

The ADPPA May Be Coming: Assessing the Potential New Federal Privacy Regime

I. Summary

Congress has long tried but failed to adopt comprehensive data privacy legislation. We are on the cusp of seeing such a law be passed. If it does, every aspect of how a business or other organization collects, retains, and uses data will need to be revisited. This article summarizes the changes that may be coming.

In July, in a rare show of bipartisan cooperation, Congress recently released a discussion draft of a comprehensive data privacy bill, the American Data Privacy and Protection Act (“ADPPA” or the “Bill”).¹ And on July 20, the House Committee on Energy & Commerce held an open markup session, which concluded in an affirmative vote (53-2) for an amended version of the Bill to make its way to the full House.²

The Bill addresses long-standing concerns, including data collection minimization, civil rights protections, and data ownership. It also would prohibit behavioral advertising to minors, on the basis of “sensitive” information, and place other restrictions on online advertising and marketing that will have a major impact on how online advertising operates in the future. Crucially, the Bill also reflects a compromise that had eluded lawmakers: It contains both a private right of action, long sought by privacy and consumer advocates, and a preemption provision, long sought by industry.

Passage is still far from certain. As a data privacy commentator noted: “It’s always a good bet that broad privacy legislation will fail to pass.”³ Nevertheless, the release of a bipartisan discussion draft signals that “we are far, far closer than we have ever been” to passage. Even more notably, the House Committee on Energy & Commerce voted to advance the legislation by an overwhelming 53-2 margin.⁴

Yet significant obstacles remain. The legislation has yet to receive the blessing of Senator Maria Cantwell, the Chair of the Senate Committee on Commerce, Science, and Transportation, who has cited “major enforcement holes” in the Bill.⁵ Given Senator Cantwell’s holdout and Senator Schumer’s reported unwillingness to bring the Bill up in the Senate without Cantwell’s support,⁶ the Bill’s future remains uncertain.

¹ <https://www.commerce.senate.gov/services/files/6CB3B500-3DB4-4FCC-BB15-9E6A52738B6C>;
<https://www.commerce.senate.gov/services/files/9BA7EF5C-7554-4DF2-AD05-AD940E2B3E50>

² <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-1178152ih.pdf>.

³ <https://www.lawfareblog.com/bipartisan-bicameral-privacy-proposal-big-deal>

⁴ <https://www.brookings.edu/blog/techtank/2022/06/27/techtank-podcast-episode-47-will-americans-finally-see-bipartisan-federal-privacy-legislation/> (at 33:10); <https://thehill.com/policy/technology/3567822-house-panel-advances-landmark-federal-data-privacy-bill/>

⁵ <https://twitter.com/viaCristiano/status/1539655259093487616>

⁶ <https://twitter.com/viaCristiano/status/1539670631104581634>

Whatever the immediate future of the ADPPA, stakeholders should take note. Once a draft agreement enjoys bipartisan support, *some* legislation has ultimately passed—be it in the current term or a future one—and it has tended to be similar to the initial draft.⁷

II. History of Data Privacy Legislation

The explosive growth of the Internet in the 1990s prompted a wave of privacy legislation, both in the United States and abroad⁸. But the appetite for privacy legislation was dampened by the September 11, 2001 terrorist attacks, after which security concerns—not privacy—took center stage⁹.

A variety of factors—including the rise of social media and targeted advertising, high-profile data breaches, and the implementation of inconsistent data privacy regulations by individual states and in Europe—increased the demand for federal data privacy legislation once again. Industry became invested in consistent regulation, given the emerging jurisdiction-by-jurisdiction patchwork and the slipshod nature of some state bills. (California’s 2018 legislation, for instance, conflicted with many of the state’s preexisting privacy laws and contained “obvious errors,” including dozens of typos¹⁰.) Given the landscape, almost all stakeholders agreed that consistent, federal regulation was desirable. Congressional Democrats and Republicans have been working toward that end since at least 2019, but have been divided on the desirability of preemption and a private cause of action¹¹. With the ADPPA, a compromise appears within reach.

