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**House Commerce Committee Passes Amended Privacy Bill, Concerns Remain**

by

**Andrew Long \***

On July 20, 2022, the House Committee on Energy and Commerce voted 53-2 to pass an amended version of the American Data Privacy and Protection Act (ADPPA). This marks the first time that comprehensive federal data privacy legislation has advanced out of committee – and, as such, represents an occasion worthy of note. Like the initial bill introduced in June, however, this version misses the mark on two key points: preemption of state law and the establishment of a private right of action. Certain revisions, in fact, have made an already problematic situation even worse.

In a [June \*Perspectives from FSF Scholars\*](#), I argued that the [ADPPA Discussion Draft](#) (Discussion Draft) – a bipartisan, bicameral bill and an undeniably substantial legislative step forward – reached the wrong conclusion as to whether individuals should be allowed to sue for damages. The establishment of a private right of action, among other things, would create incentives for frivolous lawsuits, impose costs that disproportionately impact start-ups and other small businesses, and open the door to judicial interpretations that differ from jurisdiction to jurisdiction. Exclusive enforcement of privacy protections by the FTC, on the other hand, can avoid these inefficient outcomes.

I therefore expressed hope that subsequent revisions to the Discussion Draft would (1) remove the limited private right of action included therein, and (2) excise express carve-outs to its generally preemptive approach for certain state laws that provide for a private right of action. Unfortunately, the version of the ADPPA passed by the House Commerce Committee – an [amendment in the nature of a substitute \(AINS\)](#) – not only retains that limited private right of action, it cuts in half, from four years to two, the amount of time before it goes into effect.

The AINS also adds language (specifically, references to a "State Privacy Authority") that, as a practical matter, empowers the [California Privacy Protection Agency \(CPPA\)](#) to enforce the ADPPA, thereby undermining the benefits that exclusive enforcement by the FTC otherwise would generate. (The CPPA, which was established by the [California Privacy Rights Act](#), is the first-of-its-kind state-level privacy agency. On June 28, 2022, [the CPPA voted 5-0 to oppose formally the AINS based upon its otherwise applicable preemption language.](#))

As I detailed in "[Bipartisan Privacy Discussion Draft: Significant, If Incomplete, Progress](#)," the Discussion Draft established consumer rights to: access, correct, delete, and transfer personal information; opt out from third-party data transfers and targeted advertising; and prevent the collection of *sensitive* personal data absent "express affirmative consent." It required companies to publish clear privacy policies, minimize the data they collect, and allow consumers to exercise their privacy rights free from retaliatory discriminatory pricing. It obligated that companies begin to address privacy implications during the initial planning stages of new products and services, a concept known as "privacy by design." And it called for the creation of a new privacy bureau within the FTC.

In addition, and as mentioned above, the Discussion Draft misguidedly created a limited private right of action, one that would not become effective for four years and could only be exercised if, after receiving notice, neither the FTC nor the relevant state attorney general chose to take enforcement action. However, it did bar the states from adopting or enforcing laws "covered by the provisions of [the ADPPA] or a rule, regulation, or requirement promulgated" thereunder.

Beyond shortening the private right of action delay period from four to two years and expanding enforcement authority to the CPPA, the AINS departs from the Discussion Draft in a number of ways, including by: strengthening protections relating to children; permitting companies to use personal information for first-party advertising and non-advertising communications; expanding the lists of exempted federal and state laws; providing greater guidance to the FTC regarding future rules for unified opt-out mechanisms; requiring that "large data holders" disclose certain metrics relating to responses to consumer requests; and narrowing the definition of "de-identified data."

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By making it out of committee, the AINS represents the high-water mark after years of unsuccessful congressional efforts to craft a comprehensive federal data privacy law. For the reasons set forth above, I want to remain optimistic that, as it moves forward, the legislative process will address its lingering but nevertheless important shortcomings, specifically its

inclusion of (1) a private right of action, and (2) exceptions that weaken its general intention to preempt state law.

\* Andrew Long is a Senior Fellow of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

### **Further Readings**

Andrew Long, "[Bipartisan Privacy Discussion Draft: Significant, If Incomplete, Progress](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 32 (June 16, 2022).

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

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

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

Andrew Long, "[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).

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

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

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

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

Andrew Long, "[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).

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