May 8, 2024

Re: Discussion Draft for the American Privacy Rights Act (APRA)

Dear Member of Congress:

The undersigned consumer, privacy, civil rights, and advocacy groups write to you concerning the bill currently titled as the American Privacy Rights Act (APRA). We appreciate that this bill includes robust protections to protect consumer privacy, such as a requirement that covered entities provide access to the data they have on consumers, correct errors, minimize the data they collect, and allow consumers to delete their data. However, the bill has some significant flaws that undermine its potential to be a truly meaningful law to safeguard the privacy of American consumers. There are at least three major flaws with this legislation that must be addressed.

1. APRA's Scope of Preemption is Too Broad

APRA includes a broad scope of preemption in Section 20. It would preempt state privacy laws, such as those in California, Colorado, Connecticut, Delaware, Indiana, Iowa, Kentucky, Montana, Nebraska, New Jersey, New Hampshire, Oregon, Tennessee, Texas Utah, and Virginia,[1] as well as a Maryland bill awaiting the Governor's signature.[2] In general, we oppose preemption of state laws that provide more protections or more remedies for consumers.

We are especially concerned regarding preemption of state laws governing consumer reporting, i.e. state law analogs of the Fair Credit Reporting Act (FCRA) that govern both credit reports and other types of specialty reports. We recognize that subparagraph (a)(3)(K) of Section 20 does exclude from preemption "laws that address banking records, financial records, ..., identity theft, credit reporting and investigations." However, while this language would exclude from preemption state FCRA laws to the extent they regulate credit reports, it is unclear whether the exclusion would extend to these state laws to the extent they regulate other types of consumer reports, such as tenant screening and employment checks. This might possibly preempt state FCRA laws to the extent they govern specialty reports, as well as tenant screening specific laws in California, the District of Columbia, Maryland, Minnesota, New York, Oregon, Washington State, and a number of municipalities.[3]

In general, we urge that Section 20 be revised so that APRA sets a floor, not a ceiling for privacy protections in the U.S., so that states are free to adopt stronger and more protective laws. Section 20, at subsection (a), should simply state:

---

[1] International Association of Privacy Professionals, US State Privacy Legislation Tracker 2024, April 22, 2024, https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf

[2] Natasha Singer, Maryland Passes 2 Major Privacy Bills, Despite Tech Industry Pushback, NY Times, April 7, 2024.

[3] National Consumer Law Center, Fair Credit Reporting, Appendix H (10th ed. 2022), updated at www.nclc.org/library (listing state consumer reporting laws, including tenant screening laws).

> This Act does not annul, alter, affect, or exempt any person subject to its provisions from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, except to the extent that those laws are inconsistent with any provision of this Act, and then only to the extent of the inconsistency. For purposes of this section, a State law is not inconsistent with this Act if the protection such law affords any consumer is greater than the protection provided by this Act.

If Section 20(a) is not revised as suggested, at a minimum, subparagraph (a)(3)(K) should be revised to make certain it does not preempt state laws governing tenant screening and employment checks by stating that it excludes such laws. Subparagraph 20(a)(3)(K) should be revised to state (additions in *italics and underlined*; deletions in ~~strikeout~~)

> (K) Provisions of laws that address banking records, financial records, tax records, social security numbers, credit cards, identity theft, credit reporting *and other types of consumer reporting* ~~investigations~~, credit repair, credit clinics, or check-cashing services.

2. Exclusion of Banks, Credit Bureaus, Check Cashers, Payday Lenders, Debt Collectors, Tax Preparers, and Other Problematic Actors

Subparagraph 20(b)(3)(A) of the APRA bill states that a covered entity

> that is required to comply with the laws and regulations described in subparagraph (B) and is in compliance with the data privacy requirements of such laws and regulations shall be deemed to be in compliance with the related provisions of this Act (except with respect to section 9), solely and exclusively with respect to any data subject to the requirement of such laws and regulations.

In turn, subparagraph 20(b)(3)(B) includes in its list of laws "(i) Title V of the Gramm-Leach-Bliley Act" and "(vi) The Fair Credit Reporting Act (15 U.S.C. 1681 et seq.)". Thus, APRA provides that a company covered by GBLA or FCRA is in compliance with APRA if it complies with those laws.

Unfortunately, both the FCRA and GLBA are considerably weaker than APRA. The FCRA does not provide for data minimization, a right of deletion, or a right to opt out of data transfers. GLBA similarly does not allow for deletion and only has a limited right for a consumer to opt out of sharing with a third party for marketing. GLBA also does not include critical fair information rights such as the ability to access consumer's own information or the right to correct errors.