III. ADPPA Summary

The ADPPA addresses a number of long-standing data privacy concerns and fundamentally changes how data privacy has been addressed in the United States. The “Covered Entities” to which the legislation applies are defined as “any entity or any person, other than an individual acting in a non-commercial context, that ... determines the purposes and means of collecting, processing, or transferring covered data” and is (I) “subject to the Federal Trade Commission Act,” (II) “is a common carrier subject to the Communications Act of 1934,” or (III) “is an organization not

⁷ <https://www.lawfareblog.com/bipartisan-bicameral-privacy-proposal-big-deal> (“For big pieces of legislation, once there is bicameral, bipartisan agreement on bill text, final passage may happen in the next Congress or two, and the final bill tends to look a lot like the first full draft. For privacy, this happened, for instance, in passage of the Gramm-Leach-Bliley Act in 1999 and the HIPAA amendments in the 2009 HITECH bill.”).

⁸ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404261 (“The first wave of global privacy protection coincided with the exponential growth of the Internet during the 1990’s. By 2001, the European Union had implemented its Data Protection Directive, the United States had created privacy laws for health care, financial services, and other sectors, and the Safe Harbor was in place to create a legal structure for flows of personal information across the Atlantic.”).

⁹ *Id.*

¹⁰ <https://iapp.org/news/a/an-open-letter-to-the-california-legislature-on-updating-the-ccpa/>

¹¹ <https://www.lawfareblog.com/bipartisan-bicameral-privacy-proposal-big-deal>; <https://www.wired.com/story/american-data-privacy-protection-act-adppa/> (“The effort kept stalling because Democrats and Republicans were divided on two key issues: whether a federal bill should preempt state privacy laws, and whether it should create a “private right of action” allowing individuals, not just the government, to sue companies for violations.”).

organized to carry on business for its own profit or that of its members.”¹² Federal, state, and local governmental entities are expressly excluded.¹³

The Bill defines “Covered Data” as “information that identifies or is linked or reasonably linkable, alone or in combination with other information, to an individual or a device that identifies or is linked or reasonably linkable to an individual, and may include derived data and unique persistent identifiers.”¹⁴ “Covered Data” expressly excludes “de-identified data, employee data, publicly available information, and inferences made exclusively from multiple independent sources of publicly available information that do not reveal sensitive covered data.”¹⁵

The legislation adopts a “data minimization” approach.¹⁶ Under such a scheme, Covered Entities would not be permitted to collect Covered Data unless it “is reasonably necessary and proportionate to provide or maintain a specific product or service requested by the individual to whom the data pertains” or if the data is reasonably necessary and proportionate to achieve certain expressly delineated purposes, including user authentication, fraud prevention, and security maintenance.¹⁷ The Bill also permits the use of Covered Data for “first party advertising,” defined as advertising that occurs “entirely within a first-party context, such as ... a web site or app operated by the first party.”

Covered Entities will be required to implement and maintain data policies, training, and safeguards.¹⁸ The policies must account for several factors, including the Covered Entity’s size and services, the sensitivity of the data, the amount of data collected, and the cost of implementation.¹⁹ Within one

¹² ADPPA § 2(9)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

¹³ ADPPA § 2(9)(B), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

¹⁴ ADPPA § 2(8)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>. “Derived Data” is defined as “covered data that is created by the derivation of information, data, assumptions, correlations, inferences, predictions, or conclusions from facts, evidence, or another source of information or data about an individual or an individual’s device,” ADPPA § 2(13), while a “Unique Persistent Identifier” is “an identifier to the extent that such identifier is reasonably linkable to an individual or device that identifies or is linked or reasonably linkable to 1 or more individuals,” such as an IP address. ADPPA § 2(39)(A).

