BEACON POLICY ADVISORS
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006
beaconpa.com

SPOTLIGHT REPORT

June 22, 2022

# Surveilling Data Privacy on the Federal and State Levels

**What's Happening:** Congress is considering a landmark bipartisan comprehensive federal privacy bill.

**Why It Matters:** Federal data privacy legislation has long been an elusive goal. Despite agreement from lawmakers on both sides of the aisle that data privacy is a problem requiring a federal response, Democrats and Republicans have historically been divided on how to go about it. Two issues in particular, the preemption of state laws and a private right to action to sue over privacy violations, have been difficult to resolve across party lines. **The legislation proposed this month by House Energy and Commerce Committee Chair Frank Pallone (D-NJ) and Ranking Member Cathy McMorris Rodgers (R-WA) and Senate Commerce Committee Ranking Member Roger Wicker (R-MS) is significant for tackling these thorny questions.** The American Data Privacy and Protection Act, which is also cosponsored by Reps. Jan Schakowsky (D-IL) and Gus Bilirakis (R-FL) in the House, is the farthest Congress has come to addressing data privacy in a bipartisan way. That doesn't mean that the bill will necessarily have a smooth path to passage, though. **Comprehensive federal privacy legislation faces noteworthy obstacles. Key Senate Democrats, including Senate Commerce Committee Chair Maria Cantwell (D-WA) and Senators Richard Blumenthal (D-CT), Brian Schatz (D-HI), and Ron Wyden (D-OR), do not currently support it.** There's also a ticking clock, and it's possible lawmakers may not be able to finish work on legislation with enough time left to pass it this year. **Nevertheless, in the event that this bill fails, there are other channels for taking action on data privacy. The Federal Trade Commission (FTC) has signaled that it is getting involved with privacy, and several states are striking out on their own, most notably California.**

**What's Next: The House Energy and Commerce Committee Subcommittee on Consumer Protection and Commerce has scheduled a markup of the federal privacy bill for Thursday morning.** This will give lawmakers an opportunity to make changes and potentially go after the votes of the Senate Democrats who aren't on board at this time. In an interview with Politico last week, Bilirakis said that Pallone intends to advance the bill via regular order. After the subcommittee markup, the bill is next expected to undergo a markup by the full House Energy and

> Commerce Committee before a vote on the House floor. After this Friday, Congress is scheduled to be out of session for two weeks, pushing any further action on federal privacy legislation to July.

## The Congressional Outlook

**The legislation backed by Pallone, McMorris Rodgers, and Wicker splits the difference on preemption and a private right of action.** As drafted, the bill would preempt most state privacy laws (but not all), and it would establish a private right of action, which would come into effect four years after passage. Additionally, the FTC and state attorneys general would both have a role in enforcement. State laws that would not be preempted include California's private right of action for data breaches and Illinois' law on biometric information, which facial recognition company **Clearview AI** was accused of violating, leading to a recent settlement.

**The legislation is complex, but some notable high-level components include:**

- Data minimization (i.e., restricting companies' use of data to what is necessary), and the FTC will be tasked with determining what use is "reasonably necessary, proportionate, and limited"
- A new privacy bureau at the FTC and new authority for the agency to initiate rulemaking on privacy
- Consumer rights on accessing, correcting, deleting, and transporting their personal information
- Required opt-in for use of sensitive data (such as health, financial, and biometric), and the personal information of internet users under 17 years old is also classified as sensitive data
- Required opt-out for sales/transfers of data and targeted advertising
- A prohibition on targeted advertising aimed at children under 17 years old
- Required assessments for "large data holders" of their algorithms' impacts on civil rights and harms to children on a yearly basis

**Reactions to the proposal from industry and advocacy groups have been divided, as indicated by a House Energy and Commerce Committee Subcommittee on Consumer Protection and Commerce hearing on the draft legislation last week.** In his prepared remarks, John Miller of the Information Technology Industry Council, a trade group, objected to the bill's inclusion of a private right of action. "It is too broad and will not appreciably limit a likely wave of litigation," he wrote. Former acting FTC Chair Maureen Ohlhausen, who testified for industry organization the 21st Century Privacy Coalition, praised some aspects of the bill, such as its delegation to the FTC, but criticized others, such as the exceptions to state preemption. **In an interview with Protocol this week, Ohlhausen said "I think the business community really wants this to pass."**

