



June 13, 2022

The Honorable Frank Pallone
Chairman
U.S. House Committee on Energy and
Commerce
Washington, DC 20515

The Honorable Cathy McMorris Rodgers
Ranking Member
U.S. House Committee on Energy and
Commerce
Washington, DC 20515

The Honorable Jan Schakowsky
Chair
U.S. House Subcommittee Consumer
Protection & Commerce
Washington, DC 20515

The Honorable Gus Bilirakis
Ranking Member
U.S. House Subcommittee on Consumer
Protection & Commerce
Washington, DC 20515

**RE: Hearing on “Protecting America’s Consumers: Bipartisan Legislation
to Strengthen Data Privacy and Security” (June 14, 2022)**

Dear Representatives Pallone, Rodgers, Schakowsky and Bilirakis:

The Main Street Privacy Coalition (MSPC), a coalition of 19 national trade associations representing more than a million American businesses,¹ appreciates your focus on the need for federal data privacy protections and offers this statement for the hearing record. MSPC is comprised of a broad array of national trade associations representing businesses that line America’s Main Streets. From retailers to REALTORS®, hotels to home builders, grocery stores to restaurants, gas stations to travel plazas, self-storage to convenience stores, including franchise establishments, MSPC member companies interact with consumers day in and day out. Our members’ businesses can be found in every town, city and state, providing jobs, supporting our economy and serving Americans as a vital part of their communities.

Collectively, the industries that MSPC member associations 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 is kept secure and used responsibly. For these reasons, our associations are actively engaged in the discussions surrounding data privacy and continue to work together to support Congress’s enactment of a comprehensive and uniform federal data privacy law.

MSPC is dedicated to the enactment of a uniform, national federal data privacy law that creates privacy obligations for all businesses handling consumers’ personal information, and we appreciate the Committee’s efforts to develop the American Data Privacy and Protection Act (ADPPA), a bipartisan bill to achieve this goal. In this statement, we examine several provisions of the ADPPA on which we recommend the Committee continue its work to improve the bill:

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

1. Preemption of State Law: We appreciate the bipartisan effort to develop a uniform, preemptive federal privacy bill that would set a national standard for consumer privacy protections. If enacted, such a privacy law would aid consumers and businesses alike by ensuring consumer privacy protections are the same regardless of the State in which a consumer resides or a business is located. This is necessary because the increasing patchwork of newly enacted state privacy laws threatens the ability to provide comprehensive and uniform privacy protections to Americans. For this reason, MSPC has long supported federal privacy bills that would establish a uniform national privacy framework to cover all businesses handling consumers' personal data. Despite the drafters best intentions to achieve this goal, we are concerned that the ADPPA's current preemption provision is unlikely to withstand legal challenges to its intended effect, potentially leaving States free to maintain or adopt different privacy laws that leave consumers with different rights depending on where they live and saddle Main Street businesses with compliance burdens going beyond the federal standard. We therefore urge you to examine the key Supreme Court rulings on federal preemption of state laws and adopt the type of preemption provision in the ADPPA that the Court has consistently found sufficient for Congress to establish a preemptive federal law. Improving the ADPPA to clarify Congressional intent to preempt state laws by using the language the Supreme Court upholds would make it much more likely to achieve its primary goal of creating a uniform, national privacy law for Americans.

2. Private Rights of Action: We understand the current bipartisan agreement regarding private rights of action is one the sponsors believe is necessary to advance a privacy bill that can pass Congress. Many businesses, however, are wary of allowing individuals to file lawsuits to enforce a privacy law. Our members share those concerns, which predominantly stem from the technical complexity involved in achieving mistake-free compliance with data privacy laws and from Main Street's experience with large volumes of questionable legal claims that proliferated under other areas of the law. Additionally, we urge Committee members to consider that, taking into account the Act's many exemptions (discussed further in point 3 below), private rights of action will be disproportionately used against, and significantly impact, Main Street businesses compared to other businesses. All too often, potential litigants are able to exploit the Main Street businesses' realization that obtaining legal representation and defending against an alleged claim under a complex federal law is expensive. Those costs can lead Main Street businesses to agree to settlements of even non-meritorious claims simply to avoid litigation, which has the compounding effects of making it more difficult for them to cover their expenses and consequently costing Americans their jobs. In addition, due to the complexity of achieving compliance, our preference would be for the Committee to adopt an enforcement approach similar to what state privacy laws have adopted as the most effective way to drive compliance with privacy laws: exclusive government agency enforcement against businesses after a 30- or 60-day cure period following agency notice of non-compliance.

