



555 12<sup>th</sup> Street NW, Suite 1001  
Washington, D.C. 20004

1-800-552-5342  
NFIB.com

June 23, 2022

The Honorable Janice D. Schakowsky  
House Committee on Energy and Commerce  
Subcommittee on Consumer Protection and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, D.C. 20515

The Honorable Gus M. Bilirakis  
House Committee on Energy and Commerce  
Subcommittee on Consumer Protection and Commerce  
U.S. House of Representatives  
2322 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairwoman Schakowsky and Ranking Member Bilirakis:

On behalf of NFIB, the nation's leading small business advocacy organization, I write to express concern with H.R. 8152, the *American Data Privacy and Protection Act*. NFIB is concerned that the small employer exemption in H.R. 8152 is inadequate in its current form and will result in significant new regulatory burdens for small businesses.

The *American Data Privacy and Protection Act* contains a limited exemption for businesses with average annual revenues over the last three years of \$41 million that did not annually collect or process the covered data of more than 200,000 individuals during the period and did not derive more than 50% of its revenue from transferring covered data during any year in that period. While many NFIB members would qualify for this exemption, the exemption only applies to sections 203(a)(4), 208(b)(1)-(3), 208(b)(5)-(7), and 301(c). NFIB is concerned that small businesses are not exempted from all provisions in this legislation, several of which will be difficult to comply with and burdensome.

Unlike large businesses, small business owners do not have a compliance department or a team of attorneys to help them deal with complicated new regulations. Most owners handle new paperwork and compliance burdens themselves. This legislation will require small business owners to establish new privacy safeguards and protocols, tasks they are ill-equipped to perform.<sup>1</sup>

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<sup>1</sup> Section 103. *Privacy By Design*.

H.R. 8152 would require small businesses to publicly display a lengthy privacy policy containing numerous pieces of information including a description of companies' data security practices, the length of time data is retained, and the processing purposes of the data. In addition, businesses must notify all customers if there is a change in the privacy policy or practices at the company. This standard will prove onerous and burdensome to very small employers.<sup>2</sup>

This information also must be made available in a manner that is readily accessible and usable by individuals with disabilities. Small businesses already face ambiguity in how the Americans with Disabilities Act (ADA) applies to the websites of businesses.<sup>3</sup> Regulations have yet to be written on what a "readily accessible website" looks like. This bill fails to define "readily accessible" and will likely pose the same challenges to small businesses that they have seen with ADA website compliance.<sup>4</sup>

NFIB is also concerned that the limited small business exemption appears to require a business to apply for the exemption and be granted approval by the Federal Trade Commission (FTC).<sup>5</sup> Such a process will be burdensome and potentially costly. NFIB urges the committee to explicitly state that small businesses have no obligation or requirement to apply for and seek an exemption.

NFIB has concerns that H.R. 8152 would allow a private right of action as a means of enforcement of the statute. NFIB appreciates that the committee sought to restrain this action by requiring private action to be delayed until sixty days after notifying the FTC and the State Attorney General of their intent. However, H.R. 8152 does not prohibit litigation after the sixty-day period if the FTC and the State Attorney General refuse to prosecute the case. As is often the case in statute's containing a private right of action, NFIB is concerned that this may lead to small businesses being targeted for very minor compliance mistakes, such as those related to the public posting of privacy policies and procedures.<sup>6</sup>

Small business owners care deeply about the privacy of their customers as well as their own personal privacy as consumers. However, complying with this legislation will more than likely be a significant and costly challenge for small business owners. NFIB urges the committee to make appropriate changes to ensure that small businesses do not bear an unreasonable regulatory burden.

Sincerely,



Kevin Kuhlman  
Vice President, Federal Government Relations  
NFIB

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<sup>2</sup> Section 202. *Transparency.*

<sup>3</sup> Rob Smith, *The ADA and Small Businesses: Website Compliance Amid a Plethora of Uncertainty*, NFIB Legal Center (July 21, 2021), <https://assets.nfib.com/nfibcom/ADA-Handout-07-22-2021-FINAL.pdf>.

<sup>4</sup> Section 202(d). *Accessibility.*

<sup>5</sup> Section 209. *Small Business Protections.* "Any covered entity or service provider **that can establish that it met the requirements** described in paragraph (2)."

<sup>6</sup> Section 403. *Enforcement by Individuals.*