**On the other side of the privacy debate, representatives from advocacy groups called for the legislation to have stronger privacy protections.** In their testimony, Caitriona Fitzgerald of the Electronic Privacy Information Center and David Brody of the

Lawyers' Committee for Civil Rights Under Law said that Americans should be able to pursue greater damages in litigation under the privacy law. Jolina Cuaresma of Common Sense Media testified that lawmakers should increase the age cutoff for the bill's enhanced children's privacy protections to cover 17-year-olds.

**It's notable that the first hearing on this proposal took place in the House and not the Senate. It looks like the legislation will face a steeper climb in the upper chamber because Cantwell is not on board.** She is chair of the Senate Commerce Committee, so her support will be crucial for the legislation to move forward. **The Washington state Democrat appears far from supporting it at this time, citing concerns about preemption of state laws and enforcement in an interview quoted by Politico today.** "They can come back to the table on something strong because people who want to get a bill know that you can't preempt states with a weak federal standard," she said. Cantwell also told reporters that "They have major enforcement holes — lot of right words, just not the right ability for consumers to be protected." Cantwell has previously said that she's against the private right of action taking effect after a four-year wait. **Cantwell sounded a negative tone on the bill's prospects in the Senate in the near future: "Chuck Schumer has already said there's no way they're bringing that bill up in the Senate," she said in today's interview.** Nevertheless, Cantwell has an interest in passing federal privacy legislation – just not this one. She told Politico today that "I think we're going to mark stuff up" in the future.

**Cantwell isn't alone in her criticism of the bipartisan compromise bill.** Senator Brian Schatz (D-HI) told The Washington Post that he wants the legislation to include a duty of care, a legal standard requiring companies to not cause harm. "If they fix the duty of care, I'll be a yes. If they don't, I won't," he said. Likewise, Senator Richard Blumenthal (D-CT) hasn't gotten to yes. "I have a number of concerns, particularly relating to private rights of action, potential impediments to effective enforcement," he said in a Post interview. "I don't think I can support it right now." **Politico also reported this week that Senate Finance Committee Chair Ron Wyden (D-OR) is against the bill.** In a letter to Pallone, McMorris Rodgers, and Wicker, Wyden criticized the bill for "prioritiz[ing] the interest of advertisers, data brokers and large platforms over the needs of users." **Ultimately, it appears that the privacy bill as it currently stands lacks the votes to pass the Senate and will need to undergo changes to move forward in the upper chamber.**

**The window of opportunity for passing a comprehensive federal privacy bill this year is seemingly narrowing, however.** This Friday, Congress is scheduled to go out of session for two weeks in observance of the July Fourth recess, with both chambers back in session on July 11th. That leaves just three weeks when both chambers are scheduled to be in session before the August recess (the Senate will meet for a fourth week). Once lawmakers return to Washington, DC in September, campaign season is expected to kick into gear. Passing major legislation in such an environment is tricky, and data privacy doesn't exactly fit the profile of legislation that tends to pass in the lame duck session. Usually it's must-pass bills like federal appropriations or the National Defense Authorization Act that most often make it across the finish line at that point.

**In the next Congress, Senator Ted Cruz (R-TX) is thought to be next in line to take over from Wicker as the top Republican on the Senate Commerce Committee based on seniority.** Wicker is expected to leave his position on this committee in favor of taking the top GOP spot on the Senate Armed Services Committee left open by retiring Senator Jim Inhofe (R-OK). The deeply conservative Cruz may be less inclined to work with Democrats on privacy.

***Children's Online Privacy***

Legislation focused on children's online privacy is also on the table in this Congress. **Such legislation could pass in addition to a comprehensive federal privacy bill or, in the event that the broader legislation fails, lawmakers could turn to children's privacy as a way to get something done this year.** Senator Ed Markey (D-MA), who was the chief architect of COPPA while he served in the House, has sponsored a bill with Senator Bill Cassidy (R-LA) that's considered a "COPPA 2.0" and would expand children's privacy protections from children under 13 to a higher age threshold of 16, among other provisions. Senators Blumenthal and Marsha Blackburn (R-TN) have also introduced the Kids Online Safety Act, a bill which would impose new design requirements on internet platforms focused on children's safety and privacy online. These more narrowly tailored measures could potentially gain greater support from conservatives than comprehensive privacy legislation.

