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Congressional Leaders Return Privacy to the Front Burner

by

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Somewhat unexpectedly, committee chairs from both chambers (and both political parties) recently reprioritized efforts to pass a much-needed federal comprehensive data privacy statute. On April 7, 2024, Senate Commerce Committee Chair Maria Cantwell (D-WA) and House Energy and Commerce Committee Chair Cathy McMorris Rodgers (R-WA) released a Discussion Draft of the American Privacy Rights Act of 2024 (APRA). According to their press release, "[t]his bipartisan, bicameral draft legislation is the best opportunity we've had in decades to establish a national data privacy and security standard."

Of course, it remains to be seen if Congress can leverage this opportunity to supersede the sixteen-state-and-growing "patchwork" of conflicting state laws with a single set of workable rules that apply uniformly from coast to coast. In that regard, the APRA's problematic inclusion of a private right of action may – and should – prove once again to be a sticking point.

As you likely are aware, this development is merely the most recent attempt to drive privacy legislation establishing a national framework across the federal finish line. In June 2022, another Discussion Draft, the American Data Privacy and Protection Act (ADPPA), was unveiled. After coasting through the House Energy and Commerce Committee on a near-unanimous vote,

however, an amended version of the ADPPA ran out of gas. Observers put forth several plausible explanations as to why that occurred. The actual cause (or causes) remains unknown, but one possible roadblock – the objections of Senator Cantwell, at the time the lone holdout among the so-called "four corners" of bipartisan, bicameral committee leadership – should not be an issue for the APRA given her primary role in its creation.

Another basis for optimism is the ever-expanding pressure brought to bear by the steady efforts by individual states to fill the vacuum created by congressional inaction. Already this year, three additional state comprehensive data privacy legislative efforts have reached the finish line, bringing the total (by my tally) to sixteen. A fourth currently sits on Maryland Governor Wes Moore's desk. Specifically:

- As I described in a contemporaneous post to the *FSF Blog*, on January 16, Garden State Governor Phil Murphy signed the New Jersey Data Privacy Act.
- On March 6, Granite State Governor Chris Sununu signed the New Hampshire Privacy Act.
- On April 4, Bluegrass State Governor Andy Beshear signed the Kentucky Consumer Data Protection Act.
- And on April 6, the Free State legislature passed the Maryland Online Data Privacy Act of 2024 (MODPA).

Each of these state privacy laws is unique, and thus compounds the complexity for consumers struggling to understand their rights and the compliance burdens for covered companies struggling to comply with their responsibilities. But the MODPA, which is the first to incorporate the concept of "data minimization" ("A controller shall … limit the collection of personal data to what is reasonably necessary and proportionate"), threatens to exacerbate the degree of difference substantially. Accordingly, the need for preempting federal legislation, potentially in a form like that of the APRA, is both intense and intensifying.

Turning to the specifics born of the inevitable horse-trading that produced the APRA, there are reasons for both celebration and concern. On the positive side, the APRA generally preempts state privacy laws – an essential function that any federal privacy statute must perform if it is to have value. It also expressly terminates the Federal Trade Commission's pending "commercial surveillance" rulemaking, a fraught endeavor regarding which Free State Foundation President Randolph May and I found much to criticize in our responsive Comments. And it prohibits the FCC from taking another run at broadband privacy rules, a very real possibility given that agency's imminent intention to reclassify broadband as a "telecommunications service" under Title II of the Communications Act.

In terms of consumer rights, the APRA establishes the following familiar principles:

- The right to access covered data.
- The right to know to whom that data has been transferred and for what purpose.

- The right to correct that data.
- The right to have that data deleted.
- The right to obtain a copy of that data (to the extent technically feasible).

In addition, the APRA allows consumers to opt out of (1) the transfer of "non-sensitive" covered data, (2) the use of personal information for targeted advertising, and (3) the use of algorithms for "consequential decisions" in several contexts, including housing, employment, and education.

The APRA also would bar covered entities from using "dark patterns" to interfere with consumers' ability to exercise their rights or discriminate against them for doing so. It also requires that covered entities obtain "opt-in" consent before transferring "sensitive" data to a third party.

Like the MODPA, the APRA incorporates the concept of "data minimization":

> Covered entities and service providers operating on their behalf shall not collect, process, retain, or transfer data beyond what is necessary, proportionate, or limited to provide or maintain a product or service requested by an individual, or provide a communication reasonably anticipated in the context of the relationship, or a permitted purpose.

All covered entities must make available detailed privacy policies, while those that (1) generate $250 million or more in annual revenue, (2) handle the covered data of more than 5 million consumers, or (3) handle the "sensitive data" of more than 200,000 consumers (defined as "large data holders") must make available their privacy policies spanning the previous ten years.

By contrast, smaller businesses – such as those with less than $40 million in annual revenue – are exempt from the APRA.

Large data holders also must conduct privacy impact assessments every two years, file annual certifications, and designate (1) a privacy officer and (2) a data security officer. Other covered entities may designate a single employee to perform both roles.

The Discussion Draft authorizes the Federal Trade Commission to implement various provisions of the APRA, such as the creation of a data broker registry that includes a "do not collect" mechanism similar to the "do not call" list. While this data-broker-specific approach is more targeted than the universal "do not collect" mechanism set forth in the ADPPA, it still has the concerning potential, depending on how it is constructed and implemented, to prevent consumers from receiving ad-supported services and, more broadly, information targeted to them that they would prefer to receive. It also tasks the FTC, along with state attorneys general, with enforcement responsibilities.

Speaking of enforcement, it is on this topic that the APRA's failings are the most glaring. The APRA problematically empowers individual consumers with the right to bring a civil action seeking actual damages, injunctive relief, declaratory relief, and attorney fees. It does not

establish statutory damages, thought it does preserve consumers' right to seek statutory damages under certain state laws, such as the Illinois Biometric Information Privacy Act. And it bars covered entities from enforcing mandatory arbitration clauses where a "substantial" privacy harm has been alleged. This derogation of the right to contract on a voluntary basis warrants special attention. To the extent that the aim is to restrict contractual rights, the scope of that restriction should be tightly drawn.

As I explained in a January 2020 *Perspectives from FSF Scholars*, a private right of action is inferior to exclusive enforcement by the FTC and, among other things, is far more likely to benefit the plaintiffs' bar than individual consumers.

Should it become law in its current form, the APRA will go into effect 180 days after enactment. But the draft bill can be improved meaningfully as it goes through the legislative process.

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Further Readings

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