¹⁵ ADPPA § 2(8)(B), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

¹⁶ <https://www.commerce.senate.gov/services/files/9BA7EF5C-7554-4DF2-AD05-AD940E2B3E50> (“Section 101. Data Minimization. The Act imposes a baseline duty on all covered entities not to unnecessarily collect or use covered data in the first instance, regardless of any consent or transparency requirements.”).

¹⁷ ADPPA § 101(a), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>; <https://www.wired.com/story/american-data-privacy-protection-act-adppa/>

¹⁸ ADPPA § 103(a), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

¹⁹ ADPPA § 103(b), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

year of enactment, the FTC must promulgate guidance as to what constitutes reasonable data protection policies,²⁰ and Covered Entities must make their data uses and policies publicly available in a “clear, conspicuous, not misleading, and easy-to-read and readily accessible manner.”²¹

In addition, the legislation provides individuals with means to exercise certain controls over Covered Data.²² After receipt of a verified request, Covered Entities must provide an individual with access to that person’s Covered Data and in a “human-readable format that a reasonable individual can understand and download from the internet.”²³ Covered Entities must also correct inaccurate data or delete data upon an individual’s request.²⁴ Entities will have between 45 and 90 days to honor such requests, depending on the Entity’s size and revenue.²⁵ All Entities may receive 45 day extensions “when reasonably necessary,” as long as notice of the extension is provided within the initial response period.²⁶

The ADPPA also contains civil rights provisions to prevent the use of data for discriminatory purposes.²⁷ Covered Entities are prohibited from collecting or processing data “in a manner that discriminates in . . . race, color, religion, national origin, sex, or disability.”²⁸ Large data holders—generally those that have annual revenue above \$250 million, use the Covered Data of 5 million

²⁰ ADPPA § 103(c), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²¹ ADPPA § 202(a), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²² <https://www.commerce.senate.gov/services/files/9BA7EF5C-7554-4DF2-AD05-AD940E2B3E50> (“Section 203. Individual Data Ownership and Control. Individuals have the right to access, correct, delete, and portability of, covered data that pertains to them.”).

²³ ADPPA § 203(a)(1), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²⁴ ADPPA § 203(a)(2)-(3), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²⁵ ADPPA § 203(c)(1), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²⁶ ADPPA § 203(c)(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

²⁷ <https://www.commerce.senate.gov/services/files/9BA7EF5C-7554-4DF2-AD05-AD940E2B3E50> (“Section 207. Civil Rights and Algorithms. Covered entities may not collect, process, or transfer covered data in a manner that discriminates on the basis of race, color, religion, national origin, gender, sexual orientation, or disability.”).

²⁸ ADPPA § 203(c)(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

individuals, and use the Sensitive Covered Data of 200,000 individuals²⁹—must also conduct impact assessments of their data algorithms and submit them to the FTC.³⁰

IV. Advertising and Marketing

Covered Entities who are advertisers or marketers, and their service providers, must abide by strict guidelines relating to the collection, processing, and transfer of Covered Data, Sensitive Covered Data, and data from children/minors for advertising and marketing purposes. These rules are detailed and the interplay among them will re-shape the way online advertising and marketing is conducted. The full impact of these rules will be litigated for some time. We summarize the basic rules below.

The ADPPA delineates the scope of permissible and prohibited advertising between two main categories of advertising: (1) first party advertising, defined as, “advertising or marketing conducted by a first party either through direct communications with a user such as direct mail, email, or text message communications, or advertising or marketing conducted entirely within the first-party context, such as in a physical location operated by the first party, or on a web site or app operated by the first party;”³¹ and (2) targeted advertising, defined as “presenting to an individual or device identified by a unique identifier, or groups of individuals or devices identified by unique identifiers, an online advertisement that is selected based on known or predicted preferences, characteristics, or interests associated with the individual or a device identified by a unique identifier.”³² Targeted advertising “does not include – (i) advertising or marketing to an individual or an individual’s device in response to the individual’s specific request for information or feedback; (ii) contextual advertising, which is when an advertisement is displayed based on the content in which the advertisement appears and does not vary based on who is viewing the advertisement; or (iii) processing covered data solely for measuring or reporting advertising or content, performance, reach, or frequency, including independent measurement.”³³