***Data Privacy and Abortion***

**Since Politico published the leaked Supreme Court draft opinion overturning *Roe v. Wade* early last month, Democrats have increasingly focused on data privacy for abortion patients.** In mid-May, 14 members of the Senate Democratic caucus, including Senators Bernie Sanders (I-VT) and Elizabeth Warren (D-MA), sent letters to two data brokers, **Safegraph** and **Placer.ai**, criticizing the collection of location data from women who go to abortion clinics. Senators Amy Klobuchar (D-MN) and Tammy Baldwin (D-WI) also led a group of their colleagues in writing a letter to FTC Chair Lina Khan calling on the FTC "to protect personal data and ensure the privacy of women as they make decisions that should be between them and their doctors." **Last week, Warren, Sanders, and Senators Patty Murray (D-WA), Wyden, and Sheldon Whitehouse (D-RI) introduced legislation to prohibit sales of location and health information by data brokers.** In the House, Rep. Sara Jacobs (D-CA) announced earlier this month that she would introduce the My Body, My Data Act, a bill that would tighten protections for data relating to reproductive health. **Due to near-uniform GOP opposition to abortion rights in Congress, these proposals are unlikely to net the 60 votes needed to defeat a Senate filibuster, but they indicate that the issue of data privacy is growing in importance for Democrats.**

## The FTC Outlook

As Congress weighs a path forward on data privacy, the FTC has also signaled an

intention to act on the issue. **The Biden administration's most recent Unified Regulatory Agenda (UA), released yesterday, includes two FTC rulemakings on privacy, and it projects that both will hit milestones this month. One rulemaking aims to "curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination."** The agenda states that the FTC will release an advance notice of proposed rulemaking this month with a public comment period running until August, though that deadline will likely slip. This rulemaking first appeared in the Fall 2021 UA.

The other rulemaking focuses on the agency's rule that implements COPPA. The FTC is continuing to review public comments submitted on the COPPA rule in 2019, and the UA predicts that the FTC will finish evaluating them this month. The FTC stated when it reopened consideration of the COPPA rule in 2019, several years ahead of schedule, that the speed of technological changes compelled an earlier re-evaluation.

**The FTC's re-evaluation of its COPPA rule isn't the agency's only recent action on children's privacy.** In the FTC's first meeting since the confirmation of Commissioner Alvaro Bedoya, commissioners unanimously approved a new policy statement on the agency's enforcement of COPPA relating to education technology. The statement delineates prohibitions on collecting children's personal information when using education tech services. "Parents should not have to choose between their children's privacy and their participation in the digital classroom. The FTC will be closely monitoring this market to ensure that parents are not being forced to surrender to surveillance for their kids' technology to turn on," Samuel Levine, director of the FTC's Bureau of Consumer Protection, said in a press release.

**The arrival of Bedoya, a noted privacy advocate, to the FTC makes the agency well-positioned for a push to safeguard privacy.** Prior to joining the FTC, Bedoya worked as the founding director of the Georgetown University Law Center's Center on Privacy & Technology and the chief counsel of the US Senate Judiciary Committee Subcommittee on Privacy, Technology and the Law, per his Georgetown bio.

**Best known for her stance on competition, Khan has also signaled an interest in privacy.** In April, she gave a speech at the IAPP Global Privacy Summit suggesting that a new approach is needed to protect user privacy online. **"Going forward, I believe we should approach data privacy and security protections by considering substantive limits rather than just procedural protections," she said in her remarks.** "The central role that digital tools will only continue to play invites us to consider whether we want to live in a society where firms can condition access to critical technologies and opportunities on users surrendering to commercial surveillance," Khan added in her conclusion. **In an interview with Protocol earlier this month, Khan gave further hints of what to expect from the FTC on privacy.** She called attention to "technologies that Americans rely on to navigate everyday life that have either business models that are endlessly surveilling them or that are collecting that data and then selling it on secondary markets" and said that "inasmuch as existing laws and our existing tools cover some of those practices, we're going to be taking action." **She also took aim specifically at behavioral advertising,**

**which she said "creates a certain set of incentives that are not always aligned with people's privacy protections."** With the agency's recently established Democratic majority, it will be possible for Khan and Bedoya to chart a new course on privacy.

