October 26, 2023

Via Electronic Submission
Senator Anne Carney, Chair
Representative Matthew Moonen, Chair
Members of the Judiciary Committee
Maine State Legislature
Augusta, ME 04333

RE: Additional Testimony for Consideration following the Judiciary Committee's Hearing on LD 1977 (Data Privacy) & Work Session held on October 17, 2023

Dear Senator Carney, Representative Moonen, and members of the Judiciary Committee:

The National Retail Federation appreciates your consideration of our views in your efforts to develop statewide privacy legislation, the subject of the Judiciary Committee's public hearing on LD 1977 and work session held on October 17, 2023. I participated in both and was invited to testify via Zoom in light of my subject matter expertise on federal and state privacy legislation in the United States. In follow up to my oral testimony last week, and after consultation with our members and other stakeholders in the retail industry, I am submitting to the Committee some additional observations to both support and augment my remarks made during the legislative hearing on LD 1977 and the work session that immediately followed it.

NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail succeed. NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

NRF believes federal privacy legislation is necessary to establish uniform, national standards that protect all Americans' personal data wherever it is collected and used, regardless of the state where a consumer resides or a business is located. Until Congress enacts preemptive federal privacy legislation, we have been supporting and will continue to support adoption of consistent data privacy laws by states to ensure the level of consumer protection and enforcement of these laws are substantially equivalent for consumers and businesses across the United States.

We believe it is critically important for the American economy and free-flowing interstate commerce that states model any new comprehensive privacy laws on the workable and non-controversial privacy frameworks successfully established by other states and implemented by covered businesses in recent years. This will help maintain substantially similar privacy laws across the United States that protect consumers' data comprehensively, do not overly burden interstate commerce, and ensure that legitimate businesses may continue to use that data to serve their customers in ways that they now expect. To this end, we have worked with and supported

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com

our partners at state retail associations, including the Retail Association of Maine, to provide substantive policy expertise and additional support in this complex area of law and legislation.

With respect to the development of a comprehensive privacy law for Maine (including LD 1973 and LD 1977, which are bills that propose to cover all personal data and are not limited to covering only biometric information and/or consumer health data), my additional observations provided below are limited to just two of the issues discussed by other witnesses and in my personal testimony during last week's hearing and follow-on work session: 1) private rights of action; and 2) customer loyalty programs. *(While not offered here, NRF may offer comments on other issues in proposed privacy legislation for Maine in future or supplemental testimony.)*

Private Rights of Action

Setting aside certain specialized data privacy bills that do not cover all consumer data generally but are narrowly focused on biometric information and/or consumer health data (where two states have authorized private rights of action that remain controversial provisions there), it is important to reiterate that no state's enacted comprehensive privacy law has authorized private rights of action to enforce the privacy provisions of that law. Notably, California limited the private right of action in the California Consumer Privacy Act (CCPA) to apply only to the CCPA's data security provisions, so they are not used to enforce the CCPA's privacy provisions.

In lieu of relying on private rights of action, states that enacted *comprehensive* privacy laws instead adopted exclusive attorney general (AG) and/or government agency enforcement, typically coupled with notice-and-cure rights for alleged violations as further described below. The principal reason for this is that many of the obligations to protect personal data are subject to complex rules and subjective standards. Most privacy laws, for instance, use standards of "reasonability" when setting the level of protection businesses should apply to personal data based on a range of factors from the sensitivity of the data to its intended use or sharing.

Naturally, because legislatures cannot predetermine every data-use case across a broad range of industry sectors and precisely calibrate a one-size-fits-all law to cover all potential uses, most states have found an effective way to ensure the greatest compliance with their laws is to encourage robust dialogue between covered businesses handling customer data and an exclusive state enforcement authority, such as the AG or a state privacy agency. For that reason, nearly all comprehensive state privacy laws couple the AG enforcement provision with a notice-and-cure period in which businesses have the ability to work with the AG for 30 or 60 days after being notified of any potential non-compliance with the law to explain, correct, or "cure" any data practices to the satisfaction of the AG in order to avoid legal enforcement proceedings. This approach is valuable in addressing innovative data use cases lawmakers could not anticipate.

This enforcement model, which is the national standard for comprehensive state privacy laws that contain complex rules and subjective standards, helps achieve the state legislature's primary goal of driving robust data privacy law compliance across the greatest range of businesses in order to comprehensively protect state residents from data privacy violations. This model also avoids unintentionally subjecting covered businesses to "gotcha" rules alleged to apply to data in ways never intended, and where avoiding litigation may be impossible despite a legitimate business's best efforts to comply with a complicated law with subjective standards.

For these and additional reasons, *every* state that has successfully enacted *comprehensive* privacy legislation – laws covering all personal data collected and processed by covered entities – has considered and rejected private rights of action to enforce their law's privacy provisions.