The ADPPA permits a covered entity to collect, process, or transfer covered data for any listed purpose only “if the collection, processing, or transfer is limited to what is reasonably necessary and proportionate to such purpose.”³⁴ One such purpose is first-party advertising.³⁵ Another purpose is

²⁹ ADPPA § 2(21)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³⁰ ADPPA § 207(c)(1)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³¹ See ADPPA § 2(17), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³² See ADPPA § 2(34)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³³ See ADPPA § 2(34)(B)(i)-(iii).

³⁴ See ADPPA § 101(b), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³⁵ See ADPPA § 101(b)(16), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

for targeted advertising.³⁶ However, Section 204(c) requires a covered entity or service provider that directly delivers a targeted advertisement, prior to engaging in targeted advertising and at all times thereafter, to provide such individual with a clear and conspicuous means to opt-out of receiving targeted advertisements; abide by any opt-out designations; and allow an individual to make an opt-out designation through an opt-out mechanism.³⁷ To round out the prohibitions in the Act, covered entities may not “engage in deceptive advertising or marketing with respect to any product or service offered to an individual.”³⁸

The ADPPA prohibits first-party and targeted advertising to minors (any individual under the age of 17).³⁹ Specifically, a covered entity “may not engage in targeted advertising to any individual if the covered entity has knowledge that the individual is a covered minor.”⁴⁰ This includes a prohibition on “transfer[ing] or direct[ing] the transfer of the covered data of a covered minor to a third party if the covered party has knowledge is a covered minor and has not obtained affirmative express consent from the covered minor or the covered minor’s parent or guardian.”⁴¹ However, a covered entity or service provider may collect, process, or transfer covered data of a covered minor for law enforcement, nonprofit/congressional assistance, and other child protection services.⁴²

Finally, the ADPPA prohibits collecting or processing “sensitive covered data” for advertising or marketing purposes.⁴³ This data includes government-issued identifiers (SSN, passport number, etc.), certain financial data, biometric information, genetic information, but also things like “precise geolocation information.”⁴⁴ Although sensitive covered data may otherwise be collected or

³⁶ See ADPPA § 101(b)(17), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³⁷ See ADPPA § 204(c), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³⁸ See ADPPA § 101(d), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

³⁹ See ADPPA § 2 (11), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴⁰ See ADPPA § 205(a), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴¹ See ADPPA § 205(b)(1), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴² See ADPPA § 205(b)(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴³ See ADPPA § 102(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf> (excluding first party and targeted advertising as permissible purposes for collecting or processing sensitive covered data).

⁴⁴ See ADPPA § 2 (28), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

processed for other strictly necessary and enumerated purposes, such data cannot be used for purposes of first party or targeted advertisement.⁴⁵

If these rules take effect, they will change how online advertising and marketing campaigns are designed and run.

IV. The Crucial Compromise: Preemption and Private Right of Action

The crux of the ADPPA is its compromise on enforcement. The Bill contains both a private right of action and a preemption provision.

The Preemption Provision. The preemption provision is designed to ensure that data privacy law is unified across the United States, allowing regulated entities to comply more easily with a single standard rather than a patchwork of state laws.

