

Publications

Federal Privacy Legislation Presents Challenges and Opportunities for the Retail Industry

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Hunton Retail Industry Year in Review 2024

Retailers faced key legislative challenges as the 118th Congress engaged in monthslong efforts in 2024 to pass three separate privacy bills. We examine the challenges retailers faced with these federal bills in this article and analyze how the issues of greatest importance to the industry last year produced the outcomes we saw and might be resolved in this new 119th Congress to enable passage of comprehensive and children's privacy legislation retailers can support.

Protecting Americans' Data from Foreign Adversaries Act

The privacy bill that caught the industry by surprise in 2024 was H.R. 7520, the Protecting Americans' Data from Foreign Adversaries Act of 2024 (or PADFAA). PADFAA moved rapidly through Congress in just several weeks without much scrutiny from lawmakers because it was overshadowed by the attention-grabbing bill it traveled with throughout its legislative process—the TikTok divestiture bill.

Recently upheld as constitutional by the Supreme Court, the TikTok bill had been in development for more than a year and had strong bipartisan support in Congress. By contrast, extraordinarily little attention was paid to the novel and unvetted language of PADFAA, which appeared to address the central issue at the heart of Congressional concern over TikTok. PADFAA's stated intent was to prohibit Americans' personal data from being made available to a foreign adversary of the United States, or to a company controlled by a foreign adversary.

The retail and restaurant industry trade associations raised significant concerns over the language of PADFAA, especially the bill's broadly defined terms and scope of application to a wide array of data, including internal corporate data that may be shared by a US company with their own subsidiaries or employees located in China. They warned the bill could have unintended consequences threatening lawful business operations of global retailers and

chain restaurants with establishments in China.

In particular, the bill's definition of "controlled by a foreign adversary" could potentially be interpreted to cover US businesses that had high-level employees located in China. The bill's broad definitions of "data broker" and "sensitive data" also left room for interpretation by the Federal Trade Commission, which could enforce the new law in ways that went beyond PADFAA's stated intent.

As the Senate considered these views on the House-passed legislation, the TikTok bill and PADFAA found an alternative path that ensured passage by Congress quickly and without amendment. The House-passed language of these bills was inserted into H.R. 815, the emergency supplemental spending bill to aid Ukraine, Israel and Taiwan that was approved by Congress on April 23 and signed into law the next day by President Biden as Public Law 118-50 (138 Stat. 895).

Although PADFAA took effect in June, several industry coalitions formed to develop PADFAA amendments to clarify the law's definitions and provide greater certainty that legitimate US business operations in China would not be unintentionally impacted by PADFAA's prohibitions. As we begin 2025, it is likely we will see renewed efforts to "fix" PADFAA with corrective legislation.

American Privacy Rights Act

While PADFAA passed Congress under the radar, the next major privacy bill to appear was the most anticipated of the year. H.R. 8818, the American Privacy Rights Act of 2024 (APRA), began circulating in draft form in April as a newly revised version of the American Data Privacy and Protection Act of 2022 (ADPPA). The ADPPA had been approved by the House Energy and Commerce Committee two years before but had ultimately failed to move forward in the House. The APRA fared even worse than the ADPPA by failing to pass its committee of jurisdiction. The APRA's demise was similar to all other comprehensive federal privacy bills over the past two decades, largely resulting from the inability of Democrats and Republicans to find common ground on the two most controversial issues at the center of this legislation: federal preemption of state law and private rights of action to enforce the federal law.

As nationwide retailers were seeing their data privacy compliance burdens increase with each newly enacted state privacy law, the industry's primary goal has been ensuring that any federal privacy law effectively preempts state privacy laws to establish uniform national standards. This policy objective for a national privacy law is paramount to the industry because the proliferation of state privacy laws is increasingly challenging to manage.

Many industry stakeholders and Republican lawmakers view preemption as the *raison d'être* for federal privacy law. Their view is that the federal law must become a nationwide ceiling on state regulation, rather than become the 51st law of the country that must co-exist with state laws or set a nationwide floor from which state laws could regulate upward. For these stakeholders, the latter would not yield a national law where all Americans had the same rights, and it would perpetuate the burdensome and costly compliance work from the proverbial "patchwork" of state privacy laws as states tried to one-up other states by enacting

increasingly restrictive privacy regulations.

Despite the bill's stated intent to preempt state laws, the APRA's preemption language would not effectively create the uniform national standard that retailers desired. Specifically, it was not drafted to withstand anticipated challenges in federal court by state attorneys general who would litigate to maintain the continued validity of their own state privacy laws.

Retailers also objected to the APRA's authorization of private rights of action to enforce its provisions. In contrast to the APRA, comprehensive state privacy laws had exclusive government enforcement along with, in many cases, "notice-and-cure" provisions permitting businesses to correct compliance mistakes and limit their liability exposure.