This means consumers will have fewer protections with respect to some of the most problematic industries with respect to data privacy. The FCRA regulates consumer reporting agencies such as the Big Three credit bureaus (Equifax, Experian and TransUnion) which all have

exploited, misused, and in the case of Equifax, failed to protect the data of millions of Americans.[4] As for GLBA, its coverage of "financial institutions" includes not just banks (which have their own record of problems), but check cashers, payday lenders, debt collectors, tax preparers, and more.[5]

Thus, some troublesome abusers of data will not be subject to the protections of APRA, while businesses with a far less harmful record will be subject to a much higher standard for consumer privacy. Such a result would be ironic and deprive consumers of protection where they need it most. We recommend that the exclusion for entities covered by GLBA and the FCRA be removed.[6]

At a minimum, these exclusions for entities covered by other federal law should be narrowed so that it is absolutely clear that compliance with another federal law such as GLBA or the FCRA is sufficient only if a particular subject or protection is covered by both APRA and the other federal law. But if a subject is not covered by the other federal law, such as the right to correct errors (which is missing from GLBA), then the covered entity must still comply with the pertinent provision in APRA. We recommend that subparagraph 20(b)(3)(A) of the APRA bill be amended so that

> *<u>if the specific subject of a provision of this Act is addressed by</u>* ~~that is required to comply with~~ the laws and regulations described in subparagraph (B) and a *covered entity or service provider is required to and does comply* ~~is in compliance~~ with such ~~the data privacy~~ requirements of such laws and regulations, the *<u>covered entity or servicer provider</u>* shall be deemed to be in compliance with the related provisions of this Act (except with respect to section 9), solely and exclusively with respect to any data subject to the requirement of such laws and regulations.

3. The Private Remedies of APRA Could Be Very Limited

We appreciate the fact that Section 19 of the APRA bill provides for a private remedy, albeit limited. However, the limitations are significant and could result in the remedy being illusory except in the most egregious cases.

First, Section 19(b) only provides for actual damages, which can be difficult to show with respect to privacy violations. For example, how will a consumer prove an amount for damages for a covered entity's failure to delete their data upon request as required by Section 5(a)(3)?

---

[4] *See generally*, National Consumer Law Center, Fair Credit Reporting (10th ed. 2022), updated at www.nclc.org/library.

[5] *Id.* at § 18.4.1.3 (discussing "financial Institutions" covered under GLBA).

[6] In addition, we recommend that the definition of "covered entity" in Section 2(10) be expanded. Currently the definition is limited to (1) entities subject to the Federal Trade Commission (FTC) Act, (2) common carriers, and (3) nonprofits. Section 5(a) of the FTC Act, however, excludes "banks, savings and loan institutions" from FTC jurisdiction. 15 U.S.C. 45(a)(2). We recommend that entities subject to the Consumer Financial Protection Act also be included.

Such proof could require expert witnesses or data studies, which are expensive. Such obstacles to showing actual damages are why many consumer protection statutes provide for statutory damages as well as class actions, because individual actions for actual damages would cost much, much more to litigate than the amount recovered.

Second, Section 19(a) provides that consumers can only bring enforcement actions in federal court. This language could seriously restrict the private remedy due to Article III standing issues. In 2021, the Supreme Court significantly increased the burden for private litigants to show concrete injury for Article III standing in the case *Trans Union v Ramirez*, 141 S. Ct. 2190 (2021). The *Trans Union v. Ramirez* decision has made it difficult for consumers to seek redress for certain harms under federal consumer protection laws in federal court, such as the failure to receive mandatory disclosures or privacy violations.[7] As a result, consumers have been seeking relief in their state courts, which sometimes do not impose the same standing requirements that frustrate access to justice in federal courts.[8] However, APRA would limit the ability of consumers to seek relief by requiring individual consumers to bring actions in federal court.

Thus, we recommend that Section 19(a) provide;

> Subject to subsections (b) and (c), an individual may bring a civil action against an entity for a violation of [enumerated subsections] or a regulation promulgated thereunder, in an appropriate Federal district court of the United States, *or in any other court of competent jurisdiction*.

* * * * *

We appreciate that the discussion draft of the American Privacy Rights Act has proposed some robust protections for American consumers, and support the effort behind them. We send this letter to draw concerns to discrete issues with the bill, to ensure that it truly benefits consumers without significant drawbacks.

Thank you for your attention to this letter. For any questions, please contact Chi Chi Wu at cwu@nclc.org or 617-542-8010.

National Consumer Law Center
(on behalf of its low-income clients)

National Organizations

Americans for Financial Reform
Center for Digital Democracy
Consumer Action

---

[7] *Id.* at § 11.3 (discussion of Article III standing in FCRA and data breach cases).

[8] Id.at § 11.3.1.2 (standing in state courts).

Consumer Federation of America
Demand Progress
Japanese American Citizens League (JACL)
National Association of Consumer Advocates
NETWORK Lobby for Catholic Social Justice
Public Citizen
U.S. PIRG

State and Local Organizations

Jacksonville Area Legal Aid (FL)
Economic Action Maryland
New Jersey Citizen Action
Western New York Law Center
VOICE (Voices Organized in Civic Engagement)(OK)
Texas Appleseed