However, the preemption provision includes exceptions. First, the ADPPA does not preempt state laws dedicated to more narrow data regulation purposes, including “consumer protection laws of general applicability,” civil rights laws, and laws addressing electronic surveillance and facial recognition.⁴⁶ Some state statutes are expressly excluded from preemption, including, for example, the Illinois Biometric Information Privacy Act (BIPA) and Genetic Information Privacy Act (GIPA).⁴⁷ Recent amendments also allow the California Privacy Protection Agency to enforce the ADPPA within the state,⁴⁸ although most substantive provisions of California’s two recent privacy laws will be superseded by the ADPPA.⁴⁹ Which state laws and provisions are preempted will be hotly contested, as stakeholders debate whether individual statutes fall into the ADPPA’s delineated preemption exceptions. Further, the legislation both preserves “common law rights or remedies”⁵⁰

⁴⁵ See ADPPA § 102(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf> (excluding first party and targeted advertising as permissible purposes for collecting or processing sensitive covered data).

⁴⁶ ADPPA § 404(b)(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴⁷ ADPPA § 404(b)(2)(M), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁴⁸ <https://www.documentcloud.org/documents/22089778-changes-to-adppa-in-substitute-amendment> (“The California Privacy Protection Agency has express authority to enforce the ADPPA in the same manner as it would otherwise enforce the California Consumer Privacy Act.”).

⁴⁹ https://cpa.ca.gov/meetings/materials/20220728_item2_cpa_staff_memo.pdf (stating “The American Data Privacy Protection Act (ADPPA)... seeks to preempt nearly all provisions of the CCPA, as amended by Proposition 24, the California Privacy Rights Act of 2020 (CPRA), and additional privacy legislation such as California’s data broker registry law.”).

⁵⁰ ADPPA § 404(b)(4), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

and declines to supplant state “contract or tort law.”⁵¹ Thus, state common law privacy torts will persist.

Separately, relating to federal law, the ADPPA generally preserves and does not limit the application or enforcement of antitrust law, the Children’s Online Privacy Protection Act, and other federal law with data privacy and data security requirements.⁵² For example, the ADPPA states that “[n]othing in this Act may be construed to relieve or change any obligation that a covered entity or other person may have under [COPPA].”⁵³ Further, ADPPA states that: “[n]othing in this Act may be construed to modify, impair or supersede the operation of the antitrust law or any other provision of law.”⁵⁴ Further, a covered entity that is required to, and does comply with data privacy and data security requirements in federal laws such as title V of the Gramm-Leach-Bliley Act, the Health Information Technology for Economic and Clinical Health Act, part C of title XI of the Social Security Act, the Fair Credit Reporting Act, section 264(c) of the Health Insurance Portability and Accountability Act of 1996, “shall be deemed to be in compliance with the related requirements of the [ADPPA], except for section 208, solely and exclusively with respect to data subject to the requirements of such laws.”⁵⁵

The Bill will however supersede certain provisions of the Communications Act of 1934, and any resulting FCC regulations and orders as, “any such section, do[es] not apply to any covered entity with respect to the collection, processing, transfer, or security of covered data or its equivalent, and the related privacy and data security activities of a covered entity that would otherwise be regulated under such sections shall be governed exclusively by the provisions of [the ADPPA].”⁵⁶ The only exceptions are for emergency services, as defined in section 7 of the Wireless Communications and Public Safety Act, subsections (b) and (g) of section 222 of the Communications Act, and any obligation of an international treaty related to the exchange of traffic implemented and enforced by the FCC.⁵⁷

The Private Right of Action. The private right of action has also been circumscribed. Individuals cannot sue until two years after the effective date of the act, providing regulated entities with a grace period

⁵¹ ADPPA § 404(b)(2)(E), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵² ADPPA §§ 406, 404(a), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵³ ADPPA § 406, <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵⁴ ADPPA § 404(a)(2)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵⁵ ADPPA § 404(a)(3)(4), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵⁶ ADPPA § 404(b)(4), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁵⁷ ADPPA § 404(b)(4)(A)-(C), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

to ensure compliance.⁵⁸ After then, private parties may seek “compensatory damages, injunctive relief, declaratory relief, and reasonable attorney’s fees and litigation costs.”⁵⁹ The Bill specifically allows for “any person or *class of persons* for a violation of this Act or a regulation promulgated under this Act by a covered entity or service provider may bring a civil action against such entity in any Federal court of competent jurisdiction.”⁶⁰

The absence of statutory damages—on contrast to many state and federal privacy statutes that provide liquidated damages for each violation from \$1,000 to \$5,000 (or more)—is a notable feature of the ADPPA, and should deter frivolous claims or litigation arising from purely procedural violations.