3. Exemptions for Service Providers and Financial Services Companies: We appreciate that the Committee has not resorted to reliance on private contracts to create legal obligations between parties because businesses vary greatly in size and bargaining power. However, we remain concerned that nationwide and global service providers, as defined and covered in the ADPPA, do not have equivalent privacy requirements to those applying to even the smallest of Main Street businesses. To protect Americans' privacy comprehensively, federal data privacy legislation, including the ADPPA, should ensure that all industry sectors are covered by the bill's requirements in order to avoid privacy loopholes that can leave consumers unprotected when their personal data is handled by a range of businesses. However, service

providers remain exempt from providing consumers some aspects of the privacy rights all other covered entities must provide under sections 203 and 204, and financial services companies are deemed in compliance with all provisions despite not having equivalent ones under federal banking law. For example, section 203 requires covered entities to provide consumers' with privacy rights to access, correct or delete their personal information, and section 204 requires them to first obtain consumers' affirmative consent before transferring their sensitive personal data. These are privacy requirements that exist nowhere else in federal privacy law and should be required of all businesses in the ADPPA.

These exemptions for service providers predominantly extend to businesses in the telecommunications, cable and technology sectors, and we believe the ADPPA could be improved in this regard to better protect Americans' privacy. For example, the ADPPA should be modified to meet the principle that each business handling consumers' personal data should have statutory requirements to do what is in that business's control to protect consumers' data privacy as required in the legislation. This would avoid making consumer-facing businesses responsible for the privacy violations by businesses that "serve" them – many of which are larger businesses they cannot control – including nationwide and global service providers. If the ADPPA adopts this approach, it would more effectively secure the consumer rights it establishes and would treat industry sectors fairly by making them responsible for their own conduct, not exposing them to liability for privacy violations by their business partners, including contractors, franchises and other businesses – a key MSPC principle.

MSPC members are also concerned with the exemption for financial institutions and other entities subject to the Gramm-Leach-Bliley Act (GLBA) from the consumer privacy protections in the ADPPA. We urge the Committee to recognize that GLBA is a 1999 federal law that is significantly outdated in its extremely narrow privacy protections, which do not provide anything close to the privacy protections that the ADPPA would impose on non-exempt "covered entities." For instance, GLBA only requires that an entity sharing consumer financial data with unaffiliated third parties for marketing purposes provides an annual opt-out notice in writing, which most consumers likely never read. GLBA does not, however, require any access, correction or deletion of consumers' financial data upon request, as the ADPPA would require of every other consumer-facing business on Main Street. GLBA also does not require affirmative opt-in consent of customers before transferring sensitive financial information to unaffiliated third parties. The ADPPA's exemptions for financial institutions and other entities subject to GLBA permit these select consumer-facing businesses – ones with the most sensitive financial information – to avoid the bills' privacy requirements and, unless amended, the bill will leave consumers' financial information unprotected while providing a false sense of security that consumers are fully covered.

4. Preserving Customer Loyalty Rewards and Benefits: It is clear that Americans overwhelmingly want customer loyalty programs that provide rewards, discounts and other benefits to remain legal.² Generally, the four States that have enacted privacy laws of general application since California's 2018 law have all found ways to sufficiently preserve these programs that consumers desire by protecting the ability of businesses to continue to offer better

² According to a survey by Bond Brand Loyalty Inc., 79% of consumers say loyalty programs make them more likely to continue doing business with brands that offer them, and 32% of consumers strongly agree that a loyalty program makes their brand experience better. Bond Brand Loyalty Inc., [The Loyalty Report \(2019\)](#).

prices and services to customers who voluntarily participate in bona fide customer loyalty, club or rewards programs. It is unclear, however, that the current language of the ADPPA will preserve loyalty plans. For example, section 104 of the Act requires “loyalty...with respect to pricing.” This is a concept that does not exist today. If a sales price only applies to customers who have signed up for a rewards program, does that fulfill “loyalty” to the customers who decline to give their consent to enter the rewards program? The section’s rule of construction regarding loyalty programs is also conditioned on the program complying with all of the other requirements in the Act and any regulations. That language is unnecessary and further raises an interpretive question as to whether requirements in the ADPPA that would not otherwise apply to rewards programs should now apply.

Getting this section right will be important to American consumers who wish to maintain their earned points, rewards and discounts, and is a critical need for Main Street businesses under a federal privacy law. We urge the Committee to consider an approach to privacy law that is well understood in the European Union. The principle embodied in EU privacy law is that consumers should not face retaliation for exercising a privacy right. This is consistent with the purposes of this Act and privacy laws in general. The continued operation of loyalty or rewards programs that consumers may voluntarily participate in would not be a retaliatory act against another consumer who exercises a privacy right. We believe this may be the best way to restructure section 104 so that it would not undermine this vitally important aspect of the American customer experience on which consumers and Main Street businesses rely.

We appreciate your continued consideration of the views of Main Street businesses on the ADPPA given that Main Street represents the backbone of the United States economy. Main Street businesses – many of whom have struggled to remain open to serve consumers during the COVID-19 pandemic and are now facing historic pressures from the confluence of inflation, supply chain constraints, and labor shortages – will bear the full burden of complying with the regulatory obligations under the ADPPA that the Committee is examining today. As you consider ways to improve and advance the ADPPA in the legislative process, the members of the MSPC urge you to consider and address the issues raised above. We look forward to continuing our constructive dialogue with you on these matters as you craft federal data privacy legislation going forward.

Sincerely,

The Main Street Privacy Coalition

cc: Members of the Committee
on Energy and Commerce