**Notably, Khan suggested in the Protocol interview that the FTC won't hold back on privacy while Congress considers legislation.** "While this effort is pending, we're also of course fiercely committed to using all of our existing tools, enforcement and policy — doing anything we can to make sure Americans are fully protected," she said.

## The State-Level Outlook

**In the absence of congressional action on data privacy, both red states and blue states alike have considered their own legislation this year.** In Democratic-controlled states, legislation has generally fallen on the side of users. For example, in May, Connecticut passed comprehensive privacy legislation that's seen as consumer-friendly. "The focus on opt-out is the most significant we've seen thus far, requiring companies to respect a global opt-out signal without authentication and defining a 'sale' in the broadest terms," Dan Clarke, the president of a privacy management company, told the Record.

In Republican-controlled states, on the other hand, data privacy legislation has generally fallen on the side of industry. **Utah passed a data privacy bill in March, making the Beehive State the fourth state in the country to pass privacy legislation after California, Colorado, and Virginia and the first red state to do so.** Under the legislation, Utahns have the right to know what personal information platforms are collecting on them and the right to request deletion of their data, but they would not be able to sue for violations. Enforcement would be up to the state attorney general's office, and companies would first have 30 days to resolve breaches of the law before the state could initiate proceedings. **The Markup reported last month that the tech industry has been actively lobbying state legislatures, including Utah's, in order to shape data privacy bills.** Lobbyists representing companies including **Amazon (AMZN)**, **Apple (APPL)**, **Google (GOOGL)**, **Meta (META)**, and **Microsoft (MSFT)** were all registered in Utah. The report found evidence of 445 lobbyists and lobbying firms affiliated with Big Tech active in 31 states between 2021 and May 2022.

**Seen as more industry-friendly, the Utah bill is likely to offer a roadmap for other conservative-led states on online privacy.** During a hearing in Utah, a lawyer with the State Privacy and Security Coalition said, "I really want to be upfront about this and my hope that a Utah model could be copied in other states." Politico reported that tech industry groups have also had a presence in Iowa, where in March the House of Representatives passed a bill that a Consumer Reports analyst said was "weakened" to align with the Utah legislation. The Iowa bill didn't make it through the state Senate before the end of the legislative session, but it shows the impact of the Utah legislation on other states.

***Data Privacy in California***

California remains the leader on the state level in data privacy on the legislative and regulatory fronts. **The Golden State's top privacy regulator, the California Privacy Protection Agency (CPPA), is moving towards crafting new privacy rules for the state.** Two weeks ago, the CPPA board voted to start a rulemaking process to bring the California Privacy Rights Act into effect. The agency released a draft of proposed rules in a notice circulated before the board meeting. **The draft covers consumer rights for opt-out and requests to access or correct information, rules around dark patterns, and the CPPA's enforcement powers.** Vinhcent Le, a CPPA board member, has previously said publicly that other issues, such as automated decision-making, cybersecurity audits, and privacy risk assessments, "require more work" and might be the subject of separate proposed rules in the future.

**The California Privacy Rights Act set a deadline of July 1st for the CPPA to complete rulemaking, but the agency's executive director, Ashkan Soltani, said at a February board meeting that the agency plans to finish rulemaking in the third or fourth quarter of this calendar year.**

**The California state Assembly recently passed the Age-Appropriate Design Code Act, a bipartisan bill that would boost online privacy protections for children.** Components of the bill include a requirement for platforms to make strong privacy settings the default for children and new limits on their ability to collect and distribute data belonging to young users. The bill passed by a resounding bipartisan vote of 72-0, with six lawmakers not voting. The Age-Appropriate Design Code Act is now in the state Senate, which will have until August 31st to pass it.