Parties must notify both the FTC and their state attorney general of their intent to sue, after which those agencies have 60 days to determine if they will “intervene in such action pursuant to the Federal Rules of Civil Procedure.”⁶¹ The entity sued must also be provided a written notice of provisions allegedly violated. If the entity cures the violation within 45 days, demands for injunctive relief may be dismissed.⁶²

V. Stakeholder Reactions

Many consumer and privacy advocates have embraced the Bill.⁶³ However, other advocates have reacted more cautiously. For instance, Consumer Reports’ head of Technology Policy tweeted: “This law would supersede the emerging state comprehensive privacy laws and effectively freeze privacy legislation for years to come. So it needs to get it right.”⁶⁴ The ACLU was more critical, stating that the proposed legislation contained “very problematic provisions,” including federal preemption.⁶⁵ The Electronic Frontier Foundation has also disparaged the Bill, taking particular aim

⁵⁸ <https://www.documentcloud.org/documents/22089778-changes-to-adppa-in-substitute-amendment>

⁵⁹ ADPPA § 403(2), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁶⁰ ADPPA § 403(1), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁶¹ ADPPA § 403(a)(3)(A), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁶² ADPPA § 403(c), <https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf>

⁶³ <https://www.politico.com/news/2022/06/03/bipartisan-draft-bill-breaks-stalemate-on-federal-privacy-bill-negotiations-00037092> (“Consumer advocacy and civil rights groups applauded the discussion draft.”); <https://www.wired.com/story/american-data-privacy-protection-act-adppa/> (“...the ADPPA seems wildly popular both on the Hill and among advocacy organizations.”); <https://www.wired.com/story/american-data-privacy-protection-act-adppa/> (“... privacy advocates are mostly jazzed about it.”).

⁶⁴ <https://twitter.com/JustinBrookman/status/1532779491709304833>

⁶⁵ <https://www.aclu.org/letter/aclu-letter-urgent-concerns-privacy-legislation-and-legislative-process>

at its preemption provision and the lack of liquidated or punitive damages in the private cause of action.⁶⁶

Industry has generally been more skeptical about the Bill, particularly its private right of action. Though the U.S. Chamber of Commerce has expressed support for “meaningful, consistent, and robust” data protection,⁶⁷ the group has consistently opposed a framework that would “encourage an unmanageable patchwork of laws and abusive class action lawsuits through private rights of action.”⁶⁸ Unsurprisingly, the Chamber has expressed resistance toward the ADPPA, initially stating the legislation “should be rejected,” though the organization later softened its position, claiming the ADPPA is “unworkable at this time.”⁶⁹ Other trade associations stated that, although the draft legislation provided a “workable framework,” several provisions “needed refinement,” particularly the provision providing for a private right of action, a provision claimed to be susceptible to abuse by “private lawyers for hire.”⁷⁰

VI. Chances of Passage

The ADPPA has been dubbed a “three-corners” Bill, meaning three of its four corners—the four Chairpersons and Ranking Members of the legislation’s House and Senate committees—support its passage. In this case, those are House Committee on Commerce & Energy Chairman Frank Pallone (D-NJ), committee Ranking Republican Cathy McMorris Rodgers (R-WA), and Senate Committee on Commerce, Science, and Transportation Ranking Republican Roger Wicker (R-MS).⁷¹ However, the fourth corner—Senate Committee on Commerce, Science, and Transportation Chairwoman Maria Cantwell (D-WA)—does not currently support the legislation.⁷²

⁶⁶ <https://www.eff.org/deeplinks/2022/07/americans-deserve-more-current-american-data-privacy-protection-act> (stating “EFF opposes rolling back state privacy protections to meet a lower federal standard” and “People also should be able to recover liquidated damages and punitive damages.”).

