



July 19, 2022

By email

The Honorable Frank Pallone, Chair
The Honorable Cathy McMorris Rodgers, Ranking Member
House Committee on Energy & Commerce
Washington, DC 20515

Re: American Data Privacy and Protection Act (“ADPPA”)

Dear Chairman Pallone and Ranking Member McMorris Rodgers,

Consumer Reports¹ writes to follow up on our letter of July 17th and to express our appreciation to the Committee for the latest amendments contained in the Second Amendment in the Nature of a Substitute (“Second AINS”) released earlier today.² These changes address many of the concerns raised in our letter, and as a result we believe that, if enacted as written, the Second AINS would dramatically improve the online data ecosystem and offer robust privacy protections for American consumers that do not exist today. Our primary request to the Committee is to not backtrack on the changes made in the Second AINS, especially when it comes to online tracking and targeted advertising which are the primary source of many of the concerns that motivate this bill.

While the Second AINS is a substantial improvement over previous versions, we recommend following additional changes to make the bill stronger still:

¹ Founded in 1936, Consumer Reports (CR) is an independent, nonprofit and nonpartisan organization that works with consumers to create a fair and just marketplace. Known for its rigorous testing and ratings of products, CR advocates for laws and company practices that put consumers first. CR is dedicated to amplifying the voices of consumers to promote safety, digital rights, financial fairness, and sustainability. The organization surveys millions of Americans every year, reports extensively on the challenges and opportunities for today’s consumers, and provides ad-free content and tools to 6 million members across the U.S.

² Letter from Justin Brookman, Director, Technology Policy, Consumer Reports to The Honorable Frank Pallone, Chair and The Honorable Cathy McMorris Rodgers, Ranking Member re American Data Privacy and Protection Act (“ADPPA”), (Jul. 17, 2022), <https://advocacy.consumerreports.org/wp-content/uploads/2022/07/CR-letter-to-EC-re-ADPPA-AINS.pdf>.

- *Non-retaliation and loyalty programs.* The Second AINS includes new language in § 104 to strengthen the bill’s non-retaliation provision by prohibiting differential pricing and treatment for consumers who exercise privacy rights. We support those changes, but this provision should also prohibit companies from punishing users who refuse to waive rights or who do not consent to additional tracking. Consumers can still be forced to pay for their privacy if companies are allowed to mandate that consumers hand over additional unrelated data as a condition of service.

We also support the exclusion from the non-retaliation provision of “bona fide” loyalty programs, though the definition should be improved beyond the perfunctory definition of “‘bona fide loyalty program’ includes rewards, premium features, discount or club card programs” in the Second AINS. A program that counts purchases in order to make every tenth purchase free is a bona fide loyalty program. A program that sells purchase records to data brokers is not.

- *Constructive knowledge.* The Second AINS improves protections for minors by adding a constructive knowledge standard for high-impact social media companies and a willful disregard standard for large data holders. Consumer Reports agrees that large internet platforms today take too little responsibility today for what happens to users on their platforms,³ and in many cases have failed to take even remedial steps to recognize that certain audiences are very likely to be children.⁴ However, we are concerned that companies could interpret these new obligations as requiring them to collect new data on users or to authenticate identity prior to use, which would pose a threat to privacy and free speech. We urge the Committee to add language clarifying that companies need only consider previously collected data sets in evaluating whether a particular user is likely to be a child, and are not obligated to collect additional data or to authenticate the age or identity of a user as a condition of using the platform.
- *Opt-out authentication.* Section 210(b)(4) of the Second AINS states that covered entities or service providers may “have an authentication process” to determine if a unified opt-out request is “legitimate.” Such authentication is unnecessary and impractical, and would add inappropriate friction to what is intended to be a

³ Testimony of Laurel Lehman, Policy Analyst, Advocacy, Consumer Reports, Before the United States House of Representatives Committee on Energy & Commerce, Subcommittee on Consumer Protection and Commerce, Hearing on “Holding Big Tech Accountable: Legislation To Protect Online Users”, (Mar. 1, 2022), <https://docs.house.gov/meetings/IF/IF17/20220301/114439/HHRG-117-IF17-Wstate-LehmanL-20220301.pdf>.

⁴ Allen St. John, *Advocates Say Google Illegally Collects Kids' Data From YouTube*, Consumer Reports, (Apr.9, 2018), <https://www.consumerreports.org/privacy/advocates-say-google-illegally-collects-kids-data-from-youtube-a3364536260/>.

seamless process for consumers. Access, correct, deletion, and portability rights under § 203 are subject to authentication to ensure that bad actors cannot misuse consumers' data or otherwise cause them harm. Opt-out rights for targeted advertising and data transfers in § 204 do not pose similar risks and as such are *not* subject to authentication. State laws such as California's operate similarly. Section 210(b)(4) should be removed.

- *Preemption.* While the Second AINS did not make substantial changes to ADPPA's preemption provisions, the text of the new bill offers a more compelling argument that ADPPA's protections may be worth the substantial cost of preemption. However, even an improved ADPPA is not going to be future-proof. States have long been the trailblazers on privacy issues, and they should have some capacity to build on ADPPA's protections and to respond to inadvertent loopholes and evolving privacy threats in the future.⁵

Thank you again for the tireless work you and your staffers have put in to make the long delayed dream of federal privacy legislation a reality. We look forward to tomorrow's full Committee markup.

Sincerely,

Justin Brookman
Director, Technology Policy
Consumer Reports

⁵ See, e.g., Letter from Attorney General Rob Bonta and nine other State Attorneys General to Congressional Leaders, (Jul. 19, 2022), <https://oag.ca.gov/system/files/attachments/press-docs/Letter%20to%20Congress%20re%20Federal%20Privacy.pdf>.