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Bipartisan Privacy Discussion Draft: Significant, If Incomplete, Progress

by

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I. Introduction and Summary

On June 3, 2022, two Representatives, one from each political party, and a Republican Senator unveiled a Discussion Draft of a comprehensive data privacy bill. The release of the bipartisan and bicameral "[American Data Privacy and Protection Act](#)" (ADPPA) itself is a noteworthy event, one long-awaited step toward the establishment of a critically needed federal data privacy regime that benefits both consumers and companies. But while the ability of these lawmakers to make meaningful progress toward breaking the longstanding logjam warrants commendation, it remains important to highlight how this proposed legislation should be improved before it becomes law. Specifically, the final version should reject a federal private right of action and preempt those already in place at the state level.

As a general principle, stakeholders have acknowledged for many years that personal online data transcends state borders and demands a national approach. Actual agreement on specific provisions, however, has remained out of reach. At this point, of course, the chief sticking points are well known:

- One, whether a federal privacy law should preempt state statutes. It should, for several reasons: (a) to provide consumers with a single set of clear and consistent rights no matter where they, or the companies with which they interact, may be located, (b) to minimize the compliance burdens faced by businesses, particularly smaller startups, and (c) to establish, at the national level, an appropriate balance between protecting individual privacy rights and fostering continued marketplace innovation.
- Two, whether privacy rights should be enforced through a private right of action – that is, whether consumers, individually or as part of a class, should be able to sue for damages. They should not. Private rights of action inevitably generate economic inefficiencies. The allure of attorney's fees distorts strategic decisionmaking and incentivizes frivolous lawsuits – which, in turn, impose substantial defense-related costs that, again, disproportionately harm smaller businesses and discourage new entrants. Exclusive enforcement by the Federal Trade Commission (FTC), on the other hand, avoids these concerns.

Prior to the release of this discussion draft, lawmakers representing both parties on several occasions reportedly came close to reaching a workable compromise on these issues, but each time their efforts ultimately fell short. In the face of the resulting federal silence, the states have generated a steadily louder cacophony: [Connecticut](#) recently became the fifth to pass its own unique comprehensive data privacy bill. The result is becoming unbearable – [inconsistent, overlapping approaches create confusion for consumers and compliance nightmares for businesses](#) – and these ill effects likely played a key role in carrying the ADPPA over the drafting finish line. With respect to private rights of action, however, additional heavy lifting is required.

II. In Many Ways, the Discussion Draft Warrants Praise

Authored by House Energy and Commerce Committee Chair Frank Pallone (D-NJ) and Ranking Member Cathy McMorris Rodgers (R-WA) along with Senator Roger Wicker (R-MS), Senate Commerce Committee Ranking Member, the laudable objective of the ADPPA is "[to enable meaningful privacy protections for Americans and provide businesses with operational certainty](#)." Among other things, it:

- Empowers consumers to (1) access, correct, delete, and transfer ("port") their personal information, (2) opt out of data transfers to third parties, and (3) opt out from targeted advertising.
- Requires that consumers provide "express affirmative consent" (that is, opt-in) before a business may collect *sensitive* personal data, which includes such things as social security numbers; health, financial, and geolocation information; private communications; information regarding race, religion, and sexual orientation; private photos, audio, and video; and "information revealing individuals access to or viewing of TV, cable, or streaming media services" – as well as any information regarding individuals 16 years of age or younger.
- Directs companies to make available privacy policies both general and specific to certain activities "in a readily available and understandable manner."

- Ensures that companies minimize the data they collect by establishing a "duty of loyalty," requiring that they consider consumer privacy from day one (that is, adhere to the concept of "privacy by design"), and limiting the collection, processing, and transfer of data to "what is reasonably necessary, proportionate, and limited to (1) provide or maintain (A) a specific product or service requested by an individual; or (B) a communication by the covered entity to the individual reasonably anticipated within the context of the relationship; or (2) a purpose expressly permitted by" the ADPPA.
- Prohibits businesses from forcing consumers to waive their privacy rights under the ADPPA or pay a discriminatory price to receive a service or product.
- Directs the FTC to establish a new privacy bureau within one year.

III. The ADPPA Falls Short on Preemption and Enforcement

With some exceptions, including three that problematically involve a private right of action (see below), the ADPPA largely preempts similar comprehensive data privacy laws adopted by the states:

No State or political subdivision of a State may adopt, maintain, enforce, prescribe, or continue in effect any law, regulation, rule, standard, requirement, or other provision having the force and effect of law of any State, or political subdivision of a State, covered by the provisions of this Act, or a rule, regulation, or requirement promulgated under this Act.