⁶⁷ <https://www.uschamber.com/technology/data-privacy/u-s-chamber-letter-on-national-privacy-legislation>

⁶⁸ *Id.*

⁶⁹ <https://www.cnbc.com/2022/06/09/bipartisan-privacy-proposal-is-unworkable-chamber-of-commerce-says.html>

⁷⁰ <https://www.ccianet.org/wp-content/uploads/2022/06/SIIA-TechNet-CCIA-Letter-on-Privacy-Bills-6.13.22.pdf>

⁷¹ <https://energycommerce.house.gov/newsroom/press-releases/house-and-senate-leaders-release-bipartisan-discussion-draft-of> (“U.S. Representatives Frank Pallone, Jr., D-N.J. and Cathy McMorris Rodgers, R-Wash., Chairman and Ranking Member of the House Committee on Energy and Commerce, and U.S. Senator Roger Wicker, R-Miss., Ranking Member of the Senate Committee on Commerce, Science, and Transportation, today released a discussion draft of a comprehensive national data privacy and data security framework.”).

⁷² <https://www.spokesman.com/stories/2022/jul/25/historic-data-privacy-law-could-be-within-reach-if/> (“...Cantwell said she couldn’t support the bipartisan framework unless House lawmakers add tougher enforcement measures, including limits on forced arbitration and a broad right for individuals to sue companies that violate the law.”).

To pass, the Bill must advance out of committee in both the House and the Senate, receive a majority vote in the House, and overcome a filibuster in the Senate. The ADPPA has already advanced to the House floor, meaning three hurdles remain: the House floor, the Senate committee, and the Senate floor. The 53-2 vote to advance the Bill from the House Committee on Energy & Commerce bodes well for its future in the House.

Its chances in the Senate, however, are less certain. Crucial lawmakers have unique incentives to act now. Senator Wicker, ranking member of the Senate Committee on Commerce, Science, and Transportation will not rejoin the committee next year and has spent considerable effort to pass data privacy legislation.⁷³ And the Senate Committee on Commerce, Science, and Transportation Chair Cantwell will be removed from her position if Republicans take the Senate in the midterms.⁷⁴

But passing legislation is difficult and time is short. The August recess is quickly approaching and the midterms will follow. The potential for Congress to act on the ADPPA after the August recess is modest. Lawmakers will be in midterm mode with consequential campaigns that threaten to transform the makeup of both chambers of Congress in the November elections.⁷⁵ And though recent amendments from the House appear designed to assuage Senator Cantwell (such as decreasing regulated entities' grace period from private suits from four years to two years),⁷⁶ it is not clear that those changes are sufficient. And after the midterm elections, Congress will have limited time in their final weeks to push through any last-minute legislation, particularly one hotly contested among different interest groups, as is the ADPPA, before the committee gavels change hands, should Republicans win control of either chamber.⁷⁷

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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⁷³ <https://www.lawfareblog.com/bipartisan-bicameral-privacy-proposal-big-deal>

⁷⁴ *Id.*

⁷⁵ https://www.cnbc.com/2022/08/05/critical-tech-policy-issues-likely-tabled-as-congress-heads-for-recess.html?__source=sharebar|twitter&par=sharebar

⁷⁶ <https://www.spokesman.com/stories/2022/jul/25/historic-data-privacy-law-could-be-within-reach-if/>

⁷⁷ https://www.cnbc.com/2022/08/05/critical-tech-policy-issues-likely-tabled-as-congress-heads-for-recess.html?__source=sharebar|twitter&par=sharebar

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