



June 27, 2024

Chair Cathy McMorris Rodgers
Energy & Commerce Committee
2188 Rayburn House Office Building
Washington, DC 20515

Ranking Member Frank Pallone
Energy & Commerce Committee
2107 Rayburn House Office Building
Washington, DC 20515

Re: Markup of the *American Privacy Rights Act* and the *Kids Online Safety Act*.

Dear Chair McMorris Rodgers and Ranking Member Pallone:

I write to provide the Interactive Advertising Bureau's (IAB) views on two legislative proposals that your committee is considering today. IAB represents over 700 leading media companies, brand marketers, agencies, and technology companies that are responsible for selling, delivering, and optimizing digital advertising and marketing campaigns. Together, our members account for 86 percent of online advertising expenditures in the United States. IAB is committed to professional development and elevating the knowledge, skills, expertise, and diversity of the workforce across the digital advertising and marketing industry. Through the work of our public policy office in Washington, D.C., IAB advocates for our members and promotes the value of the interactive advertising industry to legislators and policymakers.

American Privacy Rights Act

While IAB and its members appreciate the Committee for its continued interest in passing a comprehensive federal privacy law, we believe that the latest discussion draft of the American Privacy Rights Act (APRA) is still not the right vehicle. We have many of the same concerns with the APRA as we did in April, and I would like to take the opportunity to reiterate them here today.

Targeted Advertising. While this latest APRA discussion draft still makes an effort at appearing consistent with the state privacy laws that provide an opt-out right for targeted advertising, the provisions around sensitive covered data remain problematic. This version of the APRA would still treat ordinary browsing history and "online activity profiles" as sensitive data, requiring consumers to opt-in. This significant deviation from state laws could negatively impact the availability of free online products and services. According to IAB research, most people understand the trade-off, appreciate free content and personalization, and want more transparency and understanding about what companies do or don't do with their data.¹ This research also shows that consumers value the ad-supported products and services they receive by \$39,000 per person per year, which represents trillions of dollars in value each year that consumers do not have to pay

¹ Chris Bruderle, Meredith Guinness, and Jack Koch, *The Free and Open Ad-Supported Internet: Consumers, Content, and Assessing the Data Value Exchange*, INTERACTIVE ADVERTISING BUREAU (Jan. 30, 2024), <https://www.iab.com/wp-content/uploads/2024/01/IAB-Consumer-Privacy-Report-January-2024.pdf>.



for.² The opt-in concept could affect the entire ecosystem, creating a data-poor, much less functional, useful internet.

Small Businesses. Although some edits were made to the small business exemption, our original concerns remain the same. The discussion draft still requires small businesses to meet the following requirements to receive the exemption:

- (1) average revenues that do not exceed \$40,000,000,
- (2) did not collect, process, retain, or transfer the covered data of more than 200,000 individuals, and
- (3) did not transfer covered data to a third party in exchange for revenue or anything of value.

The final requirement is impractical for most small businesses, which depend heavily on third-party data for growth and sustainability. According to the Small Business & Entrepreneurship Council, 78% of small businesses utilize online advertising.³ By leveraging third-party data, these businesses gain crucial insights into consumer behavior, preferences, and demographics, enabling them to create more targeted and effective marketing campaigns. For example, small businesses can identify potential customers who have shown interest in similar products or services. Additionally, third-party data provides valuable information about existing customers that small businesses might not be able to gather independently, such as socio-economic status, buying habits, and lifestyle information. This data helps improve customer service, tailor product offerings, and make more informed decisions. Ultimately, third-party data is a powerful tool that allows small businesses to optimize their marketing efforts, better understand their customers, and remain competitive in the market.

Additionally, IAB has concerns with the second requirement. The small business owners who we consulted among over 2,000 members of our small business coalition – the Internet for Growth, were overwhelmingly concerned by the second requirement. All of the small business owners stated that they would reach the 200,000 datapoint threshold quickly and easily and feared that they would be disqualified from the small business exemption that was ostensibly designed for them. As a result, we urge the Committee to strike this provision altogether along with the third requirement.

Preemption. Based on Supreme Court and federal court precedents, the APRA would fail to preempt state privacy laws to establish a uniform, nationwide standard for data privacy. We are concerned that potential conflicts and confusion could arise if a federal privacy law does not effectively preempt state laws, as states will continue to propagate differing standards and have their Attorneys General and/or state privacy agencies continue to issue regulations that conflict from state-to-state. Courts will spend significant time determining whether APRA preempts a particular state law. Rather than waste valuable judicial resources, Congress should make clear

² *Id.*

³ Small Business and Entrepreneurship Council, *2019 SBEC/TechnoMetrica Small Business Survey on Online Advertising* (August 2019), <https://sbecouncil.org/wp-content/uploads/2019/09/SBEC-Technometrica-Online-Advertising-Report-Sept-2019.pdf>.



that APRA has field preemption with respect to all consumer data privacy. We believe that any federal privacy law should clearly establish a consistent, uniform standard protecting Americans everywhere and to which every business can adhere.

