



November 9, 2021

WHAT YOU NEED TO KNOW ABOUT

Prospects For a National Privacy Law

PRO POINTS

- **Lawmakers and consumer advocates argue that the pandemic, complexities of a state-by-state privacy regime, tech companies creating insufficient privacy policies, and invalidation of the EU-U.S. Privacy Shield have intensified the need for a national privacy law.**
- **Despite momentum at the outset of the Biden administration and 117th Congress, a national privacy law is unlikely to pass this session.**
- **Republicans on the Senate Commerce Committee, which has primary jurisdiction over privacy, have reintroduced their leading privacy legislation from the last Congress. Their Democratic counterparts have not followed suit.**
- **Separately, Republicans on the House Energy and Commerce Committee recently unveiled a draft privacy bill aimed at creating a national standard. Their Democratic counterparts have held roundtables on what to include in such a framework.**
- **The Biden administration has not publicly endorsed specific privacy legislation or outlined its privacy approach.**

HOW WE GOT HERE

Congress has been angling to pass a national privacy law for years, and there is more bipartisan consensus on the need for such legislation — and what it should include — than on almost any other issue on lawmakers' tech agenda.

The 116th Congress made considerable progress toward that goal. Privacy experts who have been following or guiding these efforts for years say Republicans and Democrats were roughly 80 percent in agreement by the end of that session on their two leading privacy bills — the Consumer Online Privacy Rights Act from now-Senate Commerce Chair Maria Cantwell (D-Wash.), and the SAFE DATA Act from Sen. Roger Wicker (R-Miss.), now the committee's top Republican.

But they've yet to reconcile two outstanding, largely partisan points of disagreement: whether a federal law should preempt state rules, and whether individuals should be able to sue companies over privacy violations. And although committee members have said they are open to discussing how best to compromise, Senate Commerce has held no hearings this Congress on specific privacy legislation and there doesn't look to be a clear path out of the deadlock over those two sticking points. The political transition and pandemic response have further diverted attention.

Lawmakers and privacy experts argue that stronger involvement from the Biden administration could help move negotiations along. Cantwell and Wicker have urged President Joe Biden to tap a top official to help Congress develop and enact a U.S. data privacy framework, and Republicans across both chambers have called on the president to prioritize this legislation.

But the White House has yet to announce an approach to consumer privacy policy and has so far stopped short of endorsing congressional efforts to pass a national standard, instead backing the Federal Trade Commission's push to write privacy rules.



Democrats and Republicans disagree on private right and preemption in privacy bills



CONSUMER ONLINE
PRIVACY ACT (DEM.)



SAFE DATA
ACT (GOP)

Two outstanding sticking points between Democrats' and Republicans' legislation, which have received little attention this Congress, are likely to prevent a national privacy law from passing this session.

WHAT BOTH BILLS WOULD DO

What data they apply to

Data that identifies a person, or that is linked to that person or his or her device, like a smartphone

Stricter rules for the most sensitive data

Prohibit sensitive data from being collected, used or shared with other parties without an individual's "prior, affirmative express consent."

Rights over your data

Give individuals the right to see what personal data companies have collected on them, fix inaccuracies and block use of that data altogether.

Clear privacy policies

Require businesses to have privacy terms that are easy to find and understand.

Privacy personnel

Require companies to appoint data privacy and data security officers to oversee the compliance with the law.

Civil rights

Prohibit companies from collecting, using or sharing covered data in a way that violates federal civil rights laws.

Algorithmic bias

Mandatory reviews of how businesses are using algorithms to process data to find potential violations of anti-discrimination laws

THE STICKING POINTS

Enforcement

While both bills task the FTC and state attorneys general with enforcing the privacy law, Sen. Maria Cantwell's (D-Wash.) legislation would give individuals the right to bring civil actions against companies they allege have violated their privacy. Sen. Roger Wicker (R-Miss.) has generally opposed this so-called private right of action, and his bill instead limits the power to sue over privacy violations to state attorneys general.