The preemption of state-specific attempts to regulate data privacy not only is dictated by the inherently cross-border jurisdictionally indeterminate nature of Internet traffic flows, it also is an essential element of any workable national regime. Absent such preemption, a federal statute would exacerbate, rather than mitigate, the growing patchwork of overlapping, inconsistent state-specific approaches poised to overwhelm consumers and impose unreasonable, innovation-killing financial burdens on businesses. To its credit, the ADPPA largely recognizes and responds to that inescapable truth.

In three critical instances, however, the draft text carves out exceptions for existing state laws that establish private rights of action. Specifically, it preserves (1) California's limited private right of action regarding [certain data breaches](#), and (2) two Illinois statutes in their entirety – the [Biometric Information Privacy Act](#) and the [Genetic Information Privacy Act](#) – both of which provide for a private right of action.

As it happens, one of the sources I cited in "[A Privacy Private Right of Action Is Inferior to FTC Enforcement](#)," a January 2020 *Perspectives from FSF Scholars* describing the problems associated with private rights of action, was a 2019 paper by the U.S. Chamber Institute for Legal Reform entitled "[Ill-Suited: Private Rights of Action and Privacy Claims](#)." That paper specifically pointed out that Illinois' Biometric Information Privacy Act (along with an enabling decision by the state supreme court) problematically serves as the basis for "dozens of boilerplate complaints every month" and "provide[s] strong incentives for the plaintiffs' bar to file suits." Sound federal privacy legislation should preempt, not exempt, such state laws.

Of related, but far greater, concern is the private right of action that the ADPPA itself creates. The FTC and state attorneys general are given primary enforcement authority, but beginning in year five individuals also would have the ability, under certain circumstances, to file suit in federal court seeking compensatory damages, injunction or declaratory relief, and attorney's fees. Granted, they first must notify the FTC and their state attorney general of their intent to do so, thereby triggering a 60-day period during which those entities may elect to initiate enforcement proceedings themselves. Nevertheless, and in its current form, the ADPPA soon would open the door to the problems associated with private rights of action described above.

IV. Conclusion

Without question, the authors of the ADPPA deserve praise for producing a Discussion Draft embodying what long appeared impossible: bipartisan compromise on a much-needed federal comprehensive data privacy law. At the same time, however, it is important to point out the ADPPA's flaws and advocate for their correction. The call to create a private right of action has stood in the way of legislative progress these many years for good reason: such litigation disproportionately would benefit lawyers rather than consumers, deter new entry, and discourage innovation. Lawmakers therefore should return to the bargaining table, reject a federal private right of action, preempt those that exist in state statutes, and entrust the FTC with exclusive enforcement authority.

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Further Readings

["#FSFConf14 Speakers on Need for Federal Privacy Law,"](#) *FSF Blog* (May 26, 2022).

["Utah Becomes Fourth State to Pass a Privacy Law,"](#) *FSF Blog* (March 25, 2022).

["Utah 'Nearly Certain' to Become Fourth State to Pass a Privacy Law,"](#) *FSF Blog* (March 8, 2022).

["A Tale of Three Data Privacy Bills: Federal Legislative Stalemate Enables Bad State Laws,"](#) *Perspectives from FSF Scholars*, Vol. 17, No. 2 (January 6, 2022).

["Privacy Recap: Senate Commerce Committee Holds Hearing on Data Privacy; Op-Ed Authors Oppose FTC Privacy Rulemaking,"](#) *FSF Blog* (October 1, 2021).

["Exhibit C\(O\) in the Case for a Federal Data Privacy Law: The Colorado Privacy Act,"](#) *FSF Blog* (July 15, 2021).

["Colorado Lawmakers Introduce Data Privacy Bill,"](#) *FSF Blog* (April 6, 2021).

["Inconsistent State Data Privacy Laws Increase Confusion and Costs,"](#) *Perspectives from FSF Scholars*, Vol. 16, No. 14 (March 16, 2021).

["Virginia's Consumer Data Protection Act Soon Could Become Law,"](#) *FSF Blog* (February 5, 2021).

["California Voters Approve the California Privacy Rights Act: A Detailed Analysis of Its Requirements and Impact,"](#) *Perspectives from FSF Scholars*, Vol. 15, No. 60 (November 17, 2020).

["Privacy Recap: Senate Commerce Committee Holds Hearing, Republican Members Introduce SAFE DATA Act,"](#) *FSF Blog* (September 25, 2020).

["A Privacy Private Right of Action Is Inferior to FTC Enforcement,"](#) *Perspectives from FSF Scholars*, Vol. 15, No. 4 (January 21, 2020).

["Federal Privacy Legislation: Bipartisan Discussions Devolve into Dueling Drafts,"](#) *Perspectives from FSF Scholars*, Vol. 14, No. 42 (December 4, 2019).

["California's Heavy-Handed Approach to Protecting Consumer Privacy: Exhibit A in the Case for Federal Preemption,"](#) *Perspectives from FSF Scholars*, Vol. 14, No. 35 (October 28, 2019).