Private Right of Action. While we appreciate the Committee’s attempts at improving the private right of action including the extension of the periods for right to cure and notice around actual damages, the mere inclusion of a PRA at all is still untenable. This legal provision allows individuals to sue companies directly for breaches of privacy, which can lead to a flood of lawsuits, even for minor infractions. For businesses, especially small and medium-sized enterprises, this can mean facing potentially crippling legal costs and the burden of constant litigation, which can divert resources from innovation and growth. Moreover, the threat of litigation could stifle willingness to engage in data-driven innovation, as companies might become overly cautious in their use of data to avoid potential lawsuits. This can ultimately slow technological progress and innovation in the economy. Additionally, the inconsistency of legal judgments across different courts can lead to a patchwork of enforcement, creating confusion and uncertainty about compliance requirements. Thus, while intended to protect consumer rights, a private right of action could have unintended consequences that might hinder economic growth and innovation in the digital age.

IAB understands that a private right of action might be necessary to win the approval of some members of Congress in order to enact a preemptive federal privacy law, however, any such private right should be significantly cabined to avoid it being abused by plaintiff lawyers seeking to earn a quick buck. To this end, we acknowledge and thank the Committee for the inclusion of the new section on “bad faith” actions and hope to see these efforts expanded.

Kids Online Safety Act (KOSA)

IAB supports the Committee’s efforts to protect children online while also ensuring that children can enjoy the benefits of digital advertising. Today’s youth are the most connected generation in history, and their use of the Internet—with all the benefits such use brings—continues to grow. Providing children with meaningful access to online resources depends, in no small part, on digital advertising. Digital advertising has powered the growth of online services for decades by supporting and subsidizing publishers that provide free and low-cost services that consumers use to connect, learn, and communicate. The revenue that publishers gain from digital advertising levels the playing field for children by reducing cost barriers to online participation. If digital advertising were restricted or eliminated, this would result in the loss of ad-funded online content. By supporting the growth of content and services, responsible digital advertising helps to ensure that children, regardless of location or family income, can experience the benefits of our connected world.

Participants in the digital advertising ecosystem take seriously their responsibility to deliver high-quality and appropriate advertising to all consumers, including children and teens. To that end, IAB has taken steps to address concerns like these by issuing guidance for our members



on advertising to children.⁴ Additionally, IAB encourages advertisers to comply with guidance from the Federal Trade Commission and from the Children’s Advertising Review Unit of the BBB National Programs. Ultimately, advertising for children should encourage interest and excitement for products, unlike advertisements to adults which might encourage purchasing behaviors.

While IAB supports protecting children online, KOSA as currently drafted would have a devastating impact on digital advertising and the ad-supported content that children enjoy. We would like to highlight two areas in which KOSA can be improved.

The Constructive Knowledge Standard is Overburdensome. The constructive knowledge standard is untenable because it sets the precedent that businesses operating online would have to know the age of every user that visits its website. Under a constructive knowledge standard, operators may be required to treat a visitor to a general audience property as a child if the operator has any indication the visitor might be a child. This would result in the need to collect additional sensitive data and implement **age verification technologies** to determine the ages of its users. This would be a **burdensome** and **expensive** requirement, and it would also be **ineffective**, as minors could misrepresent their age. The constructive knowledge standard would also have the perverse effect of requiring companies to collect additional sensitive personal information about their users in order to protect their “privacy.” Furthermore, the constructive knowledge standard would be particularly noticeable on websites and apps that are *unlikely* to have child users, and thus would have the largest negative impact on adults’ online experiences as well as bringing many businesses within the scope of KOSA. We urge the Committee to recognize the actual knowledge standard as the appropriate approach to protecting children’s online privacy without unduly burdening online experiences for adults.

KOSA Does Not Fully Preempt State Law. KOSA falls short by failing to preempt other states from enacting their own kid privacy laws. Consumers and businesses need certainty that a single uniform federal law provides. This lack of full uniformity has been particularly evident in the context of general state data privacy laws, where a complex patchwork of varying laws and regulations has developed. This situation presents significant challenges for businesses operating across multiple states, as they are burdened with the task of navigating and complying with a multitude of diverse and sometimes conflicting requirements.

To effectively address these issues, KOSA should clearly establish complete federal preemption. By doing so, a set of clear and consistent rules can be implemented, benefiting both businesses and consumers. This would not only alleviate the compliance burden on businesses, but it would also provide consumers with uniform protections for children online. This would guarantee that children from Washington would have the same level of protection online as children from Texas or anywhere else in the United States.

⁴ IAB, *Guide to Navigating COPPA* (Oct. 2019), https://www.iab.com/wp-content/uploads/2019/10/IAB_2019-10-09_Navigating-COPPA-Guide.pdf



IAB thanks the Committee for its consideration of this letter and looks forward to working closely with the Committee on these important topics. Please do not hesitate to contact me at lartease@iab.com with questions about these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Lartease M. Tiffith". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lartease M. Tiffith, Esq.
Executive Vice President for Public
Policy
Interactive Advertising Bureau

cc: Members of the House Energy & Commerce Committee