Preemption

The bills are fundamentally at odds in the way they govern the relationship between federal and state laws. Cantwell's legislation would not "preempt, displace, or supplant" state-level privacy laws that offer "a greater level of protection to individuals." Wicker's bill, meanwhile, would prevent states from governing companies' data privacy practices under their own rules.

Source: POLITICO reporting

WHAT'S NEXT

Recent revelations from a Facebook whistleblower — which have cast fresh scrutiny on social media platforms' effects on kids and plans to expand into younger markets — are shifting the privacy debate to focus on which protections should come first: stronger privacy safeguards for children, or broader guardrails for all Americans.

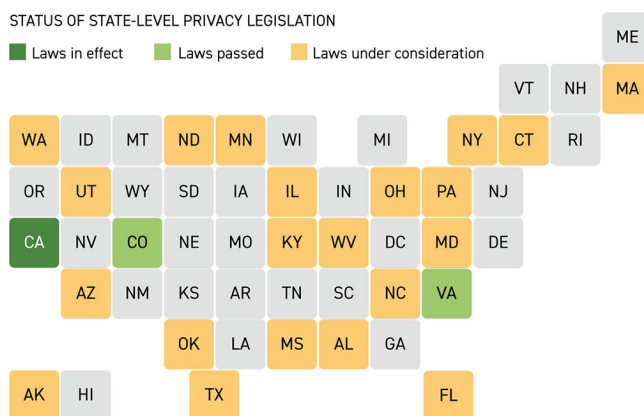
Congressional hearings and markups for various kids-focused legislative proposals — including a bipartisan bill to update federal children's online privacy rules from 1998 — are expected to happen in the coming weeks and months. Next steps for comprehensive federal privacy legislation are less clear.



In the meantime, states are expected to introduce more privacy bills in 2022. This year, some two dozen states considered privacy bills and two more, in Virginia and Colorado, passed. (California's privacy law, the first in the country, took effect in 2020, and California voters approved a ballot measure last November to amend and expand it.)

And as more states put forward their own privacy regimes, the tech industry's calls for Congress to pass one national standard are growing even louder. Businesses fear that state-by-state privacy rules will confuse consumers, complicate compliance and heighten risk to companies. In the absence of federal privacy legislation, tech giants including Apple, Facebook and Google have been setting their own privacy standards while saying they'd rather that role fall to government. Companies have also continued to develop and roll out new products that are likely to introduce even more variables into slow-moving privacy talks.

Two dozen states considered comprehensive privacy bills this year



Source: International Association of Privacy Professionals, September 2021

POWER PLAYERS

- **Sen. Maria Cantwell:** Chair of the Senate Commerce Committee, Cantwell is the lead sponsor of the Consumer Online Privacy Rights Act. Her legislation, introduced in December 2019, has not been reintroduced this Congress but it remains the leading privacy proposal from Democrats.
- **Sen. Roger Wicker:** Ranking member of the Senate Commerce Committee, Wicker is the lead sponsor of the Setting an American Framework to Ensure Data Access, Transparency, and Accountability (“SAFE DATA”) Act. His legislation, reintroduced in July, is the leading privacy proposal from Republicans.
- **Sen. Richard Blumenthal:** Chair of the Senate Commerce consumer protection panel, Blumenthal is co-leading a congressional probe into Facebook, prompted by revelations from whistleblower Frances Haugen, and working to advance various proposals dealing with children’s privacy and safety online.
- **Sen. Marsha Blackburn:** Ranking member of the Senate Commerce consumer protection panel, Blackburn is co-leading the congressional probe into Facebook and is a sponsor on Wicker’s SAFE DATA Act, the leading comprehensive privacy bill from Senate Republicans that was reintroduced in July.
- **Federal Trade Commission:** The country’s chief consumer protection agency, the FTC is likely to be the primary enforcer of any future national privacy law. Under some Democratic House and Senate proposals, it could receive additional funding to stand up a new privacy bureau.