Customer Loyalty Programs

A critically important area where one of the proposed privacy bills you are reviewing, LD 1977, proposes a rule that would be a significant outlier among all state privacy laws is in its potential regulation of customer loyalty plans. Retailers believe Maine consumers have the capacity to make intelligent and informed decisions about whether to voluntarily participate in customer loyalty programs offered by trusted companies with whom they do business. These programs include retail loyalty plans under which customers receive discounts and other benefits they want. Sometimes providing a benefit requires the retailer to share customer data with business partners in other industry sectors, such as gas stations who provide discounts on the price per gallon of gas once partnered grocery store customers reach certain levels of purchases.

Offering benefits like these to customers from valued business partners does not make a retailer a "data broker." Unlike the situation with data brokers, retail customers know who they are providing their personal information to – the retailer with whom they are shopping – and they voluntarily participate in these programs – that is, they opt into them after determining whether or not they'd like to participate in the plan to receive the offered benefits from that retailer or their business partners. By contrast, data brokers are unknown to consumers, and they collect and share consumer data often without providing consumers either notice or choice.

It is important to note that some text in LD 1977's section 9607 subsection 3.B. (starting on p. 9, line 27) is consistent with other state privacy laws' provisions that require participation in qualifying loyalty plans to be "voluntary." We support this requirement of voluntariness as it provides a higher level of protection (an opt-in), meaning that a consumer who takes no action to join would not be part of a loyalty program covered by this section's savings clause language. Furthermore, this requirement has teeth and provides a powerful incentive to offer loyalty plans *only* on an opt-in basis, because a plan that does not require participants to opt in could be found to violate the bill's prohibition on discriminating against consumers exercising privacy rights.[1]

Although we have supported similar voluntariness language in all other state privacy laws, LD 1977 is an outlier due to the *additional* language that appears in subsection 3.B. after the standard language noted above. This additional text, found in prongs (1)-(3) (on p. 9, lines 33-39), is legislative language that does not exist in any other state privacy law nor in federal proposals, and here's why. After the standard opt-in requirement above, the text of (1)-(3) is unnecessary to protect consumers and would only serve to overly restrict customer loyalty plan operations in ways that no other state privacy law does now and no federal privacy bill proposes.

[1] Subsection 3 of Section 9607 of LD 1977 interprets the meaning of the bill's prohibition on retaliation against consumers who exercise a privacy right, including *"charging different prices or rates for goods or services or providing a different level of quality of goods or services."* Because this text could inadvertently treat all customer loyalty programs as *de facto* violations of the law for providing some customers better prices or levels of service than those exercising privacy rights who do not participate in these programs, the subsection correctly includes a savings clause intended to preserve the operation of bona fide customer loyalty plans offered by retailers and other businesses to customers who voluntarily opt in to participate in them.

For comparative purposes it is also highly relevant that LD 1977's opt-in for data transfers of sensitive data to third parties, found in section 9605 subsection 3.A. (on p. 7 line 38), does not have *any* additional restrictions like those in prongs (1)-(3). This raises the public policy question as to why the bill would regulate popular customer loyalty plans that consumers already opt into more severely than transfers to third parties of consumers' most sensitive information.

We believe Maine should avoid enacting novel customer loyalty plan regulations that jeopardize the continued availability of popular loyalty plan benefits to Mainers, especially from programs that would continue to offer those benefits in nearby states. As explained in my oral testimony last week, Connecticut considered and rejected the same *additional* language before enacting its comprehensive privacy law containing the standard loyalty savings text that retail and other sectors fully supported. If Maine were to now adopt the outlier *additional* regulation that Connecticut and other states rejected, it will create disparities in the regulation of loyalty plans within New England that hurts Maine retailers, Maine consumers, and Maine's economy.

In conclusion, we support the old retail adage that the "customer is always right." By extension, we also believe that Maine consumers expect the public policy and laws of the state to preserve their current rights to choose whether to receive benefits offered in customer loyalty programs from trusted businesses that they decide to voluntarily join. For this reason, we ask you to reject the *additional* language regulating customer loyalty plans in LD 1977 that is an outlier among all enacted state privacy laws.

Thank you for your consideration of our views, and we appreciate the opportunity to continue participating in future work sessions to address these and other areas of interest to retailers in proposed privacy legislation. We also look forward to working with you and your staff to help develop a comprehensive, workable, and effective privacy law for Maine.

Sincerely,

Paul Martino
Vice President & Senior Policy Counsel

Paul Martino
National Retail Federation
LD 1977

Please see attached supplemental testimony in support of the oral testimony provided via Zoom by Paul Martino, Vice President & Senior Policy Counsel for the National Retail Federation, during the public hearing on LD 1799 and follow-on work session held on October 17, 2023.