The opposition from retailers and restaurants to private actions was supported by a broad cross-section of industry stakeholders because, unlike the enacted state privacy laws to date, the APRA would encourage litigation against businesses for technical non-compliance without the opportunity to cure compliance mistakes and avoid a lawsuit. Additionally, the APRA did not offer protections against demand-letter campaigns by trial lawyers, like retailers have experienced in litigation related to patent infringement, robocall, website accessibility and, more recently, various theories of interception in the digital context.

After three months of sustained legislative advocacy efforts by the leading retail and chain restaurant industry trade associations, the House Republican leadership indicated publicly that it too shared their concerns with both the APRA's preemption and private rights of action provisions. As a result, the committee's markup of the bill was canceled, and federal comprehensive privacy legislation effectively ended for the year.

Despite the sudden ending for the APRA, this year presents a new opportunity for retailers to help Congress develop and support comprehensive federal privacy legislation that achieves their policy goals. With both the House and Senate now controlled by Republicans, there is a renewed possibility for federal privacy legislation that differs from the APRA and that may resolve retailers' concerns that prevented past federal privacy bills from moving forward. Congress may be in a position to finally enact a preemptive, comprehensive privacy bill modeled on successful and well-crafted state privacy laws that retailers and other industry sectors could support—the type of federal privacy law that proved challenging in the divided Congresses of the past four years.

Children and Teens' Online Privacy Protection Act

After years of Congressional hearings fueling bipartisan concerns that social media companies' data and ad practices harmed children and minors, anticipation grew in 2024 that Congress would succeed in passing children's privacy and online safety legislation.

In July, the Senate passed by a nearly unanimous vote of 91-3 a package of children's legislation that contained the text of S. 1418, the Children and Teens' Online Privacy Protection Act (a.k.a., "COPPA 2.0") that would have amended the Children's Online Privacy Protection Act of 1998 (COPPA).

Despite the nearly unanimous vote by the Senate, the package faced unlikely passage by the House. The House version of the COPPA 2.0 bill (H.R. 7890) raised concerns from retailers, restaurants, and other businesses that marketed goods or services online to a general audience. Among other changes to COPPA, the bill included an outright prohibition on delivering interest-based advertising to individuals under 17 years old. Retailers and restaurants were concerned with the potential unintended consequences if this bill was enacted in the form approved as an Amendment in the Nature of a Substitute (AINS) by the House Energy and Commerce Committee in September.

A significant concern for these industry sectors, as well as the technology and advertising industries that served them, was the knowledge standard that would be applied to businesses with respect to the prohibition on interest-based ads. The Senate-passed version of COPPA 2.0 contained a single knowledge standard that applied to the interest-based ad prohibition: a business that delivered advertising or marketing to an individual under 17 would be in violation of the law if it had “actual knowledge or knowledge fairly implied on the basis of objective circumstances that an individual is under the age of 17...”

Industry stakeholders raised concerns that the Senate bill’s knowledge standard created unacceptable uncertainties as to what the FTC would consider to be the objective circumstances on which their potential liability would rest for any errant ads inadvertently delivered to children under 17. To address this concern, the House Energy and Commerce Committee amended its version of the bill to create a three-tiered definition for “knowledge” of a child or teen user on a given website or online service. Under this structure, “high-impact social media companies” (and only such companies) would be held to a broad “knew or should have known” standard. Retailers would largely fall into the bill’s middle tier: “knew or acted in willful disregard of the fact that the individual is a child or teen.” Smaller businesses would be held to an actual knowledge standard, the narrowest standard in the bill’s definition. Additionally, the House removed the FTC’s authority to determine knowledge standards and produce guidance around its definition of knowledge.

Both the Senate and House versions of COPPA 2.0 also attracted opposition over the effect of its preemption clause. The bills had identical text that would replace the text of the nearly three-decades old COPPA, which prohibited inconsistent state laws, with text effectively making the federal law a floor upon which the states could regulate upward by providing “greater protection to children or teens.” Retailers proposed striking this clause so that COPPA 2.0 remained silent on preemption, leaving the existing COPPA language in place.

After the House resumed session following Election Day for the “lame-duck” period of Congress, Speaker Johnson ended speculation on children’s online privacy and safety legislation passing Congress as part of the year-end continuing resolution he was assembling to fund the government, releasing a statement that he would work with the incoming Trump administration to address this type of legislation.

At the outset of the new 119th Congress, the Senate and House are poised to pick up where they left off in December 2024, and we suspect COPPA 2.0 will be re-introduced early in the year. While there remain issues to resolve over the knowledge and preemption standards, there is an expectation that, with both chambers of Congress now controlled by Republicans, COPPA 2.0 could move forward without amending COPPA’s existing prohibition on inconsistent

state laws.

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