.

Finally, we are concerned that the preemption provision would not adequately combat the potential for a patchwork of conflicting state laws. Section 118 of APRA disallows states from enacting or maintaining laws “covered by” the provisions of the bill. The provision’s operative phrase is “covered by,” instead of the more comprehensive phrase “relating to,” used in other federal laws. Coupled with the myriad exceptions to the preemption provision, such as for Washington’s My Health My Data Act, we worry that even if small businesses are considered “covered by” APRA, they will nonetheless face increasingly complex and contradictory state privacy requirements.

Thank you for the opportunity to share our perspective on the potential impact of APRA on small businesses. While we have concerns about the current version of APRA, we remain committed to constructive engagement on the development of a federal data privacy law.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President
ACT | The App Association